The Sovereign Individual: The Writ of *Habeas Data* and the Right to Informational Privacy

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"Over one's mind and over one's body the individual is sovereign."
– John Stuart Mill, *On Liberty*

I. INTRODUCTION

In his book entitled *On Liberty*,[1] John Stuart Mill, founder of Western individual liberalism, left a rather unchallenged rhetorical argument for the protection of the rights of the individual specifically the right to privacy. Mill argued that over one's person — particularly his mind and his body, the individual is sovereign. It was an argument of control and at the same time, an argument of limitation. Control is recognized in the possession of the individual and limitation is recognized as imposable against everyone else. Thus, one may choose how one decides to live. In the words of a famous American jurist, the right to privacy is the inalienable right of an individual "to be let alone."[2] It has been said that the "right to be let alone is the fount of all freedom; and privacy depends upon the scope and function of individual freedom in society."[3] Certainly, what that "freedom" covers is neither found in an easy enumeration nor can it be derived from an easy consensus. But largely, freedom from restraint is shown in the recognition of the divide between the government's hold over the individual's sovereign space and that held by the public sphere through governmentality.[4]

1. JOHN STUART MILL, ON LIBERTY (1859).
2. THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888) *cited in* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).
3. ALAN F. WESTIN, PRIVACY AND FREEDOM vii (1970).
4. Michel Foucault often defines governmentality as the "art of government" in a wide sense, that is, with an idea of "government" that is not limited to state politics alone, that includes a wide range of control techniques, and that applies to a wide variety of objects, from one's control of the self to the "biopolitical" control of populations. In the work of Foucault, this notion is indeed linked to other concepts such as "biopolitics" and power-knowledge. "Governmentality" applies to a variety of historical periods and to different specific power regimes. However, it is often used (by other scholars and by Foucault himself as well) in reference to "neoliberal governmentality," in other words, to a type of governmentality that characterizes advanced liberal democracies. In this case, the notion of governmentality refers to societies where power is de-centered and its members play an active role in their own self-government, as posited, for example, in neoliberalism. Because of its active role, individuals need to be regulated from "inside." A particular form of governmentality is characterized by a certain form of knowledge ("savoir" in French). In the case of neoliberal governmentality (a kind of governmentality based on the predominance of market mechanisms and of the restriction of the action of the state), the knowledge produced allows the construction of auto-regulated or auto-correcting selves. *See*, MICHEL FOUCAULT, ETHICS: SUBJECTIVITY AND

In every society, an individual has the right to live with other beings (as social animals, in the words of Plato), and yet remain the sovereign of one's own dominion: one's private domain. This is the foundation of the right to privacy — the right of the individual to insist upon his or her individuality and to control information, the dissemination of which would render his sovereignty inutile. Lord Acton defined freedom as an "assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion."[5] Lord Acton stressed an important character of freedom — that when applied to privacy, it is much endangered by the uncontrolled activity of individual persons as by the might of the Leviathan[6] or the all-seeing gaze of the governmental Panopticon.[7]

In legal history, the privacy of an individual takes its roots from common law which recognized a man's house as his castle, impregnable, even to the monarch and its officers engaged in the execution of its commands.[8] Legal history has recognized the evolution of the right to privacy as part of human freedom and one of human rights.[9]

In this Article, the authors argue that the right to control the information over one's individual person is covered by the right to privacy in Philippine constitutional jurisprudence. This is supported by an account of the development of Philippine legal literature on the constitutional right to privacy, its derivative rights and classifications, including informational privacy. This Article also examines the Supreme Court's resolution adopting

TRUTH (Paul Rabinow ed., 1997); MICHEL FOUCAULT, *Governmentality*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87-104 (Graham Burchell, et al. eds. & Rosi Braidotti trans., 1991). *See also*, MICHEL FOUCAULT, *Technologies of the Self*, *in* TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT 16-49 (Huck Gutman, et al. eds., 1988).

