YEREVAN STATE UNIVERSITY
Faculty of Law

STATE AND LAW

Scientific Journal

Special Issue 2

YEREVAN 2026

The international scientific journal is published upon the decision of the Academic Council of Yerevan State University.

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DOI: https://doi.org/10.46991/SL/2026.SP2.005

PRACTICAL PROBLEMS IN THE INITIATION OF PUBLIC CRIMINAL PROSECUTION

Gagik Ghazinyan[*], **Gevorg Baghdasaryan**[**]

Abstract. The initiation of public criminal prosecution is a decisive procedural act that both attributes an alleged offence to a particular person and activates the guarantees associated with accused status. This article examines three interrelated practical and conceptual problems arising under the 2021 Criminal Procedure Code of the Republic of Armenia: the factual and evidentiary basis for initiating prosecution, the consequences of revoking decisions not to initiate or to terminate prosecution, and the investigator's involvement in the initiation process. Drawing on doctrinal interpretation, the historical development of Armenian criminal procedure, relevant judicial decisions and selected comparative approaches, the article argues that lowering the threshold for initiating prosecution does not authorise decisions based on unsupported or merely speculative suspicion. Initiation requires an evidence-based hypothesis, capable of being formulated as a charge, that a particular person committed an offence, without requiring proof of guilt. The article further demonstrates that revoking a decision not to initiate prosecution should not automatically entail its initiation; the statutory grounds and ordinary procedure must be independently assessed. Conversely, revocation of a decision terminating existing prosecution should restore that prosecution without a further initiation decision. Finally, the article identifies the exclusion of the investigator from substantive decision-making as a structural weakness and proposes that the investigator adopt the decision to initiate prosecution, subject to the supervising prosecutor's approval. These conclusions aim to strengthen procedural coherence while securing an appropriate balance between effective public prosecution and the rights of the individual.

Keywords - *public criminal prosecution; initiation of criminal prosecution; evidentiary threshold; renewal of criminal prosecution; investigator's procedural role; prosecutorial approval; Armenian criminal procedure.*

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The article received 02 September 2026,
reviewed 04 October 2026,
accepted for publication 21 October 2026

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1. Introduction

Criminal prosecution constitutes one of the central institutions of criminal procedure. By signifying the identification, within criminal proceedings, of the person who has committed an offence, criminal prosecution is of fundamental importance for safeguarding both public and private interests. On the one hand, the initiation of criminal prosecution represents the formalisation of the preliminary outcome of activities aimed at establishing the circumstances of an offence, namely, the official attribution of the offence to a specific person. On the other hand, it entails conferring upon that person the procedural status of an accused, thereby giving rise to the principal procedural legal relationships involving that person.

Situated at the intersection of public and private interests, the issues surrounding the initiation of criminal prosecution are extensive, and their scholarly analysis is of particular importance for developing solutions that ensure a balanced protection of those interests. In light of the conceptual changes affecting the institution of criminal prosecution and their far-reaching interpretations, the interpretation of the grounds for initiating criminal prosecution and the procedures for resuming criminal prosecution remain topical. Debate also continues regarding the role and involvement of the investigator in the initiation of criminal prosecution.

2. The Grounds for Initiating Criminal Prosecution

The question of what result of evidentiary activity should serve as the basis for deciding to initiate criminal prosecution against a person continues to be a matter of scholarly debate. At the same time, the consequences of the failure to clearly define the grounds for initiating criminal prosecution have included, and continue to include, in some cases, the premature conferral of accused status upon a person and unjustified interference with his or her rights, while in other cases, delays in initiating criminal prosecution, situations in which a person is subjected to de facto criminal prosecution, and failures to provide that person with a full range of means for defending against the charge.

The study demonstrates that the wording of the grounds for charging a person with an offence has varied across criminal procedural codes adopted during different periods. For example, the Soviet Criminal Procedure Codes of 1922 provided that an investigator was to issue a reasoned decision on bringing a person in as an accused where there were sufficient data providing *grounds for charging that person with having committed an offence.* Article 135 of the Criminal Procedure Code of the Republic of Armenia of 1961 provided that: "*Where there is*

sufficient evidence providing grounds for charging a person with having committed an offence, the investigator shall issue a reasoned decision on holding that person liable as an accused."

Although, under the aforementioned regulations, sufficient evidence constituted the basis for bringing a charge against a person, such evidence was not intended to create a conviction that the person had committed an offence, but was merely sufficient to present to that person the charge, namely, the hypothesis that he or she had committed an offence, and to notify the person of the existence of a suspicion of having committed an offence. Nevertheless, the interpretation of the grounds for bringing a charge against a person generally came down to the position that *bringing a charge required a body of sufficient evidence establishing the fact that the offence had been committed by that person.* This was primarily attributable to the fact that bringing a charge was not the only form of initiating criminal prosecution, and that conferring suspect status upon a person, as the initial form thereof, on the basis of a lower degree of suspicion of having committed an offence, implied that a charge should be brought only where a more reliable conclusion could be reached in that regard. In addition, Soviet criminal procedure was characterised by an established understanding that a decision to bring a person in as an accused could be adopted, and that the person could be charged with having committed an offence, only on the basis of compelling grounds.

This approach was also attributable to the fact that bringing a charge against a person was not regarded as merely a preliminary procedural act, and it was considered that a person who was charged with having committed an offence was guilty.

Thus, I. Ya. Foinitsky noted that, in order to adopt a decision to bring a person in as an accused, it was necessary to "be convinced that the person involved in the investigation is reasonably suspected of having committed an offence[1]." Other authors likewise stated that, in order to bring a person in as an accused, the competent authority had to be absolutely convinced that the person had committed an offence[2].

Contrary to these approaches, some authors regarded probable knowledge that the offence had been committed by the person concerned as the basis for bringing a charge against that person. In particular, P. A. Lupinskaya noted that "the existence of data sufficient to bring a person in as an accused, which entitles the investigator

[1] See **Foinitsky, I. Ya.** Course of Criminal Procedure. Vol. I. 4th ed. St. Petersburg: Printing House of the "Obshchestvennaya Polza" Partnership, 1912, p. 75.

[2] See **Polyansky, N. N**. Issues of the Theory of Soviet Criminal Procedure. Moscow: Moscow University Press, 1956, p. 186; **Zhogin, N. V., Fatkullin, F. N.** Preliminary Investigation in Soviet Criminal Procedure. Moscow: Yuridicheskaya Literatura, 1965, pp. 191–192.

to adopt such an important procedural decision, does not mean that the truth in the case has been established in all respects. [3]" M. S. Strogovich stated that "...at the moment when a person is brought in as an accused, the guilt of that person cannot be considered proven, and the investigator is required to be convinced that the evidence already collected is sufficient to place that person in the position of an accused of committing an offence, but not in the position of a guilty person[4]." Supporters of this approach noted that "the degree to which the circumstances constituting the substance of the charge brought against a person have been established reflects probable knowledge, which is 'characterised by a gradual increase in its reliability, whereby an increase in the amount of information received (provided that the requirements of the criminal procedural law concerning the rules of evidence are complied with) leads to the acquisition of a new quality. [5]"

Despite these attempts to lower the high threshold of sufficient evidence required for initiating criminal prosecution, as well as the arguments advanced in support thereof that bringing a person in as an accused also serves to safeguard his or her rights, particularly the right to be informed of the charge and the right to defend against it, legal practice did not abandon the widespread practice of conducting the investigation without formally bringing the person in as an accused and notifying him or her of the charge only immediately before referring the case to the court. Assertions that a person should be accorded accused status only on the basis of a sufficient body of admissible, relevant, and reliable evidence continued to be advanced in legal scholarship as well.[6]

The 1998 Criminal Procedure Code of the Republic of Armenia, in turn, did little to alleviate the problem and, rather, further exacerbated it by expressly providing in Article 202 part 1 that "the basis for bringing a person in as an accused is the body of sufficient evidence indicating that the person committed the offence." By referring not merely to evidence sufficient to present to a person the hypothesis that he or she had committed an offence, but specifically to sufficient evidence indicating that the offence had been committed by that person, the former criminal procedural legislation left virtually no scope for distinguishing between the bodies of evidence sufficient, respectively, to bring a charge against a person, to conclude the pre-trial investigation with an indictment, and to convict the person. Consequently, even during the period of validity of the former criminal

[3] See **Lupinskaya, P. A**. Proof in Soviet Criminal Procedure. Moscow, 1966, p. 55.
[4] See **Strogovich, M. S**. The Accused's Right to Defence and the Presumption of Innocence. Moscow: Nauka Publishing House, 1984, p. 33.
[5] See **Karieeva, L. M.** Bringing to Criminal Liability: Legality and Justification. Moscow, 1971, p. 15.
[6] See **Kudin, F. M., Kostenko, R. V.** Sufficiency of Evidence in Criminal Proceedings: A Monograph. Krasnodar: KG AU, 2000, pp. 85–86.

procedural legislation, the body of sufficient evidence indicating that an offence had been committed continued to be assessed at the discretion of the competent authorities, resulting in cases of both premature and delayed initiation of criminal prosecution.

Article 189 part 1 of the Criminal Procedure Code of the Republic of Armenia, adopted in 2021 (hereinafter also referred to as the "Code"), provides that "public criminal prosecution against a person shall be initiated by a decision of the supervising prosecutor on the basis of facts indicating that the person committed an offence." As is evident from the quoted provision, in defining the basis for initiating criminal prosecution, the legislature abandoned the reference to evidence or a sufficient body of evidence, instead considering the basis for conferring accused status on a person to be not evidence indicating that the person committed an offence, but facts indicating the commission of an offence by that person. Such wording of the grounds for initiating criminal prosecution has given rise to further debate on the matter.

Thus, professional sources note that, for the initiation of criminal prosecution, "it is not necessary to establish that the person committed the alleged offence and is guilty thereof (as was the case under the 'sufficient body of evidence' standard); nor is it necessary for the suspicion that the person committed the offence to be compelling (the threshold of reasonable suspicion). Rather, it is only necessary for an individualised suspicion of the commission of an offence to arise, that is, for the commission of the alleged offence by the person concerned, based on forensic experience, to constitute one of the reasonably possible (reasonably non-excludable) suspicions, which, however, does not preclude the possibility of other suspicions."

Such a threshold of suspicion constitutes one of the reasonably possible alternatives, which must have a certain factual basis, exceed so-called intuitive perceptions, and clearly individualise the person suspected of having committed the alleged offence. However, it does not, in any way, require or presuppose proof of all (or any) elements of the offence or a compelling demonstration (high probability) that the person committed the offence. Such suspicion may arise, for example, where, in an oral report of an offence, a specific person is identified as the perpetrator, accompanied by clearly identifying information concerning that person (his or her first and last name and other necessary identifying information). [7]

[7] See **A. Ghazaryan**, "The Threshold of 'Suspicion' Required for the 'Entry' of an Accused into Criminal Proceedings (The Force of Inertia or the Disregard of the Legislative 'Revolution' in Law-Enforcement Practice)," Constitutional Court Bulletin, No. 4(112), 2023, pp. 11–38.

While acknowledging the view that the current Criminal Procedure Code, by abolishing the procedural status of the suspect and linking criminal prosecution exclusively to the conferral of accused status upon a person, has lowered the evidentiary threshold required for initiating criminal prosecution,[8] we consider its extreme interpretations unwarranted and problematic in practice.

First, although it is acceptable that the initiation of criminal prosecution against a person does not require all elements of the offence to be proven, this cannot mean that the basis for initiating criminal prosecution is lower than even the evidentiary standard of "reasonable suspicion." It is important to note that the basis for detention, as a coercive measure that may be applied even prior to the initiation of criminal proceedings, is a *reasonable suspicion* of having committed an offence that has arisen directly. This, in itself, does not permit the basis for the subsequent formal initiation of criminal prosecution against the person to be regarded as falling below that standard.

The interpretation of the grounds for initiating criminal prosecution and conferring upon a person the procedural status of an accused cannot disregard the fact that the consequences of such procedural status are not limited to acquiring the means to become aware of the charge and to defend against it. Even if we leave aside the risks to the exercise of the right, deriving from the principle of the presumption of innocence, to be regarded as innocent until a court judgment is rendered—risks that exist in our society and are manifested in the immediate and irreversible perception of an accused person as guilty—we cannot ignore that the procedural status of an accused may, and does, entail other significant procedural and extra-procedural consequences for the person, such as suspension from the exercise of official duties, an adverse integrity assessment, restrictions on career advancement, and so forth.

It is clear from the statutory formulation of the grounds for criminal prosecution that it refers to facts which indicate, that is, form a certain degree of conviction that the person committed an offence. The formation of even such a preliminary conviction presupposes sufficient evidence giving rise to it. Put more simply, treating facts as indicative of something presupposes that a certain degree of conviction has been formed in this regard, which goes beyond the mere existence of multiple possible hypotheses.

[8] See Practical Guide to the Conceptual Solutions, Innovative Approaches, and Interpretation of the Main Institutions of the New Criminal Procedure Code of the Republic of Armenia, Council of Europe, July 2022. p. 110.: https://rm.coe.int/new-criminal-procedure-code-guideline-/1680a72908 (last accessed: September 10, 2026)

In this context, it is likewise inappropriate to contrast the concepts of "facts indicating that an offence has been committed" and "a body of sufficient evidence indicating that an offence has been committed" in such a way as to suggest that the existence of facts without evidence is possible. The point is that the facts indicating that an offence was committed by a particular person, as facts set out in the decision to initiate criminal prosecution against that person and attributed to that person, cannot exist independently of evidence and proof. This is evidenced by the provisions of criminal procedural law stipulating that, in criminal proceedings, the event and the circumstances thereof are subject to proof, and that evidence constitutes data concerning a fact, which means that, in criminal proceedings, facts cannot exist without evidence.

It is noteworthy that the idea that, in order to initiate criminal prosecution, the competent official must, on the basis of certain evidence, be satisfied that the person who, by virtue of that official's decision, is accorded the procedural status of an accused has apparently committed an offence is expressed not only in Soviet or Russian scholarly literature, which reflects or is closely related to our legal traditions, but also in American and European legal scholarship. Thus, although the Italian Code of Criminal Procedure does not establish any evidentiary standard for initiating criminal prosecution, legal scholarship interpreting Article 335 thereof notes that "the prosecutor must enter the suspect's details in the relevant register of the public prosecutor's office and thereby recognise that person as a suspect when he or she considers that the person has committed an offence.[9]" Under American law as well states that the basis for initiating criminal prosecution is probable knowledge founded on certain facts.[10] Moreover, Article 313 of the Polish Code of Criminal Procedure regards a *"sufficiently substantiated suspicion" (dostatecznie uzasadnione podejrzenie)* that an offence was committed by a specific person as the basis for conferring accused status upon that person. Legal scholarship further expresses the view that such suspicion "must be objectively based on verified facts."[11]**:**

Considering that, pursuant to Article 6, Part 1, Clause 41 of the Criminal Procedure Code of the Republic of Armenia, the initiation of criminal prosecution constitutes the adoption by the prosecutor of a decision describing the person's

[9] See **Kremens, Karolina**. (2021). Powers of the Prosecutor in Criminal Investigation: A Comparative Perspective. New York: Routledge. p. 236.

[10] See **Kremens, Karolina**. (2021). Powers of the Prosecutor in Criminal Investigation: A Comparative Perspective. New York: Routledge. pp. 247-248.

[11] See **Kosonoga J** (2016) Przedstawienie zarzutów. In: Ryszard Stefański (ed) System Prawa Karnego Procesowego. Postępowanie przygotowawcze. Volume X. Wolters Kluwer, Warsaw, p. 745.

alleged criminal act and containing its legal assessment, that is, the formulation of the charge against that person, the basis for initiating criminal prosecution cannot therefore be interpreted outside the context of the concept of "charge" and the requirements applicable to the formulation of the charge. Thus, pursuant to Article 6, Part 1, Clause 42 of the Criminal Procedure Code of the Republic of Armenia, "a charge is a hypothesis that a specific person has allegedly committed an offence, which has a factual and legal basis." Part 4 of Article 189 of the Code provides that the decision on initiating criminal prosecution shall indicate, inter alia, "the factual basis of the charge—the nature of the act attributed to the person, the place, time, manner of its commission, and other circumstances, insofar as they have been established by the available evidence, as well as the legal assessment of the act."

The Court of Cassation of the Republic of Armenia has expressed legal positions concerning the formulation of a charge, stating that:

-"The importance attached to the formulation of the charge is due to the fact that its inclusion in the relevant procedural documents (the decision to bring a person in as an accused and the indictment) enables the person subject to criminal prosecution to exercise his or her right to defence effectively.[12]"

- In the formulation of the charge, in addition to the information concerning the perpetrator, the place, time, and manner of commission of the offence, the facts underlying the criminal-law classification of the act must be set out in detail and with precision, including a comprehensive description of the occurrence of the offence and the circumstances related thereto. From the perspective of the exercise of the fundamental right to a fair trial, it is unacceptable for a competent official, when formulating the charge in the relevant procedural documents, to confine the charge merely to a general description of the act prohibited by criminal law. Likewise, it is unacceptable, to bring the same charge against the co-perpetrators without specifying the particular acts of each of them and the nature and degree of each person's participation in the offence, when an offence has been committed by a group of persons[13]»:

It is obvious that, even on the basis of the foregoing, it is impossible to establish precisely in which circumstances facts may be regarded as indicating that an offence was committed by a person, or when evidence may be considered sufficient to formally attribute those facts to the person as a charge, since this is always an integral part of the individual process of proof. Moreover, as with any

[12] See paragraph 19 of the Decision of the Court of Cassation of the Republic of Armenia of 5 November 2010 in the case of **Arkadi Patvakani Papyan**, Case No. ՏԴ/0115/01/09.

