

THE LEGAL FRAMEWORK FOR THE PROTECTION, CORRESPONDENCE AND VIOLATION OF THE RIGHT TO PRIVACY AND PERSONAL DATA IN THE REPUBLIC OF KOSOVO ON LOCAL AND INTERNATIONAL OVERVIEW

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ABSTRACT

From the rights and fundamental freedoms which are guaranteed by the Constitution of the Republic of Kosovo and other international acts, we will explain briefly the right to privacy and then more specifically the legal framework for the protection of personal data in Kosovo on local and international overview. The purpose of this paper is to be informed specifically with the human rights and fundamental freedoms according the Constitution of the Republic of Kosovo, referring to the right to privacy (Article 36) in legal terms. Moreover, in this scientific paper we will analyze in details Article 36, paragraph 3 of the Constitution which stipulates as follows: “Secrecy of correspondence, telephony and other communication is an inviolable right. This right may only be limited temporarily by court decision if it is necessary for criminal proceedings or defense of the country as defined by law, always respecting Article 8 of the European Convention on Human Rights and Article 12 the Universal Declaration of Human Rights.

Keywords: Interest rates, Personal Information, Corruption, Abuse of privacy, Human Rights.

INTRODUCTION

Article 36, especially paragraph 3 and 4 of the Constitution of the Republic of Kosovo, addresses the issue of the right to privacy which is also regulated based on international conventions. The privacy is understood as a right of the individual, institution or certain groups to decide how and to what extent want to make public their information and personal data related with the abovementioned subjects. The specialists who regulate the human rights and fundamental freedoms continuously mention that the right to privacy does not enjoy the same status confirmed as other rights. Soon, in the future the social changes and continuous dynamics in our life will be able to move the boundaries of Article 8 of the European Convention on Human Rights. According the Strasburg Court, private life is a broad concept which is incapable of exhaustive definition.

Personal data means any information relating to an identified or identifiable natural person (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.

The personal data subject is each citizen whose personal data is processed. I want to specify that there is no Article of the Constitution (35, 36 and 37) that explicitly regulates the right of inviolability of private life. Therefore, regarding this issue, we can refer to Article 8 of the Convention (ECHR) which defines as follows:”Everyone has the right to respect for his private and family life, his home and his correspondence”, whereby we can draw a conclusion that regulates the issue for personal data protection by referring to the laws,

regulations and other directives which regulate this complex aspect. Also in this thesis will be elaborated the point 3 of Article 36 of the Constitution of the Republic of Kosovo, comparing with other applicable laws governing this so sensitive and complex area. Moreover, in this paper will be elaborated also the paragraph 3 of Article 36 of the Constitution of the Republic of Kosovo, by comparing it with other applicable laws which regulate this sensitive and complex aspect.

THE LEGAL FRAMEWORK ON THE PROTECTION OF PRIVACY AND PERSONAL DATA

The European Convention on Human Rights and Fundamental Freedoms – Article 8 of this Convention defines that: "Everyone has the right to respect for his private and family life, his home and his correspondence". Moreover, according the Convention, exceptionally is stipulated that "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". From this situation commences the ground of legislation for the protection of personal data. Thus, all laws which regulate this issue as a referral point has the Article 8 of the European Convention on Human Rights and Fundamental Freedoms.¹

Constitution of the Republic of Kosovo – The provisions of European Convention on Human rights are directly applied in the Constitution of the Republic of Kosovo and this is regulated with Article 22 of the Constitution, referring to Article 36, particularly paragraph 3 and 4 in relation with the right to privacy, respectively the personal data protection.²

Law on the protection of personal data known as the Law no.03/L-172 - Article 2, paragraph 1 and item 1.1 together with Article 3 and 28, determine the rights, responsibilities, principles and measures with respect to the protection of personal data. Pursuant to the law, personal data means any information relating to an identified or identifiable natural person (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. With Article 30 of this Law is envisaged the Organization of the National Agency for Protection of Personal Data.³

Law on access to public documents (Law no. 03/L-215) –While on the one hand, aspects of security, protection of the public interest and the need to fight crime, legitimate the limitation and exclusion of the principle of non-interference in the privacy and personal data on the other hand, the need for freedom, information and free access to the work of state authorities, requires a greater necessity to provide the right for each natural or legal person, without discrimination on any ground, to have access, upon application by the law to be able to access in all documents kept, drafted

¹ Article 8 of the European Convention on Human Rights

² Article 22, 36, paragraph 3 and 4 of the Constitution of the Republic of Kosovo

³ Article 2, 3 and 28 of the Law on Protection of Personal Data

or received by the public institutions. Moreover, the confidentiality principle, publicity principle, transparency principle, etc. shall be considered⁴.