5. Lord John Emerich Edward Dalberg Acton, Address delivered to the Members of the Bridgnorth Institute: The History of Freedom in Antiquity (Feb. 26, 1877).
6. THOMAS HOBBES, THE LEVIATHAN (1651).
7. The Panopticon is a type of prison building designed by English philosopher Jeremy Bentham in 1785. The concept of the design is to allow an observer to observe (-opticon) all (pan-) prisoners without the prisoners being able to tell whether they are being watched, thereby conveying what one architect has called the "sentiment of an invisible omniscience." Bentham himself described the Panopticon as "a new mode of obtaining power of mind over mind, in a quantity hitherto without example." JEREMY BENTHAM, *Panopticon*, *in* THE PANOPTICON WRITINGS 29-95 (Miran Bozovic ed., 1995).
8. WESTIN, *supra* note 3, at 7-30.
9. *See generally*, ALAN F. WESTIN, PRIVACY AND FREEDOM (1964).

the writ of *habeas data* which provides for a judicial remedy recognizing the right of informational privacy.

II. TWO LAWYERS WRITING A RIGHT

The article by Samuel Warren and Louis Brandeis (later Justice Brandeis) entitled *The Right to Privacy*[10] forever changed legal literature and subsequent jurisprudence when the authors popularized the right to privacy as an independent legal right. With extreme foresight ahead of their time, Warren and Brandeis declared in 1890 that:

> [T]he individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle.
>
> The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.
>
> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone."[11]

Warren and Brandeis opened the portals for a more systematic study of the distinctive principles upon which the right to privacy is based. Recent developments, however, have shown that said right covers broader aspects of human activity of an individual, family, home, and reputation. Indeed, no less than the Universal Declaration of Human Rights, in article 12, states that: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[12]

10. Warren & Brandeis, *supra* note 2.
11. Warren & Brandeis, *supra* note 2, at 194-96.
12. Universal Declaration of Human Rights [UDHR], G.A. Res. 217A, U.N. GAOR, 3rd sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

Countries such as France explicitly protect privacy in their constitution.[13] On the other hand, the United States (U.S.) Constitution does not explicitly express the right to privacy, yet the U.S. Supreme Court has repeatedly recognized such a right in its efforts to preserve the individual's control over his personal image. The Supreme Court has found that the U.S. Constitution contains "penumbras" that implicitly grant a right to privacy against government intrusion. This is exemplified in *Griswold v. Connecticut*,[14] where the U.S. Supreme Court recognized that privacy is within the legal penumbra of the Bill of Rights, particularly in the First, Third, Fourth, Fifth, and Ninth Amendments.[15]

In *Griswold*, the Supreme Court explained that even though a right to privacy is not specifically articulated in the Constitution, "[the] right to privacy [is] older than the Bill of Rights — older than our political parties."[16] The Court established that the right to privacy is a fundamental right.

As Professor Coquia noted:

> The right to privacy has been expressed several thousands of years ago with the maxim that "A man's house is his castle." The expectation of privacy within one's home is found in the *Talmud*, the Jewish civil and religious law and the Code of Hamurrabi. These principles eventually have been incorporated in the Bills of Rights in several state constitutions. The Philippines in its Malolos Constitution adopted in 1899 states that "no person shall enter the domicile of a Filipino or foreigner residing in the Philippine Islands without his consent, except in urgent cases of fire, flood, earthquake, or other natural danger or unlawful aggression proceeding from within, or in order to assist a person calling for help." The Americans in their fight for independence from England questioned the quartering of armed troops in their homes.[17]

Other countries without constitutional provisions on privacy have laws protecting privacy, such as the United Kingdom's Data Protection Act 1998 or Australia's Privacy Act 1988. On the other hand, the European Union, through directives such as Directive 95/46,[18] requires all member states to legislate to ensure that citizens have a right to privacy.

13. *See*, French Declaration on the Rights of Man (1789).

14. Griswold v. Connecticut, 14 L. Ed. 2d 510 (1965).

15. *Id.* at 514-15.

16. *Id.* at 516.