[13] See paras. 19, 21 and 27 of the Decision of the Court of Cassation of the Republic of Armenia of 24 August 2012 in the case of **Grigor Chagharyan** and Others, Case No. ԵՇԴ/0002/01/11.

issue concerning the balanced exercise of public and private interests, the problem in this case lies not so much in the legal regulation as in the proper application of the law. It is, naturally, impossible to establish a categorical and non-discretionary basis for initiating criminal prosecution. In practice, preventing premature or delayed criminal prosecution, and the resulting infringement of a person's legitimate interests, depends on the legal consciousness of each law enforcement practitioner and on a proportionate approach to public and private interests. It is noteworthy that numerous legal scholars have raised concerns regarding the discretionary assessment of the grounds for initiating criminal prosecution and have argued that "conferring accused status upon a person is the duty of the competent authority from the moment when there are reasoned grounds for believing that the person has committed an offence. [14]"

However, a comprehensive analysis of the statutory formulation of the grounds for initiating criminal prosecution, the components of the charge set out upon its initiation, and the requirements applicable to the decision to initiate criminal prosecution permits the conclusion that the supervising prosecutor is obliged to initiate criminal prosecution where there is a hypothesis, based on the evidence or body of evidence obtained in the proceedings, that a person has committed a specific offence prescribed by the Criminal Code of the Republic of Armenia. On the one hand, the initiation of criminal prosecution does not require the fact that the offence was committed by the person be regarded as established, confirmed, proven, not subject to verification, or exceptionally reliable; on the other hand, an unexplained assumption that the person committed an offence, or a probable suspicion based on forensic experience that constitutes merely one among several possible suspicions, is insufficient to confer accused status upon that person. The authors advocating the contrary approach outlined above do not explain, in the context of the requirements concerning the structure and formulation of the charge, how the facts of the act attributed to the person are to be formulated in the decision to initiate criminal prosecution when there is no evidence whatsoever concerning those facts, or how the act attributed to the person is to be set out in the charge, for example, where, based on forensic experience, there are equally individualised suspicions that one of several persons committed the offence without co-perpetrators. Can criminal prosecution be initiated against more than one person for having committed the same offence individually? The answer is obvious.

[14] See **Brodzisz** (2018) Komentarz do art. 303 k.p.k. In: Jerzy Skorupka (ed) Kodeks postępowania karnego. Komentarz. CH Beck, Warsaw. P. 754.

Therefore, insofar as a charge constitutes a hypothesis that a person has committed an offence and has a factual and legal basis, and insofar as the decision to initiate criminal prosecution, which sets out the charge, specifies the nature of the act attributed to the person, the place, time, manner of its commission, and other circumstances to the extent that they have been established by the available evidence, it follows that **the initiation of criminal prosecution against a person requires a preliminary hypothesis, based on evidence and capable of being formulated, that the person committed an offence.**

3. Renewal of Criminal Prosecution as a Ground for Its Initiation.

Although debates concerning the grounds for initiating criminal prosecution against a person have focused on the sufficiency of evidence or facts required for such initiation, the Criminal Procedure Code of the Republic of Armenia also provides for an equally problematic formal ground and a mandatory situation for adopting such a decision in the course of renewing criminal prosecution.

The renewal of criminal prosecution constitutes the restoration of criminal prosecution that had been excluded and takes place where the decision excluding criminal prosecution is unlawful because it was adopted in violation of the law or because new factual or legal circumstances have emerged. Although the renewal of criminal prosecution always takes place through the revocation of the decision excluding criminal prosecution, the legislature has expressly defined “renewal of criminal prosecution” as referring only to some of the circumstances in which such a decision is revoked.

Thus, the Code provides for the procedure and consequences of revoking decisions not to initiate criminal prosecution and decisions terminating criminal prosecution within the framework of the procedure for challenging such decisions, whereas Article 198, entitled “Renewal of Criminal Prosecution Not Initiated or Terminated,” regulates the procedure and circumstances for revoking only those decisions excluding criminal prosecution that have entered into legal force. This gives the impression that the legislature considers the “renewal of criminal prosecution” to mean the revocation only of decisions excluding criminal prosecution that have entered into legal force, that is, the restoration of criminal prosecution only where the decision excluding it has entered into legal force.

On the other hand, however, Part 2 of Article 25 of the Code provides that the existence of a decision not to initiate criminal prosecution or a decision terminating criminal prosecution that has entered into legal force precludes the renewal of criminal prosecution. It may therefore be inferred that, where a decision excluding

criminal prosecution has not entered into legal force, the renewal of criminal prosecution is not precluded. Moreover, the provision of Part 11 of Article 196 of the Code, according to which "where a court upholds a complaint against a decision not to initiate criminal prosecution or to terminate criminal prosecution, the competent prosecutor shall initiate criminal prosecution or renew it," likewise indicates that the renewal of criminal prosecution also takes place where a decision excluding criminal prosecution that has not yet entered into legal force is revoked.

Reiterating that the renewal of criminal prosecution constitutes the restoration of criminal prosecution that had been excluded, it should also be noted that, from a purely terminological perspective, there is no difference as to whether its restoration takes place following the revocation of a decision that has already entered into legal force or one that has not yet entered into force. Therefore, the renewal of criminal prosecution constitutes the restoration of previously excluded criminal prosecution, irrespective of the procedure by which such restoration takes place.

A systematic analysis of the Criminal Procedure Code of the Republic of Armenia demonstrates that the legislature considers it possible to renew not only terminated criminal prosecution but also criminal prosecution that has not been initiated. This conclusion follows directly from the title of Article 198 of the Code, "Renewal of Criminal Prosecution Not Initiated or Terminated," as well as from the provision of Part 2 of Article 25 stating that *"a decision not to initiate criminal prosecution that has entered into legal force precludes the renewal of criminal prosecution."* It follows, therefore, that in order to renew criminal prosecution, the decision not to initiate it must first be revoked and, accordingly, criminal prosecution is renewed following such revocation.

On the other hand, pursuant to Part 11 of Article 196 of the Code, "where a court upholds a complaint against a decision of a superior prosecutor confirming the lawfulness of the decision not to initiate criminal prosecution or to terminate criminal prosecution, the *competent prosecutor shall initiate criminal prosecution or renew it."* Alternatively, pursuant to Part 4 of Article 198 of the Code, "where decisions *not to initiate criminal prosecution or to terminate criminal prosecution* are revoked, criminal *prosecution shall be initiated or renewed.*" It also follows from the above provisions that the term "renew" applies only to cases involving the revocation of a decision to terminate criminal prosecution; that is, only terminated criminal prosecution may be renewed, whereas the consequence of revoking a decision not to initiate criminal prosecution is the initiation of criminal prosecution. It should be noted that, from a purely terminological perspective, the term

"renew"[15] is indeed understood as referring to the restoration or reactivation of something that previously existed; therefore, criminal prosecution that has not previously existed cannot be renewed.

However, the issue under consideration is not merely terminological and gives rise to practical problems, since, in substantive terms, the legislature has in fact adopted the approach of "renewing criminal prosecution that has not been initiated."

Thus, it is clear from the above-quoted provisions of Part 11 of Article 196 and Part 4 of Article 198 of the Code that they regard the initiation of criminal prosecution as the consequence of revoking a decision not to initiate criminal prosecution. Put more simply, revocation of a decision not to initiate criminal prosecution against a person makes the initiation of criminal prosecution against that person mandatory in every case, which is nothing other than the "renewal" of criminal prosecution that had not previously been initiated.

However, the concept of renewing criminal prosecution that has not been initiated, and the resulting obligation to automatically initiate criminal prosecution upon revocation of a decision not to initiate criminal prosecution, are incompatible with the fundamental rules governing the grounds for initiating criminal prosecution discussed above. The point is that, although the basis for initiating criminal prosecution consists of facts indicating that the person committed an offence, where a decision not to initiate criminal prosecution is revoked, criminal prosecution is initiated solely by virtue of that legal circumstance itself. Apart from the fact that initiating criminal prosecution against a person solely by virtue of a particular legal circumstance is conceptually incompatible with the very notion of criminal prosecution. It is also unclear how criminal prosecution can be initiated at all merely as a result of the revocation of a procedural decision, without consideration of the facts indicating that an offence has been committed.

Moreover, this would mean that, by virtue of the revocation of a decision not to initiate criminal prosecution, criminal prosecution may be initiated against a person even where the decision revoking it contains no finding as to the existence of facts indicating that the person committed an offence and was adopted, for example, solely on the ground that there remain unresolved circumstances relevant to determining whether criminal prosecution should be initiated.

The above-described mechanism for renewing criminal prosecution that has not been initiated bypasses not only the grounds for initiating criminal prosecution but

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[15] "To reform, correct, rebuild, restore to use." See **Eduard Aghayan**, Explanatory Dictionary of Modern Armenian, Hayastan Publishing House, Yerevan, 1976, p. 1085; **Stepan Malkhasyants**, Explanatory Dictionary of the Armenian Language, Yerevan: State Publishing House of the Armenian SSR, 1944, p. 1628.

also the procedure for such initiation. As a result, contrary to the provisions of Parts 2 and 6 of Article 189 of the Criminal Procedure Code of the Republic of Armenia, the decision to initiate criminal prosecution is adopted neither upon the investigator's motion nor, on the basis of the materials of the proceedings, on the initiative of the supervising prosecutor. Under the procedure described above, criminal prosecution is initiated against a person solely by virtue of the revocation of the decision not to initiate criminal prosecution against that person, on the basis of that decision itself.

In our view, in order to eliminate the identified problems, the institution of the renewal of criminal prosecution requires a fundamental reform. Accordingly, the term "renewal of criminal prosecution" should refer exclusively to the revocation of a decision to terminate criminal prosecution, irrespective of whether that decision has entered into legal force. The revocation of a decision to terminate criminal prosecution should result in the automatic restoration of the terminated criminal prosecution, without repeating the procedure for initiating criminal prosecution, that is, without adopting a new decision to initiate criminal prosecution. In other words, as a result of the revocation of the decision to terminate criminal prosecution, the decision to initiate criminal prosecution against the person should regain legal force.

As for the revocation of a decision not to initiate criminal prosecution, this cannot, in any circumstances, be regarded as the renewal of criminal prosecution. A decision of revoking a decision not to initiate criminal prosecution cannot constitute a ground or basis for restoring criminal prosecution, insofar as no criminal prosecution had previously been initiated and, consequently, there was no prosecution in existence that could be renewed. The revocation of a decision not to initiate criminal prosecution cannot, in itself, constitute a ground for initiating criminal prosecution against a person. In such a case, the question of initiating criminal prosecution should be resolved in accordance with the general procedure prescribed by the Code, upon the investigator's motion or on the initiative of the supervising prosecutor, on the basis of an assessment of the facts indicating that the person committed an offence.

4. The Investigator's Involvement in the Initiation of Criminal Prosecution

The Criminal Procedure Code of the Republic of Armenia, departing from the approach initially envisaged in its Concept[16], according to which "the initiation of

[16] Concept of the New Criminal Procedure Code of the Republic of Armenia. Approved by Protocol Decision No. 9 of the Session of the Government of the Republic of Armenia of 10 March 2011.

criminal prosecution" was to be understood as the approval by the supervising prosecutor of the investigator's decision to bring a person in as an accused, instead established that it constitutes the direct adoption of such a decision by the supervising prosecutor, upon the investigator's motion or on the prosecutor's own initiative (Article 189).

The Practical Guide to the Conceptual Solutions, Innovative Approaches, and Interpretation of the Principal Institutions of the New Criminal Procedure Code of the Republic of Armenia explains this approach by stating that "the initiation of criminal prosecution is an exclusive function of the prosecution, that the prosecutor is an official who implements the State's criminal policy and is accountable for doing so, and that, under these circumstances, it is logical that all decisions concerning criminal prosecution are made exclusively by the prosecutor.[17]" It is noteworthy that the Concept, likewise explaining the proposed regulation by reference to the prosecutor's pivotal rolein the initiation of criminal prosecution[18], did not consider it necessary, for the purpose of ensuring such a role, to exclude the substantive involvement of any other actor besides the prosecutor.

First, it should be noted that the underlying premise of the adopted approach—that the implementation of the State's criminal policy is the exclusive prerogative of the prosecutor—is, at the very least, open to debate, having regard to the substance of the prosecutor's functions and their relationship with other functions within criminal proceedings. It is unclear why the prosecutor, who oversees the legality of pre-trial proceedings, initiates criminal prosecution, prosecutes the case before the court, and appeals judicial decisions, is regarded as implementing the broadly defined criminal policy, whereas the investigator, who performs the investigative function underlying these very functions, is not similarly regarded as an actor implementing that policy. Yet even more difficult to understand is the proposition that, because the prosecutor implements the criminal policy, the prosecutor should therefore initiate criminal prosecution without the substantive involvement of the investigator in that process.

In our view, this approach adopted by the legislature overstates the necessary role of the supervising prosecutor in initiating criminal prosecution, while entirely disregarding the indispensable role of the investigative function performed by the investigator in making such a decision. Rather than assigning a decisive role to the

[17] See Practical Guide to the Conceptual Solutions, Innovative Approaches, and Interpretation of the Main Institutions of the New Criminal Procedure Code of the Republic of Armenia, Council of Europe, July 2022, p. 288. https://rm.coe.int/new-criminal-procedure-code-guideline-/1680a72908 (last accessed: September 10, 2026)

[18] See para. 3.4 of the Concept of the New Criminal Procedure Code of the Republic of Armenia.

supervising prosecutor in the initiation of criminal prosecution, the Code's provisions have effectively excluded the investigator from participating in the adoption of a procedural decision that is of pivotal importance both to the criminal proceedings as a whole and, in particular, to the investigative function performed by the investigator. This regulation overlooks that the facts constituting the grounds for initiating criminal prosecution are established precisely as a result of the evidentiary activities carried out by the investigator, who is the procedural actor responsible for establishing those facts and for directly perceiving them. It clearly fails to take into account that, irrespective of the manner in which the conduct and results of evidentiary activities are recorded and the opportunities available for reviewing them, neither the supervising prosecutor nor any other procedural actor can have a better understanding of the probative value of each item of evidence, or form a more accurate inner conviction on the basis thereof, than the investigator who has had direct contact with the source from which that evidence was obtained and has directly perceived the relevant information. Moreover, the investigator is excluded from any substantive involvement in adopting the decision to initiate criminal prosecution, even though that decision alters the procedural relationships involving the investigator, enables the investigator to perform a number of procedural actions, and gives rise to procedural duties incumbent upon the investigator.

It is by no means accidental, and is precisely attributable to the foregoing considerations, that Parts 2 and 3 of Article 189 of the Criminal Procedure Code of the Republic of Armenia effectively establish the adoption of the decision on the basis of a motion by the investigator as the principal procedure for initiating criminal prosecution. In that motion, the investigator sets out the information established as a result of the pre-trial investigation conducted by the investigator, which must be included in the supervising prosecutor's decision to initiate criminal prosecution. This regulation and the practice developed on its basis confirm that the investigator is the procedural actor who identifies, records, and assesses the facts constituting the grounds for initiating criminal prosecution, and it is therefore entirely natural that the investigator should be the first to respond to those facts.

Although it may appear that initiating criminal prosecution upon the investigator's motion already entails the investigator's necessary involvement in the process, in reality, apart from formally bringing the matter before the prosecutor, the investigator has no substantive role in the initiation of criminal prosecution. The point is that, although, pursuant to Point 22 of Part 1 of Article 41 of the Criminal Procedure Code of the Republic of Armenia, the investigator may file an objection against the supervising prosecutor's decision rejecting the

investigator's motion to initiate criminal prosecution, the investigator's filing of such an objection has, in practice, ceased to serve as a means of expressing the investigator's position, as a result of the rejection of virtually all such objections, largely due to institutional interests. Moreover, by the "directive" of the Prosecutor General of the Republic of Armenia dated 20 December 2022, it was established that an investigator's objections to a supervising prosecutor's decision rejecting a motion to initiate criminal prosecution are not subject to consideration, and no decision may be rendered thereon. This document, which directly contradicts the Criminal Procedure Code, is likewise premised on the view that the initiation of criminal prosecution falls within the prosecutor's exclusive powers. However, the document does not explain how the investigator's filing of such an objection could compromise the exclusivity of the prosecutor's function of initiating criminal prosecution, given that the objection is considered by the prosecutor and the question of whether to initiate criminal prosecution is, in any event, decided by the prosecutor. It is likewise unclear why the submission of a motion to initiate criminal prosecution does not undermine the exclusivity of that prosecutorial power, whereas an objection lodged by the same investigator against the decision on that motion does, despite the fact that, in substance, the latter is likewise merely an initiative to initiate criminal prosecution.

In that case, however, when the prosecutor's exclusive authority to dispose of criminal prosecution is treated as absolute and invoked as a basis for excluding the investigator's substantive involvement in the initiation of criminal prosecution, it is worth considering why it is the investigator who presents the decision to initiate criminal prosecution to the accused and thereby completes the process of initiating criminal prosecution. Or, why is it, nevertheless, that the indictment, which is the sole document setting out comprehensively the charge and the evidence underlying it and constituting the basis for the prosecution's presentation of the case before the court, is prepared not by the same prosecutor who exercises the exclusive functions of initiating criminal prosecution and presenting the prosecution's case before the court, but by the investigator? Moreover, the investigator, who is not entitled to participate in the initiation of criminal prosecution, despite the fact that such initiation results from the pre-trial investigation conducted by the investigator and has a decisive impact on that investigation, prepares the indictment serving as the basis for the examination of the case by the court, even though the investigator does not participate in the judicial proceedings in any manner or perform any function at that stage, while the prosecutor's function of presenting and maintaining the prosecution before the court is, indeed, an indisputably exclusive power. Against the backdrop of the approach adopted by the legislature and taken

to extremes and abused in practice, it is unclear why the investigator participates in preparing for the exercise, in the judicial proceedings, of the supervising prosecutor's exclusive power, even where the investigator disagrees with concluding the pre-trial investigation in that manner and considers that the criminal prosecution should be terminated and the proceedings discontinued. Moreover, in order to preclude a situation in which the investigator would be required to act contrary to his own procedural conviction when deciding whether to initiate criminal prosecution, Point 7 of Article 189 of the Criminal Procedure Code of the Republic of Armenia expressly provides that the prosecutor may not instruct the investigator to submit a motion to initiate criminal prosecution containing specified content or to prepare a draft of such a decision. Why, then, is the prosecutor entitled to instruct the investigator to prepare an indictment of specific content, which unquestionably serves solely as the basis for the prosecutor's function of presenting and maintaining the prosecution before the court and has no bearing whatsoever on the investigative function that has already been completed by the investigator? This cannot be explained by the logic of the prosecutor's absolute and exclusive authority to dispose of the charge.

