

Oct 2020

# Ecuador: The Data Protection Bill and habeas data as enforcement mechanism

One year has passed since the President of Ecuador submitted the Data Protection Bill ('the Bill') to the National Assembly for revision and approval. Jaime Mantilla Compte, at Falconi Puig Abogados, provides updates and analysis on the Bill, and, in the absence of an effective general data protection law, assesses the current regulatory landscape, focusing in particular on *habeas data* as a means to enforce privacy rights.



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## The Data Protection Bill

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Unfortunately, legislative proceedings with the Bill have been very sluggish. The Bill was assigned to the Sovereignty Commission of the Assembly ('the Commission'), formed of 12 assemblymen who during this past year have reviewed the Bill and received expert advice and recommendations from the private sector, including the recently founded Ecuadorian Association of Data Protection regarding possible amendments.

Finally, on 23 September 2020, the Commission reviewed the final draft of the Bill and approved it unanimously, so now a report to the President of the National Assembly will be prepared by the Commission and the Bill will be scheduled for debate by the plenary session of the Assembly, during which additional observations can be made by all the assemblymen.

Afterwards, a second report with all these observations will have to be prepared by the Commission within 45 working days before a second and final debate in which additional amendments can be made by the assemblymen. Once all discussion has taken place, the Bill will be voted on for approval. If approved, the Bill will then be sent to the President who can ratify or object to it, partially or totally. In this case, an objection seems very unlikely since the Bill has been promoted by the Executive Branch.

In any case, the Bill still has a long way to go in the legislative proceedings, so the possibility of having a data protection law with clear concepts, definitions, rights, obligations, proceedings, and sanctions within this year seems impossible.

In the meantime, privacy continues to become more relevant worldwide, especially with regards to the landmark decisions that have been taken by European courts since May 2018, when the General Data Protection Regulation (Regulation (EU) 2016/679) ('GDPR') came into force, and with the declaration of invalidity of the EU-US Privacy Shield on 16 July 2020 by the Court Justice of the European Union ('CJEU') in *Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems* (C-311/18) ('the Schrems II Case').

## Enforcing data privacy in the absence of a data protection law: *habeas data*

Against this backdrop, many different actors in Ecuadorian society involved in data protection and interested in the prompt approval of a law have begun to point out that, although scarce, there is currently some local regulation that guarantees privacy rights for Ecuadorian citizens in the Constitution and in other secondary legislation and, more importantly, that there are existent - if not very efficient - mechanisms to exercise those rights.

Such was the reminder issued by the National Director of Public Data Registry ('DINARDAP'), who has publicly stated that until a data protection law is approved, *habeas data* is the course of action to enforce privacy rights.<sup>1</sup>

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It is important to recall that DINARDAP is the original promoter, within the Executive Branch, of a data protection law, and that its Director with her close team was the one that drafted the first version of the Bill at the end of 2017. Hence, DINARDAP is quite interested and supportive of effective protection of personal data in Ecuador.

In order to understand the position DINARDAP has taken, we need to take a look at Article 92 of the Ecuadorian Constitution, which states that the data owner can request the data controller or processor to, free of charge, access, update, rectify, eliminate or cancel his or her data, and if such request is not favourably addressed, then he or she can go to the competent judge to demand such rights.

Accordingly, the Organic Law on Jurisdictional Guarantees and Constitutional Control, in its Articles 49 and 50, establish *habeas data* as the course of action to enforce the aforementioned privacy rights recognised by the Constitution and demand their application by data controllers or processors, including the possibility of indemnity for the damages caused.

Although *habeas data* actions do not involve complex proceedings, they do entail an important procedural burden since they involve hearings and submitting evidence, and it is not always a plain compliance proceeding. Furthermore, the Ecuadorian judicial system is overwhelmed and has an extraordinary backlog in all proceedings, so *habeas data* actions can take several months, even years to be resolved. In addition, with first-level judges being competent in these proceedings, appeals before the Provincial Court can be filed against their resolutions, and then a cassation recourse is available for certain specific legal situations before the National Court - all of which may prolong the proceedings even more.

That is why an administrative proceeding before a specialised authority is urgently required and constitutes one of the most important aspects of the Bill. However, until it is in effect, people can use the available courses of action that, despite not being efficient, do protect their rights.

## Concluding thoughts

The use of the existing regulatory framework to start demanding data protection rights is being promoted by several sectors in Ecuador in order to enable citizens, companies, and authorities to understand the scope and relevance of personal data, which will be useful as preparation to the adoption of the Bill, which, despite the delays, will still happen sooner rather than later.

Despite the support that data protection regulation has garnered, and even with the backing of DINARDAP, it is very unlikely that litigation on data protection will see a notable rise in Ecuador. Moreover, even when the Bill is finally approved, it is expected that it will take quite some time for enforcement to become a reality.

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Ecuador still has some way to go with data protection. Having actual cases in litigation proceeding and, later, a specific law on the matter, is definitely the best way for everyone involved to start understanding these rights, which have become so important in the world.

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1. See: <https://www.dinardap.gob.ec/habeas-data-es-la-accion-juridica-para-proteger-los-datos-personales-hasta-tener-una-legislacion/>

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