17. Jorge R. Coquia, Annotation, *The National Computerized Identification Reference System as Violation of the Right to Privacy: A Review of the Principles and Jurisprudence on Privacy as Human Rights*, 293 SCRA 201, 203 (1998).

18. Council Directive 95/46, 1995 O.J. (L 281) at 231 (EC).

III. CONSTITUTIONALIZING INDIVIDUALISM

The 1987 Philippine Constitution guarantees the privacy of correspondence and communication.[19] The 1935 Constitution[20] and the 1973 Constitution[21] contained the same provisions.

Some argued that the right to privacy is not inherent in Philippine legalese because it is not rooted in Philippine culture.[22] However, if one should find the 1899 Constitution of Malolos as a legal document worth considering, it contained provisions that protect the individual's right to privacy including the privacy of the person, family, home, correspondence, and even modern communications such as telegraphs and telephones.[23] Why these provisions were not carried to the 1935 Constitution is unclear. Perhaps the reason for the non-inclusion is the fact that the 1935 Constitution was a copy of the U.S. Constitution. But even with the use of safeguards in the U.S. Constitution, it should be kept in mind, as Justice Brandeis wrote in *Olmstead v. United States*,[24] that:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect … . They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[25]

Thus, the principle underlying the Fourth and Fifth Amendments is protection against invasion of the sanctities of a man's home and privacy of

19. 1987 PHIL. CONST. art III, § 3, ¶ 1.

> The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise, as prescribed by law.

20. 1935 PHIL. CONST. art III, § 1, ¶ 5 (superceded 1971).

21. 1973 PHIL. CONST. art IV, § 4, ¶ 1 (superceded 1987).

22. Dean Irene Cortes, *Constitutional Foundations of Privacy, in* EMERGING TRENDS IN LAW 4-5 (1983) (quoting the argument of Carmen Guerrero Nakpil in *Consensus of One*, arguing that there is no work that can be transliterated for "privacy" in the local vernacular because there is no such concept in the Philippines).

23. 1899 PHIL. CONST. arts 10, 12, 13 (superceded 1935).

24. Olmstead v. United States, 277 U.S. 438 (1928).

25. *Id.* at 478-79 (Brandeis, J., dissenting).

life. This is a recognition of every person's right to life and to an inviolate personality — spiritual nature, feelings, and intellect.

This was echoed, albeit in a paler voice, in the 1969 case of *Stanley v. Georgia*,[26] where Justice Marshall wrote that, "[A] State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. *Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.*"[27]

And in 2003, in the case of *Lawrence v. Texas*,[28] Justice Kennedy expounded on the individual's right to privacy, thus:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[29]
>
> ...
>
> The petitioners are entitled to respect for their private lives ... .Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[30]

In *Morfe v. Mutuc*,[31] the Philippine Supreme Court through Chief Justice Fernando ruled that:

> The right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection. The language of Prof. Emerson is particularly apt: "[t]he concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen." This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.[32]

26. Stanley v. Georgia, 394 U.S. 557 (1969).

27. *Id.* at 565 (emphasis supplied).

28. Lawrence v. Texas, 539 U.S. 558 (2003).

29. *Id.* at 574 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

30. *Id.* at 578.

31. Morfe v. Mutuc, 22 SCRA 424 (1968).

There are several principles in society that we have to hold on to — that we have to protect. There are things that we share with the public and there are those that we keep to ourselves, and rightly so. The writ of *habeas data* enforces the individual's right to privacy in relation to one's life, liberty, and security. It has been held even before the *Magna Carta* that there are areas in which the individual shall remain sovereign — that no power, be they the monarch, can intrude. This is the individual's right to be let alone and to live one's life.

The notion of freedom should not be limited to physical liberty. In the age of modern technology, the individual may be physically free but nevertheless unduly restricted. To uphold the intangible rights — the freedom from fear and unwarranted intrusion especially those that derivatively assail the more primordial rights of life, liberty, and security — that is the duty of the courts of justice.

