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CHALLENGES OF GUARANTEEING PRIVACY IN PANDEMIC TIME

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ABSTRACT

The right of citizens to privacy in the Republic of Kosovo is guaranteed under the Law on Personal Data Protection. Moreover, this right is guaranteed by the Constitution (Official Gazette, 2008), which is the highest legal act.

The purpose of this academic paper goes beyond a superficial assessment of the level of implementation of this fundamental right of the citizen. The core of this paper focuses on highlighting the existing challenges and those that may persist in guaranteeing the privacy of each of us under the reign of the 'Covid 19' Virus in the geographical and psychological space of all citizens of Kosovo.

Despite the existence of an independent authority, mandated to oversee the implementation of this right in the public and private sector, its implementation is a permanent mission of this authority, which in our country is the Information and Privacy Agency, but also is subject to challenges, which are not always generated by human negligence.

To give the deserved physiognomy to this article, official accessible sources of the sole authority that oversees the implementation of this right in our country have been used. Statistical data presented within the trunk of the paper reinforce the thesis introduced in the introduction of the article, which is confirmed during its full elaboration, reinforcing the view

that part of the main challenges for Information and Privacy Agency persists being the limited number of human professional resources, as a guarantee for establishing an unwavering trust among the citizens that their privacy is guaranteed.

Key words: Privacy; Covid 19; Challenge; Commissioner.

Abbreviations

AIP	Information and Privacy Agency (authority transformed by NAPPD)
LPPD	Law on Personal Data Protection
PDPO	Personal Data Protection Officer

PROLOGUE ON PRIVACY IN KOSOVO

The right to privacy, as one of the fundamental human rights, derives from the Constitution of the Republic of Kosovo (RKS, 2008, Chapter II, Article 36, p. 11) and is enforced through the Law on the Protection of Personal Data, based on which the independent authority for overseeing the implementation of this law in the public and private sector was established.

If we make a comparison of the definition of the two terms (*privacy* and *personal data*), it is seen that the meaning of the term 'privacy' is more related to the right to have guaranteed space (geographical, aerial and mental) of the individual, which also includes the aspect of personal data as an integral part, but not only, of the privacy of the individual. On the other hand, personal data is any information related to an identified or identifiable natural person.

In conclusion, privacy, as an entirety of rights of the individual to have the freedom not to be disturbed, influenced, intercepted, covertly monitored, etc., should be seen as a broader concept than the area of personal data, which remains an integral part of the concept on privacy, but as a point of view is narrower, focused only on personal data.

During the nine-year period, since the establishment of the authority that takes care of the respect of citizens' privacy by controllers of personal data from the public and private sector, the current situation suggests that much work still needs to be done to establish a sustainable trust among the citizens that their data are considered secure. Only a depoliticized leadership of this authority could face the serious challenges in this pandemic period and could restore a sustainable trust of the citizens in this authority of special importance.

In the framework of this paper, written especially for this magazine (SEE Review), it will be presented the current state regarding the respect of this right and the challenges of the relevant authority during the first half of this year, characterized by an unprecedented challenge in all areas, but also in the privacy segment.

In order to break down the thesis presented in the first paragraph of this introduction, the case study analysis will be applied as a research method, which will synthesize elaborated data, provided by official open sources, written and electronic, to highlight a more realistic picture of what has been done precisely in this area by the competent authority to overcome the challenge of guaranteeing the right to privacy in the Republic of Kosovo.

Within the trunk of this paper, special space and attention will be paid to the measures taken by the sole independent authority of the state not to leave room for infringing the privacy of citizens, as well as the treatment of specific cases addressed to this authority, whether in the form of complaints from citizens or requests for interpretation from public institutions that process personal data.

As a result of the elaboration of this topic, recommendations will be addressed to the Parliamentary Committee on Security and Defence within the Assembly, but also to all public institutions and the private sector, which are subject to the ongoing IPA oversight in this area.

The final part of this paper presents the conclusions produced after the analysis of the subject case study, which is provided as a conclusion of a credible summary concept for the public in general, and especially for the mandated authority to oversee the respect for the privacy of citizens of the newest State in Europe.

IMPLEMENTING THE RIGHT TO PRIVACY IN KOSOVO

The first steps of our State towards legal care of the privacy of its citizens were taken with the enactment of the relevant law during 2010, which provided for the guarantee of personal data of each citizen, as a personal data subject.

While other countries in Europe and beyond, even the countries of the region, had established such an authority to supervise the practical implementation of respect for privacy, our country established its independent authority to guarantee its citizens the fundamental right to privacy only in mid-2011. The seriousness and commitment of the State, in this case, was proven by

giving the National Agency for the Protection of Personal Data an independent status, because this was prejudiced by its wide scope in terms of supervising the implementation of personal data processing rules by all public institutions and private sector business organizations.