Law on Administrative Procedure – One of the main principles of the procedure, which is applied by the administration bodies is the principle of balancing the public and private interests by ensuring that the public administration bodies during their administrative activity establish a fair balance between public and private interests, in order to avoid the unnecessary interferences in the rights and interests of natural and legal persons, here it is included also the application of the 3 abovementioned principles. Moreover, regarding the possibility to access in the documents and work of administration, it is affirmed the principle that the work and documents issued by the administration bodies shall be public for the citizens and only exceptionally some of the information may be restricted only for the purpose of protecting public legitimate interests of the life and other private legitimate interests defined with the relevant laws.

Criminal Procedure Code of Kosovo (CPCCK) – defines the procedures of the police, prosecutorial and judicial authorities in detecting, prosecuting, investigating and combating the crime and deviant actions of the individual in general. All these issues in practise are regulated by reference to Article 90, paragraph 1 of CPCCK, as well as Articles 186, 190, 191, 194 and 196; Article 256-26; Article 503, paragraph 1, item 8 and Article 451 of CPCCK.

In order to ensure objectivity and control eventual arbitrary actions, there shall be a control and supervision by an independent body such as the National Agency for Protection of Personal Data, for which we mentioned that the Organization of this Agency is regulated with Article 30 of the Law on protection of personal data in coordination with civil society and other relevant mechanisms. It would be important to monitor, ascertain and put before their responsibilities, the holders of these functions which eventually would exceed the limit of the competences as a consequence of not being informed or other subjective reasons. One of the reasons to file an appeal against a judgment, is the fact when the judgment is issued based on an inadmissible evidence. An inadmissible evidence is considered every interference (application of secret measures) done in contradiction with the procedures envisaged with the law.

Law on Kosovo Intelligence Agency (Law no. 03/L-063) – A greater interference made in the field of personal data and privacy, is presented by the activities of the KIA - regulated with the Law on Kosovo Intelligence Agency (Law no. 03/L-063), which are more wider and less restricted, according to Articles 2 and 24-34 of the Law on Kosovo Intelligence Agency (Law no.03/L-063). This issue is being discussed also in the Kosovo Assembly in relation with the draft law on interception of electronic communications which is returned to the Government for review by the European Integration Committee because they consider that KIA exceeds the competences and this law enables the abuse of interceptions.

The Criminal Code of Kosovo – From Article 202 to Article 206 of the Criminal Code of Kosovo are regulated the matters in relation with the protection of privacy and personal data. The Criminal Code of Kosovo (hereinafter “CCK”) incriminated actions that violate the privacy and personal data, considering such actions as criminal offenses and determining criminal sanctions for these violations. Such violations – criminal actions are defined as

⁴ Law no. 03/L-215 on Access to Public Documents

follows: inviolability of housing; illegal controlling; infringing privacy in correspondence and computer databases; unauthorized disclosure of confidential information; unauthorized interception and tone recording; unauthorized photographing and other recording; violating orders for covert or technical measures of surveillance or investigation.

Law on Electronic Communications dated 30 November 2012 – This law is one of very important laws governing the protection of personal data, including the two directives such as Directive 2006/24/EC of the European Parliament dated 15 March 2006, and Directive 2009/136 of the European Parliament which regulate specific issues dealing with personal data.

The National Agency for Protection of Personal Data – The organization of the National Agency for Protection of Personal Data is regulated by law. Briefly the mission of this agency is to ensure consultation to public and private bodies, deciding on complaints submitted, inspections and controls, public information, as well as promotion and support of fundamental rights for protection of personal data are part of major scope of Agency's mission, as well as the rights of each individual to privacy to be protected while processing the personal data and cooperation with international and European bodies to achieve the goals of integration.

The draft law on interception of electronic communications – This draft law is returned to the Government by the European Integration Committee on 20 January 2015 because the same shall be corrected in order to be in compliance with the European standards.

Processing and access to personal data – processing of personal data – any operation or set of operations which is performed upon personal data, whether or not by automatic tools, such as collection, recording, organization, storage, security, adaption or alteration, retrieval, consultation, usage, disclosure by transmission, dissemination or otherwise ways making available, alignment or combination, blocking, erasure or destruction. Securing personal data must be distinguished from the storage of personal data.