IV. FREEING NEO FROM THE MATRIX

A. *Computers, Data Storage, and Information Accumulation*

Generally, the right to privacy involves the most basic rights of individual conduct and choice. It includes the right of a person to prevent intrusion into certain thoughts and activities which embraces the freedom of speech, of association, the right against unreasonable searches and seizures, and freedom from self-incrimination.[33]

Subsequent to the Second World War, a powerful undercurrent of thought has evolved with respect to privacy which focused on personal information. The second half of the 20th century saw technological advances that made it increasingly possible to monitor and track persons as a result of the remarkable amount of personal identifying data that could be stored in ever more efficient ways. Governments that had always wanted to keep track on their citizens now had the means to do so and, with the paranoia that attended the Cold War, had a harrowing sense of urgency.

As innovations in computer technology continued at an incredible pace, authors and commentators warned of a future state in which governments

32. *Id.* at 444-45 (citing Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965)) (emphasis supplied).

33. Coquia, *supra* note 17, at 203.

could use personal data to track and control the masses. To many, the right to be let alone took on a different meaning from that of Warren and Brandeis. The new understanding of "information privacy" referred to information as power, and the increasing availability of personal data created a real danger for abuse of such power.

In *Whalen v. Roe,*[34] a New York statute required the recording in a centralized computer file the names and addresses of persons who obtained certain drugs, where there are both lawful and unlawful markets, pursuant to a doctor's prescription. The statute prohibited public disclosure of the patient's identity. The U.S. Supreme Court held that the statute did not violate the patient and doctor relationship but it solidified the right to information privacy.[35]

The use of computers in the accumulation, storage, processing, retrieval and transmission of data has greatly advanced research methods. However, such advancement poses new threats to privacy in the form of interference with and deprivation of the right of the individual to control the flow of personal information.[36]

B. The Right to Informational Privacy

Information privacy is a prominent concept in American constitutional law designed to safeguard the ability of a person to restrict dissemination of personal information. Alan Westin, in a seminal book on the right to privacy, described a person's life in analogy to a series of circles within circles. The inner-most circle contains the things we tell no one about ourselves. The next inner-most circle contains the things about us that are known only by those with whom we are most intimate. The circles continue until it reaches the information that is known by all.[37]

Computer technology has advanced rapidly with the global internet system.[38] Such technology tends to intrude into privacy as personal information, including evidence of present and past actions or associations may be disseminated without the individual's consent. There is also the probability of introducing inaccurate information that might create erroneous information of which the individual has no control.[39]

Professor Coquia further explained:

34. Whalen v. Roe, 429 U.S. 589 (1977).
35. *Id.* at 606. *See,* Coquia, *supra* note 17, at 214.
36. Coquia, *supra* note 17, at 214-15.
37. *See,* ALAN F. WESTIN, PRIVACY AND FREEDOM 33 (1964).
38. Coquia, *supra* note 17, at 215.
39. *Id.*

> An individual, from the time of his birth, through the schools he has attended, the work of which he was employed, and all former and social associations, are recorded. He may have filled up numerous forms all about himself without any idea that all the information would one day be put together and made available to others at different times and for various purposes. An information of a privileged character can be fed in a computer machine, which certainly is an invasion of one's privacy.[40]

V. DEFROSTING PHILIPPINE PRIVACY JURISPRUDENCE

The right to privacy has recently emerged from a frozen amber. The scattered provisions of privacy protection clauses in the 1987 Philippine Constitution and the growing number of privacy jurisprudence have given life to the right to privacy.

From the old jurisprudential theory enunciated in *Arnault v. Nazareno,*[41] where the petitioner invoked before an investigation of the Blue Ribbon Committee of the Philippine Senate the right to privacy on his dealings with other persons and wherein the Supreme Court held that there was no violation of the right to privacy, there has been a shift to a modern jurisprudential theory where the right to privacy is respected and upheld.