In reality, however, the organic connection between the investigative function and the mechanism for initiating criminal prosecution requires that the investigator have clear and effective substantive involvement in the process of initiating criminal prosecution, including the authority to make the relevant decision. The prosecutor's decisive role in this pivotal stage of criminal proceedings should be exercised through approval of the decision to initiate criminal prosecution, without which that decision should have no legal effect.

The correctness of this approach is demonstrated not only by the artificial separation, under the current legal framework, between the authority to initiate criminal prosecution and the investigative function that makes such initiation possible, but also by the practical elimination of the procedural significance of the investigator's position in determining whether criminal prosecution should be initiated. This is not merely, or even primarily, a theoretical issue arising from the disruption of the organic connection between procedural functions; rather, it is a cause of practical situations that may, at times, bring the investigation to an impasse. The absence of an effective means of objecting to the prosecutor's position not to initiate criminal prosecution and of having that issue reconsidered by a superior prosecutor may result, and in practice does result, in a situation where, as a consequence of the supervising prosecutor's "unchallengeable" position not to initiate criminal prosecution, the investigator at least loses the

opportunity to carry out evidentiary measures that could have been undertaken had criminal prosecution been initiated against the person.

5. Conclusion

Although the Criminal Procedure Code of the Republic of Armenia has lowered the evidentiary threshold required for initiating criminal prosecution by altering the grounds for such initiation, conferring accused status on a person in the absence of any evidence indicating that the person committed an offence is incompatible with the very concept of criminal prosecution. A combined analysis of the grounds for initiating criminal prosecution, the concept of "charge," and the requirements governing the formulation of a charge demonstrates that initiating criminal prosecution against a person requires a preliminary hypothesis, grounded in evidence and capable of being formulated in procedural terms, that the person committed an offence. At the same time, the continuing practice of, at times, initiating criminal prosecution without any evidence that the person committed an offence and, at other times, delaying such a decision despite the existence of substantial evidence may be overcome by strengthening legal reasoning among law-enforcement authorities grounded in the principle of a balanced protection of public and private interests.

Furthermore, by providing for the revocation of a decision not to initiate criminal prosecution as a form of renewing criminal prosecution and making it mandatory, in such a case, to confer accused status on the person, the legislature has effectively treated even a non-existent criminal prosecution as capable of being renewed. The criminal procedure law has thus provided for the possibility of initiating criminal prosecution against a person in the absence of facts indicating that the person committed an offence, solely by virtue of the formal circumstance of revoking a decision not to initiate criminal prosecution, which is likewise incompatible with the modern concept of criminal prosecution. Therefore, the revocation of a decision not to initiate criminal prosecution should not constitute a form of renewing criminal prosecution, and in such a case, the question of whether to initiate criminal prosecution should be resolved in accordance with the general procedure prescribed by the Code.

Finally, the procedural framework governing the initiation of criminal prosecution, together with its overly restrictive interpretations, has effectively excluded the investigator conducting the pre-trial investigation from participating in the determination of whether criminal prosecution should be initiated, disregarding the fact that the investigator is the sole procedural actor who

establishes and directly perceives the facts constituting the grounds for initiating criminal prosecution. Therefore, the decision to initiate criminal prosecution should be adopted by the investigator and acquire legal effect upon approval by the prosecutor, thereby ensuring, on the one hand, the investigator's participation in this process, which is pivotal to the pre-trial investigation, and, on the other hand, preserving the exclusivity of the prosecutor's authority to initiate criminal prosecution.

Conflict of Interests

The authors declare that there are no ethical issues or conflicts of interest in this research.

Ethical Standards

The authors confirm that this research did not involve other people as research participants.

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DOI: https://doi.org/10.46991/SL/2026.SP2.025

DISAGREEMENTS BETWEEN THE PUBLIC PARTICIPANTS IN THE PROCEEDINGS IN THE PROCEDURE FOR INITIATING CRIMINAL PROCEEDINGS AND THE INITIATION OF CRIMINAL PROCEEDINGS AS A SEPARATE, EXCLUSIVE POWER OF THE INVESTIGATOR

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Abstract. The article examines the problems concerning the relationship between the competences of the public participants in the proceedings and the disagreements arising between them in the procedure for initiating criminal proceedings. Considering the initiation of criminal proceedings as a separate and exclusive procedural power vested in the investigator, the author first addresses the legal significance of the transition from the model of "instituting a criminal case" to the mechanism of "initiating criminal proceedings" and the lawful prerequisites for the commencement of proceedings.

Subsequently, on the basis of a combined analysis of the legal nature of the prosecutor's report and their instruction to initiate criminal proceedings, the author substantiates that a prosecutorial instruction, as a means of supervisory influence, cannot independently replace the occasion prescribed by law for initiating criminal proceedings. In this context, it is proposed to establish legislatively that such an instruction must comply with the requirements prescribed for a prosecutor's report or be accompanied by the corresponding report.

The procedural procedure applicable when an investigator discovers indications of another alleged crime during the preliminary investigation is discussed separately. Through an analysis of the relationship between Articles 41, 173 and 177 of the Criminal Procedure Code of the Republic of Armenia (hereinafter referred to as the Code), the author identifies the normative uncertainty between the power to initiate new proceedings immediately and

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The article received 08 September 2026,
reviewed 07 October 2026,
accepted for publication 19 October 2026

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the requirements for submitting a report of a crime. It is proposed to recognise such discovery as an independent lawful occasion for initiating criminal proceedings. At the same time, it is substantiated that, until the legislative elimination of the aforementioned uncertainty, following any of the possible interpretations of the competing regulations cannot, in itself, constitute a sufficient basis for instituting disciplinary proceedings against the investigator.

Keywords - *initiation of criminal proceedings, public participants in the proceedings, investigator's exclusive power, procedural independence, prosecutorial supervision, instruction, proper report of an apparent crime, occasion for initiating proceedings, conflict of norms.*

1. Introduction

The legal mechanism for initiating criminal proceedings is one of the central issues of criminal procedure, since it determines the commencement of the state's procedural response to information about a crime. The significance of that mechanism is not limited to establishing the formal conditions for commencing a preliminary investigation; it directly concerns the distribution of competences among the public participants in the proceedings, their procedural independence and their responsibility for the decisions adopted. Therefore, the content of the power to initiate criminal proceedings cannot be fully revealed without examining the interrelations between the investigator, the prosecutor and the head of the investigative body.

The replacement, under the Criminal Procedure Code of the Republic of Armenia, of the former model of "instituting a criminal case" with the mechanism of "initiating criminal proceedings" has given new significance to the questions of the occasions for the commencement of proceedings and the competence to assess them. The establishment of the investigator's duty to initiate proceedings upon receiving a proper report requires a clear distinction between the direct competence to initiate proceedings and prosecutorial supervision over its exercise. This distinction is particularly important in cases where the investigator's and the prosecutor's legal assessments of the prerequisites for initiating proceedings do not coincide. The resolution of such disagreements cannot be based solely on official subordination or the binding nature of an instruction, disregarding the legislative allocation of the power in question and the mandatory conditions for its exercise.

In this context, the relationship between the prosecutor's report and their instruction to initiate criminal proceedings is problematic. While the report is regarded as a lawful occasion for initiating proceedings, the instruction is a means of procedural influence between public participants. Equating their legal

significance may lead to a violation of the boundaries between the supervisory power and the direct competence to initiate proceedings. It is therefore necessary to clarify the conditions under which a prosecutor's instruction may ensure the initiation of proceedings while preserving both the effectiveness of prosecutorial supervision and the content of the investigator's exclusive power.

A separate problem also arises when an investigator discovers indications of another alleged crime during the preliminary investigation. The relationship between the norms regulating the direct power to initiate new proceedings and the requirements concerning the form and content of the investigator's report requires clarification as to whether such discovery itself constitutes a sufficient lawful occasion or whether a separate report must be drawn up. This issue has not only theoretical but also practical significance, since it concerns the legality of the initiated proceedings, the possibility of their termination and the limits of the investigator's disciplinary liability.

The purpose of the article is to reveal the content of the separate and exclusive power vested in the investigator to initiate criminal proceedings, distinguish it from prosecutorial supervisory influence and assess the uncertainties existing between the relevant regulations. For this purpose, the regulations concerning the occasions for the commencement of proceedings, the prosecutor's report and instruction, and the investigator's direct discovery of indications of another crime are examined in order to propose solutions ensuring legal certainty and the functional separation of public participants.

2. Main Text of the Article

The initiation of criminal proceedings is one of the central institutions of criminal procedure, since it is from that moment that the state's criminal procedural response acquires a specific procedural form. Therefore, it cannot be regarded as a purely technical action; it is an independent procedural process that predetermines the legal basis of the subsequent preliminary investigation and directly concerns the questions of the delimitation of powers, independence and responsibility of public participants.

In this context, the question of the relationship between the competences of public participants in connection with the initiation of criminal proceedings acquires fundamental significance. Its resolution requires distinguishing, on the one hand, the competence to adopt a specific procedural decision and, on the other hand, the powers of supervision or oversight over the legality of that decision. Equating these legal functions may lead to a situation in which the supervisory

power of a public participant effectively becomes a means of exercising or replacing the decision-making competence vested by law in another participant.

Particularly problematic are cases where the legal assessments of the investigator and another public participant concerning the existence or absence of grounds for initiating proceedings do not coincide. Such a disagreement cannot be regarded merely as an internal organisational or official disagreement, since its subject directly concerns the emergence of a criminal procedural legal relationship and the allocation of the corresponding procedural power. Consequently, the mechanism for its resolution must derive not only from the logic of hierarchical subordination but, first and foremost, from the principles of the functional separation of the participants in criminal procedure and the legislative delimitation of their competences.

From this perspective, characterising the initiation of criminal proceedings as a separate and exclusive power of the investigator implies not the exemption of that power from oversight, but clarification of the subject in whom it is vested. In other words, if the initiation of the process in question is legislatively vested in the investigator, supervisory influence over it must not turn into the transfer or replacement of the primary decision-making competence. It is precisely the determination of this boundary that makes it possible to reveal the actual content of the investigator's procedural independence during the initiation of criminal proceedings and assess the lawfulness of the existing mechanisms for resolving disagreements arising between public participants.

Thus, according to the criminal procedure scholar Malikova, criminal procedural relationships begin when a report of a crime being prepared or already committed is registered in the manner prescribed by law and is regarded as a sufficient ground.[1]

According to Vlasova, the stage of instituting a criminal case begins from the moment the competent body receives and records information about a crime.[2]

It should first be noted that the Code has substantially transformed the legal mechanism of the initial stage of pre-trial proceedings. Under the former Code, it was constituted as an independent procedural stage of "instituting a criminal case," within which information about a crime could be preliminarily verified through the adoption of corresponding procedural decisions. The Code has abandoned that classical model, replacing it with the mechanism of "initiating criminal

[1] Malikova L. N. Improvement of Criminal Procedure Legislation at the Stage of Instituting a Criminal Case // Society and Law. 2008. No. 3, p. 24.
[2] Vlasova N. A. Pre-trial Proceedings in Criminal Procedure. Moscow, 2000, p. 68.

proceedings."[3] Moreover, the Code already defines criminal proceedings as a procedure beginning from the moment of being properly informed of an apparent crime, while establishing the investigator's duty to initiate criminal proceedings upon receiving a proper report. Thus, as a result of the legislative reform, the emphasis has shifted from the preliminary verification of "sufficient grounds for instituting a criminal case" to the immediate initiation of criminal proceedings on the basis of a proper report and the clarification of the corresponding factual circumstances within the proceedings themselves.

Similar positions concerning the concept of an occasion for instituting a criminal case[4] exist in the theoretical literature, which makes it possible to generalise it by citing several main approaches.

Thus, according to Strogovich, these are the sources prescribed by law that provide the inquiry body, the investigator and the prosecutor with information about crimes and oblige them to decide whether a criminal case should be instituted or not.[5] Timushkin has also expressed a similar view.[6]

The approach developed by the Court of Cassation of the Republic of Armenia is also of considerable significance. Its analysis shows that the occasion for instituting a criminal case was not, in itself, sufficient to resolve the question of instituting a criminal case. The information received had to contain at least such data as indicated the existence of signs of a possible crime. It was precisely the existence of such information that necessitated its further verification by the competent body and, as a result, the adoption of a procedural decision to institute a criminal case or refuse to institute it.[7]

In this context, it is necessary to consider the power vested in the investigator to initiate criminal proceedings not only as a separate competence deriving from their procedural status but also from the perspective of its place in the system of interrelations between the public participants in the proceedings. Such an approach is due to the fact that, although the exercise of the aforementioned power is directly

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[3] H. Ghukasyan et al., "The Practical Guide to the Interpretation of the Conceptual Solutions, Innovative Approaches and Main Institutions of the New Criminal Procedure Code of the Republic of Armenia," Council of Europe, 2022, pp. 268–270.

[4] It should be noted that, comparatively, the theoretical discussions of this concept may, to some extent, be extended to the institution of initiating criminal proceedings, since, substantively, as the commencement of proceedings, they have significant features of the same nature.

[5] Strogovich M. S. Course of Criminal Procedure. Vol. II. Procedure in Criminal Cases under Soviet Criminal Procedure Law. Moscow, 1970, p. 13.

[6] Criminal Procedure Law of the Russian Federation / Responsible editor P. A. Lupinskaya. 3rd edition, revised and supplemented. Moscow, 2000, p. 270.

[7] Decision No. VB-133/07 of the Court of Cassation of the Republic of Armenia of 13 July 2007. https://arlis.am/hy/acts/38640/print/act_changes.

vested in the investigator, legal interactions with the supervising prosecutor, the head of the investigative body and other public participants may arise in the process of its exercise. Consequently, the content and limits of the investigator's power to initiate criminal proceedings cannot be fully revealed by isolating it from the supervisory, organisational and instructional relationships existing between public participants. It is precisely in the context of those relationships that it is possible to assess the extent to which the power in question actually expresses the investigator's procedural independence and within what limits the influence of another public participant may be regarded as lawful without replacing or narrowing the content of the competence vested in the investigator by law.

When examining the power vested in the investigator to initiate criminal proceedings in the context of the interrelations between the public participants in the proceedings, particular attention should be paid to the role of the prosecutor, including the superior prosecutor. On the one hand, the Code has vested the duty to initiate criminal proceedings exclusively in the investigator, establishing that the latter, within the limits of their competence, is obliged to initiate criminal proceedings upon receiving a proper report of an apparent crime. Moreover, among the possible sources of such a report, the prosecutor's report in connection with the exercise of their powers is also expressly provided for.[8] Separate formal and substantive requirements are also prescribed for the prosecutor's report: it must take the form of a duly authenticated official letter, an email or another accepted form of report and disclose, among other things, the power during the exercise of which the fact of an apparent crime became known to the prosecutor.[9]

At the same time, the Code provides a special mechanism for the superior prosecutor to respond to the discovery of indications of an apparent crime. Thus, where the superior prosecutor discovers indications of an apparent crime while exercising their powers during pre-trial proceedings, they immediately instruct the supervising prosecutor to take measures towards initiating criminal proceedings and commencing a preliminary investigation.[10] The supervising prosecutor, in turn, upon discovering indications of an apparent crime while exercising their powers, is entitled to instruct the investigator immediately to initiate criminal proceedings and commence a preliminary investigation.[11] Thus, in relation to the same legal fact—the prosecutor's discovery of indications of an apparent crime during the exercise of their powers—the Code provides two mechanisms that, at first glance, are

[8] Article 173, paragraph 1, subparagraph 4 of the Code.
[9] Article 177, paragraphs 1 and 2 of the Code.
[10] Article 37, paragraph 1, subparagraph 1 of the Code.
[11] Article 38, paragraph 1, subparagraph 2 of the Code.

interconnected but differ in their procedural nature: the prosecutor's report as an occasion for initiating criminal proceedings and the prosecutor's instruction as a means of procedural influence between the public participants in the proceedings.

In our opinion, the comparison of the aforementioned regulations creates a need to clarify their relationship. Particularly problematic is the question of whether the superior or supervising prosecutor's instruction to initiate criminal proceedings can independently replace the occasion prescribed by law for initiating criminal proceedings. A systematic analysis of the Code does not provide sufficient grounds for such a conclusion. The range of occasions for initiating criminal proceedings is established by Article 173 of the Code, while an "instruction" is not provided for within that range as an independent occasion. Moreover, the Code expressly prohibits initiating criminal proceedings where information about a crime has been obtained from a source not provided for by Article 173, including an unknown or undisclosed source.[12] Consequently, the prosecutor's instruction, being a procedural directive binding on the investigator in the cases prescribed by law, must not, in itself, eliminate the requirement for the existence of a legislatively prescribed occasion for initiating criminal proceedings.

This conclusion is particularly significant in view of the fact that the legality of the occasion for initiating criminal proceedings does not have merely formal significance but is directly connected with the subsequent legal fate of the initiated proceedings. Under Article 13, paragraph 1, subparagraph 2 of the Code, criminal proceedings are subject to termination if they have been initiated, among other things, in violation of the conditions prescribed by Article 173, paragraph 6.[13] In other words, if criminal proceedings have been initiated on the basis of information obtained from a source not prescribed by law, the legislature regards that violation not as an abstract procedural defect but as a circumstance determining the termination of the entire criminal proceedings. Therefore, the investigator cannot initiate criminal proceedings solely on the basis of the fact of an instruction from the superior or supervising prosecutor if the corresponding lawful occasion prescribed by Article 173 of the Code is absent.

