

REDEFINING PRIVACY IN SERBIA: A CHALLENGE FOR PUBLIC POLICY?*

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One of the key reasons for privacy breaches in Serbia is the lack of strategy and clearly defined approach to privacy protection. Thorn between its heritage from socialist times when privacy was valued only to some extent and pressures from the EU to accept the European concept of privacy, Serbia does not have a clearly defined politics of privacy. The aim of this paper is to analyse challenges Serbia is facing while trying to shape up its public policies and to stress out the importance of defining its general opinion on privacy as a human right, especially in the context of data privacy of our "digital doubles" which are the more exposed or more vulnerable versions of ourselves.

KEYWORDS: Privacy / privacy rights / data privacy / public policy / socialism

INTRODUCTION

Can we still speak about privacy if we live in the "surveillance society" (Lyon, 1994, Murakami Wood, 2009, Fuchs, 2010), long after the "death of privacy" (Garfinkel, 2000) or in the age of the so-called "post-privacy" (Heller, 2011, Schaar, 2009, Schramm, 2012), in the "sensore society" (Andrejević and Burdon, 2014) or in the era of the "posthuman" (Braidotti, 2013) in which personal data include even genetic materials (Everett, 2003)? Protection of private life has never been a more talked-about topic precisely because of the reduction of a person to its data double (Haggerty, Eriscon, 2000: 605), because every piece of technology that can be connected to internet can potentially be a surveillance

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technology (Weber i Weber, 2010, Bauman and Lyon, 2013) and especially after "events in recent years that underlined the difficulties of managing information and data privacy in the digital environment" (Petrescu, Krishen, 2018: 1).

The concept of privacy was almost non-existent in public policies of Serbia until 2000. In 2000, Serbia has become a potential candidate for the EU membership and it is when the country started changing its legislation so that it becomes compatible with the EU laws. This led to reshaping of public policies and adjusting it so as to accept core European values, but it is still at the very beginning of transforming its public policies on privacy.

In 2007, Serbia has signed the Stabilisation and Association Agreement, then applied for the membership in 2009, in 2011 it has officially become a candidate country and in 2014 accession negotiations had started. During this period, Serbia's legal framework for the protection of all human rights including the right to privacy has been adjusted to be in line with European legislation. But even though Serbia accepted this legal framework and changed its attitude towards privacy on paper, in reality it remains to be thorn between its socialist heritage and the European concept of privacy.

The respect for privacy and the right for privacy as one of the first generation human rights was one of the core values that Serbia was about to import from Europe in 2000, but it was incompatible with values nurtured in this country during the socialist times from 1945. to 1992. In the period between 1992 and 2000. Serbia was in a state of "blocked transition" (Lazić, Cvejić, 2014) which means that even though it was a post-socialist state, it was not yet on a path towards a consolidated democracy or the EU.

Embracing the concept of privacy was a challenge for Serbia after socialism. The additional problem was the privacy crisis which occurred immediately after 9/11 attacks in the USA in 2001. In this particular historical moment, Serbia had to import a concept which was not only almost foreign to its citizens after socialism, but also largely problematic on a global level due to the rise of terrorism which led to prioritising security over privacy. The key questions are: how has Serbia's attitude towards privacy changed after socialism and what the challenges for its public policies are right now.

1. (RE)INTRODUCING EUROPEAN CONCEPT OF PRIVACY IN SERBIA AFTER SOCIALISM

In socialist times privacy was not a highly valued concept in Yugoslavia as it was in conflict with its ideology and key socialist values. Not only that the word "private" did not exist in the legal framework, but it was also a notion which had a negative meaning (Streltsov, 2017: 45). Furthermore, the structures in power were openly favouring public against private and it has often been manifested in "drastic" measures such as confiscations of private properties, especially after II World War (Popović, Timotijević, Ristović, 2011: 408).