In the case of *Morfe v. Mutuc,*[42] the Supreme Court had an occasion to rule on the existence of the right to privacy despite dismissing the action for declaratory judgment challenging the validity of the provisions of the Anti-Graft and Corrupt Practices Act. In *Morfe,* the questioned law required every public officer to submit in January of each year a statement of his assets and liabilities. The petitioner alleged that the statute is "an unlawful invasion of the constitutional right to privacy, implicit in the ban against unreasonable searches and seizures construed together with the prohibition against self-incrimination.[43] The Court did not find merit in the contention on the ground that the statute did not call for the disclosure of information which infringes on the right to privacy of any person. Such pronouncement bore heavily in subsequent jurisprudence a most potent call for the delineation of what infringes on the right to privacy of a person. *Morfe* recognized the constitutional right to privacy as laid down in *Griswold.*[44]

The ruling in *Ramirez v. Court of Appeals,*[45] strongly recognized a person's right to privacy. The court clarified therein, that "even a person

40. *Id.*
41. Arnault v. Nazareno, 87 Phil. 29 (1950).
42. Morfe v. Mutuc, 22 SCRA 424 (1968).
43. *Id.* at 429.
44. *See,* Griswold v. Connecticut, 14 L. Ed. 2d 510 (1965).
45. Ramirez v. Court of Appeals, 248 SCRA 590 (1995).

privy to a communication who records his private conversation with another without the knowledge of the latter will qualify as a violator" under section 1 of the Anti-Wiretapping Act.[46]

In *Ople v. Torres*,[47] the Supreme Court declared that:

> [T]he right to privacy does not bar all incursions into individual privacy. The right is not intended to stifle scientific and technological advancements that enhance public service and the common good. It merely requires that the law be narrowly focused and a compelling interest justifies such intrusions. Intrusions into the right must be accompanied by proper safeguards and well-defined standards to prevent unconstitutional invasions. We reiterate that any law or order that invades individual privacy will be subjected by this Court to strict scrutiny.[48]

The basic attribute of an effective right to informational privacy is the individual's ability to control the flow of personal information, which must, however, be counterbalanced with legitimate public concerns. To deprive an individual of the power to control or determine whom to share such information is to deprive the individual of personhood. For the essence of the constitutional right to informational privacy goes to the very heart of a person's individuality — a sphere as exclusive and as personal to an individual which the state has no right to intrude without any legitimate public concern.

As the erosion of personal privacy through computer technology and advanced information systems accelerates, the individual's ability to control its use diminishes.

There is more than a chilling prospect that one's profile formed from the gathering of data from various sources may divulge his or her private information to the public. There is also the unsettling thought that these data may be inaccurate, outdated or worse, misused. There is, therefore, a pressing need to provide for judicial remedies that would allow the summary hearing on the unlawful use of data or information and to remedy possible violations of the right to privacy.

VI. THE WRIT OF *HABEAS DATA*

In several Latin American countries, *habeas data* has attained not only a procedural legal mechanism status, but also as a direct constitutional right.[49]

46. *Id.* at 596.
47. Ople v. Torres, 354 Phil. 948 (1998).
48. *Id.* at 985.
49. Andrés Guadamuz, *Habeas Data: An Update on Latin America Data Protection Constitutional Right*, Paper presented during the 16th BILETA Annual Conference in Edinburgh, Scotland (Apr. 9-10, 2001). The paper is an update

The scope and concept of *habeas data* varies from country to country, but in general, it is designed to protect, by means of an individual complaint presented to a constitutional court, the image, privacy, honor, information self-determination, and freedom of information of a person.

The first Latin American country to implement *habeas data* was the Federal Republic of Brazil. In 1988, the Brazilian legislature voted a new Constitution, which included a novel right: the right to initiate an individual *habeas data* complaint. It is expressed as a constitutional right under article 5, title 2 of the 1988 Brazilian Constitution.

