

# CONSTITUTIONALISM - REFORM ON DATA PROTECTION LAW AND HUMAN RIGHTS

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**ABSTRACT:** *The purpose of this paper is to address one of the most Fundamental Freedom and Human Rights the protection of privacy, particularly under the provisions of the European Convention on Human Rights as interpreted by the Strasbourg institutions and by national courts. Article 8 of the Convention provides in its first paragraph that everyone has the right to respect for his private and family life, his home and his correspondence. This paper is focused to one of the central issues of the problem of “human rights and scientific and technological developments” i.e., the protection of the privacy. This paper is intended to explain the legal measures and the state efforts to regulate and to protect the privacy. It tries to interpret the Directive 95/46/EC of the European Parliament and of the Council and to present the major reasons for the movement towards comprehensive privacy and data protection laws. This paper seeks to arrive at conclusions that the problem is continuing even with the adoption of legal and other protections measurements, violations of privacy remain a concern. In many countries, laws have not kept up with the technology, leaving significant gaps in protections. In other countries, law enforcement and intelligence agencies have been given significant exemptions. Finally, in the absence of adequate oversight and enforcement, the mere presence of a law may not provide adequate protection.*

**KEYWORDS:** *human rights, privacy, data protection, threat, technological developments.*

**JEL CLASSIFICATION:** *K 10*

## 1. INTRODUCTION

The privacy<sup>1</sup> is one of the fundamental human rights established in to many constitutive acts, in UN Declaration of Human Rights<sup>2</sup>, the International<sup>3</sup> Convention on Civil and Political Rights and in the Albanian Constitution. Privacy is formed by human

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<sup>1</sup> The privacy was mentioned from ancient since 2000 years ago. The Hippocratic Oath is an oath historically taken by doctors and other healthcare professionals swearing to practice medicine ethically. They were swearing: I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know.

<sup>2</sup> Universal Declaration of Human Rights <<http://www.hrweb.org/legal/udhr.html>>.

<sup>3</sup> International Covenant on Civil and Political Rights <<http://www.hrweb.org/legal/cpr.html>>.

dignity<sup>4</sup> and other rights such as freedom of correspondence, freedom of residence. But in the same time it relates closely to the freedom of association and freedom of speech. Nowadays, this fundamental right<sup>5</sup> has become the most important right.

In this article we would like to present the state of privacy in Albania. We'll present the constitutional and legal provision of privacy protection. Like every country in the world Albania constitution recognizes the right of privacy explicitly<sup>6</sup>. But this right is foreseen in the same time in to many international acts such as European Convention on Human Rights, International Covenant on Civil and Political Rights which are adopted by law. According to the Albanian Constitution these international legal acts adopted by law stands above the domestic laws at the hierarchy of legal acts. As we interpret and the Constitutional Court in Albania says that what these international legal acts regulate, prevail on what domestic laws regulate.

## 2. BRIEF HISTORY

In the beginning of years 60, the building of so called "social society" was accompanied with the need of information. During that time big companies and public administration that possessed lot of files started to use computer systems<sup>7</sup>. Their capacity was considered as a valued and limited resource and for that reason came the idea to kept data in a place and to gave the right of access to different users. This was evaluated as the simplest way to create, administrate and up-to-date the system.

These developments and the new term "integrated administrated data" borne the new idea of data protection. Nowadays in the modern society some decisions related to individuals are made on information kept on computer file. But person's responsible to those files should assure data subject to use them in an appropriate manner. Automated files compare to manual files has a higher saving capacity and they offer many possibilities of transactions and contribute in developing commercial and economic agreements. Legal protection of privacy initiate in USA, but first legislations on data protection<sup>8</sup> and resource of many laws on privacy became from Europe. Some countries established new legislation on data protection, but the need of international actions was very strong to provide free movement of data. So first international acts were guidelines on protection of privacy and free international movement of data by Organization for Economic Cooperation and Development<sup>9</sup> in 1980. These guidelines underlined general principles on data protection and free movements between countries. However, these guidelines had no legal power, they determined some way of communications between USA and EU, taking into the consideration the fact that they were members of OECD.