In Yugoslavia, the survival of the socialist community was the main priority and even human rights and freedoms had been sacrificed whenever the community was at stake (Kardelj, 1977: 136). This means that the state and the society in socialist Yugoslavia were above the individual. But even though there was the clear precedence of collective, Yugoslavian laws contained elements of the right to privacy as it is usually defined today in modern day Europe. The article 184 of the Constitution of SFRJ adopted in 1974 was guaranteeing inviolability of the apartment. It says that nobody can enter anybody else's apartment against the will of its user unless there is a permission for that issued in accordance with law.¹ The Article 185 of the Constitution guarantees the inviolability of the secrecy of letters and other correspondence and states that this right can be violated only if it is needed for criminal proceedings or for state security.²

The article 191 guarantees reproductive rights as it states that parents have the right to decide whether they will have children or not and that this right can only be limited for the purpose of protecting health.³ This article legalises abortion and protects reproductive rights of women which is an important element of traditional European concept privacy. However, there are many cases which reveal that SFRJ actually held a pronatalist campaign which was at odds with the right to family planning, but was nevertheless quite subtle and only indirectly interfered with reproductive rights (Stevanović: 2007, Milanović: 2013, Popović, Timotijević i Ristović: 2011).

Some authors suggest that after 1945 the state was "omnipresent" and tried to control all aspects of life, including the private life of an individual" (Popović, Timotijević i Ristović, 2011: 419). At the same time, the awareness of human rights was "fundamentally marginalised" and even the international conventions which SFRJ ratified had not been promoted but remained "un the shade" (Šeks, 1989: 361).

The concept of human rights simply was not compatible with the ideology of socialism. Even though the legislation partially protected some of the rights, protecting them was not the priority because the state authorities promoted ideology which emphasised precedence of the collective over the individual. Due to such heritage, the post-socialist Serbia was confronted with a complex task to introduce the whole concept of human rights into public policies.

After 47 years of socialism, Serbia has not immediately start embracing the concept of privacy even though it instantly re-introduced the concept of private property. From 1992 to 2000, Federal Republic of Yugoslavia (a state which was later renamed Serbia and Montenegro and after Montenegro proclaimed independence in 2006 it was named Serbia) still has not started introducing the concept of human rights into its public policies. It waited until 2000 to become a member of the United

¹ Ustav Socijalističke Federativne Republike Jugoslavije (1974) Beograd: Savremena administracija, article 184.

² Ibid. Article 185.

³ Ibid. Article 191. P. 138.

Nations and start ratifying the international documents for protection of human rights.

Surprisingly, in 1998 Federal Republic of Yugoslavia has adopted the first law for protection of personal data⁴ which was made to resemble the Convention 108 which regulates the protection of individuals with regard of automatic processing of personal data which was adopted in 1981. However, this law has never been used and the main reason was a "very low level of awareness of citizens of their own rights or the scale of their violations (Pirc-Musar 2009: 6). The additional reason was that it has never been established which governmental body is in charge of supervising implementation of this law (ibid. 6).

Since the concept of human rights was pretty much an alien concept not only during socialism in SFRJ but also in the following period from 1992 to 2000, it was difficult to introduce it public policies. In 2000, Serbia starts introducing new laws and regulations which are protecting human rights but these steps were only the beginning of a big transformation of public policies.

Introducing the concept of privacy into public policies in Serbia was difficult for several reasons. One of them was the global privacy crisis followed by terrorist attacks in USA and Europe in 2001 (Levi, Wall, 2004: 194). As soon as Serbia has turned towards Europe and started implementing the concept of human rights, the right to privacy has already become a deeply contradictory and problematic concept on a global level and the key problem was creating and maintaining a meaningful balance between "private interests of an individual and interests of other individuals, the public and the state" (Streltsov, 2017: 49). Due to the rise of terrorism, security has become priority over privacy in the whole western world and Serbia was quickly faced with demands to introduce biometric documents and other methods of surveillance instead of turning towards privacy.

