Issues Concerning the Regulation of the Freedom and Secrecy of Communications in the Republic of Armenia

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Հայաստանի Հանրապետությունում հաղորդակցության ազատության և գաղտնիության կարգավորման հիմնախնդիրները

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ՀՀ ԳԱԱ Գիտակրթական միջազգային կենտրոնի իրավագիտության ամբիոն (Երևան, ՀՀ),
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Ամփոփագիր. Հաղորդակցության ազատության և գաղտնիության իրավունքի կարգավորման հիմնախնդիրը արդիական է ժամանակակից իրավագիտությունում: Մասնավորապես, ժամանակակից իրավաբանները անձնական հաղորդակցության ազատությունը և գաղտնիությունը դիտարկում են որպես հիմնարար իրավունք, որը կարող է սահմանափակվել միայն օրինական հիմքերի առկայության դեպքում: Սույն գիտական հոդվածում, հիմնվելով հայտնի իրավաբանների, ազգային օրենսդրության և դատական նախադեպի ուսումնասիրության վրա, ներկայացնում են հաղորդակցության ազատության և գաղտնիության իրավունքի սահմանափակման առանձնահատկությունները: Ավելին, հոդվածում դիտարկվում է «գաղտնիություն» հասկացության էությունը, որը տարբեր մեկնաբանություններ է ստացել ժամանակակից իրավաբանական գրականությանում: Հաղորդակցության ազատության և գաղտնիության խնդիրները դիտարկելիս, գիտական հոդվածի հեղինակները ընդգծում են, որ այս հասկացությունները սերտորեն փոխկապակցված են և լրացնում են միմյանց: Ավելին, այս գաղափարներն ունեն ընդհանուր նպատակ՝ պաշտպանել անհատի ինքնավարությունը: Հաղորդակցության ազատությունը թույլ է տալիս մարդկանց ազատորեն կիսվել իրենց մտքերով, մինչդեռ հաղորդակցության գաղտնիության պահպանումը օգնում է կանխել դրանց օգտագործումը վնասակար նպատակներով, ինչպիսիք են շանտաժը կամ կեղծ տեղեկատվության տարածումը: Միասին այս հասկացությունները ստեղծում են պետության և անհատի միջև անվտանգ հարաբերությունների ամուր հիմք:
Հայտնի է, որ համացանցի և թվային տեխնոլոգիաների հեղափոխությունը իրավունքի զարգացման ժամանակակից փուլ է: Այն ստեղծել է հաղորդակցության աննախադեպ հնարավորություններ, բայց միևնույն ժամանակ աննախադեպ ռիսկեր անձնական կյանքի համար: Հեղինակները շեշտում են, որ ինչպես պետական, այնպես էլ մասնավոր տեխնոլոգիական կորպորացիաների ձեռքերում հսկայական քանակությամբ տվյալներ հավաքելու, պահելու և վերլուծելու կարողությունը պահանջում է իրավական պաշտպանության սկզբունքների վերանայում և նոր, ավելի հուսալի երաշխիքների ստեղծում:
Հանգուցաբառեր և բառակապակցություններ՝ պետություն, սահմանադրություն, օրենք, իրավունքներ, սահմանափակումներ, հաղորդակցության ազատություն և գաղտնիություն, համաչափության սկզբունք, նամակագրության, հեռախոսային խոսակցությունների և հաղորդակցության այլ ձևերի գաղտնիության իրավունք

Проблемы регулирования свободы и тайны сообщений в Республике Армения

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Аннотация. Проблема регулирования права на свободу и тайну сообщения является одной из актуальных исследований современной юриспруденции. В частности, современные юристы рассматривают свободу и тайну сообщения личности в качестве фундаментального права, которое может быть ограниченно лишь на законных основаниях. В данной научной статье, на основании изучения мнений известных правоведов, внутригосударственного законодательства, судебных прецедентов представлены особенности ограничения права на свободу и тайну сообщения. Более того, в научной статье раскрывается сущность концепции “тайна” которая в современной юридической литературе получила разнообразную огранку. Рассматривая проблемы свободы и тайны сообщения, авторы подчеркивают, что данные понятия тесно взаимосвязаны и дополняют друг друга. Более того, данные идеи преследуют одну общую цель -защиту автономии личности. Свобода сообщения позволяет людям свободно делиться своими мыслями, а сохранение тайны сообщений помогает предотвратить их использование во вред, например, для шантажа или распространения ложной информации. Вместе эти понятия создают прочную основу для безопасных взаимоотношений в обществе между государством и личностью.