From this perspective, it would be more consistent to provide, in the event of the superior prosecutor's discovery of indications of an apparent crime, a mechanism under which their instruction would not replace but would be accompanied by or include a prosecutor's report complying with the requirements of Article 177 of the Code. Under the opposite approach, the investigator is obliged

[12] Article 173, paragraph 6 of the Code.
[13] Article 13, paragraph 1, subparagraph 2 of the Code.

to initiate criminal proceedings on the basis of the prosecutor's instruction, whereas that instruction is not independently recognised by Article 173 as an occasion for initiating criminal proceedings. Such legal regulation may create not only a theoretical problem concerning the relationship between individual norms but also a practical contradiction, simultaneously imposing on the investigator, on the one hand, the duty to execute the prosecutor's instruction and, on the other hand, the duty to initiate criminal proceedings exclusively on the basis of an occasion prescribed by law.

Thus, it is appropriate to regard a prosecutorial instruction not as an independent legal fact replacing the occasion for initiating criminal proceedings but as a means of prosecutorial influence exercised over the investigator where a lawful occasion already exists. Such an interpretation makes it possible to preserve simultaneously both the effectiveness of prosecutorial supervision and the legal certainty of the power vested in the investigator to initiate criminal proceedings, as well as the completeness of the mandatory prerequisites established by the Code for the commencement of criminal proceedings.

A systematic analysis of the above regulations makes it possible to conclude that the prosecutor's instruction to initiate criminal proceedings cannot independently replace the occasion for initiating proceedings prescribed by the Code, since the commencement of criminal proceedings is conditional on the existence of a proper report or another lawful occasion established by Article 173, whereas an instruction, by its legal nature, is a binding means of influence applied in the interrelations between the public participants in the proceedings. Consequently, where the superior or supervising prosecutor discovers indications of an apparent crime, the possibility of initiating proceedings solely on the basis of an instruction creates an inconsistency between the exhaustive regulation of the occasions for the commencement of criminal proceedings and the instruments of prosecutorial supervision. Therefore, we propose legislatively clarifying the aforementioned mechanism by providing that the prosecutor's instruction to initiate criminal proceedings must simultaneously comply with the requirements established by Article 177 of the Code for the prosecutor's report and, in that case, be regarded as a proper report of an apparent crime or, alternatively, that the corresponding prosecutorial report must be attached to the instruction. Such a solution will ensure both the effective exercise of prosecutorial supervision and the unequivocal existence of the lawful occasion necessary for the investigator to exercise the power to initiate criminal proceedings.

Where the investigator discovers indications of an apparent crime, the legislature has provided a regulation different from the mechanism applicable to

the prosecutor. Although Article 173 of the Code regards both the investigator's and the prosecutor's reports as possible sources of information about an apparent crime,[14] the procedural consequences of their discovery of such information are not identical.

Thus, if the investigator discovers the fact of the commission of another alleged crime during the preliminary investigation, new criminal proceedings are initiated in each such case, and the materials of the proceedings confirming the corresponding fact are attached to the record on the initiation of criminal proceedings.[15] That is, in the investigator's case, the legislature has provided a direct procedural connection between the discovery of the fact of a new crime and the initiation of new proceedings. The investigator, being the subject competent to initiate criminal proceedings, does not need an additional instruction or the intervention of another public participant in that case.

At the same time, the investigator's power to initiate new criminal proceedings cannot be perceived as an independent[16] action carried out outside any oversight. After drawing up the record on the initiation of proceedings, the investigator immediately sends copies of it and the attached materials to the supervising prosecutor, enabling the latter to exercise prosecutorial supervision over the legality of the pre-trial proceedings.[17]

Moreover, if the investigator who initiated criminal proceedings is not competent, under the rules of investigative jurisdiction, to conduct the preliminary investigation in those proceedings, then, after performing the necessary procedural actions dictated by the situation, they send the record on the initiation of proceedings and the materials of the proceedings to the supervising prosecutor.[18]

Consequently, although the investigator's discovery of the fact of a new crime and the initiation of proceedings are carried out within the framework of their direct procedural power, they are simultaneously included in the general mechanism of prosecutorial supervision and compliance with investigative jurisdiction.

The comparison of Article 41, paragraph 1, subparagraph 3 of the Code with Articles 173 and 177 creates a certain uncertainty concerning the applicable procedural form where the investigator discovers indications of another alleged

[14] Article 173, paragraph 1, subparagraph 4 of the Code.
[15] Article 178, paragraph 7 of the Code.
[16] In practice, it is often asserted that, when following this approach, the investigator acts arbitrarily and remains outside oversight, which, in our opinion, is by no means particularly well-founded.
[17] Article 178, paragraph 3 of the Code.
[18] Article 178, paragraph 6 of the Code.

crime during the preliminary investigation. Specifically, Article 41, paragraph 1, subparagraph 3 directly empowers the investigator, in such a case, to draw up a record on the initiation of criminal proceedings, immediately informing the supervising prosecutor thereof in writing.[19] Meanwhile, Article 173, paragraph 1, subparagraph 4 of the Code provides for the investigator as a subject submitting a proper report of an apparent crime, while Article 177 also establishes the formal and substantive requirements for the investigator's report.[20] Consequently, on the one hand, the legislature provides a direct power to initiate proceedings where the investigator directly discovers indications of a crime and, on the other hand, regards the same investigator as a subject submitting a report, without clarifying whether, in the case provided for by Article 41, paragraph 1, subparagraph 3, the preparation of a separate report in accordance with Article 177 is also required.

The aforementioned uncertainty is particularly significant in the context of the regulation under Article 13 of the Code. Article 173, paragraph 6 of the Code excludes the initiation of criminal proceedings if information about a crime has been obtained from a source not provided for by that Article, including an unknown or undisclosed source, while Article 13, paragraph 1, subparagraph 2 regards proceedings initiated in violation of the requirements of Article 173, paragraph 6 as a ground for terminating criminal proceedings.[21] Therefore, the relationship between the investigator's power prescribed by Article 41, paragraph 1, subparagraph 3 and the regulations concerning reports does not have merely theoretical significance; it directly concerns the legality of the initiation of proceedings and the possibility of their subsequent continuation.

Professor Ghambaryan has expressed a distinct view on this issue, according to which "an investigator who has discovered indications of another crime during the preliminary investigation must not immediately draw up a record on the initiation of criminal proceedings; they must prepare a report of an apparent crime and submit it to the head of the investigative body, since otherwise the initiation of proceedings may be based on an occasion not prescribed by law."[22]

The solution proposed by Professor Ghambaryan,[23] according to which an investigator who has discovered indications of another crime during the preliminary investigation should not immediately initiate new proceedings but

[19] Article 41, paragraph 1, subparagraph 3 of the Code.
[20] Article 173, paragraph 1, subparagraph 4 and Article 177, paragraphs 1 and 2 of the Code.
[21] Article 173, paragraph 6 and Article 13, paragraph 1, subparagraph 2 of the Code.
[22] Ghambaryan A., Initiating Criminal Proceedings (Scientific and Practical Commentaries), Yerevan, "Tigran Mets," 2022, p. 31.
[23] It should also be frankly noted that legal practice has developed precisely in this direction in order to avoid the problem of subsequently putting the proceedings at risk.

should draw up a report and submit it to the head of the investigative body, is a logical option for overcoming the internal contradiction in the legal regulation. Nevertheless, in our opinion, it too cannot be regarded as a final solution to the problem, since Article 41, paragraph 1, subparagraph 3 of the Code directly obliges the investigator to draw up a record on the initiation of criminal proceedings upon discovering indications of another alleged crime, whereas the combined application of Articles 173 and 177 may provide a basis for the approach of first preparing a report. Under these conditions, what exists is not the unequivocal unlawfulness of the investigator's conduct but a problem of interpreting mutually competing legislative regulations. Consequently, in our opinion, the fact of following any of the aforementioned conflicting regulations cannot, in itself, constitute a sufficient basis for instituting disciplinary proceedings against the investigator until the legislature has clearly established the applicable procedural procedure. The opposite approach would effectively place on the investigator the risk of the consequences of uncertain legal regulation, which is difficult to reconcile with the requirements of legal certainty and of linking a person's liability only to the violation of a clearly established duty.

3. Conclusion

Taking the foregoing into account, it may be concluded that the initiation of criminal proceedings is a separate and exclusive procedural power vested in the investigator, whereas an instruction issued by the prosecutor, including the superior prosecutor, must be regarded as a means of supervisory influence and cannot independently replace the lawful occasion for initiating proceedings prescribed by the Code. Therefore, it is appropriate to clarify legislatively that such an instruction must either comply with the requirements prescribed for the prosecutor's report or have the corresponding report mandatorily attached to it.

At the same time, where the investigator discovers indications of another crime during the preliminary investigation, there is normative uncertainty between Article 41, paragraph 1, subparagraph 3 and Articles 173 and 177, which must be eliminated by recognising such discovery as an independent lawful occasion for initiating criminal proceedings. Until that conflict of norms is resolved legislatively, in our opinion, the investigator's following any of its possible interpretations cannot, in itself, constitute a sufficient basis for instituting disciplinary proceedings against them.

Conflict of Interests

The authors declare that there are no ethical issues or conflicts of interest in this research.

Ethical Standards

The authors confirm that this research did not involve other people as research participants.

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DOI: https://doi.org/10.46991/SL/2026.SP2.037

THE ROLE OF PRECEDENT DECISIONS OF THE COURT OF CASSATION IN SHAPING JUDICIAL GUARANTEES OF THE RIGHT TO LIBERTY: A COMPARATIVE ANALYSIS

Hamlet Asatryan[*]

Abstract. The article analyses precedent decisions of the Court of Cassation of the Republic of Armenia adopted in 2005–2011 that established key judicial guarantees of the right to liberty and the right to a fair trial: recognition of the "criminal" nature of administrative detention, the availability of bail regardless of the gravity of the charge, the standards of due diligence and reasoning in extending pre-trial detention, the requirement to bring a wanted person promptly before a judge, and the "reasonable suspicion" standard. Using comparative and historical legal methods, the article examines the state of judicial practice before and after each decision. It argues that the positions examined followed a common path — from a European Convention standard to a domestic precedent and then to legislative regulation — and that judicial precedent functions in the Armenian legal system as an independent instrument of legal development. Particular emphasis is placed on the role of Davit Avetisyan in shaping this case law.

Keywords - *Court of Cassation, judicial precedent, right to liberty, pre-trial detention, bail, reasonable suspicion, fair trial, European Convention on Human Rights.*

1. Introduction

The exceptional personal contribution of Davit Zakhari Avetisyan — a judge for more than three decades and former President of the Criminal Chamber of the Court of Cassation of the Republic of Armenia — to the formation and consolidation of the judicial system of the Third Republic of Armenia, as well as to the introduction and consistent refinement of precedent-based law in Armenia, can hardly be overestimated. Owing to his direct influence, the precedent decisions of the Court of Cassation have become an integral part of the legal culture of our

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The article received 07 September 2026,
reviewed 05 October 2026,
accepted for publication 18 October 2026

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society, serving as a cornerstone of fundamental human rights and freedoms. During his presidency, the precedent decisions of the Court of Cassation resolved issues of human rights protection of such significance that they considerably enhanced the respect accorded to domestic case law by international bodies.

Thus, by the constitutional amendments of 2005 the constituent power for the first time defined the Court of Cassation as the judicial instance ensuring the uniform application of the law, thereby heralding the emergence of the institution of judicial precedent as a new manifestation of legal culture; by the constitutional amendments of 2015 it was defined as the instance ensuring the uniform application of laws and other normative legal acts and eliminating fundamental violations of human rights and freedoms.[1]

In keeping with the mission enshrined in the Constitution of the Republic of Armenia, the precedent positions of the Court of Cassation have served in judicial practice as legal guidelines and acquired a guiding role in the uniform and consistent application of the law, thereby raising the level of legal certainty and foreseeability and, as a result, contributing to predictable justice.

Within the framework of its mission of developing the law, the precedent-setting decisions of the Court of Cassation have consistently relied on international best practice, on the case law of the European Court of Human Rights (hereinafter also "the European Court"), and on the resolutions and recommendations of the Committee of Ministers of the Council of Europe and of the United Nations, thereby shaping a unified policy in judicial practice.

The significance of the precedent positions of the Court of Cassation can be revealed most fully not only by examining their content as such, but also through a comparative analysis of the judicial practice that existed before and after their formation. Such an approach makes the actual impact of a precedent decision more visible and reveals its role in harmonising judicial practice and ensuring legal certainty and foreseeability.

The aim of this article is to demonstrate, on the example of a number of landmark decisions delivered by the Court of Cassation in 2005–2011, the role of case law in shaping judicial guarantees of the right to liberty and the right to a fair trial. The object of the study is the body of criminal procedural relations connected with restrictions on personal liberty; its subject is the relevant precedent positions of the Court of Cassation, their Convention foundations and their impact on

[1] See Article 92 of the RA Constitution (as amended in 2005) and Article 171(1) of the RA Constitution (as amended in 2015).

judicial practice and legislation. The study employs the comparative legal, historical legal and formal legal methods.

2. Administrative Detention and the Autonomous Interpretation of the Notion of a "Criminal Charge"

Under the legal framework in force until 2005, administrative detention was a recognised and statutorily regulated institution of the legal system of the Republic of Armenia. Although it was classified as an administrative penalty and applied in cases of administrative offences, in substance it entailed a deprivation of personal liberty. The legislature had confined its application to "exceptional cases", set a maximum term of 15 days and reserved the power to impose administrative detention to the courts.

In its decision of 22 July 2005 in the case of Vanik Salartsortsyan,[2] the Court of Cassation addressed the specific features of the application of this institution and, examining them in the light of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also "the European Convention") and the case law of the European Court, held that although the five-day sentence of deprivation of liberty imposed on V. Salartsortsyan by the court had been delivered within the limits of administrative legislation, the nature of the offence committed, together with the nature and severity of the penalty imposed, led to the conclusion that the offence should be classified as a criminal charge.

In reaching that conclusion, the Court of Cassation took into account that Article 182 of the RA Code of Administrative Offences was of general application: the provision was addressed not to a particular group of persons with a special status but to all citizens, it prescribed a certain conduct for everyone, and compliance with it was secured by a punitive sanction. Moreover, persons detained for administrative offences were held in the conditions applicable to arrested persons.

Consequently, the Court of Cassation found a violation of V. Salartsortsyan's right to a "public hearing" under Article 6 § 1 of the European Convention, since the procedural rules governing this type of deprivation of liberty did not provide an opportunity to examine the witnesses testifying against him at the hearing or to call witnesses on his behalf. Guided by the interpretations of the European Court, the Court of Cassation further held that these circumstances also violated V. Salartsortsyan's right guaranteed by Article 6 § 3 (d) of the European Convention.

[2] See the decision of the RA Court of Cassation of 22 July 2005 in the case of Vanik Salartsortsyan.

The exceptional importance of the legal positions expressed in this decision is evidenced by the fact that it effectively put an end to the practice whereby a penalty was in fact imposed on a person under branches of legislation other than criminal law, bypassing both the need for and the real possibility of exercising the guarantees provided by domestic and international norms, as well as fundamental rights, including the right to a fair trial. This landmark decision was followed by the 2005 amendment to the RA Code of Administrative Offences, under which administrative detention as a type of administrative penalty was repealed.

3. Bail Irrespective of the Gravity of the Offence Charged

Under the RA Code of Criminal Procedure adopted on 1 July 1998[3] (hereinafter also "the former RA Code of Criminal Procedure"), the availability of bail was directly linked to the gravity of the offence imputed to the accused: bail could be applied only in respect of offences of minor and medium gravity.

In its decision of 13 July 2007 in the case of Taron Hakobyan,[4] the Court of Cassation addressed the fundamental question of whether persons charged with grave or particularly grave offences could likewise be released from detention on bail.

In particular, the Court of Cassation examined this question in the light of the case law of the European Court in Caballero v. the United Kingdom[5] and S.B.C. v. the United Kingdom,[6] cases factually and legally similar to the one at hand. According to those judgments, where the possibility of considering release on bail is excluded by law from the outset in certain categories of cases, such a restriction on judicial review of pre-trial detention amounts to a violation of Article 5 § 3 of the European Convention. Treating this provision of the European Convention as an integral part of the law of the Republic of Armenia, the Court of Cassation held that the competent courts of the Republic of Armenia are empowered to consider the possibility of releasing the accused from detention on bail, irrespective of the gravity of the offence imputed to him or her.

Following this landmark decision, practice developed in such a way that the gravity of the charge was no longer an obstacle to applying bail to the accused as a

[3] See Article 143(1) of the former RA Code of Criminal Procedure.
[4] See the decision of the RA Court of Cassation of 13 July 2007 in the case of Taron Hakobyan.
[5] See the judgment of the European Court of Human Rights in Caballero v. the United Kingdom of 8 February 2000, application no. 32819/96.
[6] See the judgment of the European Court of Human Rights in S.B.C. v. the United Kingdom of 19 June 2001, application no. 39360/98.

preventive measure, although the corresponding legislative amendment was made only in 2020.

4. The Lawfulness of Extending Detention and the Due Diligence Standard

In another decision, delivered on 31 October 2008 in the case of Aslan Avetisyan,[7] the Court of Cassation, in assessing the lawfulness of an extension of detention, held that where a person is kept in continuous detention but the authority conducting the proceedings fails to carry out the investigation with the necessary speed and diligence, the continued deprivation of liberty cannot be justified indefinitely by the mere existence of grounds for detention.