Furthermore, development of internet and digital communication in the first decade of the new century posed additional challenges to the traditional concept of privacy. The key challenge was to have legislation that follows the development of technology and does not lag behind. Back in the 1970's, legislating technology was already a problem as the constant development was very hard to be kept in a legal framework. Regulating technology was not a project which could be finished once and for always, but rather a continuous "process" (Council of Europe, 1989: 5).

The key reason for shifting the focus from privacy to security on a global level was the 9/11 attack in the USA in 2001. These events marked a new chapter in history of privacy in the whole western world. A whole new "politics of surveillance" has been created and it resulted in new inventions such as biometric documents which were created to preserve security and invade privacy in new ways (Levi, Wall, 2004: 203). It has become important to have a free flow of personal data to prevent terrorism and this made it very complicated to protect privacy. Some authors such as Gregory Walters are stressing out the problem of the antagonism between privacy and

⁴ "Sl. list SRJ" br. 24/98

security which is contained even in the Convention 108. Namely, he claims that this document is trying to strike the right balance between the two (Walters, 2002: 119).

Serbia had a difficult task to adopt the concept of privacy after it has already been disputed and present it as a new value. Considering the fact that Yugoslav socialism subordinated individuality and privacy to the community, control and surveillance were normalised as an integral part of life, the citizens of Serbia were more or less used to have their privacy invaded on a daily basis.

2. LEGAL FRAMEWORK FOR PRIVACY PROTECTION IN SERBIA

Since becoming an EU candidate, Serbia strives to have a legal framework for human rights protection which is in line with European laws and this clearly entails importing the concept of privacy from Europe. But has it overcome its socialist heritage and embraced the European concept of the right to privacy?

The right to privacy is dispersed and therefore regulated by a number of documents within the legal framework of the Republic of Serbia. Even though it is not explicitly mentioned in the Constitution of the Republic of Serbia⁵, several aspects of the right to privacy are regulated by this document including "spatial privacy" and "communicational privacy" (Pavlović, 2017: 225) which now also comprises digital privacy or privacy of data. These aspects of privacy are regulated in the articles 40, 41 and 42. The article 40 guarantees inviolability of home, the article 41 guarantees secrecy of correspondence and the article 42 regulates protection of personal data⁶. Furthermore, article 16 of the Constitution states that all the ratified international agreements are an integral part of the legal order of Serbia and must be directly applied.⁷

Among other international documents, Serbia has ratified Universal Declaration of Human Rights⁸, European Convention on Human Rights⁹, International Covenant on Civil and Political Rights¹⁰ and Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data¹¹ and all of these documents are regulating the right to privacy. In addition to these main legal documents, Serbia is also obliged to respect a number of directives, decisions and additional protocols which are regulating various aspects of the right to privacy.

⁵ Ustav Republike Srbije, *Službeni glasnik RS*, No. 48/94 i 11/98

⁶ Ibid.

⁷ Ibid.

⁸ Universal Declaration of Human Rights <http://www.un.org/en/universal-declaration-human-rights/> (Accessed: 01.04.2018)

⁹ European Convention on Human Rights

https://www.echr.coe.int/Documents/Convention_ENG.pdf (Accessed: 01.04.2018)

¹⁰ International Covenant on Civil and Political Rights

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (Accessed: 01.04.2018)

¹¹ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data <https://rm.coe.int/1680078b37> (Accessed: 01.04.2018)

In Serbian law, regulations for protecting the right to privacy are dispersed among various laws and sublegal acts but they are not coherent and sometimes the norms are contradicting each other. Codification is necessary in order to provide sufficient protection of personal data. The second most important problem is that the legal framework is not in line with EU legislation, especially with the General Data Protection Regulation¹². Additionally, there are also many legal loopholes and many important issues related to privacy protection are not regulated at all, while some are only partially regulated. Some important issues are only generally regulated, while the elaboration is left to ministers and their free will.