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<sup>4</sup> Privacy as an Aspect of Human Dignity, [1964] 39 New York U. L.R. 962 at 971.

<sup>5</sup> James M, 1994, *Privacy and Human Rights*, UNESCO p.1.

<sup>6</sup> Most recently-written Constitutions such as South Africa's and Hungary's include specific rights to access and control one's personal information.

<sup>7</sup> Simon, D 1997, *Re-engineering the right to privacy : how privacy has been transformed from a right to a commodity*, in Agre and Rotenberg (ed) *Technology and Privacy : the new landscape*, MIT Press, p.143.

<sup>8</sup> The first law on Data Protection was approved at Hesse Germany, in 1970.

<sup>9</sup> OECD, *Guidelines governing the Protection of Privacy and Transborder Data Flows of Personal Data* , Paris, 1981.

There are to many important international regulations in the field of data protection. First we have to mention International Pact relating to civil and politic rights on 1966. Also an important instrument is the Convention<sup>10</sup> for the Protection of Human Rights and Fundamental Freedoms in 1950, and the Convention<sup>11</sup> on the protection of individuals with regard to the automatic processing of personal data in 1981 which is a very important legal instrument so called "Convention 108" it foresee free movement of personal data between Parties. The aim of convention 108 is unification and harmonization of national legislations. So each State has to implement to their national legislation, principles foreseen in this Convention on data protection. The aim of the Convention is not only collecting and processing personal information but limiting the processing to the purpose declared and guarantee the protection of all persons, respecting fundamentals rights and freedoms and above all their right to privacy.

Council of Europe and European Union approved similar legislation and established specific institutions to protect personal data. Now about 40 countries has legislation on data protection.

Within Europe, laws on the protection of personal information (or data protection laws, as they are widely known) have their origins in the European Convention on Human Rights (ECHR). Article 8.1 of the ECHR says that "Everyone has the right to respect for his private and family life, his home and his correspondence." Data protection is a development of this right to private<sup>12</sup> life in the field of personal information. The need for data protection laws was recognized during the 1970s as computers, with their power to process large quantities of information very quickly, became established features of society. Several European countries introduced data protection laws during that decade. At the same time, work was going on to establish internationally accepted frameworks for such laws. In September 1980, the OECD adopted its Guidelines on the Protection of Privacy and the Transborder Flows of Personal Data. These were quickly followed in January 1981 by the adoption of the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Later, in 1995, the European Union adopted its Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data. In 2001, the Council of Europe updated its Convention with the adoption of an additional Protocol.

The Convention with its additional Protocol, and the Directive set the benchmark for national laws within Europe. Data protection is established as a free-standing right in the European Union's Charter of Rights.

There are 2 article that are dealing with processing of personal data in the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. Article 8 which underline the protection of privacy and article 10 on freedom of communication of information's. These articles, like Europian Court on Human Rights<sup>13</sup>

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<sup>10</sup> Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950.

<sup>11</sup> *Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data* Convention, ETS No. 108, Stasbourg, 1981.

<sup>12</sup> Volio, F 1981, *Legal personality, privacy and the family* in Henkin (ed) *The International Bill of Rights*, Columbia University Press, New York.

<sup>13</sup> European Court of Human Rights, Case of Klass and Others: Judgement of 6 September 1978, Series A No. 28 (1979). *Malone v. Commissioner of Police*, 2 All E.R. 620 (1979). See Note, *Secret Surveillance and the European Convention on Human Rights*, 33 *Stanford Law Review* 1113, 1122 (1981).

says are not in contradictory, but they are complementary. Data protection on the European model consists of a set of legislative rules which regulate the way in which personal data are collected and used. "Personal data" means any information that relates to an identifiable individual. The rules apply to personal data held in automated form, but they can also be applied to some manually held records. This extension to manual records is required by the Directive and permitted by the Convention. Most frequently personal data will be in written form, but the rules also apply to personal data in the form of images and sounds. The rules apply to any activity that is performed upon personal data, from their collection to their destruction, including merely holding them. The word "processing" is used to describe any one or more of these activities. Thus, for example, a disclosure of personal data from one organization to another is a form of processing. The organizations which process personal data and are responsible in law for complying with the rules are known as "controllers". The individuals about whom personal data are processed are known as "data subjects".