> *Habeas Data* shall be granted: (1) to ensure the knowledge of information related to the person of the petitioner, contained in records or databanks of government agencies or of agencies of a public character; (2) for the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative.[50]

This constitutional provision was further bolstered by Brazil's National Congress in a 1997 regulatory law (*Congreso Nacional de Brasil, Lei 9507*).[51]

Following the Brazilian example, Colombia incorporated the *habeas data* right in its 1991 Constitution. The 1991 Colombian Constitution as reformulated by the 1997 version recognizes the right to individual privacy and recognizes that the citizens shall have: "the right to know, access, update and rectify any information gathered about them in databases, both public and private."[52] After that, many countries followed suit and adopted the new legal tool in their respective constitutions: Paraguay in 1992, Peru in 1993, Argentina in 1994, and Ecuador in 1996.

The 1992 Paraguay Constitution follows the example set by Brazil, but guarantees stronger protection of the right. Article 135 of the Paraguayan Constitution provides that:

> Everyone may have access to information and data available on himself or assets in official or private registries of a public nature. He is also entitled to know how the information is being used and for what purpose. He may request a competent judge to order the updating, rectification, or destruction of these entries if they are wrong of if they are illegitimately affecting his rights.[53]

on the author's article entitled *Habeas Data: The Latin-American Response to Data Protection*, *in* THE JOURNAL OF INFORMATION, LAW AND TECHNOLOGY (2000).

50. 1988 FEDERAL REPUBLIC OF BRAZIL CONST. art 5, § 71.
51. Congreso Nacional de Brasil, Lei No. 9507, Nov. 12, 1997.
52. 1997 COLOMBIAN CONST. art 15.
53. 1992 PARAGUAY CONST. art 135.

Aside from giving the individual the right to find out what personal information is kept, there is also the right to know the use and purpose for which such data is collected. The petitioner is also given the opportunity to question the data, and argue for its "updating, rectification, or destruction."[54]

The Peruvian Constitution also recognizes *habeas data.* Article 200 thereof, is similar to the *habeas data* provision of Brazil and Paraguay.[55] More than that, their Legislature was quick enough to provide for a regulatory law, effective 18 April 1995, that recognizes not only the procedural guarantees of updating one's data as contained in manual or physical records, but also one's right to update one's "automated" data or those personal data kept and supplied by any "information service, automated or not."[56] In this model, the *habeas data* remedy may be enforced against automated or digitized records.

In Argentina, the writ of *habeas data* is not specifically called "habeas data" but is subsumed by the Argentine writ of *amparo.* Article 43 of the Argentine Constitution, under the title of *Amparo* or protection, states that:

> Any person may file this action to obtain information on the data about himself and their purpose, registered in public records or data bases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data. The secret nature of the sources of journalistic information shall not be impaired.[57]

The Argentine version, despite not being called *habeas data* is more comprehensive than other Latin American models. This model includes the judicial remedy to enforce one's right to access the data, to rectify it, update it, or destroy the data, like the Paraguay model. This model also guarantees the confidentiality of personal or private information and gives specific protection to journalistic privilege, which is presumably to protect the lofty democratic role that the press enjoys.

Several legal literatures have recounted the varying effects of *habeas data.* Legislatures in Latin America are constantly restudying its regulatory and substantive roles and limitations. As such, the Philippine Legislature must similarly study its applicability in data protection especially in this day and age of information technology where privacy can easily be pierced by a push of a button.

54. 1992 PARAGUAY CONST. art 135.

55. 1993 PERUVIAN POLITICAL CONST. art 200, § 3.

56. 1993 PERUVIAN POLITICAL CONST. art 2, § 6.

57. 1853 ARGENTINE CONST. art 43 (amended 1994).

However, several studies have shown a remarkable use of the *habeas data* writ that was not really intended by its developers: an "unforeseen effect" of this judicial remedy is that "it became an excellent Human Rights tool mostly in the countries that are recovering from military dictatorships."[58]

In Paraguay, an action for *habeas data* was filed to view the records from a police station bringing to light several atrocities that were committed at that site. In Argentina, an important ruling from the Argentine Supreme Court stated that the *habeas data* rule applied implicitly to the families of the deceased in a case involving extralegal killing and enforced disappearance.[59] This was a recognition of the right of the families of the disappeared, usually victims of the military regime, to request access to police and military records otherwise closed to them — and in essence, establishing a right to truth.