The Court of Cassation also set a high standard of reasoning for judicial acts, obliging courts to substantiate their conclusions on the existence of grounds for detention with specific factual information. It further held that an extension of detention cannot be automatically justified by the gravity of the offence charged alone.

As a result of these precedent positions, judicial practice evolved so that courts began to assess not only the continued existence of the grounds and conditions for detention, but also the diligence displayed by the investigating authority. The new RA Code of Criminal Procedure adopted in June 2021 elevated to the statutory level the requirement to substantiate the due diligence[8] exercised by the authority conducting the proceedings.

5. The Guarantee of Bringing a Wanted Person Promptly Before a Judge

The legal position expressed by the Court of Cassation in its decision of 26 December 2008 in the case of Tigran Vahradyan[9] concerned the obligation to bring a wanted person promptly before a judge once he or she has been located. The Court of Cassation identified an inconsistency between the rules of criminal procedure and the European Convention and established a law-enforcement mechanism designed to ensure effective judicial review of the lawfulness of the deprivation of liberty of a person who had been wanted and was subsequently located.

Specifically, the former criminal procedure legislation of the Republic of Armenia allowed detention to be ordered as a preventive measure against a wanted

[7] See the decision of the RA Court of Cassation of 31 October 2008 in the case of Aslan Avetisyan.
[8] See the RA Code of Criminal Procedure adopted on 30 June 2021.
[9] See the decision of the RA Court of Cassation of 26 December 2008 in the case of Tigran Vahradyan.

accused in his or her absence, and once located, the person would remain in detention for a lengthy period without being brought before a court.

Such practice was contrary to the requirement of Article 5 § 3 of the European Convention that everyone arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.

In that case, the Court of Cassation transformed the requirements of Article 5 of the European Convention into a direct judicial guarantee in domestic law. In particular, the requirement of "promptness" was linked, in the domestic context, to the 72-hour maximum period of arrest; consequently, the fact that a person had been on the wanted list could no longer serve as a ground for bypassing the right to judicial review with that person's participation, and an initial detention order made in the person's absence was no longer regarded as final judicial review. Accordingly, once the person had been located, a fresh judicial review with his or her direct participation had to be ensured.

6. The Introduction of the Standard of "Reasonable Suspicion of Having Committed an Offence"

The decision of the Court of Cassation of 24 February 2011 in the case of Vahram Gevorgyan[10] is a further example of the development of procedural law, the significance of which should be viewed from the perspective of shaping the methodology of judicial review of detention. In that decision, the Court of Cassation attached particular importance to the reasonable suspicion that the accused had committed the act imputed to him, holding that it is a primary condition for restricting a person's liberty.

Before that decision, judicial review of detention attached importance solely to the manifestations of the person's possible conduct provided for in Article 135 of the former RA Code of Criminal Procedure, disregarding the importance of the question whether there was any sufficient basis at all for believing that the person concerned was connected with the offence imputed to him or her.

Notably, the concept of "reasonable suspicion of having committed an offence" — a mandatory condition when deciding on detention — was "introduced" into judicial practice by this decision, became a benchmark for the proper exercise of judicial review of detention thereafter, and was elevated to the statutory level only in 2018.

[10] See the decision of the RA Court of Cassation of 24 February 2011 in the case of Vahram Gevorgyan.

7. Conclusion

Thus, a comparative analysis of the precedent decisions of the Court of Cassation examined above shows that all of them followed the same logical path of development: from a standard enshrined in the European Convention and the case law of the European Court to a domestic judicial precedent, and from the latter to legislative regulation. The abolition of administrative detention as a type of administrative penalty (2005), the statutory recognition of the standard of "reasonable suspicion of having committed an offence" (2018), the removal of the gravity-based bar on bail (2020), and the enshrinement of the due diligence requirement for the authority conducting the proceedings in the new RA Code of Criminal Procedure (2021) demonstrate that the precedent positions of the Court of Cassation not only filled legislative gaps and overcame inconsistencies between domestic norms and Convention requirements, but in fact predetermined the subsequent steps of the legislature.

The foregoing leads to the conclusion that judicial precedent in the legal system of the Republic of Armenia has become not only a means of ensuring the uniform application of the law, but also an independent and effective instrument of legal development, through which international human rights standards are directly implemented in domestic judicial practice. The role of Davit Avetisyan in this process has been decisive: the case law formed during his presidency continues to guide judicial practice to this day, serving as a reliable guarantee of the judicial protection of the right to liberty and the right to a fair trial.

Conflict of Interests
The author declares no ethical issues or conflicts of interest in this research.
Ethical Standards
The author affirms this research did not involve human subjects.

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13. S.B.C. v. the United Kingdom, no. 39360/98, 19 June 2001.

DOI: https://doi.org/10.46991/SL/2026.SP2.045

PECULIARITIES OF INITIATING CRIMINAL PROCEEDINGS IN MONEY LAUNDERING CASES

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Abstract. The purpose of this article is to analyze certain peculiarities related to the initiation of criminal proceedings in money laundering cases.

The article examines such issues as the legal necessity for, and possible legal consequences of, the Financial Monitoring Center (hereinafter also referred to as the FMC) of the Central Bank of the Republic of Armenia sending a notification to a public participant in the proceedings, as well as the necessity of initiating new criminal proceedings in relation to the criminal offense of money laundering where criminal proceedings have already been initiated in relation to the predicate offense preceding the money laundering. Relevant research has been conducted with respect to these issues, on the basis of which practical proposals are presented.

Emphasizing the role of the FMC in combating money laundering, the article aims to prevent, as far as possible, the circumvention of statutory requirements by public participants in the proceedings within the framework of legal relations arising from the exercise of the FMC's powers. In addition, it is important to ensure the implementation of the principle of legal certainty and the realization of a legitimate public purpose within these legal relations. The article also puts forward practical proposals aimed at achieving these objectives.

The research conducted for this article has identified legislative gaps and resulted in proposals aimed at addressing them.

In addition, the article seeks to reiterate the necessity of initiating new criminal proceedings in money laundering cases where the grounds and conditions for initiating criminal proceedings exist.

To this end, the article puts forward proposals whose adoption would contribute to addressing legislative gaps concerning the initiation of criminal proceedings in money laundering cases.

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The article received 13 September 2026,
reviewed 10 October 2026,
accepted for publication 24 October 2026

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The approaches presented in the article may be of interest to legal professionals involved in legislative drafting, as well as to law enforcement officers and judges.

Keywords - *Financial Monitoring Center, initiation of criminal proceedings, predicate offense, operational information, confidentiality, public participants in the proceedings, bodies conducting operational-search activities, report of a crime.*

Introduction

The initiation of criminal proceedings lays the foundation for criminal procedural relations and subsequent legal processes. In this context, it is particularly important to minimize legislative gaps and potential circumvention of legal requirements and to ensure the principle of legal certainty to eliminate legislative gaps and prevent potential circumvention of legislative requirements to the greatest extent possible, while ensuring the observance of the principle of legal certainty at the legislative level, with the aim of contributing to the effective implementation of the procedure for conducting proceedings concerning alleged crimes.

In practice, certain issues arise in connection with the initiation of criminal proceedings in money laundering cases. Identifying these issues and proposing ways to overcome them is of significant theoretical and practical importance.

The article discusses legal issues such as the legal expediency of the information analyzed by the FMC in proceedings related to money laundering and, as a result thereof, the sending of a notification to a public participant in the proceedings, as well as the necessity of initiating new criminal proceedings in respect of a possible act of money laundering.

The study employed both general methods of scientific cognition (synthesis, induction, and deduction) and special methods of jurisprudence (formal-logical and comparative legal methods).

PECULIARITIES OF INITIATING CRIMINAL PROCEEDINGS IN MONEY LAUNDERING CASES

Initiating criminal proceedings is a complex procedural institution that occupies an important place among the other institutions of criminal procedural law, due to the fact that it is precisely through the initiation of criminal proceedings that the mechanisms of criminal procedure are set in motion. In other words, the initiation of criminal proceedings constitutes the starting point for the operation of a special regime for the regulation of criminal procedural relations between the state and the individual, and it is through the initiation of criminal proceedings that the scope of

criminal proceedings is predetermined[1]. The initiation of criminal proceedings involves specific tasks, a defined range of participants, time limits, and special procedural actions, and concludes with the preparation of an appropriate procedural document[2].

There is also a view that the initiation of criminal proceedings is an activity consisting of a system of procedural relations and characterized by actions and decisions from the moment of receiving a report of a crime until the initiation of criminal proceedings or a decision to refuse to initiate criminal proceedings[3].

Thus, it can be stated that the record of the initiation of criminal proceedings marks the beginning of criminal procedural relations and subsequent legal processes; therefore, the initiation of criminal proceedings is a cornerstone and initial action upon which the entire subsequent process may depend, for the simple reason that problems arising at the beginning of the procedural process affect the entire proceedings, with corresponding legal consequences, and may even lead to the unlawfulness of the entire proceedings.

By virtue of the new regulations of the Criminal Procedure Code of the Republic of Armenia (hereinafter also referred to as the Code), the initiation of a criminal proceeding must be the rule, while non-initiation must be an exception[4]. Currently, a relatively low threshold for initiating criminal proceedings has been envisaged, ensuring, within the framework of preliminary investigation, the possibility of a full examination of each report corresponding to the minimum requirements. This is also due to the fact that, unlike the former code, the investigator does not have procedural means to verify the truthfulness or reliability of the facts stated in the report. That is, prior to initiating a criminal proceeding, the investigator cannot perform any actions and will determine the steps to be undertaken by them solely through analyzing and evaluating the content of the report (and, if available, also the materials attached thereto). Proceeding from the same consideration, following the example of the code adopted in 1998, the new code also considers the legal assessment of the facts stated in the report—that is, the selection of a specific article, paragraph, or point of the Criminal Code—as

[1] Lazarev, V. A. (2001). Initiation of a criminal case as an act of legal response to criminal encroachments (Candidate of Legal Sciences dissertation abstract, 18 p.). Available at: http://www.namvd.ru/sciense/dis/Autoref/369.html

[2] Vandyshev, V. V. (2002). Criminal procedure: Course of lectures. St. Petersburg: p. 63.

[3] Manova, N. S., & Frantsiforov, Yu. V. (2007). Criminal procedure: Lecture notes. Moscow: Yurayt-Izdat, p. 68.

[4] Ghukasyan, H., Melkonyan, D., & Nikoghosyan, A. Practical Guide to the Conceptual Solutions, Innovative Approaches, and Interpretation of the Main Institutions of the New Criminal Procedure Code of the Republic of Armenia. p. 270.

provisional, since it is reasonably probable that on the basis of information obtained during the preliminary investigation, it may be adjusted or changed. To ensure this, the Code provides that upon the instruction of the supervising prosecutor, the investigator is authorized to make a change in the protocol on initiating a criminal proceeding if there is a need to correct the factual description of the alleged crime or the legal assessment given thereto.

The Code has expanded the scope of sources of information regarding an apparent crime or the grounds for initiating criminal proceedings. In addition to natural and legal persons, the investigator, prosecutor, and judge, such a report can henceforth be submitted also by a state or local self-government body or an official thereof in connection with the exercise of their activities, as well as by a body carrying out operational-search activities in connection with the exercise of its powers. This essentially fills the gap that previously existed in the criminal procedural legislation, when information about an apparent crime revealed through any of the specified methods was submitted to the competent authorities not in the form of a report, but simply in the form of providing relevant materials[5].

The Code has provided an exhaustive list of persons and bodies authorized to submit reports of crimes, on the basis of whose duly submitted reports concerning apparent crimes criminal proceedings may be initiated. It is precisely in this context that we will address the legal issue of whether information analyzed by the FMC in proceedings related to money laundering can serve as a possible occasion for initiating a criminal proceeding.

The Criminal Procedure Code[6] points out the conditions necessary for initiating a criminal proceeding. Namely, the existence of a lawful occasion and sufficient grounds, as well as the absence of data regarding circumstances excluding proceedings in the case. In legal literature, there is no unambiguous understanding regarding the legal nature of grounds for initiating criminal proceedings, although the clarification of this very issue is of essential importance when initiating a criminal proceeding.

Some proceduralists view the grounds for initiating criminal proceedings as sources of initial information about a crime, while others consider them to be legal facts. Other opinions regarding the legal nature of grounds for initiating criminal proceedings are also expressed in scientific legal literature. The first view is the most widespread. It should be noted that many proceduralists are proponents of the view that considers grounds for initiating criminal proceedings as sources

[5] Ibid., p. 271.
[6] Criminal Procedure Code of the Republic of Armenia (adopted on June 30, 2021).

established by law (R. Rakhunov, S. Borodin, B. Teterin, E. Troshkin, A. Koblikov, B. Bezlepkin, and others), according to which these sources are the authorized bodies or officials of the state who receive initial information about a committed or prepared crime[7].

According to proceduralists N. Zhogin, F. Fatkullin, M. Fayzullin, R. Uskov, and L. Maslennikova, the criminal procedural law gives occasions the significance of legal facts, the emergence of which leads to the necessity of discussing the issue of initiating a criminal proceeding [8]. Other views, according to E. Kozilov, represent attempts to find a compromise between the above-mentioned two approaches in defining the legal nature of grounds for initiating criminal proceedings[8].

In this case, grounds for initiating criminal proceedings are, as a rule, understood as having a dual nature: as "sources established by law, from which the inquiry body, investigator, prosecutor, or court becomes aware of a prepared or committed crime, and as a circumstance that gives rise to the obligation of these bodies to discuss the issue of the necessity of instituting a criminal case"[9].

That is, two components of occasions are distinguished: informational and legal. Thus, an occasion, as a received signal, on the one hand contains information about the attributes of a crime, and on the other hand constitutes a legal fact that requires the competent body to perform certain actions provided for by law. Grounds for initiating criminal proceedings are legally significant actions that constitute legal facts (specifically, lawful legal acts), with which the law associates the emergence of criminal procedural relations. This position was substantiated and articulated by N. Zhogin and F. Fatkullin, who asserted that "The occasion for instituting a criminal case must be viewed first of all as a legal fact that gives rise to the rights and duties specified in the law and the relations stemming therefrom.

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[7] Rakhunov, R. D. (1954). Initiation of a criminal case in Soviet criminal procedure law. Moscow: Gosyurizdat, pp. 14–20; Borodin, S. V. (1966). Resolving issues on the initiation of a criminal case. Moscow: Yurid. lit., p. 11; Teterin, B. S., & Troshkin, E. Z. (1997). Initiation of a criminal case. Moscow: Novyy Yurist, pp. 18–22; Koblikov, A. S. (Ed.). (2002). Criminal procedure: Textbook for higher education institutions. Moscow: Norma, p. 156; Bezlepkin, B. T. (2004). Criminal procedure of Russia. Moscow: KnoRus, p. 162; See also: Kozilov, E. N. (2007). Grounds for initiating a criminal case: Legal nature, system, ways of improvement. Ugolovnoe sudoproizvodstvo, (2), pp. 35–40.

[8] Zhogin, N. V., & Fatkullin, F. N. (1961). Initiation of a criminal case. Moscow: Yurid. lit., pp. 18–24; Maslennikova, L. N. (1993). Procedural significance of grounds for initiating a criminal case. Zakonnost, (5), pp. 15–17; Fayzullin, M. S. (1980). Grounds and basis for initiating a criminal case (Candidate of Legal Sciences dissertation abstract). Kazan, pp. 10–12; Ushkov, R. G. (2011). Concept and legal nature of grounds for initiating a criminal case. Sotsial'no-gumanitarnyye znaniya, (4), pp. 312–315.

[9] Bozh'ev, V. P. (Ed.). (2004). Criminal procedure: Textbook. Moscow: Spark, p. 225.

Meanwhile, any legal fact is not a source of any information or factual data, but a certain action (inactivity) or event"[10]:

Thus, we can state that Article 173 of the Criminal Procedure Code of the Republic of Armenia lists the sources from which the competent body receives a report on a crime. This view is further supported by the fact that the practical guide to the interpretation of the conceptual solutions, innovative approaches, and main institutions of the new Criminal Procedure Code of the Republic of Armenia also uses the term source; in particular, addressing the issue of discussing improper reports, it is stated: if information concerning a crime has been received from a source not provided for by the Code, including an unknown or undisclosed source, then initiating a criminal proceeding is inadmissible. Nonetheless, this prohibition is not absolute, and the legislator has also established that such information is verified within the framework of operational-search activities[11]

Thus, we consider the persons and bodies specified in Article 173 of the Criminal Procedure Code of the Republic of Armenia to be the proper sources from which a duly submitted report of a crime can be legally obtained. Developing this approach, we consider that the information contained in a report becomes the legal fact with which the law associates the commencement of legal relations.

Thus, it stems from the content of Article 173 of the Criminal Procedure Code of the Republic of Armenia that the investigator is obligated, within the limits of their competence, to initiate a criminal proceeding if a proper report on an apparent crime has been received from a physical person, legal entity, state or local self-government body or an official thereof in connection with the exercise of their activities, a body carrying out operational-search activities, an investigator, prosecutor, or judge in connection with the exercise of their powers. In addition, information published in the mass media about an apparent crime can be an occasion for the investigator to initiate a criminal proceeding, and in accordance with international law, the refusal of an extradition request for a person in connection with the alleged crime specified in that extradition request is an occasion to initiate a criminal proceeding if the operation of the Criminal Code of the Republic of Armenia extends to that person and the alleged act attributed to them. Of course, anonymous reports were not ignored by the legislator either, and in accordance with the same article, a criminal proceeding cannot be initiated if information about a crime has been received from a source not provided for in this

[10] Zhogin, N. V., & Fatkullin, F. N. (1961). Initiation of a criminal case. Moscow, p. 92.
[11] Ghukasyan, H., Melkonyan, D., & Nikoghosyan, A. Practical Guide to the Conceptual Solutions, Innovative Approaches, and Interpretation of the Main Institutions of the New Criminal Procedure Code of the Republic of Armenia. p. 270.