Serbia has its own Law on Protection of Personal Data (*Zakon o zaštiti podataka o ličnosti*)¹³, but it is hardly a sufficient tool in fighting against privacy breaches. This law should be the key element of the legal framework for protection of the right to privacy. However, it does not provide adequate and effective protection even though article 2 of this law guarantees this.¹⁴ The law does not address new, sophisticated methods of intrusion into privacy such as video surveillance and biometric data. It also ignores the problem of the right to be forgotten

This law cannot be analysed or applied isolated from the entire corpus of laws and sublegal acts which are or should be regulating collection and processing of personal data. Serbia does not have many important legal documents which should be in this corpus. The key question is how to commit governmental actors and other actors to refrain from intrusions into privacy. This is the main goal of the article 8 of the European Convention on Human Rights and the article 42 of the Constitution of Serbia. The law on data protection should be in line with these norms.

However, the law is ignoring its main goal to a large degree and leaves space for governmental bodies to collect and process personal data without getting a consent from persons they are referring to. The power of governmental institutions is almost unlimited which is clearly stated in the article 13 of this law which states that governmental bodies can process personal data without consent if this is necessary for preserving security, state defence, preventing crimes or prosecuting perpetrators, preserving states economic or financial interests, preventing health and morals as well as protection of rights, liberties and other public interests¹⁵

This law should be the basic law that regulates privacy protection and all other laws should be in line with it. This would provide the much needed consistency. Privacy protection is also regulated with the Law on Private Security (*Zakon o privatnom obezbeđenju*)¹⁶ which was adopted in November 2013 and it is still not being fully applied as there is no personnel licenced for this type of job. This law is not fully developed, particularly regarding sanctions because the only type of

¹² General Data Protection Regulation <https://gdpr-info.eu/> (Accessed: 01.04.2018)

¹³ *Zakon o zaštiti podataka o ličnosti, Službeni glasnik RS*, No. 97/08 from 27.10.2008., 104/09 - law 68/2012- decision in 107/2012

¹⁴ *Ibid.* Article 2.

¹⁵ *Ibid.* Article 13

¹⁶ *Zakon o privatnom obezbeđenju, Službeni glasnik RS*, No. 104/2013, No. 42/2015

punishment is a fine and this not enough to protect privacy. This law also has loopholes, but the key problem is that it does not prevent abuse of personal data because it allows collection of personal data on citizens without their consent. This is especially problematic when it comes to video and audio surveillance because even though the law prescribes that these materials can be used only for the specific purpose they were collected for¹⁷, there is no efficient methods of preventing abuse of these materials. The article 32 states that sharing these data with third parties is forbidden, but there is no efficacious protection from this. And while the law contains only general regulations, it authorises the Ministry of Internal Affairs to further regulate private security, despite the fact that the minister in charge of this can be biased. Furthermore, this law does not guarantee the right to privacy. Instead, the article 19 says that citizens' "tranquillity"¹⁸ should be preserved and it is not clear what this expression refers to.

It is visible on the first glance that security has precedence over privacy in the vast majority of Serbian laws and this already implies that public policies in Serbia are favouring security over privacy. Laws on criminal proceedings are confirming this. There are currently two different laws in Serbia which are regulating criminal proceedings: the first Criminal Procedure Code was adopted in 2001¹⁹ and it is still relevant because it is applied to a large number of proceedings which had started before the second Criminal Procedure Code has been adopted in 2011.²⁰ Both laws contain regulations on secret surveillance of the suspects. The article 232 of the Criminal Procedure Code adopted in 2001 defines the right of the Investigative Judge to prescribe measures of secret surveillance according to the suggestion of the State Prosecutor. The article 233 of the same law prescribes how should this material be treated and treats this material as the official secret.