The right to truth is a fundamental principle central to the project of confronting transitions to democracy and the history of massive human rights violations in Latin America. This right entitles the families of disappeared persons to know the totality of circumstances surrounding the fate of their relatives and imposes an obligation of investigation on the part of governments. This right is particularly crucial in cases of political disappearances because these frequently imply secret execution of detainees without any trial, followed by the concealment of the body with the purpose of erasing all material traces of the crime and securing impunity for the perpetrators. This strikes right through the right to life of a person.

The right to truth is an integral part of the right to life, liberty, and security. The connection between the right to truth and the right to justice — a right that the State is more generally obligated to protect under national and international law,[60] gives us a stronger resolve that by seeking the truth, many shall be freed, both in the literal sense and in the sense that the Good Book implied. No family member can sleep well not knowing the whereabouts of his or her father, mother, brother, sister, son, or daughter. In finally reaching the truth, there shall be some sense of freedom and to this end, a judicial remedy recognizing this right should be worth considering.

Habeas data is an existing legal arsenal that will further strengthen the campaign against extralegal killings and enforced disappearances.

58. Guadamuz, *supra* note 49.

59. Horacio Verbitsky, El Camino de la Verdad, 12 (Oct. 16, 1998).

60. *See*, UDHR, art 8.

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

In addition to the general constitutional right to access information in the hands of the government,[61] every person has the right to access information about himself or herself, especially if it is in the possession of the government. This is part of one's right to privacy which includes the right to modify, remove, or correct such information due to its sensitive, erroneous, biased, or discriminatory nature. The right to access and to control personal information is essential, since the lack of legal mechanisms for the correction, updating, or removal of information can have a direct impact on the right to privacy, honor, personal identity, property, and accountability in information gathering.

61. *See*, 1987 PHIL. CONST. art 2, § 24 ("The State recognizes the vital role of communication and information in nation-building."); art 3, § 7 ("The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law."); art 6, § 12 ("All Members of the Senate and the House of Representatives shall, upon assumption of office, make a full disclosure of their financial and business interests. They shall notify the House concerned of a potential conflict of interest that may arise from the filing of a proposed legislation of which they are authors."); art 6, § 20 ("The records and books of accounts of the Congress shall be preserved and be open to the public in accordance with law, and such books shall be audited by the Commission on Audit which shall publish annually an itemized list of amounts paid to and expenses incurred for each Member."); art 7, § 12 ("In case of serious illness of the President, the public shall be informed of the state of his health. The members of the Cabinet in charge of national security and foreign relations and the Chief of Staff of the Armed Forces of the Philippines, shall not be denied access to the President during such illness."); art 11, § 13 ("The Office of the Ombudsman shall have the following powers, functions, and duties ... (5) Request any government agency for assistance and information necessary in the discharge of its responsibilities, and to examine, if necessary, pertinent records and documents ... . (6) Publicize matters covered by its investigation when circumstances so warrant and with due prudence ... ."); art 12, § 21 ("Foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public."); art 16, § 10 ("The State shall provide the policy environment for the full development of Filipino capability and the emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country, in accordance with a policy that respects the freedom of speech and of the press."); and many other scattered provisions related to information control, regulation and freedom.

VII. CONCLUSION

The modern and the postmodern world subscribe to the notion that human rights guarantee that the individual shall be let alone in a world that is ever shrinking and globalizing. Jürgen Habermas once argued for the rational divide between the private-public sphere, and Mill's liberalism has made individualism a buzzword. In the legal world, this translates in the enforcement of human rights. All over the world, judiciaries have been entertaining complaints and have been issuing writs pursuant to their task of pacifying disputes and resolving conflicts — more importantly, in guaranteeing the protection and vindication of rights of the individual through legal mechanisms that legitimate their purposes. The most recent of these legal mechanisms is the writ of *habeas data*.