Известно, что революция интернета и цифровых технологий — это современный этап развития права. Она создала беспрецедентные возможности для коммуникации, но в то же время и беспрецедентные риски для неприкосновенности частной жизни. Авторы подчеркивают, что возможность сбора, хранения и анализа огромных объемов данных, как в руках государства, так и частных технологических корпораций, требует переосмысления принципов правовой защиты и создания новых, более надежных гарантий.

Ключевые слова и словосочетания: государство, конституция, закон, права, ограничение, свобода и тайна сообщения, принцип соразмерности, право на тайну переписки, телефонных переговоров и иных форм сообщений

Introduction

A comprehensive analysis of the constitutional and legal regulation of the freedom and secrecy of communications requires an in-depth study of their conceptual foundations, substantive elements, and legal nature. Underlying these consept is the fundamental principle of respect for individual autonomy and human dignity. In the philosophy of law, the concept of “secrecy” is defined as an intentional disruption of the social flow of knowledge, where specific information is purposefully concealed by a keeper from an excluded party [**15**]. Sometimes, in legal literature the term “privacy” is used instead of term the term “secrecy”. The term “privacy” is defined not only as a fundamental the right to be let alone and free from unwarranted interference, but also as an individual’s capacity to shape their identity, manage social relationships, and define the boundaries of their personal sphere [**1**; **6**; **22**]. The confidentiality of communication enables an individual to create spaces of trust and intimacy where they can freely experiment with ideas, express doubts, and develop their personality without fear of public condemnation or sanctions. Without this protected sphere, the individual is under constant pressure to align their behavior with public expectations, which hinders self-discovery and personal growth. Therefore, the state is also obliged to create conditions for the effective exercise of the aforementioned rights of the individual, which includes establishing an effective legal framework that protects individuals against infringements by other private parties. For example, legislation regarding defamation must strike a balance between the protection of reputation and freedom of expression. The state is also obliged to ensure media pluralism by preventing the concentration of information in the hands of one or a few groups [**4**]. This may include transparent rules for licensing television companies, guarantees of the public broadcaster's independence, and support programs for the print media. Finally, there is a positive obligation to ensure accessibility, which applies both to physical access (for example, extending internet connectivity to remote communities) and to access to information held by public authorities (the right to freedom of information) [**14**].

Legislative analysis of the issue

The Constitution of the Republic of Armenia (hereinafter: RA) serves as the cornerstone for the protection of the freedom and secrecy of communications within the legal system of the Republic of Armenia. Unlike many countries where this freedom is derived from the broader right to the inviolability of private life, the Constitution of RA affords it distinct, clearly defined protection, thereby underscoring its particular importance. The constitutional core of this right is Article 33 of the Constitution of RA: “Freedom and Secrecy of Communications”. Part 1 of the Article stipulates: “Everyone shall have the right to freedom and secrecy of correspondence, telephone conversations and other means of communication” [**17**].

The aforementioned formulation is significant from several perspectives. First of all, it enumerates

traditional forms of communication (correspondence, telephone conversations) that enjoy a historically established high level of protection. Second, the Constitution of the Republic of Armenia employs the open-ended term "other means of communications", allowing constitutional protection to dynamically extend to new forms of communication emerging alongside technological advancements, such as email, internet messaging services, video calls, and so forth. Thus, the framers of the Constitution anticipated the need for a technologically neutral interpretation of this right, avoiding a restrictive approach that would tie the protection of these rights and freedoms to specific technologies.