Article, including an unknown or undisclosed source. Such information is verified upon the initiative of the prosecutor or investigator in the manner established by the Law "On Operational-Search Activities" if it contains facts that can reasonably be verified[12].

In light of the foregoing, and with reference to the importance of financial intelligence in money laundering proceedings and the possibility that information analyzed by the FMC may constitute an occasion for initiating criminal proceedings, the following should be noted:

In international practice, the procedure for using the results of financial investigations by financial intelligence units depends on their organizational structure and the scope of their powers. The standards (recommendations) of the Financial Action Task Force (FATF) allow the activities of financial intelligence units both as part of other departments and as independent bodies. The principal requirement of FATF Recommendation 29 in this regard is based on the necessity of establishing a financial intelligence unit that will serve as a national center for the receipt and analysis of reports on suspicious operations (transactions) and other information related to money laundering, predicate offenses, and terrorist financing, as well as for transmitting the results of the analysis to competent law enforcement authorities[13].

Articles 3 and 13 of the Law of the Republic of Armenia "On Combating Money Laundering and Terrorism Financing" establish that it is also among the competencies of the authorized body, i.e., the Central Bank of the Republic of Armenia, to provide notifications to bodies carrying out operational-search activities, as well as to public participants of proceedings, if as a result of analysis performed on the basis of reports or other information received in the manner established by this law from persons providing reports, it concludes that there are reasonable suspicions related to money laundering or terrorism financing, or such reasonable suspicions of a predicate offense that may lead to money laundering. Simultaneously with the notification or subsequently, in addition to the notification, the authorized body may, on its own initiative, submit to bodies carrying out operational-search activities, as well as to public participants of proceedings, other information related to the circumstances indicated in the notification. The notification or the information provided in addition to the notification may contain information constituting a secret established by law. For these purposes, the authorized body has a responsible structural unit—the Financial

[12] Criminal Procedure Code of the Republic of Armenia (adopted on June 30, 2021).
[13] Financial Action Task Force (FATF). (2012). International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations.

Monitoring Center—which, inter alia, must ensure the necessary conditions for the secure storage of information received, analyzed, and provided in accordance with this Law. This information can be accessible only to competent authorities or persons in the manner established by law.

It follows from Article 12 of the same law that the authorized body is prohibited from disclosing any information received, analyzed, and provided by it, including information regarding a person who provided a report on a suspicious transaction or business relationship or other data to the authorized body or participated in their provision, or a person involved in the provision of a notification by the authorized body to bodies carrying out operational-search activities, as well as to public participants of proceedings—making them known to other persons orally or in writing through mass media or otherwise, directly or indirectly granting other persons the opportunity to obtain such information, except for cases provided for by this law.

In addition, information received and maintained by the authorized body, as well as other information accessible to the authorized body, cannot be provided or used for any purpose not related to combating money laundering and terrorism financing. In cases provided for by the Law "On Combating Money Laundering and Terrorism Financing," notifications and other information provided by the authorized body to bodies carrying out operational-search activities, as well as to public participants of proceedings, constitute operational information that can be used only in the manner established by legislation and cannot be provided to a third party, except for bodies carrying out operational-search activities, as well as public participants of proceedings[14].

According to the Charter of the FMC, the FMC is the national financial intelligence body of the Republic of Armenia. Its tasks are:

"(...) 2/ analysing suspicious transactions or business relationships as prescribed by law, on the basis of information received from reporting entities and state bodies, and providing notifications as a result of the analysis regarding reasonable suspicions of ML/TF to bodies carrying out operational-search activities, as well as to public participants of proceedings[15].

The FMC carries out monitoring and analysis of financial transactions for the purpose of preventing money laundering and terrorism financing.

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[14] Law of the Republic of Armenia on Combating Money Laundering and Terrorism Financing (adopted on May 26, 2008).

[15] https://www.cba.am/file_manager/FMC/FMC%20AM/%D5%96%D4%B4%D4%BF_%D5%AF-%D5%A1%D5%B6%D5%B8%D5%B6%D5%A1%D5%A4%D6%80%D5%B8%D6%82%D5%A9%D5%B5%D5%B8%D6%82%D5%B6.pdf (Accessed: May 4, 2026).

The interpretive note to FATF Recommendation 29 directly states that information received, processed, held, or disseminated by an FIU must be securely protected, exchanged, and used only in accordance with agreed procedures and policies, and applicable laws and regulations[16].

Thus, the above gives grounds to make such conclusions as:

1. The FMC, being the financial intelligence body in the RA, operates within the Central Bank and, when exercising its powers, provides notifications regarding reasonable suspicions of ML/TF resulting from analysis of information received from persons and state bodies to bodies carrying out operational-search activities, as well as to public participants of proceedings.

2. A notification provided by the Financial Monitoring Center constitutes operational information, which is directly enshrined in Article 12 of the Law of the Republic of Armenia "On Combating Money Laundering and Terrorism Financing," according to which provided notifications and other information are operational information that can be used only in the manner established by legislation and cannot be provided to a third party, except for bodies carrying out operational-search activities, as well as public participants of proceedings.

3. The Financial Monitoring Center operates on a confidential basis. This is not only logical, given the need to protect the source of the information, but also follows directly from both legislative provisions and the FATF Recommendations.

Proceeding from all of the above, as well as from the requirement of lawful grounds for initiating a criminal proceeding and the very limited range of legal instruments available to the body conducting the proceedings before the initiation of criminal proceedings, guided by the principle of certainty and aiming to exclude potential legislative circumventions in practice, we state the following: the Financial Monitoring Center sends notifications both under conditions of an initiated proceeding and under conditions where a criminal proceeding has not been initiated. Moreover, in both cases, the legislative regulations are such that the notification can be sent both to the body carrying out operational-search activities and to the public participant of the proceeding. It is here that the legal problem and question arise as to what purpose a notification sent to a public participant of the proceeding serves under conditions where a criminal proceeding has not been initiated, and whether it can achieve its purpose at the legislative level. Thus, we believe that, where no criminal proceeding has been initiated, the notification in question may, in substance, be regarded as a report concerning an apparent

[16] Financial Action Task Force (FATF). (2012). International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations.

criminal offence, yet it cannot be realized in any way at the legislative level because, firstly, it constitutes operational information, and secondly, its contents may not be disclosed, nor may it even be retained in the case materials; therefore, aiming to avoid possible misunderstandings, we think that the legislative formulation in this regard should be made more specific and amended as follows:

In accordance with part 3 of Article 13 of the Law of the Republic of Armenia "On Combating Money Laundering and Terrorism Financing":

"In the event that a criminal proceeding has been initiated, the authorized body provides a notification to bodies carrying out operational-search activities, as well as to public participants of proceedings, and in the event that a criminal proceeding has not been initiated, provides a notification only to bodies carrying out operational-search activities, if as a result of analysis conducted on the basis of reports or other information received in the manner established by this law from persons providing reports, it concludes that there are reasonable suspicions related to money laundering or terrorism financing, or such reasonable suspicions of a predicate offense that may lead to money laundering. Simultaneously with the notification or subsequently, in addition to the notification, the authorized body may, on its own initiative, submit to bodies carrying out operational-search activities, as well as to public participants of proceedings, other information related to the circumstances indicated in the notification. The notification or the information provided in addition to the notification may contain information constituting a secret established by law."

Accordingly, we propose to make the following amendment in the Charter of the Financial Monitoring Center as well: According to the Charter of the Financial Monitoring Center, the FMC is the national financial intelligence body of the Republic of Armenia. Its tasks are:

"(...) 2/ Analysis of suspicious transactions or business relationships established by law, taking as a basis information received from reporting persons and state bodies, and providing notifications as a result of the analysis regarding reasonable suspicions of ML/TF in the event that a criminal proceeding has been initiated, to bodies carrying out operational-search activities, as well as to public participants of proceedings, and in the event that a criminal proceeding has not been initiated, only to bodies carrying out operational-search activities."

In this way, both the level of certainty and an approach stemming from the logic of the law will be ensured, and practical possible circumventions, which under existing legislative conditions are at least not excluded, will be excluded; henceforth, initiating a criminal proceeding in cases of this type will be more invulnerable.

Detailing what has been said and emphasizing the relevance of the proposal, we consider it necessary to note that sending the relevant notification only to the body carrying out operational-search activities prior to initiating a criminal proceeding is more than logical and stems both from the Law of the Republic of Armenia "On Operational-Search Activities" and from the necessity of preserving criminal procedural frameworks and phased structure. Thus, regarding the sending of the relevant notification to the public participant of the proceeding prior to initiating a criminal proceeding, there are two possible situations; they are:

First — the public participant of the proceeding views it as a report on a crime, but it cannot be viewed as such, to the extent that, firstly, the notification cannot in this case be a report; secondly, initiating criminal proceedings on the basis of operational information that may not be disclosed not only does not stem from international standards and domestic legislative requirements, but would also undermine the very nature of the Financial Monitoring Center's activities and the evidentiary or informational value of the data obtained.

Second — the presented notification amounts to an unnecessary use of resources, since it is not viewed as a report on a crime and, in a criminal procedural sense, no procedural powers under criminal procedure law arise in connection with this notification; therefore, it cannot be aimed at ensuring any lawful interest in a criminal procedural sense.

The picture is entirely different in the event that, under conditions where a proceeding has not been initiated, the relevant notification is sent only to the body carrying out operational-search activities. In this case, it is viewed as operational data on the basis of which relevant measures are carried out and a report on a crime is submitted, where the issue of source disclosure and the requirement of confidentiality are already preserved.

The next issue related to proceedings concerning money laundering that we wish to address relates to the following:

In accordance with part 7 of Article 178 of the Criminal Procedure Code of the Republic of Armenia: "7. Whenever the fact of another alleged criminal offence is discovered during the preliminary investigation, a new criminal proceeding shall be initiated, and the materials of the proceedings confirming that fact shall be attached to the relevant protocol."

Taking into account the circumstance that for the corpus delicti of money laundering a predicate offense is necessary and there is generally already an initiated criminal proceeding for the predicate offense, we want to draw special attention to the necessity of initiating a new proceeding regarding the possible fact of money laundering, if the factual description in the protocol on initiating a

criminal proceeding concerning the fact of the predicate offense did not contain a factual description regarding money laundering, based on the following justification:

A new act discovered during the preliminary investigation is considered another crime (in connection with which a new proceeding must be initiated) if that act has no in personam and (or) in rem connection with the act regarding which the preliminary investigation is being conducted.

Of fundamental importance in this regard is how the law-enforcement practitioner interprets the concept of “criminal act”: in a substantive criminal-law sense or in a procedural sense.

In case of a criminal-legal understanding of the concept of "criminal act," new episodes discovered during the preliminary investigation that are encompassed within the framework of the same criminal-legal qualification given to the act will not be considered "another crime" (hence the necessity of initiating a new criminal proceeding will not arise).

From a procedural perspective, a newly discovered alleged crime will not be considered "another crime" if that act is substantively connected with the act in respect of which the preliminary investigation is being conducted[17].

We believe that in the absence of a factual description regarding money laundering in the factual description of the protocol on initiating a criminal proceeding concerning the fact of the predicate offense, there is a necessity to initiate a new criminal proceeding regarding the possible fact of money laundering.

Moreover, we believe that in this case, proceeding from the circumstance that a criminal proceeding is initiated on the basis of a proper report, the existence of a report is necessary in the case of any other crime so that the criminal proceeding is initiated on its basis. In addition, a situation is also possible where, for example, an investigator examining a case in their proceedings has an internal perception that there is an alleged crime related to money laundering and immediately sets about initiating a criminal proceeding, while another investigator might find on the basis of that report that even the minimum threshold for initiating a criminal proceeding does not exist; therefore, initiating a criminal proceeding without a report on a crime is legally fraught with negative consequences.

Based on the foregoing, we believe that under conditions where a criminal proceeding has been initiated regarding the predicate offense, in the protocol of which the factual description of money laundering is absent, while the authorized person finds that there is also an alleged case of money laundering, it is necessary

[17] Ghambaryan, A. (2022). Initiation of criminal proceedings: Scientific and practical commentaries.

to submit a report concerning the possible commission of a money-laundering offence and, once the applicable threshold has been met and the statutory conditions have been satisfied, to initiate a new criminal proceeding.

Conclusion

1. In the event that a criminal proceeding has not been initiated, the notification provided by the Financial Monitoring Center may be regarded as a report on an apparent crime but it cannot be acted upon within the existing legislative framework, since, first, it is operational information, and second, its content and source cannot be disclosed and it cannot even be kept in the materials of the proceeding; therefore, in order to avoid possible misunderstandings, we believe that the legislative formulation in this regard should be made more specific and amended as follows:

In accordance with part 3 of Article 13 of the Law of the Republic of Armenia "On Combating Money Laundering and Terrorism Financing":

"The authorized body, in the event that a criminal proceeding has been initiated, provides a notification to bodies carrying out operational-search activities, as well as to public participants of proceedings, and, **in the event that a criminal proceeding has not been initiated, provides a notification only to bodies carrying out operational-search activities**, if, as a result of an analysis performed on the basis of a report or other information received from reporting persons in the manner established by this Law, it concludes that there are reasonable suspicions related to money laundering or terrorism financing, or such reasonable suspicions of a predicate offense that may lead to money laundering. Simultaneously with the notification or subsequently, in addition to the notification, the authorized body may, on its own initiative, provide bodies carrying out operational-search activities, as well as public participants of proceedings, with other information related to the circumstances indicated in the notification. The notification or the information provided in addition to the notification may contain information constituting a secret established by law".

1.1 Accordingly, it is necessary to make the following amendment in the Charter of the Financial Monitoring Center as well: According to the Charter of the Financial Monitoring Center, the FMC is the national financial intelligence body of the Republic of Armenia. Its tasks are:

"(...) 2/ Analysis of suspicious transactions or business relationships established by law, taking as a basis information received from reporting persons and state bodies, and providing notifications as a result of the analysis regarding reasonable

suspicions of ML/TF in the event that a criminal proceeding has been initiated, to bodies carrying out operational-search activities, as well as to public participants of proceedings, and **in the event that a criminal proceeding has not been initiated, only to bodies carrying out operational-search activities."**

1.2 Prior to initiating a criminal proceeding, sending the relevant notification only to the body carrying out operational-search activities is more than logical and follows both from the Law of the Republic of Armenia "On Operational-Search Activities" and from the necessity of preserving the criminal procedural mechanisms and phased structure.

3. In the absence of a factual description regarding money laundering in the factual description of the protocol on initiating a criminal proceeding concerning the fact of the predicate offense, there is a necessity to initiate a new criminal proceeding regarding the possible fact of money laundering.

3.1 Under conditions where a criminal proceeding has been initiated regarding the offense preceding money laundering, in the protocol of which the factual description of money laundering is absent, while the authorized person finds that there is also an alleged case of money laundering, it is necessary to submit a report on the possible existence of the corpus delicti (crime) of money laundering, and upon overcoming the relevant threshold and the existence of legislative conditions, to initiate a new criminal proceeding.

Conflict of Interests

The authors declare that there are no ethical issues or conflicts of interest in this research.

Ethical Standards

The authors confirm that this research did not involve other people as research participants.

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DOI: https://doi.org/10.46991/SL/2026.SP2.060

PROSPECTS FOR ENHANCING OPERATIONAL-INVESTIGATIVE ACTIVITIES IN LIGHT OF THE CASE LAW OF THE COURT OF CASSATION OF THE REPUBLIC OF ARMENIA

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Abstract. The article examines the case law of the Court of Cassation of the Republic of Armenia concerning operational-investigative (operational-search) measures conducted on the basis of judicial authorization. Its purpose is to analyse and synthesise the fundamental principles, approaches and legal positions derived from the precedent-setting decisions of the Court of Cassation that may prove useful and effective in the conduct of operational-investigative activities. Drawing on the Constitution of the Republic of Armenia, the RA Law "On Operational-Search Activities", the RA Code of Criminal Procedure and the case law of the European Court of Human Rights, the author considers judicial review as a key safeguard against arbitrary interference with the right to respect for private life. Particular attention is paid to the enhanced protection of communications between the accused and defence counsel, the two-stage test for challenging judicial decisions authorizing operational-investigative measures, the requirement that the desired result cannot reasonably be achieved by other means, the qualitative rather than quantitative assessment of the materials supporting an application, the requirements applicable to judicial acts authorizing such measures, and the conduct of "covert observation" in places of detention. The study employs the formal-legal and comparative-legal methods, as well as the analysis and synthesis of judicial practice. The author concludes that judicial oversight is a fundamental mechanism for maintaining a proper balance between constitutionally protected interests, and that the legal positions of the Court of Cassation have evolved in accordance with the principle of a reasonable balance between public and private interests.

Keywords - *criminal procedure, Court of Cassation, case law, legal approaches, operational-search measures, operational-search bodies, judicial review, right to respect for private life, evidence.*

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The article received 24 August 2026,
reviewed 02 October 2026,
accepted for publication 14 October 2026

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Introduction

In the course of fulfilling the tasks assigned to operational-search authorities, operational-search measures conducted pursuant to judicial authorization assume particular importance. Such measures constitute among the most effective means of detecting, uncovering, preventing, and suppressing offenses. Nevertheless, their application is permissible only where the objectives prescribed by law cannot be achieved through other means.

The legal foundations for the conduct of operational-search measures are established by the Constitution, while the procedure governing their implementation is prescribed by the RA Law "On Operational-Search Activities," the RA Code of Criminal Procedure, and a number of other normative legal acts.

At the same time, judicial precedents constitute an important source of law for ensuring the legality of operational-search measures, as they serve to ensure the uniform application of laws and other normative legal acts. Such precedents are binding upon all relevant actors.