The main features of a data protection regime on the European model include the following.

- A requirement for controllers to comply with a legislative code of practice on the proper processing of personal data, known as the "data protection principles". These principles are at the heart of the substantive data protection rules. In brief, they require personal data to be processed fairly and lawfully; collected for specified purposes and not used in a way which is incompatible with those purposes; adequate, relevant, not excessive, accurate and kept up to date; kept for no longer than is necessary.
- A requirement for special safeguards for certain categories of personal data that are regarded as particularly sensitive,
- A requirement to protect personal data with an appropriate level of security.
- The right for data subjects to be able to gain access to the personal data that are held about them, and the right to have the data corrected or erased if they are wrong or being processed unlawfully.
- Restrictions on the transfer of personal data to third countries.
- An independent supervisory authority which monitors compliance with the law and enforces it.

The Directive, but not the Convention, also requires controllers notify the supervisory authority of the processing that they do. The register that is compiled from the notified information is required to be published. Both the Convention and the Directive<sup>14</sup> provide for exemptions from the data protection principles and the right of access by data subjects where necessary to protect important public interests.

The objectives are creating an ever closer union among the peoples of Europe fostering closer relations between the States belonging to the Community, ensuring economic and social progress by common action to eliminate the barriers which divide Europe encouraging the constant improvement of the living conditions of its peoples, preserving and strengthening peace and liberty and promoting democracy on the basis of the fundamental rights recognized in the constitution and laws as well as in the Convention on the Protection of Human Rights and Fundamental Freedoms.

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<sup>14</sup> Directive 95/46 /EC of the European Parliament and of the Council of On the Protection of Individuals with regard to the processing of personal data and on the free movement of such data.

Processing of data systems are designed to serve man; whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy and contribute to economic and social progress, trade expansion and well being of individuals.

Another objective is the establishment and functioning of an internal market in which the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded. The Ministry of Justice in Albania has undertaken concrete and meaningful action to live up to the commitments that Albania has undertaken in the framework of the Stabilization and Association Agreement (SAA) signed with the Communities and the European Union Member States in June 2006. The approximation of data protection legislation with the Community acquis is a central area of the process of approximation of Albanian legislation with the Internal Market acquis that should take place during the first stage of the implementation of the association (see SAA Article 70).

### 3. WHY DATA PROTECTION

Immeasurable quantities of information about people are collected every day. All kinds of organizations, large and small, use this information to provide the services that people need, and to ensure that society functions smoothly and safely. At one end of the scale, state institutions use detailed information about large numbers of people for the many functions, such as managing health, welfare, education, or public safety, with which they are entrusted by the population<sup>15</sup>. At the other end of the scale, small businesses may do no more than hold lists of their customers' names and addresses. All employers hold and use information about their employees. Every time we use our mobile telephone or a cash machine, whenever we shop using a card rather than cash, when we take out insurance, fill in a registration form at a hotel, or buy an airline ticket, or when we simply send an e-mail, we are telling something about ourselves to the organization that is providing the service we are using. That organization<sup>16</sup> is collecting and using our personal data. New technology has transformed the way we view the world. New technology on processing information has evolved, has transformed the way we communicate. New technology has transformed also the way we live, at home, at work, etc. New technology<sup>17</sup> is continuing to develop, it is a force for good, if properly used. New rules are necessary to ensure proper use of this new technology.

Information is a key resource. We can collect it more easily, process it more quickly use it for more purposes and transmit it instantaneously in the entire world.

Information is about people. Much of that information concerns to peoples so information to an individual. Information about people is essential and very important to

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<sup>15</sup> Richard, H 1984, *Privacy in a Public Society: Human Rights in Conflict*. See Barrington, M 1987 *Privacy: Studies in Social and Cultural History*.

<sup>16</sup> Darwin, B 1998 *The transparent society*, Perseus Books, p67.