The right to the confidentiality of communication is closely linked to Article 31 of the Constitution of the Republic of Armenia, which guarantees the inviolability of private and family life, honor, and good reputation. While Article 33 protects the communication process and its content, Article 31 protects the information that may be revealed as a result of such communication. Together, these two articles establish the constitutional basis for an individual's right to informational self-determination—the right of a person to independently control the collection, use, and dissemination of information about themselves. It should be noted that the 2005 version of the Constitution regulated the freedom and secrecy of communications

under Article 23. At the same time, the aspect of freedom of communication is guaranteed by the Article 42 of the Constitution of the Republic of Armenia, which establishes the freedom of expression of opinion, which includes freedom to hold own opinion, as well as to seek, receive and disseminate information and ideas through any media, without the interference of state or local self-government bodies and regardless of state frontiers [**17**] Current article protects the communication process as a necessary condition for the functioning of a democratic society.

However, the aforementioned rights and freedoms are not absolute. For this reason, the Article 33 of the Constitution of the Republic of Armenia establishes the possibility of their restriction. According to the Article 33, the Freedom and secrecy of communication may be restricted only by law, for the purpose of state security, economic welfare of the country, preventing or disclosing crimes, protecting public order, health and morals or the basic rights and freedoms of others. In its tern, the secrecy of communication may be also restricted only upon court decision, except where it is necessary for the protection of state security and is conditioned by the particular status of communicators prescribed by law [**17**]. It is noteworthy that both Article 23, of the Constitution of RA (amended in 2005) and Article 33, of the amended Constitution of RA (2015) provide for the possibility of restricting the freedom and secrecy of communications only by a court decision. Moreover, in this instance, we are dealing solely with a restriction on the confidentiality of communication, rather than a restriction on the freedom of communication. As legal experts rightly note, Article 33, provides an exception to the requirement that restrictions on the confidentiality of communication be imposed by a court. This exception applies to the communication rights of specific categories of persons where such restriction is necessary for the protection of state security and is warranted by the special status of the individuals involved. The scope of such persons must be defined by law. In other words, the aforementioned constitutional provision requires clarification through legislative regulations and judicial practice to prevent abuse and to ensure compliance with the requirements governing restrictions on fundamental rights (Articles 78–81 of the Constitution of RA) [**16**, p. 53].

It is known that any restriction must also comply with the principle of proportionality established by Article 78 of the Constitution of the Republic of Armenia, according to which: "The means chosen for restricting basic rights and freedoms must be **suitable and necessary** for achievement of the objective prescribed by the Constitution. The means chosen for restriction must be **commensurate** to the significance of the basic right or freedom being restricted" [**17**].

It is evident that the article in question encompasses three key elements: the measures selected for the restriction must be **suitable, necessary, and commensurate** (proportionate in the strict sense). This implies that, in each instance, the state must demonstrate that: a) the interference is capable of achieving the legitimate aim pursued (suitability); b) there is no less intrusive alternative measure to achieve the same aim (necessity); and c) the harm caused to the individual's rights by the interference does not outweigh the public benefit gained through that interference (commensurateness). It is well established that the Constitutional Court of the Republic of Armenia has provided a detailed interpretation of these three elements in its rulings, regarding them as mandatory prerequisites for the lawfulness of state interference [**10**; **11**].

The Constitutional Court of the Republic of Armenia has repeatedly referred to these rights in its practice, especially when examining the constitutionality of legislation on operational-investigative activities. For instance, in Decision SDAO-805 ՍԴԱՈ-805, while examining the procedure for

conducting types of measures of operational intelligence activity, the Constitutional Court emphasized that any restriction on individuals' fundamental rights, including the right to the secrecy of communications must be lawful, pursue a constitutionally permissible objective, and adhere to the principle of proportionality [**13**].

The Court underscored the importance of judicial oversight as a crucial safeguard protecting citizens against arbitrary state interference.

In another decision (DCC-1142), concerning the protection of personal data, the Constitutional Court further developed the concept of the right to informational self-determination, noting that an individual must have the opportunity to know what data is being collected about them and for what purpose [**12**]. Although these positions are sometimes general in nature, they shape the constitutional-legal framework within which sectoral legislation must operate.

Constitutional norms are specified and developed in sectorial legislation. Several legal acts are of pivotal importance regarding the restriction and protection of the right to the confidentiality of communications. The most significant and simultaneously the most problematic act is the Law of the Republic of Armenia "On operational intelligence activity" (hereinafter: the Law on OIA). This law establishes the legal grounds and procedures enabling competent state bodies to conduct covert measures that directly interfere with the confidentiality of communications. Article 14 of the Law defines types of operational intelligence measures which include interception of correspondence, postal, telegraphic and other communications, wire-tapping, etc. [**19**].

