Data Protection in Latin America

Academic and practitioner discussions of data protection laws tend to revolve around two well-documented models: the ones developed in Europe and the United States, respectively.[1] Each approach is grounded in a particular set of socio-political values that shape the contours of the legal regime erected upon them. Generally speaking, the European model takes a fundamental rights-based approach to data privacy, while the US one gives primacy to economic freedom and consumer protections.[2] This dichotomy is deconstructed endlessly in the legal literature as well as at privacy law conferences everywhere. Given the predominance of these two paradigms for data protection, few are aware of a "third way" arising from legal traditions in Latin America and practiced throughout the region.[3]

In Latin America, data protection is uniquely built upon the concept and tradition of *habeas data* as a constitutional right.[4] Since the 1980s, countries in the region have protected privacy and personal data *vis à vis* their governments through a right to *habeas data*, which mirrors the writ of *habeas corpus* but for information.[5] *Habeas data* translates from Latin as "bring me the data" and implies the right of the data subject to access the information that the State possesses about him or herself.[6] As a constitutional right, it applies to government authorities first and foremost, but has been extended to cover non-state actors as well. A writ of *habeas data* applies to any type of personal date, which a data subject is entitled to request and access on demand.[7] It can also include the rights to rectify as well as sometimes erase personal data held buy any public or private third party. [8]

Habeas data was first introduced in the region as a constitutional right enshrined by a number of Latin American countries during the eighties and nineties.[9] In this way, Latin American constitutional law became the primary means of protecting personal data through the operation of three key mechanisms: the recognition of *habeas data* as an autonomous fundamental right; the concomitant creation of a specialized constitutional remedy - the writ or action of *habeas data*; and recognition of the broad scope of the right and its enforcement actions as against both public and private actors.

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[1] Paul M. Schwartz & Karl-Nikolaus Peifer, *Transatlantic Data Privacy Law*, 106 GEO L.J. 115, 119 (2017).
[2] Id.; see also Paul M. Schwarz & Daniel J. Solove, Reconciling Personal Information in the United States and the European Union, 102 CALIF. L. REV. 877 (2014).
[3] Josiah Wolfson, The Expanding Scope of Human Rights in a Technological World — Using the Interamerican Court of Human Rights to Establish a Minimum Data Protection Standard Across Latin America, 48 U. MIAMI INTER-AM. L. REV. 188-190, 206 (2017)
[4] Josiah Wolfson, *The Expanding Scope of Human Rights in a Technological World — Using the Interamerican Court of Human Rights to Establish a Minimum Data Protection Standard Across Latin America*, 48 U. MIAMI INTER-AM. L. REV. 188, 206 (2017).
[5] *Id*.
[6] *Id.*
[7] Sarah L. Lode, Note, *"You Have the Data"…The Writ of Habeas Data and Other Data Protection Rights: Is the United States Falling Behind?*, 94 IND. L.J. 41, 43 (2019).
[8] *Id.* at 45.
[9] For example, Brazil (1988), Colombia (1991), Paraguay (1992), Peru (1994), Bolivia (1995), Ecuador (1996), and Venezuela (1999); Lode, *supra* note 7, at 44.

After the approval of the EU's Personal Data Directive in 1995, Latin American countries moved towards the enactment of specific data protection laws that complemented the aforementioned constitutional protections. Those new laws tended to follow the European approach of enacting comprehensive "omnibus" legislation and thus providing more detailed rights and procedures to increase both legal certainty within domestic jurisdictions and harmonization across countries in the region. Commentators have divided those legislative initiatives into "two waves."[10] The first wave of legislation came immediately after the adoption of the Data Protection Directive in 1995 with the enactment of data protection laws in Chile (1999), Argentina (2000), and Paraguay (2000). The second wave came in the following years, with the enactment of new laws in Uruguay (2008), México (2010), Costa Rica (2011), Peru (2011), Nicaragua (2012), and Colombia (2012).[11] […] The results of our panoramic survey of the region suggest that in the wake of the European Union's General Data Protection Regulation (GDPR)'s enactment in 2016, a "third wave" of EU standards-driven legislative reform is currently underway, led by new or proposed laws in Brazil (2018), Mexico (2016) and Argentina.

In short, Latin American countries often protect data privacy through comprehensive legislation that expands upon the core right of *habeas data* in their constitutions. Inspired in turn by EU initiatives like the Directive, and now the GDPR, these evolving legislative frameworks govern the collection, use and dissemination of personal data by private as well as public parties. They grant individual rights, known as "ARCO" rights for their acronym in Spanish, to data subjects, to allow them through a writ of *habeas data* to *A*ccess, *R*ectify (correct), *C*ancel (erase) or *O*ppose processing personal information that has been collected by government authorities or, more recently, by private companies.[12] If the data is inaccurate, incomplete or outdated, the subject can ask for its rectification; if the data is being processed, he or she can request that it not be.[13] […].

[10] W. Gregory Voss & Céline Castets-Renard, Proposal for an International Taxonomy on the Various Forms of the "Right to be Forgotten": A Study on the Convergence of Norms, 14 COLO. TECH. L.J. 281, 314 (2016).
[11] *Id.*
[12] Lode, at 55.
[13] *Id.* at 45.