The Criminal Procedure Code adopted in 2011 is more developed with articles 166 to 173 regulating secret surveillance. Comparative analysis of these two laws shows that the emphasis is even more on security in the second Criminal Procedure Code as it introduces more restrictions of privacy. In the first Criminal Procedure Code, police was in charge of secret surveillance and the article 173 of the second one gives authority to the Security Information Agency and the Military Security Agency. While the first law gave authority to the police to conduct surveillance and the Public Prosecutor was supervising the work of the police, the new law gives the authority to the secret services which are independent organisations and their work is not supervised by the Public Prosecutor or in fact anyone. This implies that these organisations can break the law because they are not supervised or controlled by anyone. Furthermore, according to the first law, secret surveillance could be prescribed only if a criminal offence has been committed, while the new one allow prescribing these measures even if there is only a suspicion that a certain crime might be committed.

¹⁷ Ibid. Article 32 and article 76.

¹⁸ Ibid. Article 19.

¹⁹ Zakonik o krivičnom postupku *Službeni list SRJ 70, 2001*

²⁰ Zakonik o krivičnom postupku *Službeni glasnik RS 72 2011*

Laws which are regulating activities of state security services are also very important for privacy protection and the key legal document in Serbia which has this function is the Law on the Bases Regulating Security Services of the Republic of Serbia (Zakon o osnovama uređenja službi bezbednosti RS)²¹. The article 5 states that the National Security Council which has the role to guide and coordinate security services in Serbia should assure "the agreed application of regulations and standards for the protection of data on person, as well as other provisions protecting human rights potentially affected by information exchange or by other operational actions"²². However, this norm is only declarative and does not offer an efficient sanctions which would enable its application. On the other hand, this law suggests that there should be sanctions which should ensure that some other functions of this Council are fully applied.

Each of the three security services in Serbia (Security Information Agency BIA, Military Security Agency VBA and Military Intelligence Agency VOA) are regulated with a separate law. When it comes to ordinary citizens and their privacy concerns, the Security Information Agency is the most important one and it is regulated by the Law on Security Information Agency (Zakon o bezbednosno-informativnoj agenciji)²³. This law stipulates that Security Information Agency is a "special organisation" which is separated from all the state bodies, while the two military security agencies are a part of the Ministry of Defence. It seems that this agency is a *sui generis* organisation which no longer belongs to the Ministry of Internal Affairs. The most important issue related to the privacy of citizens is the secret files directory.

The Law on Police (Zakon o policiji)²⁴ has a number of articles which are concerned with the right to privacy including 18, 28, 33, 47, 52, 64, 67 and 68, but the law does not mention privacy protection with regard to conducting security measures. The Law on General Administrative Procedure (Zakon o opštem pravnom postupku)²⁵ is a retrograde law because it does not regulate protection of privacy with regard to biometric documents, video surveillance or personal data on the internet or in the sphere of marketing.

3. CONCLUSION: KEY CHALLENGES TO PRIVACY PROTECTION IN SERBIA

The key question is what state's attitude towards the right to privacy really is. The analysis of the legal framework shows that Serbian laws are favouring security over privacy. The main problem is the lack of adequate legislation, but there is also the lack of mechanisms for implementing laws as it seems that the issue of privacy is

²¹ Zakon o osnovama uređenja službi bezbednosti RS *Službeni list RS*, No. 116/2007

²² Ibid. Article 5.

²³ Zakon o BIA *Službeni list RS*, No. 42/2002, 111/2009 and 65/2014

²⁴ Zakon o policiji, *Službeni glasnik RS*, No. 101/2005, 63/2009

²⁵ Zakon o opštem pravnom postupku, *Službeni glasnik RS*, No. 18/2016

being systematically neglected. Even in the most aggravating cases, the punishments for privacy breaches in Serbia are low fines, between 5 and 50 thousand Serbian dinars (Poverenik, 2017: 49) which implies that privacy breaches are not considered as serious crimes.

Serbia struggles to accept the new concept of privacy of personal data. This is partially because of the habit to treat personal data as something that belongs to the state and not its citizens. This habit dates back to the social times and it is deeply embedded into the culture and everyday life which is why changing legal practices is difficult to accomplish.