Interception of correspondence, postal, telegraphic and other communications, This activity is enshrined in Article 25 of the law under consideration, according to which the conducted oversight allows interception of correspondence, postal, telegraphic and other communications, including fax messages, with or without use of technical means, shall the examination of transmitted letters, postal, telegraphic and other communications, including their content, and corroboration of their results as well as identification of the person having sent the letter, postal, telegraphic and other communications through the handwriting thereof or using other technical means [**19**].

Wire-tapping. The Article 26 of the Law on OIA emphasis that wire-tapping is the secret monitoring of conversations, including telephone conversations via the Internet and electronic communication, carried out using special and other technical means, which shall mean [**19**]. The Law "On Operative-Investigative Activity" also defines the grounds for carrying out these measures. They may be implemented, among other instances, when there is information regarding grave or especially grave crimes being prepared or committed, as well as actions threatening state security.

Another important legal act is the Law of the Republic of Armenia "On the Protection of Personal Data" [**20**]. Although this law does not directly regulate wire-tapping, it is of significant importance for the protection of communication metadata. The law establishes principles for the processing of personal data (such as purpose specification, data minimization, storage limitation, etc.) that also apply to the processing of user data (call history, internet traffic data) by telecommunications operators.

It should be noted that Article 50 of the Law of the Republic of Armenia **"On Electronic Communication"** stipulates: "Any person who is not a party to a message transmitted via any means of electronic communication may interfere with or record the message, or disclose its content, only with the written consent of the parties to said message or by a court decision, in the cases and manner prescribed by law" [**18**]. Furthermore, Part 3 of the same article reinforces the principle that all operators and service providers are required to grant law enforcement and national security personnel access to communication equipment, infrastructure, and devices such as switches, routers, and similar apparatus, including equipment necessary for conducting wire-tapping, in the cases and manner prescribed by law [**18**]. It should be noted that the aforementioned legislative amendments, enacted by the legislature in recent years, have expanded the capacity of law enforcement agencies to conduct wiretapping and other operational-investigative measures.

The Criminal Code of the Republic of Armenia and the Criminal Procedure Code of the Republic of Armenia also contain important provisions. Article 206 of the Criminal Code establishes criminal liability for the unlawful violation of the confidentiality of a person's correspondence, telephone conversations, and other forms of communication, thereby creating a criminal-law guarantee for the protection of this right [7]. Article 26 of the Criminal Procedure Code, in turn, clarifies that interference with a person's correspondence, telephone conversations, and other forms of communication during proceedings may be carried out only by a court decision, in the cases and manner prescribed by law [**8**].

The European Court of Human Rights (ECHR) has also addressed this issue in its judgment in the Case of Ekimdzhiev and Others v. Bulgaria, finding a violation because domestic legislation failed to

provide sufficient judicial oversight or clear procedures for data retention and destruction [**2**]. Consequently, beyond the letter of the law, the interpretation and application of laws by the courts are of equal importance. In this regard, the Court of Cassation of the Republic of Armenia has consistently emphasized in its rulings that information obtained in violation of the procedures established by the Law "On operational intelligence activity" cannot be used as evidence in criminal proceedings [**9**]. The Court has also highlighted the necessity of applying ECHR case law, noting that domestic legislation must be interpreted in light of the Convention and the positions adopted by the ECHR. However, human rights organizations and lawyers frequently raise concerns regarding the effectiveness of judicial oversight at the stage where authorization for covert measures is granted. Since this process is confidential and the individual subject to the measure is not present at the court hearing, the judge is generally compelled to rely solely on materials submitted by law enforcement agencies. This creates a risk that judicial oversight may become merely perfunctory. Another systemic issue is the absence of an effective mechanism for subsequently notifying an individual about a covert measure carried out against them, which deprives the person of a practical opportunity to challenge the alleged violation of their rights.

Thus, although the legislation of the Republic of Armenia formally provides for mechanisms to protect the confidentiality of communications and ensure judicial oversight, their practical application and effectiveness remain issues requiring discussion and further improvement. This general conclusion stems from an analysis of various systemic problems and legislative gaps within the Armenian legal system that warrant specific and detailed examination.