<sup>17</sup> An excellent analysis of these laws is found in David, F 1989, *Protecting Privacy in surveillance societies*, University of North Carolina Press, Carolina.

our “information society<sup>18</sup>”. The public sector needs it to provide services to the public. Businesses need it to remain competitive to the market.

Individuals often have little choice whether or not to provide the information. In some cases, providing the information is a legal requirement. In other cases, a choice is, in theory, available, since individuals are able to decide whether or not to take the service that is on offer. However, it is often not reasonable for the individuals to go without the service, if they wish to take full advantage of the benefits that society offers. The effective choice is not whether to take the service, but which service provider to use. The personal information<sup>19</sup> will always be needed. Moreover, much personal information held by organizations is not collected directly from the individuals themselves but obtained from other sources. The information might come from publicly available sources, such as public registers of various kinds, or from the disclosure of information by one organization to another.

Wherever it comes from, the information that is collected is a potent resource for the organizations that collect it. According to the nature and amount of the information that they have, it gives them some degree of insight into the individuals’ lives and thus the power to affect those lives. For example, businesses often use basic information about names and addresses to send out large numbers of personally addressed letters containing marketing material. Similar approaches are made by telephone, fax or e-mail, (the latter being the familiar phenomenon of “spam”). These approaches are often of no more than nuisance value, but sometimes they can be a real, and harmful, intrusion into people’s private lives. Information can also be wrong, and decisions based on wrong information can be damaging for the individuals concerned. For example, benefit entitlements can be wrongly refused, and employment opportunities<sup>20</sup> unjustifiably lost. If personal information gets into the wrong hands, there is also a real risk of identity theft, which can result in distress as well as financial loss for the individuals concerned.

Some uses of personal information are providing medical treatment or social care; keeping records of school and university students; allocating state housing; keeping records of employees; recording passengers on airplanes, managing communications systems, keeping records of suppliers and customers, etc.

More uses of personal information are investigating and prosecuting<sup>21</sup> criminal offences; running the courts; providing insurance and banking services; recording hotel guests; writing articles for the media; licensing cars and their drivers; arranging this seminar; etc.

The scope for individuals to protect themselves against such outcomes is limited since they have little effective control over the collection and use of their personal

<sup>18</sup> Simon, D 1996, *Big Brother : Britain's web of surveillance and the new technological order*, Pan, London, p. 23.

<sup>19</sup> Carey, P (ed) 2009, *Data Protection, A practical Guide to UK and EU Law*, Third Edition, Oxford, London p17.

<sup>20</sup> Nadine, S 1990, *Recent US and Intl. Judicial Protection of Individual Rights: A comparative Legal Process Analysis and Proposed Synthesis*, 41 *Hastings L.J.* 805.

<sup>21</sup> European Court of Human Rights, Case of Klass and Others: Judgement of 6 September 1978, Series A No. 28 (1979). *Malone v. Commissioner of Police*, 2 All E.R. 620 (1979). See Note, *Secret Surveillance and the European Convention on Human Rights*, 33 *Stanford Law Review* 1113, 1122 (1981).

information. That is why it is necessary to have a law to regulate the way in which personal information is used.

There are some concerns on processing personal data and interfering in our private lives<sup>22</sup>. Increasing use of personal data is inevitable. Strengthening use of new technology has increased opportunities to intrude into private lives. Individuals have no real control over information about them. Information can be wrong or misused. Also exist some problems like unsolicited marketing material—spam; loss of databases—identity fraud; inaccurate information; illegal market in personal information.

But what is data protection? Where it consists? “Data protection” this term is used like a legal abbreviation even if it won’t means protection of data. We are not protecting these data but we are protecting the persons against a bad treatment for the purpose that they have been collected, or used, or changing the performance of data which have personal information. But for practical reasons we use the term “data protection”.

A brief definition of this term is: “A set of rules, enshrined in legislation, which regulate the way in which information about individuals is used”.

What can data protection intended to do? It won’t solve all problems, but it can contribute. In the other way it balances organizations’ need to use personal information with individuals’ right to respect for their privacy<sup>23</sup>. It gives reassurance to individuals that their information is being properly use. Also data protection helps organizations manage information better.