'Challenges for the protection of privacy are increasing with the rapid development of technology, and in parallel with them, NAPPD is mobilizing its staff by investing in building intellectual capacities to serve as a legal shield against violations of the privacy of citizens and controllers' (Jashari, 2015).

The Agency, during the first five years of its operation, conducted a total of 430 inspections in public and private bodies (NAPPD, 2016). According to the summary of achievements for the period 2011-2016 published by NAPPD, in all public bodies, at least once a regular inspection has been conducted, whereof decisions have been issued that controllers should destroy personal data collected without legal basis, stop the processing of data until internal procedures and acts are issued, stop the processing of biometric data, then they advised to install a camera surveillance system, advising that the application of direct marketing is in accordance with the Law on the Protection of Personal Data, etc.

In this period, 27 cases were preceded further in regular court proceedings for issuing administrative punitive measures, because in the very beginning, this authority did not have a mandate to impose direct fines on controlling entities that processed personal data illegally (NAPPD, 2016).

The period after the end of the first five-year mandate of the collegial body, consisting of five state supervisors is characterized by a lack of representative capacity of this authority before the Assembly of the Republic of Kosovo, as well as in relation to international organizations present in Kosovo.

Even after two years of lacking a Head, this Agency kept being seen with scepticism by the public in terms of supervisory, preventive or even punitive capacity against public institutions and data controllers from the private sector. Something similar is noticed in the statements of the management level of this authority, such as the case of a chronological-character article on the background of this institution by one of its directors, in which, among other things, it is said that the essential objective of this institution remains to build a culture of trust of secure data in Kosovo. "We will do our part, advising, educating, inspecting and implementing. However, we cannot do this alone. Data protection represents a mission, the implementation of which requires teamwork. Effective regulation requires engagement with the public, private sector, civil society and citizens in general.

All this has to do with citizens and increasing public confidence about how their data are being processed. If we manage to apply the principles that derive from the law, we can manage to build the citizens' trust because their data are of special importance to them (Arifi, 2019)."

Government initiative to draft a new law in this area, which would strengthen this authority by changing the composition of the governing body from a collegial body to a single head who would be called a Commissioner, then the transfer of competence to conduct inspections from the former state supervisors to the civil servants of this Agency, caused a prolonged delay in the consolidation of this independent institution.

Law No. 06/L-082 on the Protection of Personal Data was approved on 11 March 2019 automatically repealing the old law of the same name (Official Gazette of RKS, 2019).

Through this process, the mandate was added to this Agency to serve as an appealing authority for citizens who cannot exercise the right to access public documents in public institutions.

The new Law on the Protection of Personal Data has paved the way for a new approach and management mentality of this institution, giving decision-making and management powers to an individual. Moreover, IPA has already been given a concrete mechanism of sanctioning those who violate this law, which will be applied by imposing fines directly. This greatly strengthens the influence of the independent authority and increases the efficiency of law enforcement in practice.

However, the fate that preceded this authority, mainly influenced by unstable political circumstances, made this Agency not to serve the citizens at full capacity, as every citizen would expect. Even representatives of civil society have described it as non-operational due to the lack of a political appointee in the capacity of the head (TV Dukagjini, 2019).

The citizen, as a taxpayer, does not care what challenges this authority faced in the last five years. He/she has reasonable expectations to exercise his right to complain and, under the influence of the Information and Privacy Agency, to feel that his privacy is being respected and as such is guaranteed (Arifi, 2021).

This authority continues to operate without strengthening the two main executive pillars, the one for the protection of personal data and the one for access to public documents. This is all as a result of the absence of its head, whose selection has remained hostage to the fragility that is characterizing the political scene in the country.

CHALLENGES OF THE AGENCY OVER THE LAST FIVE YEARS

Data protection is a matter directly related to trust. When an individual fears that others will not respect his/her privacy or will not be able to guarantee the security of his/her data, he/she loses trust and does not want to share the data with others. Therefore, trust is the main source of the digital economy, which can be built by the authority mandated by law to supervise the processing of data of our citizens (Arifi, 2019).

The lack of care and seriousness expressed by the Assembly of the Republic of Kosovo towards this institution has affected people to lose confidence in the inviolability of their private life. This phenomenon is presented by a disregard shown continuously by the elected citizens in the seats of the Assembly towards this independent agency, which is the only address where citizens knock whenever they have reasons to believe or even manage to prove that their privacy has become the exchange currency of unsupervised businesses in terms of personal data processing.

The challenges that this institution will be able to face during the first five years, after the appointment of the Commissioner, are mainly related to drafting the secondary legislation that will stem from the two relevant laws, then other bylaws that will facilitate and clarify the work in the practice of the employees of this authority, and in particular of its inspectors, who will be civil servants.

In an article published in the local media, the Head of the Public Communication Department of this authority, stated that the vision to strengthen the institution and increase the credibility of its performance in public, among other things, is to apply strict criteria in staff recruitment, giving priority to information technology and legal profiles, with special emphasis on female staff, leaving no room for nepotism and employment without any criteria, because adequate human resources are the key to the success of an organization. However, the lack of enforcement of internal acts deriving from the Law on the Protection of Personal Data has blocked the initiation of numerous recruitment processes necessary to achieve the intended objectives.