There shall be a difference between the security of personal data and storage of personal data. The security (Article 14 and 16 of the Law on Protection of Personal Data) means the security of software and other technical-logistic issues of systematization of telecommunication from interferences and misuses whereas the storage means the storage of personal data due to the overload of communications. This storage (Article 24 and 25 of the Law on Protection of Personal Data) as well as according to Article 68 of the Law on electronic communications is done within the time limit of 6 months (due to internal uses and needs of traffic and market analysis as well as an additional 6 months due to the needs of different bodies for persons under investigation⁵). The processing of personal data is regulated by the Law on Protection of Personal Data, respectively Article 5.

Article 68, paragraph 1 of the LEC – Personal data preservation and administration for the criminal proceedings purposes stipulates that: 1. Regardless of other definitions in this Law, the entrepreneurs of public electronic communications services and networks shall be obliged to store and administrate, for a period not longer than one (1) year, the data files of their subscribers referred to in paragraph 2 of this Article. Such storage shall be paid for by state

⁵ Directive 2006/46/EC of the European Parliament dated 15 March 2006; Directive 2009/136 of the European Parliament

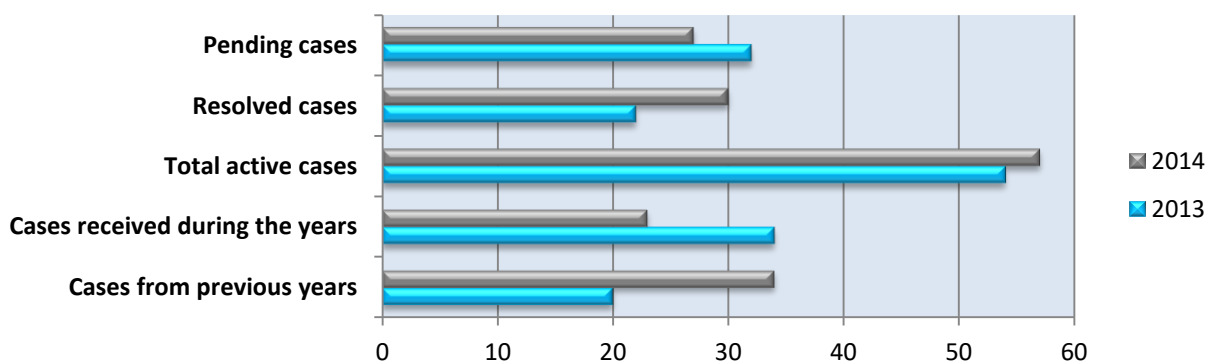
funds in accordance with the procedure established by the Government (see article 68 of the Law on Electronic Communications).

Article 86, paragraph 1 of the LEC – Confidentiality of communications

The confidentiality of communication and related traffic data by means of a public communications network and publicly available electronic communications services shall be preserved by the service provider. The service providers in particular shall impede the eavesdropping, interfering to telephonic calls, saving or other overhearing or observation forms of communication and traffic data related to it by the persons excluding the users, except when legally authorized to do so, in individual cases, always in accordance with the provisions of criminal procedure code. This does not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality; Directive 2006/24/EC – Protection of Personal Data.

Cases dealing with official corruption and misuse of official position for 2013 and 2014 in the Basic Court in Peja which inter alia can contain certain elements of misuse of personal data at work without prejudice until the finalization of the court proceedings⁶

Figure 1. Cases dealing with official corruption



Source: author's work

Penalty provisions for the protection on personal data

Criminal Code of Republic of Kosovo in XVII – Chapter “Crimes against freedom and human rights” namely Article 202 and 203 provides penalties regarding the privacy in correspondence and computer databases (202) and unauthorized disclosure of confidential information (203), also Article 422 and 423 of the Criminal Code of the Republic of Kosovo - Chapter XXXIV “official corruption and criminal offenses against official duty” provides penalties in cases of abuse of official position or authority (422) respectively, misuse of official information (423) including serious penalties with fines and imprisonment, depending on the qualification of information and the value of the damage caused by misuse mentioned above.

Interception, violating of privacy and correspondence, protection of personal data and challenges in the future – Law on Protection of Personal Data is derived in accordance with

⁶ Basic Court in Peja – Statistics Office

Directive 95/46⁷, as well as in full compliance with the abovementioned acts. In this directive is specified that within a certain time limit, countries shall make a full harmonization of the primary and secondary legislation with the directive in question. After the analysis, we can conclude that the primary and secondary legislation applicable in the Republic of Kosovo need a lot of improvements in order that the entire legislation be in harmony with the principles of processing the personal data under the Law on Protection of Personal Data.