According to our juridical abbreviation terms “data” or “information” in every day use they mean the same but it is always “data protection”. In Europe “privacy” is broader, is the right to be left alone, but “data protection is a subset of privacy, concerned only with personal information. Outside Europe “privacy” is frequently used to mean “data protection”.

There is no hiding place. Information<sup>24</sup> about our daily lives is routinely available to a range of agencies in the private and public sectors. Is this the “surveillance society”? Individuals can try and limit the amount of personal data they provide. But in most of the cases we don’t think about that and we are not limiting the giving of personal data. If we want to participate in a society is inevitable to do not submit personal data. For that reason protection of personal data<sup>25</sup> is very important.

#### 4. WAS DATA PROTECTION GUARANTEED IN ALBANIA?

Albania has had a data protection law since 1999. However, that law failed to meet the international standards in a number of respects, most notably because it applied only to public authorities. The new law “On Protection of Personal Data” adopted by Parliament on 10 March 2008 marks a fresh start. It completes the legislative framework started by the 1999 law. But that in itself is not enough. The law must be made to work

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<sup>22</sup> European Parliament, Scientific and Technological Options Assessment (STOA), An Appraisal of Technologies of Political Control, 6 January 1998. <<http://jya.com/stoa-atpc.htm>>.

<sup>23</sup> Privacy and the Limits of Law, [1980] 89 Yale L.J. 421, at 428.

<sup>24</sup> Darvin, B 1998, *The transparent society* Perseus Books, London, p 67.

<sup>25</sup> Report of the Committee on Privacy and Related Matters, Chairman David Calcutt QC, 1990, Cmnd. 1102, London: HMSO, page 7.

in practice. There remains a huge job to do to alert data controllers to their responsibilities under the law, and to inform the public of their rights<sup>26</sup>.

Due to flows of data from a country to another data protection is needed to be ensured not only at national level but also at international level of protection. However, even this protection in national level is not ensured. The considerable increase of international flows of information requires international efforts to regulate the balance between free movement of information with need to protect personal data<sup>27</sup>.

Protection of personal data within the territory of the Republic of Albania is foreseen in the Constitution. So article 35 says that nobody can be forced except when it is regulated by law, to make public data relating to him. In the second paragraph of this article it is foreseen that collection, use and disclosure of personal data should be done with his consent except when it is regulated by law.

In these terms, everyone has the right to know the data collected relating to him except when it is regulated by law, and to require that the data must be accurate, true and require to erase, or correct the data that are collected against the law.

But even in this aspect drafters of the constitution had been skeptical. The guarantee for an effective protection of personal data is an supervisory authority.

The right to privacy<sup>28</sup> is one of the human rights and fundamental freedom and it deserves a special protection. Supervisory authority must be an independent supervisory body with sufficient financial and human resources in order to efficiently monitor and guarantee the enforcement of national legislation on personal data protection. Therefore establishment of this institution should have been foreseen in the Constitution.

The establishment of independent supervisory authorities is essential to guarantee the protection of individuals in the context of processing their personal data. Moreover, the supervisory authority must be given a core of investigative powers, effective powers of intervention and powers to engage in legal proceedings across the board for the enforcement of personal data protection standards, including both the public and private sector. (See Directive 95/46/EC, Recital 62 and Article 28). So the establishment of independent supervisory authorities must be regulated by law.

Differences on protection of personal data can be obstacles for free movement of personal data between Albania and other members of European Union in which capitals, services and persons move freely. In order to avoid these obstacles Stabilization and Association Agreement obligate Republic of Albania to adapt the Directive 95/46/EC of the European Parliament and of the Council of Europe 24 October 1995 "On the protection of individuals with regard to the processing of personal data and on the free movement of such data".

For these reasons, Republic of Albania has ratified with law no. 8137, date 31.07.1996 European Convention on Human Rights and Fundamental Freedoms. Article 8.1 of the ECHR says that "Everyone has the right to respect for his private and family

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<sup>26</sup> Rolv, R 1992, 'Data Protection and the European Convention on Human Rights in Council of Europe Data protection, human rights and democratic values, XIII Conference of the Data Commissioners 2-4 October 1991, pp.41-43.