In legal history, filing an individual complaint before the courts to invoke constitutional rights has long been granted a substantive recognition. The first and perhaps most famous of these complaints is the *habeas corpus*, roughly translated, "you should have the body." The writ of *habeas corpus* is a guarantee against deprivation of liberty of a person. It originated in England during the Middle Ages and recognized in the several versions of the *Magna Carta* so that a person held in custody is brought before a judge or court to determine whether the detention is lawful or otherwise. Throughout history, several writs have been developed to protect the rights of the individual against the State such that in the United States of America, the writ of *mandamus* has become popular to command a governmental agency to perform a ministerial function in order that a person may enjoy the benefits of a common government; in the Latin American countries, particularly Mexico and Argentina, the writ of *amparo* constitutes a general guarantee covering a whole gamut of constitutional rights; in Taiwan the *respondeat superior* writ in issued to make a superior liable for the acts of the subordinate; and so on and so forth.

Recently, the Supreme Court *En Banc* has promulgated the Rule on the Writ of *Amparo*.[62] The Philippine version of the writ of *amparo* was designed to protect the most basic right of a human being, which is one's right to life, liberty, and security as guaranteed not only by the 1987 Philippine Constitution but as also by the 1898 Declaration of Philippine Independence and the Universal Declaration of Human Rights.

The *habeas corpus* writ has been used for more than five centuries now. The writ of *amparo* has been recognized for more than five decades. Compared to those two, the writ of *habeas data* has a very short history.[63] The writ of *habeas corpus* can be traced as early as 1215 in the United

62. THE RULE ON THE WRIT OF AMPARO, A.M. No. 07-9-12-SC, Sep. 25, 2007.

63. *See*, Andrés Guadamuz, *Habeas Data and the European Data Protection Directive*, *in* THE JOURNAL OF INFORMATION, LAW AND TECHNOLOGY (2001).

Kingdom which was subsequently codified in 1679,[64] while the writ of *amparo* can be traced up to the last 50 decades of democratization in Latin American countries. The direct predecessor of the writ of *habeas data* is the Council of Europe's 108th Convention on Data Protection of 1981. The writ of *habeas data* may be said to be the youngest legal mechanism studied by comparative law. The writ is young because it appeals to the present generation. A comparative law scholar has described *habeas data* as "a procedure designed to safeguard individual freedom from abuse in the information age."[65]

The European Data Protection Convention of 1981 was convened to develop safeguards to secure the privacy of the individual by way of regulating the processing of personal information or data. Though *habeas data* was initially developed in Europe in the early 1980's, where countries, like Germany, founded its use upon their constitutional recognition of the right to self-determination, it has found use against perennial problems regarding the protection of the individual against human rights abuses in Latin American countries.

In recent years, recourse to the action of *habeas data* has become a fundamental, instrument for investigation into human rights violations committed during past military dictatorships in the Western Hemisphere. Family members of disappeared persons have used *habeas data* actions to obtain information concerning government conduct, to learn the fate of disappeared persons, and to exact accountability. Thus, these actions constitute an important means to guarantee the right to privacy and as a complementary right, the enforcement of the "right to truth."

By designing a Philippine version of the *habeas data*, we can further our resolve in finally bringing to a close the problem of extralegal killings and enforced disappearances in our country, a spectral remain of the Martial Law regime.

The Supreme Court should not be blind to the happenings of the present. Ever always is there a need to balance the powers of the government and the right of the individual so that we can all enjoy that ever elusive "just and humane society" where over one's own mind and body, the individual remains sovereign.

64. Habeas Corpus Act (1679). *See,* 1 BLACKSTONE, COMMENTARIES 131 (1st ed. 1765-69).

65. ENRIQUE FALCON, HABEAS DATA: CONCEPTO Y PROCEDIMIENTO 23 (1996) (translation provided).

Watching the Watchers: A Look into the Drafting of the Writ of *Amparo*

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