At the same we re-concluded that the Convention for the Protection of individuals with regard to Automatic Processing of Personal Data known as Convention 108 must be ratified by the Assembly of Kosovo. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data requests from the members states to provide the rights and freedoms of natural persons regarding the processing of personal data and in particular of their right to privacy, in order to ensure free movement of personal data in community.⁸ With the aim of implementing the law, the Agency will continue issuing necessary by laws. The protection of personal data and privacy is a new challenge in the Republic of Kosovo, despite the fact that this issue in the European Union is addressed specifically in the Convention 108 in 1981, then with Directive 95/46, where derived special laws on the protection of personal data and privacy and special authorities dealing with supervision of processing of personal data and privacy. Despite the fact the implementation of the principles of data protection and privacy, namely the normative regulation of this right through the constitution and the laws is a new relative right regulated in the Republic of Kosovo in comparison with other countries, actually the last one.

The draft law on interception of telecommunication

Legal experts who deal with these issues regarding the draft law on electronic interceptions state that the main deficiency or defect of this issue is that the draft law fails to limit the number of authorized institutions who will have access on interceptions. In the draft law is mentioned that the authorized institution is the Kosovo Police, KIA and other institutions with a specific law, but it is not specified who the other institutions are⁹.

The draft law is prepared based on an EU directive which has already been dismissed, because such interception failed to provide results in the countries where it is applied. Thus, this EU directive is repealed and now the EU is trying to draft a regulation on protection of personal data and that this regulation will facilitate the work of countries in such way that there will be no need to enact laws to regulate the interception but only to strengthen the regulation in question after its approval.

The Government of Kosovo submitted the draft law on interception of telecommunication before the Assembly on December 17, 2012¹⁰. The legal experts challenge the content of the draft because, according to them, there shall not be any division of interceptions for the needs of the judiciary and intelligence. Therefore, the law shall be in compliance with the European Union standards. According to the opinion of security experts and members of parliament, this draft law centralizes the interception of communications by the KIA, then empowers KIA for interceptions and minimizes the role of the courts and prosecutions. The draft law is

⁷ Law on Protection of Personal Data

⁸ Directive 95/96 of the European Parliament, 1995

⁹ Draft law on interception of telecommunication

¹⁰ www.rks-gov.net

challenged also from legal experts because it is considered that this law fails to divide interceptions for the needs of courts and intelligence. Article 4 stipulates that the employee of the “Electronic Administrative Center” allows the interception after receiving the “lawful order by the authorized institutions”.¹¹ According to the same, the draft law lacks a clear specification that the authorized institutions need an order issued by the Court to make interceptions. One of the main principles of all modern and democratic societies is the clear and practical division of executive, legislative and judicial authority. This law provides full authority to the Kosovo Intelligence Agency to administer all interceptions. The international institutions requested from the Government to make amendments in the last draft law on “interception of electronic communications” and therefore on 20/01/2015, the draft law is returned to the Government for amendments by the European Integration Committee because they considered that the law is not in compliance with the European Union directives. The insistence is that electronic interceptions without permission from the courts, by changing the hitherto procedure which is regulated by the Criminal Code of Kosovo, which requires that in order to intercept a phone call, there shall be issued a request from the prosecutor and an order by the judge of the concerned procedure. However, despite the request of international institutions to request permission for interceptions from the Court, according to Article 10 of this draft law, the Kosovo Intelligence Agency has the authority to regularly inspect facilities, equipments and software installed and used by Network Operators for interception purposes, in order to ensure compliance with technical and security requirements set out in secondary legislation. “Failure to amend the Article 10 with falls in contradiction with Article 4 of the draft law”. Mostly there were complaints from the European Commission because for numerous articles is assumed to contain violation of human rights as well as the competences of KIA where this draft law does not allow the interception of this Agency without preliminary court orders. The members of the Parliamentary Integration Committee state that they will not allow the approval of this law having that content, which included violations of human rights, including the violation of privacy.

It is important to make sure whether it is in accordance with the Constitution of Kosovo and protection of the right to privacy as a fundamental human rights protected by the Constitution of Kosovo which it is essential and shall be in compliance with the European criteria thus by avoiding any tendency for Kosovo to become a police state. The experts stated that this draft law contains two main problems. The first is the fact that there will continue to be a general interception of the population, including those who are not part of any doubt, and the second problem is that the Kosovo Intelligence Agency (KIA) will have unlimited access to these interceptions¹².