<sup>27</sup> The Rachel affaire. Judgment of June 16, 1858, Trib. pr. inst. de la Seine, 1858 D.P. III 62. See Jeanne M. Hauch, Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris, 68 Tul. L. Rev. 1219 (May 1994).

<sup>28</sup> Samuel, W & Louis BR, 1890 *The right to privacy*, Harvard Law Review 4, pp 193 – 220.

life, his home and his correspondence.” Relating to this principle every person has the right to be informed that personal data relating to him has been processed from an authorized person. Among others, in this article is foreseen that public authority can’t intervene in exercising this right<sup>29</sup>, except in cases foreseen by law. In cases needed for operations concerning public security, defense, State security matters, to safeguard the economic well-being of the State and the activities of the State in areas of criminal law, to protect freedoms and rights of others and to the protection of health of others, etc.

In order to balance respecting of the privacy and the free movement of information beyond the Republic of Albania territory it has ratified the Council of Europe’s Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Republic of Albania is a member State of this Convention.

Implementation of the Convention obligates members to ensure legal protection by establishing new legislation in domestic legislation to determine by law the fundamental principles of protection of personal data. Convention says that personal data must be processed fairly and lawfully; accurate and when necessary kept up to date, etc..

Convention recognize to individuals the right of access on their data, it determines fundamental principles on protection of privacy. According to the Constitution<sup>30</sup> of the Republic of Albania base on article 122 when the Convention can not be implemented directly it is necessary to establish new legislation within internal rule of law or regime.

Also Republic of Albania has ratified with law no. 9287, date 7.10.2004, additional Protocol of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. This additional Protocol ensure protection of individuals relating to automatic processing of personal data as well as international transfers.

Republic of Albania had a law no. 8517, date 22.7.1999, “On protection of Personal Data<sup>31</sup>” which had never been implemented in practice. No one in Albania has knowledge on this law. This situation has caused difficulties on international cooperation between Albanian institutions and international organizations like EUROJUST, EUROPOL, and to many problems on economic, commercial, police collaboration agreements, etc.

The main difficulty of this law was that controllers according to the law were only public administration institutions and no agencies from private sector. So the right to process personal data was to these institutions. But individual are getting daily services from private sector like from banks, insurance companies, etc. Data subjects had no protection on activities from private sectors. In these conditions it was no supervision nor control on private sector activities.

Albanian citizens had no guaranty on the protection of personal data. But they are giving personal data to private companies to ensure their services and they have no guaranties on data protection since nobody is monitoring their process.

Also this law was not applicable to the personal data processed by companies and foundations which process sensitive data.

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<sup>29</sup> The White Paper of Grand Britain para. 30 year 1975.

<sup>30</sup> Omari, LU & Anastasi, AU 2010, *Constitutional Law*, Publishing ABC, Tiranë, pp. 30.

<sup>31</sup> Now this law is abrogated.

The law has no regulation on balance between privacy and the right of expression. Regulations on protection of personal data may limit the right and freedom of expression. According to article 9 of the Council of Europe Convention says that States can derogate from these rules in order to provide and ensure rights and freedoms of expression. These derogations must be established by law as a necessary measure in a democratic society on behalf of rights and freedoms of expression. Generally press activities must respect rules on the protection of personal data also they must respect privacy. Anyway a balance on these rights and freedoms should be found.

After all this time since 1999, the law is not considered as a legal framework on the protection of personal data of individuals in the Republic of Albania. Other legislation related to privacy has been implemented but they have not taken into consideration principles on protection of personal data. The case is the regulation on elections lists which have included personal information but they didn't respect principles on the protection of personal data relating to drafting, keeping and using of personal information from political parties.

Some regulations on the protection of personal data had been made even from Constitutional Court in Albania. In its decision no. 16, date 11.11.2004 it declares that personal data of some categories of employees must be published.