Main Issues related to freedom of communication and privacy

The first and most fundamental issue concerns the actual effectiveness of preliminary judicial oversight ("ex-ante" control). Although the Law of the Republic of Armenia "On Operative Investigative Activities" and the Criminal Procedure Code of the Republic of Armenia generally mandate a court order for the implementation of measures restricting the confidentiality of communications, the nature of this process itself entails significant risks. Judicial proceedings regarding the authorization of covert measures take place ("ex parte"), that is, without the participation of the person whose rights may be restricted and without an adversarial process. Under these conditions, the judge, acting as a guarantor of rights, faces an information asymmetry: they possess only the information provided by the body conducting operational-investigative activities or by the investigator. The opposing party is absent—a party that could otherwise challenge the sufficiency of the presented grounds, point to the existence of alternative, less intrusive measures, or question the proportionality of the interference.

Studies and reports conducted by human rights organizations in Armenia indicate that the rate at which motions authorizing wiretapping and similar measures are granted is extremely high, often approaching 100% [**21**]. This suggests that judicial oversight is frequently merely formal in nature, failing to conduct a genuine, substantive review and instead becoming a process of rubber-stamping the actions of law enforcement agencies. According to the case law of the European Court of Human Rights (ECHR), judicial oversight must be real and effective, and the judge must thoroughly examine the necessity of the interference in a democratic society in light of the specific circumstances of each case.

The second major systemic issue is the practical absence of an effective mechanism for the **subsequent notification** of an individual regarding a covert measure carried out against them. The legislation of the Republic of Armenia does not establish a general obligation for law enforcement agencies to inform the subject of a covert measure—whether an operative-investigative measure or an investigative action—once the measure has concluded and the need to maintain its secrecy no longer exists. This renders legal remedies illusory. If a person never learns that their telephone conversations have been wiretapped or their electronic correspondence monitored, they are effectively deprived of the opportunity to challenge the lawfulness of such interference in court and to obtain effective redress in the event of a violation.

It is obvious that all of this directly contradicts the right guaranteed by Article 13 of the European Convention on Human Rights (right to an effective remedy), as well as Article 8 of the Convention. It should be noted that the ECHR, in a number of its judgments, specifically in the Cases of "Klass and Others v. Germany" [**3**] and "Weber and Saravia v. Germany" [5], has clearly stated that, in a democratic society, preventing abuse requires the existence of safeguards allowing an individual to subsequently learn of the surveillance to which they were subjected, so that they may exercise their right to legal protection. Although notification may be deferred to avoid jeopardizing the interests of an investigation, its absolute and indefinite absence constitutes a systemic flaw that undermines the entire system of legal protection.

Third issue concerns the weak mechanisms for oversight and accountability regarding covert measures that have been implemented. In addition to judicial oversight, democratic states employ other supervisory bodies,such as special parliamentary committees or independent administrative agencies (e.g., data protection authorities),empowered to verify the legality of special services' activities. In Armenia, although the relevant National Assembly committees possess certain oversight powers, their activities are often constrained by legislation on state secrets, and they lack the sufficient resources and expertise to conduct in-depth, comprehensive oversight. As a result, a situation arises where information regarding the number of wiretapping authorizations granted annually, the grounds for them, and their effectiveness in solving crimes remains practically inaccessible to the public.

Conclusion

In summary, it should be noted that the system of protecting freedom and secrecy of communications in the Republic of Armenia is characterized by a significant gap between progressive constitutional standards and problematic sectoral legislation and law enforcement practice. In addition, the ability to collect, store, and analyze vast amounts of data, whether in the hands of the state or private technology corporations, requires a rethinking of legal protection principles and the creation of new, more robust safeguards.

The legislative framework requires serious reform to align it with the minimum safeguards established by the case law of the European Court of Human Rights (ECHR). Specifically, it is necessary to clarify the vague wording of the Law "On Operational Investigative Activities", strengthen genuine mechanisms for judicial oversight, introduce a system of subsequent notification, and ensure effective parliamentary and public oversight of the activities of special services. Without these systemic changes, the constitutionally guaranteed right will remain vulnerable to the risk of disproportionate state interference.

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