Legitimacy of the state intervention, violation of privacy and correspondence for the protection of national security!

After the Court affirms the legitimacy of the intervention, it will review the legality of the purpose. However, it happened that the Court considered purposes that differed from those expressly stated.

It has to do with the protection of the country from the risk of damage posed by the activities of internal and external enemies like the inversion of the states government or violent attacks against the democratic system. This provision is referred in a limited number of cases relating

¹¹ Draft law on interception of telecommunication

¹² www.rks-gov.net

to collection of covert information to some specific individuals or measures of covert interceptions, which allegedly are necessary to combat threats posed by terrorist alarming activities or by sophisticated formats of espionage¹³.

Protection of personal data and features

Everyone has the right to respect for his private and family life, his home and his correspondence. How can we protect the sensitive personal data? Sensitive personal data must be specifically protected and classified to prevent any unauthorized access and use. When sensitive personal data are transmitted over telecommunications networks they shall be considered as suitably protected if they are encrypted to ensure their illegibility and non-recognition. What do personal data mean? An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. Elements of personal data can be: name, surname, paternity, motherhood, date of birth, residence, address, education, occupation, professional title, nationality, citizenship, marital status, identification number, ID number, phone, passport, driving license, index, tax administration, social security, pension etc. information of bank account, insurance policy, pension contributions; Records at a doctor, any hotel, airport, library, court acts, the police, fixed and mobile phones; Reference for individual in documents, social networks, e-mail messages, SMS, MMS, etc. The sensitive personal data are as follows: racial or ethnic origin, religious beliefs, trade union membership, health, sexual life, and biometric characteristics, etc¹⁴. All these physical, psychological and behavioral features of the individuals are unique and permanent for each individual, if particularly can be used to identify an individual such as: finger prints, papillary lines, retina, facial characteristics and DNA etc. Term “need” used in the Convention embodies the tension created from the clash between the individual and society.

The purpose of the right under consideration is “protecting the individual against arbitrary actions by public authorities”. This purpose is achieved through the protection of the four dimensions of personal autonomy of the individual such as private human life, family life, home and correspondence. While in the most cases the Court does not challenge the legitimacy of legal intervention by the state in the enjoyment of the rights by individuals, but requests from the party to prove that the challenged measure is necessary in a democratic society as far as fulfills the urgent social needs and it is in compliance with common values. Practical application of Article 8 consequently became a challenging process because it is difficult to predict its application in contradictory social situation. In this regard it could be said that Article 8 is one of the most opened provisions to amendments of the Convention, which over the years has proven that can cover an increasing number of issues and expand protection for a range of interests, which cannot be included in the scope of any other article. This partly happens because of the fact that Strasbourg authorities have not provided any clear detailed definition of Article 8, thus by making it easily customizable to changing times¹⁵.

¹³ Doracaku per te drejatat e njeriut te Kwshillit te Evropes. Strasburg 2012 Ivana Roagna

¹⁴ Law on protection of personal data

¹⁵ National Agency on Protection of Personal Data www.amdp-rks.org

RECOMMENDATIONS AND CONCLUSIONS

As a conclusion it shall be noted that theoretical knowledge and practice regarding the human rights and fundamental freedoms according to the right to privacy (Article 36) with specific emphasis on the study of the legal framework on the protection of personal data, with an international overview, they have great importance in the construction and function of the democratic state, its presentation and development of a legal state.

This research particularly studies the right to privacy and national and international legal framework which regulates the area of private right and specifically as in this case to protect personal data. This topic has a large character which regulates a large number of local and international laws as well as other authorized bodies, based on the law, together with specialized institutions for this sensitive and complex issue. Therefore, the paper presented can be a very good reference to orient on materials and other important resources which regulate this field.

Moreover, besides the legislation that regulates this area, a large contribution is made also by the bodies, work of which is related with the protection of personal data such as: police, prosecution, court, National Agency on Protection of Personal Data, professional lawyers, etc.

In order to have maximum success in the protection of personal data, the abovementioned bodies shall combat to avoid arbitrariness of state mechanisms. The courts shall not render orders on issues that violate the privacy; the same is applicable also for the Prosecution offices. Moreover, all evidences issued in contradiction with the local and international laws must be dismissed as inadmissible, etc.

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