These are some of the reasons why the law has not been implemented in practice. Lawyers know very well that a law can not be good without enforcements measures and an supervisory authority. The supervisory authority responsible for the implementation of the law in the Republic of Albania is the Ombudsman. As we mentioned before the Republic of Albania has ratified the additional Protocol of the Convention "On protection of individuals relating to automatic process from supervisory authorities and transborder flow of personal data". This protocol foresee the establishment of supervisory bodies for the implementation of the law.

This Protocol is based on some principles to ensure effective protection and to guarantee the rights and freedoms determined in the Convention. Therefore it is necessary to harmonize the way of processing personal data as well as the way of implementation of the law. In order to respect this principle determined by the additional Protocol all member States of the Convention has established supervisory bodies like commissioner in Grand Britain, Ireland, Slovenia; commission in France, Italy; ombudsman in Finland, inspectorate in Poland, Sweden; or office in Spain, Holland. These authorities enjoy independence to exercise their powers and duties.

Citizens of Albania has the right to complain for violence of their privacy to ombudsman. But only for violence committed by public authorities. Such regulation is different from the establishment of supervisory bodies on European Union member States. This is also against our Stabilization and Association Agreement (SAA). It is a specific obligation deriving from Article 79 of the SAA that "Albania shall establish independent supervisory bodies with sufficient financial and human resources in order to efficiently monitor and guarantee the enforcement of national legislation on personal data protection."

This commitment is further repeated and elaborated by the National Plan for the Implementation of the SAA 2007-2012 (NPISAA) adopted by Decision no. 463 of 5.7.2006 of the Council of Ministers. NPISAA lists the establishment of an independent data protection structure capable of monitoring the implementation of personal data

protection legislation in an effective way as one of its short term priorities for the period of time 2007-2008.

According to the Community *acquis* the establishment of independent supervisory authorities is essential to guarantee the protection of individuals in the context of processing their personal data. Moreover, the supervisory authority must be given a core of investigative powers<sup>32</sup>, effective powers of intervention and powers to engage in legal proceedings across the board for the enforcement of personal data protection standards, including both the public and private sector. In this law approved on 1999, the supervisory authority has been vested in the People's Advocate or ombudsman, a constitutional body whose mission, as determined in Article 60 of the Constitution, it is to defend the rights, freedoms and legitimate interests of individuals from unlawful or improper action or failure to act of the institutions of public administration. This together with the fact the People's Advocate<sup>33</sup> has no enforceable instruments of action constitutes an inherent limitation of its enforcement powers, in particular with respect to the private sector, that cannot be overcome unless constitutional provisions provide for this.

Giving the People's Advocate this role by means of this law raises a number of questions concerning the authority delegated by law to this body. Major changes to the powers of the People's Advocate might require constitutional amendments in accordance with Article 177 of the Constitution. Even if not, substantial changes would be needed in the law to ensure that the People's Advocate has the adequate resources, structures and powers to satisfy the requirements for independence and effectiveness. We also caution that such changes would entail the need to comply with article 81 (2) of the Constitution since they involve the organization and functioning of an institution provided in the Constitution such as the People's Advocate is. Albania has had a data protection law since 1999. However, that law failed to meet the international standards in a number of respects, most notably because it applied only to public authorities.

## 5. REASONS FOR ADOPTING A COMPREHENSIVE NEW LAW

The Ministry of Justice has undertaken concrete and meaningful action to live up to the commitments that Albania has undertaken in the framework of the Stabilization and Association Agreement (SAA) signed with the Communities and the European Union Member States in June 2006. The approximation of data protection legislation with the Community *acquis* is a central area of the process of approximation of Albanian legislation with the Internal Market *acquis* that should take place during the first stage of the implementation of the association (see SAA Article 70).

In terms of the legislative process it is very positive that an open process of consultation with public institutions and groups of interest has started with some roundtable organized. The Instruments of Approximation, part of the Rules of the Council of Ministers, should serve as a means for achieving a higher degree of compliance of domestic legislation with the *acquis*. In this connection, we applaud the fact that the assessment of compatibility of the Draft with the applicable *acquis* was carried out in accordance with the Instruments of Approximation. Article 79 of Stabilization and

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<sup>32</sup> See Directive 95/46/EC, Recital 62 and Article 28.