Under the Constitution of the Republic of Armenia, responsibility for ensuring the uniform application of laws and other normative legal acts is vested in the Court of Cassation, which constitutes the highest judicial instance of the Republic of Armenia, with the exception of matters falling within the jurisdiction of constitutional justice.

The purpose of this scholarly article is to analyze and synthesize the fundamental principles, approaches, and positions derived from the precedent-setting decisions of the Court of Cassation concerning operational-search measures, which may prove useful and effective in the conduct of operational-search activities.

2. Judicial Review as a Safeguard of the Lawfulness of Operational-Investigative Activities

As with any other form of activity carried out by public authorities, operational-investigative activity is subject to specific mechanisms of oversight and control. They are intended to serve as an additional framework for establishing and strengthening safeguards to ensure the lawfulness of operational-investigative activities, an aspect that is undoubtedly of considerable importance in terms of ensuring the public accountability of state authorities. As has been rightly observed in the legal and scholarly literature, the distinctive nature of operational-investigative activities presents particular challenges in establishing their legal foundations and developing a reliable system of safeguards to ensure the legality of

their implementation. Accordingly, operational-investigative activities require clear and comprehensive legislative regulation capable of establishing effective mechanisms to safeguard the legality of such activities. Among the safeguards governing operational-investigative activities are prosecutorial oversight and judicial review of such activities.[1]

Furthermore, the exercise of judicial review over operational-investigative activities is directly necessitated by the significant impact that certain operational-investigative measures may have on individuals' rights and, more broadly, on their legal status. This, in turn, calls for the legal framework governing such measures to be placed on an entirely new qualitative footing, supported by reliable mechanisms for impartial review.

In this context, reference should be made to the case law of the European Court of Human Rights, according to which, "when (…) balancing, on the one hand, the respondent State's interest in protecting national security through measures of secret surveillance and, on the other hand, the seriousness of the interference with the applicant's right to respect for his or her private life, the competent national authorities enjoy a certain margin of appreciation in determining the appropriate means to be employed in pursuing the legitimate aim of protecting national security." Nevertheless, according to the European Court of Human Rights, "there must be adequate and effective safeguards against abuse." Accordingly, the Court takes into account all the circumstances of the case, including, for example, the nature, scope and duration of the measures that may be taken; the grounds required for ordering them; the authorities competent to authorise, carry out and supervise their implementation; and the type of remedy provided for under domestic law.[2]

Furthermore, the European Court of Human Rights has held that, while the choice of means employed to achieve the objectives pursued generally falls within the State's margin of appreciation, the scope of that margin may be broader or narrower depending on the nature of the right at stake. For example, "having regard to the fundamental importance of the rights guaranteed under Article 8 of the [European] Convention for an individual's identity, self-determination and physical and moral integrity, the margin of appreciation afforded to States in this sphere is

[1] See: Legal, Theoretical, and Practical Foundations of Judicial Review over Pre-Trial Proceedings: Contemporary Developments and Prospects for Improvement. A Scientific-Practical Manual / Authors: V. Yengibaryan, M. Hakobyan; Editor: D. Avetisyan. Yerevan: Asoghik, 2015, p. 66.

[2] See: the European Court of Human Rights, Roman Zakharov v. Russia, judgment of 4 December 2015, Application no. 47143/06, para. 232; İrfan Güzel v. Turkey, judgment of 7 February 2017, Application no. 35285/08, para. 85.

narrower where the case concerns rights protected solely under Article 1 of Protocol No. 1 to the [European] Convention."[3]

3. Enhanced Protection of Communications between the Accused and Defence Counsel

At the same time, the Court of Cassation has held that the enhanced protection afforded to communications between certain participants in criminal proceedings (a suspect or accused person and his or her defense counsel or legal representative), as a means of safeguarding the right to a fair trial, may, in the context of Article 8 of the European Convention, be overridden where there are sufficiently compelling factual grounds which, while precluding unjustified interference with such communications on the one hand, nevertheless establish the lawfulness of the interference on the other, while preserving the essential substance of those communications. More specifically, interference with communications afforded enhanced protection, where such interference is carried out through the application of criminal procedural measures and operational-investigative measures, may be justified both on the grounds prescribed by law and by the existence of compelling factual circumstances that, on their face, substantiate and would be sufficiently persuasive to an objective observer in demonstrating the alleged presence of elements of a criminally prohibited act committed in the course of such communications. Conversely, where communications subject to enhanced protection are subjected to unjustified interference, the criminal procedural safeguards designed to protect such communications would be deprived of their purpose and rendered devoid of practical effect.

This approach also underlies the European Court of Human Rights' jurisprudence. In particular, according to the European Court of Human Rights, lawyers cannot effectively discharge the important function entrusted to them unless the confidentiality of their communications with their clients is guaranteed. Such confidentiality is founded on the relationship of trust between lawyers and their clients, upon which the effective enjoyment of the right to a fair trial also depends.

It is noteworthy that, in the same decision, the highest judicial instance, applying the "fruit of the poisonous tree" doctrine, also deemed the record of the examination of the audio-visual recording obtained through the "internal

[3] See: the European Court of Human Rights, Gladysheva v. Russia, judgment of 6 December 2011, Application no. 7097/10, para. 93.

observation" operational-investigative measure inadmissible as derivative evidence.[4]

As the Court of Cassation of the Republic of Armenia has held in one of its legal positions concerning communications between an accused person and his or her defense counsel, the State, acting through the criminal prosecution authorities, is required, on the one hand, within the scope of its negative obligations, to refrain from unjustified interference with such communications and, on the other hand, within the scope of its positive obligations, to ensure the proper organization of such communications, thereby guaranteeing the full protection of the individual's fundamental rights.[5]

4. Challenging Judicial Decisions Authorizing Operational-Investigative Measures

In this context, particular attention should also be given to the specific features of challenging decisions authorizing the conduct of both "internal observation" and other operational-investigative measures that require prior judicial authorization. It should be noted that a legal position on this matter has already been established in Armenian case law. In particular, the Court of Cassation has identified the substantiation of the applicant's status as a victim of a violation of the right to respect for private life as a criterion for determining the admissibility of a challenge to such decisions. In challenging the lawfulness of a court decision authorizing the conduct of an operational-investigative measure, an individual must establish that there has been an interference with his or her right to respect for private life that has either directly or indirectly caused harm to the individual or affected his or her legitimate interests. The foregoing indicates that the two-stage test governing the exercise of the mechanism for challenging the lawfulness of a court decision authorizing an operational-investigative measure requires the determination of the following questions:

a) whether there has been an interference with the individual's right to respect for private life; and

b) if so, whether such interference has directly or indirectly caused harm to the individual or affected his or her legitimate interests.

[4] See: the decision of the Court of Cassation of the Republic of Armenia in the case of Narek Mayisi Khachatryan, Case No. ԱՎԴ4/0028/01/16, dated 18 September 2019.

[5] See: the decision of the Court of Cassation of the Republic of Armenia in Criminal Case No. ԱՎԴ4/0028/01/16, dated 18 September 2019.

At the same time, the Court of Cassation considers it important to emphasize that the aforementioned final criterion should not be applied in judicial practice in such a formalistic manner (excessive formalism) as to deprive an individual, in circumstances where there has been an interference with his or her right to respect for private life, of the opportunity to have the lawfulness of the court decision authorizing the conduct of an operational-investigative measure judicially reviewed. On the other hand, it should be noted that, when lodging a complaint, interested persons must substantiate the existence of the aforementioned criteria. In this regard, and taking into account the examination of judicial practice, the Court of Cassation considers it particularly important to emphasize that the fact that an individual has been charged and formally designated as an accused person on the basis of factual information obtained as a result of an operational-investigative measure cannot, in itself, establish that the aforementioned criteria have been satisfied. In particular, third parties may be charged on the basis of information obtained as a result of operational-investigative measures conducted in respect of other individuals. In the context of the issue under consideration, however, this cannot be regarded as a mechanism for protecting a legitimate interest where none of the rights of such third parties was interfered with in the course of the operational-investigative measure itself. Such persons may subsequently, within the framework of any ensuing criminal proceedings, challenge the admissibility of the factual information obtained as a result of that operational-investigative measure and relied upon as the basis for the charges.

The Court of Cassation further considers it important to emphasize that a finding, following the examination of a complaint lodged by an interested person, that the person's rights were violated as a result of an operational-investigative measure conducted pursuant to a judicial decision does not, in itself, establish that the rights of other persons were likewise violated. Thus, being confined to the grounds and arguments raised in the complaint, the higher courts examine the lawfulness of the contested decision solely with regard to the alleged violation of the complainant's rights, rather than the rights of all persons who were directly or indirectly connected with the operational-investigative measure or who may even have been subjected to interference as a result thereof.

Moreover, a finding, following the examination of an interested person's complaint, that the person's rights were violated as a result of an operational-investigative measure does not, in itself, render inadmissible the evidence obtained as a result of that measure. The interplay of these circumstances must be subjected to a careful and comprehensive assessment by the authority conducting the proceedings in order to reach the appropriate conclusion.

Thus, summarizing the foregoing, the Court of Cassation concludes that the mechanism of "effective review" of a court decision authorizing the conduct of an operational-investigative measure may be invoked by challenging the lawfulness of that decision before a higher judicial instance where, as a result of the measure, an individual has become a victim of a violation of the right to respect for private life.[6]

5. Timing of Operational-Investigative Measures and the Absence of Reasonable Alternative Means

The authority responsible for conducting operational-investigative activities is accountable for carrying out operational-investigative measures in accordance with the prescribed procedure, within the prescribed time limits, and effectively. Given that the implementation of such measures may entail restrictions on a number of fundamental rights, they cannot be carried out for excessively prolonged periods. In the context of such temporal limitations, the question of when an operational-investigative measure should be initiated becomes particularly important. The timing must be selected so as to coincide with a period during which the individual is most likely to engage in active and purposeful conduct, establish contacts with other persons, or exchange certain information.

At the same time, a practical difficulty arises in cases where, in taking measures aimed at detecting, preventing, suppressing, and investigating a number of serious and particularly serious offences, it is of paramount importance to act "while the trail is still hot"—in other words, promptly and without delay. In such circumstances, it may often be impossible to ensure effective judicial oversight while simultaneously complying with the statutory time limits prescribed by the Criminal Procedure Code of the Republic of Armenia.

In this regard, a practical difficulty may arise when, during the operational-investigative stage, applications are submitted to the court seeking authorization to conduct operational-investigative measures. In such cases, the court may require the relevant authority to substantiate that obtaining the evidence by other means would be reasonably impossible. However, compliance with such a requirement may result in the loss, alteration, destruction, or otherwise compromising of evidence.

In this context, we are of the view that the issue is not merely one of demonstrating that all other means of obtaining the relevant result have been

[6] See: the decision of the Court of Cassation of the Republic of Armenia in the criminal case concerning Ara Shahnazaryan, Case No. Բ-3683/20, dated 30 June 2022. Available at: www.datalex.am.

exhausted through previously conducted operational-investigative measures, but rather of establishing the absence of a reasonable possibility of resorting to alternative means. This is because the legislature requires not only that it be demonstrated that the desired result cannot be achieved by other means, but also that, in the circumstances of the particular case, there is no reasonable alternative means available at all.

Accordingly, we consider it appropriate for courts, when examining such applications, to take into account the specific circumstances of the operational-investigative situation that has arisen in the particular case. Moreover, the Court of Cassation of the Republic of Armenia has established a similar exception to the general rule with regard to the grounds for conducting searches, stating, in particular, as follows: "…. Where, however, the evidentiary value of information obtained through operational-investigative activities cannot be assessed, such information cannot, in itself, constitute sufficient grounds for conducting a search. Nevertheless, when considered in conjunction with other information, including the prevailing operational-investigative circumstances, it may be taken into account in determining whether a search is necessary, particularly at the early stages of an investigation, when the relevant evidence has not yet been obtained".[7]

6. Qualitative Assessment of Applications and of Operational Information

Furthermore, in its decision of 22 November 2024 in Case No. 20/01.12.2023, the Court of Cassation of the Republic of Armenia articulated the following legal position:

"(...) 13.1. Reaffirming the positions set forth in the aforementioned judicial precedents, the Court of Cassation holds that the necessity of interference with an individual's rights must be assessed not from a formalistic perspective, but in substantive terms. It follows from the foregoing that, when determining its position on an application, the competent court must rely not on the quantity of the materials attached to the application, or, in other words, on the quantitative characteristics of the information submitted by the authority conducting the operational-investigative measures, but rather on the qualitative characteristics of that information. Thus, where an application seeking authorization to conduct operational-investigative measures is accompanied by information which, by its substance, indicates that the person against whom the measures are to be conducted is suspected of having committed a serious or particularly serious offence, and

[7] See: the decision of the Court of Cassation of the Republic of Armenia in the case concerning Sepuh Tadevosyan and Sirun Najaryan, Case No. ԵՇԴ/0073/07/15, dated 18 December 2015, para. 22.

where there is compelling evidence that it is impossible to obtain, by other means, the information necessary for the authority conducting the operational-investigative measures to discharge the functions assigned to it by law, the court, when examining the application, must assess it in terms of whether it provides sufficient justification for the interference with the individual's rights."

The Court of Cassation further observes that adopting the contrary approach could result in situations where a court grants an application for authorization to conduct operational-investigative measures solely on the basis of voluminous but substantively deficient materials attached thereto. This would directly distort the essence of the court's judicial function of reviewing the lawfulness of interference with an individual's rights and would also result in the adoption of an insufficiently reasoned judicial decision. (...)"

In its decision of 18 October 2024 in Case No. ՕՀՍ-56/12 10.2023, the Court of Cassation of the Republic of Armenia articulated the following legal position:

"(...) As regards the legal position referred to by the complainant, as expressed in the Court of Cassation's decision in the case of Ruben Khlghatyan, according to which a report containing information obtained from an operational source, standing alone, does not constitute a sufficient evidentiary basis for establishing the substantiation of an application, and that other factual information must be provided in order to assess the reliability of such a report, it should be noted that the Court of Cassation's conclusion in that case was based on the court's assessment, within the particular proceedings, of the sufficiency of the operational information obtained for the purposes of determining whether the application was adequately substantiated. The Court of Cassation reiterates that requiring the submission of additional factual information corroborating the reliability of operational information contained in the evidentiary basis supporting an application for authorization to conduct operational-investigative measures is inconsistent with the nature and purpose of operational-investigative activities. Nevertheless, in each individual case, the court retains the authority to assess the sufficiency of the operational information when determining whether the application under consideration is adequately substantiated. (...)

As the Court of Appeal correctly noted, in the present case, it was not possible to provide additional factual information for the purpose of assessing the reliability of the operational information obtained. In this regard, the Court of Cassation considers it necessary to emphasize the following. First, the interference with the right to respect for private and family life was sought outside the framework of criminal proceedings. Second, the less intrusive measures undertaken by the authority conducting the operational-investigative activities in the sphere of private

and family life had proved ineffective. Third, having determined that obtaining the necessary information by other means was impossible, the head of the authority conducting the operational-investigative activities applied to the Court of First Instance for authorization to conduct operational-investigative measures entailing a higher degree of interference with the fundamental right in question.

In light of the foregoing, the Court of Cassation concludes that, in the present case, it was the limited range of available investigative tools, coupled with the impossibility of obtaining the necessary information by other means concerning the operational information already obtained, that gave rise to the necessity of conducting the operational-investigative measures sought. It follows that (...) seeking authorization to conduct operational-investigative measures involving a higher degree of interference with a fundamental right was itself aimed at verifying the reliability of the operational information already obtained. In such circumstances, requiring the submission of additional factual information to corroborate the reliability of that information, as noted above, is inconsistent with the nature and purpose of operational-investigative activities."

7. Requirements for Judicial Acts Authorizing Operational-Search Measures

It is noteworthy that, in its case-law, the Court of Cassation also attaches importance to compliance with the formal requirements applicable to the judicial acts at issue. In this regard, the Court of Cassation considers it necessary to address the substantive requirements applicable to judicial acts authorizing interference with an individual's fundamental rights, particularly in the context of ensuring adequate and effective safeguards against arbitrary interference with, or abuse of, the right to respect for private life. Thus, in addition to the general requirements applicable to judicial acts, a judicial act authorizing interference with a fundamental right through the implementation of an operational-search measure must, inter alia, contain a clear indication of the type of measure, the person in respect of whom it is to be carried out, and the period of its validity, and, in certain cases, the place of its implementation. The legal and practical purpose of these qualitative requirements is to delineate the permissible limits and conditions of interference with an individual's fundamental rights, thereby ensuring that such interference is neither arbitrary, unlimited, nor incompatible with the applicable legal framework, while at the same time preserving the possibility of subsequently reviewing the lawfulness of the actions of the persons carrying out the measure. Accordingly, compliance with these requirements constitutes one of the conditions for the lawfulness of permissible interference with an individual's rights.

In light of the foregoing considerations, the Court of Cassation holds that an authorization (decision) of a court permitting the implementation of an operational-search measure that is formulated in excessively vague terms does not, by its very nature, sufficiently circumscribe the interference with an individual's rights to the extent that is "necessary in a democratic society" within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This is because, as a consequence of the resulting uncertainty and lack of foreseeability, such an authorization affords the body carrying out the measure broad discretion to determine, inter alia, the place where the measure is to be conducted. In such circumstances, the possibility of arbitrariness and abuse cannot be excluded. In the assessment of the Court of Cassation, this fails to ensure the requisite balance between the public interest and the interests of the individual.[8]

In another case, the Court of Cassation held that the examination of the lawfulness and substantiation of the motion submitted for the conduct of operational-search activities—in the present case, the "Monitoring of Telephone Conversations" operational-search measure—and the examination of the lawfulness and substantiation of the decision rendered by the lower court upon consideration of that motion constitute independent procedural mechanisms under criminal procedure and are not contingent upon one another. Accordingly, where the substantiation of the motion is not called into question, a higher court's finding that the judicial act rendered as a result of judicial oversight over the implementation of an operational-search measure is inadequately or erroneously reasoned cannot, in itself, constitute grounds for finding the motion seeking authorization to conduct such a measure unsubstantiated and for refusing it. In the present case, the Court of Appeal could have dismissed the motion only after examining, on the basis of the motion submitted to the lower court and the materials substantiating it, the factual grounds for granting authorization to conduct the "Monitoring of Telephone Conversations" operational-search measure.