Besides, a part of the serious challenges for the Information and Privacy Agency keeps being the limited number of professional human resources, as a guarantee for building an unwavering trust among the citizens that their privacy is guaranteed.

The last challenge I mentioned is not overcome until the parliamentarians go beyond their private interests and give priority to meritocracy in selecting the head of this agency, who has been missing for five years now.

The rapid development of information technology in general, then digital media, social networks and even the individual as a data controller owing to the wide digital platform, is a challenge in itself for IPA. Challenges of this nature can be overcome more easily owing to a concrete cooperation and interaction with other public institutions related to this area.

COVID 19 PANDEMIC AS AN UNPRECEDENTED PRIVACY GUARANTEE CHALLENGE

Institutions in the health sector excel at processing sensitive personal data, which requires strict security measures to prevent their misuse by unauthorized parties. Not coincidentally, the Agency had continuously invested in this sector, training the medical staff of regional hospitals throughout the country (NAPPD, 2019), with the sole purpose that sensitive citizens' data are processed in accordance with the provisions of Law on the Protection of Personal Data.

The uncontrollable spread of the new virus 'SARS COVID 19' in our country highlighted an unprecedented challenge. The need for urgent health treatment of the affected citizens made them forget the criteria of legal processing of sensitive personal data by health employees, focusing entirely on saving the lives of patients infected with this previously unknown virus.

Therefore, the Information and Privacy Agency, following with increased concern and attention the level of respect for the privacy of citizens by public institutions in general and the health sector in particular, during March 2020 issued a notice to the public (IPA, 2020). The same was disseminated through the media and called for the exchange of information within the health and safety sector to be done in accordance with the Law on the Protection of Personal Data, advising medical staff to adhere to the principle of restricting access in this data, not to share them with third parties without the prior consent of the data subject.

It is worth mentioning that throughout this period of the reign of the unofficially declared state of emergency, the authority supervising the controlling entities of personal data has not received any specific complaints of serious breaches of privacy by health professionals.

These challenging circumstances found the Information and Privacy Agency understaffed which its staff could not be recruited, despite ongoing efforts and requests addressed to the Assembly of the Republic of Kosovo. Being obliged to respect the successive decisions of the Government for the management of the created situation, this authority was forced to temporarily suspend the consultation hours with parties (IPA, 2020). This measure made it difficult for citizens to have direct access to this authority, either to complain or to receive advice.

Moreover, the rotation of attendance of employees in IPA, suggested by Government decisions, which changed almost every week, reduced the institutional performance and consequently reduced the level of efficiency in considering the citizens' complaints.

Of course, the most substantial challenge cannot be mentioned here, which is not only related to the pandemic period but which has been accompanying this authority for more than five years, which is related to the absence of the Commissioner of this Agency, as its head. This lack has caused the impossibility of enforcing internal derivative acts by both laws supervised by IPA, according to which acts (regulations), the respective inspectorates could not be set up for both its executive areas. Consequently, this Agency is not conducting inspections, without which it is difficult to establish effective supervisor of lawful processing of personal data, whether by the public or private sector.

CONCLUSION WITH RECOMMENDATIONS

Rational use of the identified key opportunities and facing a serious approach to the expected challenges will be able to rank the Agency in the list of the most credible public institutions in the eyes of the public.

Such a mission requires that this authority be initially managed by a person who is well acquainted with the area, who is non-political and impartial in decision-making. It should be a person with a high moral integrity, who has already built cooperative relations with counterpart international authorities. Someone who has already had the opportunity to benefit from international expertise while working in this authority and has a clear vision of what path the

development of this institution should take, recognizing the challenges of its past and what awaits this independent authority.

It is obvious that as stable conclusion remains the undeniable fact that the Information and Privacy Agency, as the only authority mandated to guarantee the right of citizens to privacy, is followed by fragility in its full operation. This circumstance is a result and consequence of the lack of seriousness of the Parliamentary Committee on Security and Defence within the Assembly of the Republic of Kosovo, which supervises the work of the IPA and recruits its Head.

Given that our country is currently in the pre-election campaign and that it cannot be predicted exactly how long it will take to convene a new legislature, the real likelihood of re-organizing a new recruitment process for the Head of IPA Head for the fourth time, may be sometime in the end of the first half of this year.

Regardless of when this momentum will be achieved and how much this already unreasonably prolonged process can be expedited, in the capacity of the author of this paper, I recommend the Assembly of the Republic of Kosovo to pay unreserved attention to the issue of selection of the IPA Commissioner as soon as possible, supporting effectively the meritocracy criterion. Thus, the citizen would begin to restore the already lost trust in this independent public institution, charged with protecting and guaranteeing the right of everyone to privacy.

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