<sup>33</sup> Different Ombudsman Annual Reports of 2000, 2001, 2004, etc, in Albania.

Association Agreement says that it is necessary the harmonization of domestic Albanian legislation in the field of personal data with *acquis communautaire* and international legislation. Also it is necessary the establishment of a supervisory authority to has the adequate resources, structures and powers to satisfy the requirements for independence and effectiveness. According to *acquis communautaire* the establishment of supervisory authority is essential to guarantee the protection of individuals rights, in the framework of processing of personal data. In the same time in order to ensure the implementation of the law this supervisory authority must have some investigative powers to efficiently monitor and guarantee the enforcement of national legislation on personal data protection.

Systems of processing of personal data are designed to serve to individuals. They must respect human fundamental rights and freedoms especially the right of privacy, besides nationality or country of residence of individuals and to contribute to their economic and social improvement and to the extension of markets.

In Accordance to the Directive 95/46/EC the Republic of Albania shall protect the fundamental rights and freedoms of natural persons<sup>34</sup>, and in particular their right to privacy with respect to the processing of personal data. It shall neither restrict nor prohibit the flow of personal data between Member States for reasons connected with protection of personal data. The new law "On Protection of Personal Data" adopted by Parliament on 10 March 2008 marks a fresh start. It completes the legislative framework started by the 1999 law. But that in itself is not enough. The law must be made to work in practice. There are to many sub legal acts to be drafted to supplement the law. There remains a huge job to do to alert data controllers to their responsibilities under the law, and to inform the public of their rights.

## 6. CONCLUSIONS

By implementing this new law the Republic of Albania intends creating an ever closer union among the people of Europe, fostering closer relations between the States belonging to the Community, ensuring economic and social progress, by common action to eliminate the barriers which divide Europe, encouraging the constant improvement of the living conditions of its people, preserving and strengthening peace and liberty and promoting democracy on the basis of the fundamental rights, recognized in the constitution and laws of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Data-processing systems are designed to serve man, they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals.

This law will enforce the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded.

The increasingly frequent recourse is being had in the Republic of Albania to the processing of personal data in the various spheres of economic and social activity. The

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<sup>34</sup> *Halford v United Kingdom* (Application No 20605/92), 24 EHRR 523, 25 June 1997.

progress made in information technology is making the processing and exchange of such data considerably easier. The economic and social integration resulting from the establishment and functioning of the internal market within the meaning of Article 7a of the Treaty will necessarily lead to a substantial increase in cross-border flows of personal data between all those involved in a private or public capacity in economic and social activity in the Member States. The exchange of personal data between undertakings in different Member States is set to increase. The national authorities in the various Member States are being called upon by virtue of Community law to collaborate and exchange personal data, so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State within the context of the area without internal frontiers as constituted by the internal market. By the implementation of this law the increase in scientific and technical cooperation and the coordinated introduction of new telecommunications networks in the Community will necessitate and facilitate cross-border flows of personal data. The implementation of this law will remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States. This objective is vital to the internal market but cannot be achieved by the Member States alone, especially in view of the scale of the divergences which currently exist between the relevant laws in the Member States and the need to coordinate the laws of the Member States so as to ensure that the cross-border flow of personal data is regulated in a consistent manner that is in keeping with the objective of the internal market as provided for in Article 7a of the Treaty; whereas Community action to approximate those laws is therefore needed. Given the equivalent protection resulting from the approximation of national laws, the Republic of Albania will no longer be able to inhibit the free movement between them of personal data on grounds relating to protection of the rights and freedoms of individuals, and in particular the right to privacy. Republic of Albania therefore has been able to specify in its national law the general conditions governing the lawfulness of data processing. Republic of Albania in doing so has improved the protection currently provided by its legislation and constitution.

The object of this law on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law. For that reason, the approximation of this law must not result in any lessening of the protection it afford but must, on the contrary, seek to ensure a high level of protection in the Republic of Albania.

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