The research shows that Serbia did not break away from its socialist heritage and that it is persistently favouring security over privacy. Yet, at the same time it is promoting the European concept of privacy and transforming its legal framework to be in line with EU laws. Its public policies are therefore steeped in contradiction as these two opposite understandings of the concept privacy cannot function side by side.

On the other hand, the relationship between the church and the state is changing since 2000. in Serbia, and this also has implications on privacy. In this case the country breaks away from the socialist heritage which didn't allow freedom of religion, but instead of reaffirming secularism, it is strengthening relations between the state and the church thereby de-privatising religion (Simović and Petrov, 2017: 71). Even though the Constitution proclaims the principle of secularism, the practise and the views of the Constitutional Court confirms the existing model of "cooperative separation" (ibid. 80). Separation of church and state is at the very core of the European concept of privacy ever since John Locke established two separate spheres: private and public and proclaimed the idea that one's religious views should be perceived as something private rather than public (Locke, 2010).

One of the main reasons for the lack of protection of privacy in Serbia is the fact that the citizens don't have enough information and knowledge about privacy rights (Bašić, 2017: 124). This results in numerous breaches of the right to privacy, many of which are done without individuals being aware of the fact they are breaking the law. The problem is therefore not just the lack of adequate legislation, but the lack culture of privacy. But since state's attitude towards privacy which is mirrored in its public policies has the power to influence cultural changes, it has to be perfectly clear on how it resolves conflicts between individual interests and interests of the society as a whole.

The state should have a clear criteria on how to prioritise between privacy and other values in various contexts. For example, in the context of privacy of data, "the borderline between the right to privacy and the right to free information is unclear, yet there must certainly be an established minimum to it" (Pavlović, 2017: 221). In the context of child protection in media reporting, the state should establish whether all the rights of a child including the right to privacy is to take precedence over the public interest to receive information (Stevanović, 2017: 265). And in the context of secret monitoring of communication, the state should establish a criteria to determine "the borderline between the right to privacy and the public interest to

investigate or prevent crime and collect evidence" (Kolaković-Bojović and Turanjanin, 2017: 323).

The Commissioner for Information of Public Importance and Personal Data Protection states that Serbia as a society needs to determine its attitude towards the right to privacy²⁶ and claims that Serbia is still at the very beginning of the process of implementation of European standards into its legal framework as well as "real life" (ibid. 6). However, the key question is whether Serbia really can and wants to change its attitude towards interests of an individual in general. In order to have consistent public policies and a functional legal framework, the state itself should have a strong opinion of how it perceives the concept of privacy, what it wants to do with its heritage from socialist times and whether it really wants to accept EU policies on privacy, embrace its core values and develop strategies for achieving these goals.

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²⁶ Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti <https://www.poverenik.rs/images/stories/dokumentacija-nova/izvestajiPoverenika/2017/2017CirGodisnjiIzvestaj.pdf> (Accessed 01.04.2018)

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REDEFINISANJE PRIVATNOSTI U SRBIJI: IZAZOV ZA JAVNE POLITIKE

Jedan od ključnih uzroka kršenja prava na privatnost u Srbiji je nedostatak razvijene strategije i jasno određenog pristupa zaštiti privatnosti. Zbog nasleđa socijalizma koji je privatnosti vrednovao samo restriktivno na jednoj strani i uticaja EU koja nameće zapadni model privatnosti na drugoj strani, Srbija nema jasno definisanu politiku privatnosti već se neprestano kreće između ova dva pola. Cilj ovog rada je da analizira izazove pred kojima se Srbija nalazi u pogledu definisanja privatnosti kroz svoje javne politike i da istakne značaj zauzimanja jasno određenog stava prema privatnosti kao ljudskom pravu, naročito s obzirom na kontekst privatnosti podataka o našim "digitalnim dvojnicima" koji su izloženije i ranjivije verzije nas samih.

KLJUČNE REČI: privatnost / pravo na privatnost / privatnost podataka / javne politike / socijalizam