Based on the foregoing, the Court of Cassation holds that the conclusion of the Court of Appeal that the motion submitted by a representative of the National Security Service of the Republic of Armenia seeking authorization to conduct the "Monitoring of Telephone Conversations" operational-search measure in respect of E. Karapetyan should be dismissed on the ground that the judicial act of the Court of First Instance lacked adequate reasoning was unlawful.[9]

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[8] Decision of the Court of Cassation of the Republic of Armenia dated 21 June 2024 in Criminal Case No. 09/08.07.2021.

[9] Decision of the Court of Cassation of the Republic of Armenia dated 21 June 2024 in Criminal Case No. 36110319 B-2186/21 M-8590/21.

8. "Covert Observation" in Places of Detention

In another case, in its decision of 16 June 2023 in Criminal Case No. 22/04.06.2020 M-13904/20, the Court of Cassation first reiterated that the foregoing principles cannot be applied mechanically to exclude the possibility of conducting the "Covert Observation" operational-search measure in a place of detention and to deem unlawful, solely on the basis that it was conducted in such a location, each decision authorizing the implementation of such a measure. In particular, in the case of Gor Sarkisyan, the "Covert Observation" operational-search measure was conducted in the context of public-law relations, where a police officer, acting as a representative of the State, conducted a covert interrogation in his office with an individual who had voluntarily appeared before the authority conducting the proceedings. In such circumstances, the latter did not have, and could not reasonably have had, an expectation of privacy or of the protection of the guarantees safeguarding the confidentiality of his private life.

In this context, the Court of Cassation held that, in each case involving the implementation of the "Covert Observation" operational-search measure in a cell of a place of detention, the applicability of the legal positions expressed by the Court of Cassation in the case of Gor Sarkisyan should not be determined in abstracto, merely by identifying the fact that the relevant measure was carried out in a place of detention constituting a police facility. Rather, such applicability must be determined on the basis of a comprehensive, complete, and objective examination of the case materials, with an assessment of the factual circumstances in concreto, including by establishing whether the "Covert Observation" operational-search measure was conducted in accordance with its nature and intended purpose.

However, in the present case, without assessing in concreto the circumstances characterizing the nature of the legal relationship between the persons subject to surveillance and the relevant authorities at the place of detention of the Yerevan City Department of the Police of the Republic of Armenia, the Court of Appeal deemed the implementation of the "Covert Observation" operational-search measure impermissible solely on the ground that it had been conducted in the relevant cell. The Court of Appeal reasoned that H. Antonyan, while being held in the place of detention, did not have, and could not reasonably have had, an expectation of privacy or of the protection of the guarantees safeguarding the confidentiality of his private life.

In addition to the foregoing, the Court of Cassation reiterates that, although the guarantees of the right to respect for private life afforded to a person in a place of

detention cannot be fully equated with the guarantees of privacy enjoyed by a person in his or her home, the possibility of recognizing, in principle, a minimum level of such guarantees in a place of detention cannot be entirely excluded. Accordingly, through the implementation of the "Covert Observation" operational-search measure, the authority conducting the criminal prosecution may, in principle, exercise surveillance over an individual's right to respect for private life, which falls within the scope of protection of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.Consequently, the reasoning of the Court of Appeal that the "Covert Observation" operational-search measure could not have been conducted in Cell No. 5 of the place of detention of the Yerevan City Department of the Police of the Republic of Armenia, on the ground that H. Antonyan did not have, and could not reasonably have had, an expectation of privacy or of the protection of the guarantees safeguarding the confidentiality of his private life while in the cell, is unsubstantiated.

Addressing the Court of Appeal's finding that, based on the factual information contained in the case materials, the implementation of the "Covert Observation" operational-search measure had been authorized despite the apparent availability of less intrusive means of obtaining the necessary information, the Court of Cassation holds that this finding is well-founded and consistent with the legal position expressed by the European Court of Human Rights in Dragojević v. Croatia. In particular, in that case, the European Court of Human Rights found a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, noting that the application seeking authorization for covert surveillance had not set out factual details based on the circumstances and specific facts of the alleged offense, nor had it demonstrated that the investigation could not have been conducted by means entailing a lesser degree of interference.

The Court of Cassation observes that, in the present case, criminal proceedings had been instituted, and H. Antonyan, as a detained person, was under the control of the authority conducting the proceedings. In such circumstances, the pre-trial investigation body failed to substantiate the absence of any possibility of obtaining the necessary information through the broad range of procedural instruments available under criminal procedure. Instead, both the initiating authority and, subsequently, the Court of First Instance confined themselves to a formal assertion that obtaining such information by other means was impossible.

With regard to the appellant's argument referred to in paragraph 5 of the present decision, it should be emphasized that, when reviewing the lawfulness of a lower court's decision, the scope of judicial review is limited to assessing the factual information examined during the consideration of the motion and the findings

made by the court in support of the necessity of interfering with the individual's right to respect for private life.

However, upon examining the materials of the case, the Court of Cassation observes that no factual information was submitted concerning the procedural actions undertaken in the criminal case during the period preceding the submission of the motion to the court, including information concerning the questioning of H. Antonyan as a suspect. Moreover, neither the written instruction of the authority conducting the proceedings in the criminal case nor the decision to initiate a motion seeking authorization to conduct the "Covert Observation" operational-search measure contains any such information. Accordingly, the aforementioned argument of the appellant cannot be taken into consideration in the circumstances of the present case.

The Court of Cassation further observes that, based on the factual circumstances of the present case, it is apparent that, in the motion seeking authorization to conduct the "Covert Observation" operational-search measure, the competent authority failed to substantiate, in any manner, the purpose for which the measure was to be conducted, the factual circumstances that had rendered its implementation necessary, or the specific circumstances that the competent authority expected to establish through the measure.

The Court of Cassation considers it necessary to reiterate that, having regard to the significantly heightened degree of interference with the individual's right to respect for private life entailed by the "Covert Observation" operational-search measure, it is impermissible to conduct such a measure without substantiating its necessity, merely for the purpose of ensuring the completeness of the investigation of the case. Only where a legitimate aim underlying the implementation of the "Covert Observation" operational-search measure has been established can the court properly assess the proportionality of the interference in question in relation to that aim.[10]

9. Conclusion

Thus, it may be concluded that judicial oversight of operational-search activities constitutes a fundamental mechanism for ensuring the lawfulness of such activities, aimed at maintaining a proper balance between constitutionally protected interests in the implementation of each type of operational-search measure.

[10] Decision of the Court of Cassation of the Republic of Armenia dated 16 June 2023 in Criminal Case No. 22/04.06.2020 M-13904/20.

From this perspective, particular importance attaches to the role of the Court of Cassation as the institution responsible for ensuring the uniformity of judicial practice. A retrospective analysis of the case law of the Court of Cassation demonstrates that the legal positions articulated in its decisions have evolved in accordance with the principle of striking a reasonable balance between public and private interests. This, in turn, suggests that, within the broader philosophical framework underlying the resolution of universal legal issues, more specific and particular questions arising in this field are likewise being addressed and resolved in contemporary judicial practice.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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DOI: https://doi.org/10.46991/SL/2026.SP2.076

SELECTED ISSUES CONCERNING THE CONDITIONS FOR THE LAWFULNESS OF APPLYING A PREVENTIVE MEASURE

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Abstract. The article is devoted to the examination of selected fundamental issues concerning the conditions for the lawfulness of applying a preventive measure, with particular attention to certain problems related to the assessment of reasonable suspicion and the substantiation of the purposes of preventive measures. The paper argues that reasonable suspicion must be understood as a minimum, yet lawful and objective evidentiary threshold, which cannot be overcome through an obvious circumvention of the law, including by reference to materials whose use for proving the relevant charge is manifestly precluded. In this regard, the article also addresses the relevant positions developed by the Court of Cassation, considering them problematic and debatable from a scholarly perspective.

The next important thesis of the article concerns the assessment of the purposes of preventive measures. The author demonstrates that the purposes of a preventive measure cannot be assessed in an abstract or mechanical manner. They must be substantiated by individualized facts and examined separately, since each risk has an independent legal content. It is emphasized that facts relied upon to substantiate one risk cannot automatically serve to confirm the existence of another risk.

Addressing limitation periods, the paper advances the position that, as a rule, the expiry of the limitation period for bringing a person to criminal liability excludes an independent ground for applying detention, except in cases where the accused objects to the termination of prosecution and violates the conditions of an alternative preventive measure applied in respect of him. At the same time, it is argued that the approaching expiry of the limitation period, although it does not in itself preclude the application of a preventive measure, constitutes a significant counterbalancing factor in assessing the degree of risks and may lead to the need to choose a more lenient preventive measure, in light of the requirements of the principle of proportionality.

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The article received 02 August 2026,
reviewed 30 September 2026,
accepted for publication 26 October 2026

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Keywords – *pre-trial proceedings, reasonable suspicion, extra-procedural document, restriction on the use of evidence, purposes of preventive measures, individualized assessment of risks, detention, limitation periods, principle of proportionality.*

Issues concerning the conditions for the lawful application of preventive measures, including the assessment of reasonable suspicion, are a constant subject of discussion in doctrinal sources[1]. This is because their relevance does not diminish: the issues concerned are characterized by continuous development, while conflicting and non-uniform interpretations and approaches persist in legal practice. This divergence in legal practice became particularly pronounced following Decision No. ՀԿԴ/0331/06/25 of the Court of Cassation of 23 June 2026, which sought to construe the restriction on use laid down in Article 97(10) of the CPC, at the stage of assessing reasonable suspicion, within a substantially narrower scope than follows from the systemic and safeguard function of that provision.

This article focuses, in particular, on the following four principal issues:

- reliance on and assessment of evidence that may not be used to substantiate a specific charge as a basis for reasonable suspicion;
- the independent and separate assessment of the purposes of preventive measures;
- the assessment of the purposes of preventive measures where the limitation period for bringing a person to criminal liability has expired;
- the assessment of the purposes of preventive measures where the limitation period for bringing a person to criminal liability has not yet expired but is approaching expiry.

I. Assessment of Reasonable Suspicion.

According to established case-law[2], the following criteria should guide a court's assessment of reasonable suspicion in pre-trial proceedings:

[1] See, inter alia, Davit Avetisyan, "Reasonable Suspicion as a Condition for the Lawful Application of Preventive Measures under the Draft New Criminal Procedure Code of the Republic of Armenia," State and Law, No. 2 (64), 2014, YSU, Yerevan, pp. 35–44; Hrayr Ghukasyan, "Grounds and Procedural Rules for the Application of Detention under the Criminal Procedure Code of the Republic of Armenia," Collection of Scientific Papers Dedicated to the 70th Anniversary of the YSU Faculty of Law, Yerevan, pp. 214–217; Davit Melkonyan, "Specific Features of the Application of Preventive Measures under the Draft New Criminal Procedure Code," State and Law, No. 1 (59).

[2] See, inter alia, insofar as relevant, paragraph 15 of Decision No. ԵԱՆԴ/0017/06/16 of the Court of Cassation of 22 June 2017 concerning E. Yeghiazaryan; paragraph 5.6 of Decision No. ՍԴՈ-1453 of the Constitutional Court of 16 April 2019; paragraph 15.2 of Decision No. ԱՎԴ2/0019/06/21 of the Court of Cassation of 17 May 2024 concerning E. Hovhannisyan.

- in the absence of reasonable suspicion, any restriction of a person's right to liberty is unlawful in itself;

- reasonable suspicion does not require the existence of sufficient facts proving the accused's guilt in the act committed to the standard of proof beyond reasonable doubt; nevertheless, the “suspicion” must be reasonable and must be based on specific factual information obtained in accordance with the procedure prescribed by law (indicating the person's connection to the act committed and the correspondence of the incident or event to the offence which the person is accused of having prima facie committed), and the court's conclusions as to the existence or absence of such suspicion must be substantiated and reasoned;

- when extending a period of detention, it must be shown that the suspicion that the person committed an offence has persisted and continues to remain “reasonable”. The duration of the deprivation of liberty may be an important factor in determining the requisite degree of suspicion;

- the lawfulness of the charge is a mandatory precondition for establishing the existence of reasonable suspicion that an offence has been committed;

- when assessing the existence of reasonable suspicion, the court's task is not to determine whether the legal classification given to the act imputed to the person is correct or incorrect, but whether the act prima facie contains the elements of an offence provided for in the Special Part of the Criminal Code of the Republic of Armenia and whether the factual description of the act prima facie corresponds to those elements. In other words, establishing the existence of reasonable suspicion does not entail confirming the legal classification given to the act imputed to the person or conclusively establishing the existence of a specific offence;

- when considering a motion for detention, the court is not entitled to examine issues falling outside the scope of the tasks before it at that stage. Accordingly, when verifying the existence of reasonable suspicion, the court may not prejudge the issue of guilt, make a legal assessment of the person's guilt or innocence, or directly establish the presence or absence of the elements of an offence in the person's conduct. At the same time, without making legal assessments on the foregoing issues, the court may reject a motion seeking the application, extension or reconsideration of detention as a preventive measure where it establishes the prima facie existence and possible applicability of a circumstance precluding criminal prosecution. Moreover, the indication that such a circumstance prima facie exists must result not from the kind of comprehensive and in-depth analysis of the materials, including evidence, required when examining and deciding the case on the merits, but from relatively obvious facts arising from the materials submitted (for example, where the act of which the person is accused was not a criminal

offence at the time it was committed; where criminal prosecution has been initiated against a person who had not reached the age of criminal responsibility; where the limitation periods have expired; where an amnesty act has been adopted; and so forth);

- in assessing reasonable suspicion, decisive significance may attach to situations in which the legal classification given to the act is manifestly inconsistent with its factual description (or with the materials attached to the motion that support the facts attributed to the person), while the factual aspect of the act prima facie indicates the commission of an alleged offence of lesser gravity than the legal classification assigned to it (for example, where the person is charged with theft on a large scale, although that classification is manifestly inconsistent with the factual description of the act, while the latter prima facie indicates the elements of simple theft).

Thus, the established case-law on the assessment of reasonable suspicion[3] shows, inter alia, that assessing reasonable suspicion does not require the kind of comprehensive and in-depth analysis of the materials submitted, including evidence, that is required when examining and deciding the case on the merits. At the same time, however, deciding whether reasonable suspicion exists requires answering whether there is information, facts or evidence substantiating the suspicion that directly indicates the person's connection to the alleged offence attributed to him or her, and whether the incident of which the person is accused prima facie corresponds to the elements of an offence prescribed by the Criminal Code.

Reliance on and assessment of evidence that may not be used to substantiate a specific charge as a basis for reasonable suspicion.

Within the foregoing analysis concerning the assessment of reasonable suspicion, it is necessary to consider an issue arising in legal practice: whether extra-procedural documents provided for by Article 96(3) of the Criminal Procedure Code of the Republic of Armenia (hereinafter also the Current Code or the CPC) may be relied upon as a basis for substantiating reasonable suspicion of the prima facie commission of an act of minor or medium gravity imputed to the

[3] In addition to the above-mentioned precedents, see also the judgments of the European Court in Kandzhov v. Bulgaria, 6 November 2008; K.-F. v. Germany, 27 November 1997; Murray v. the United Kingdom, 28 October 1994; Gusinskiy v. Russia, 19 May 2004; Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990; Decision No. ՀԿԴ/0201/06/24 of the Court of Cassation of 17 April 2025; Decision No. ՏԴ2/0009/06/11 of the Court of Cassation of 22 December 2011 concerning Harutyun Khachatryan; Decision No. ԵԿԴ/0678/06/10 of the Court of Cassation of 24 February 2011 concerning Vahram Gevorgyan; Decision No. ԼԴ/0197/06/08 of the Court of Cassation of 26 December 2008 concerning Tigran Vahradyan; and other judicial acts.

accused, and whether, within the framework of judicial safeguards in pre-trial proceedings, the court is competent to address and assess that issue.

In this connection, it should first be noted that, as follows from the legal rule enshrined in Article 96(3) of the Criminal Procedure Code of the Republic of Armenia, video recordings, audiovisual recordings, audio recordings and other objective documents obtained with judicial authorization as a result of operational-search activities conducted outside the framework of criminal proceedings may be recognized as extra-procedural documents and attached to the case materials only where the relevant measure was carried out for the purpose of preventing or suppressing the alleged offence, or identifying the person who allegedly committed the offence at the time of its commission or immediately thereafter. At the same time, it follows directly from the legal regulations laid down in Article 97 of the same Code that, although such documents are considered admissible evidence, they may not be used to substantiate a charge of an offence of minor or medium gravity.

It follows directly from the above-mentioned rule, in particular Article 97(10) of the Criminal Procedure Code of the Republic of Armenia, that it is undisputed that such extra-procedural documents may not be used to substantiate a charge of an offence of minor or medium gravity. At the same time, it should be noted that the concepts of "charge" and "reasonable suspicion" are directly interconnected: reasonable suspicion is a constituent element of the charge and, although the limits of its assessment differ from those applicable to the assessment of the charge, the fact that a particular item of evidence manifestly and indisputably cannot be used to substantiate the charge necessarily means that it cannot serve as a basis for reasonable suspicion either. In other words, given that the issue in question requires no substantive or in-depth analysis and involves merely identifying the applicable statutory rule—that is, by its nature, the answer is highly evident—we consider that where the authority conducting the proceedings relies on such evidence, among other material, to substantiate reasonable suspicion, the court is competent, within the framework of judicial safeguards in pre-trial proceedings, to address and assess that matter. In our view, therefore, assessment of this issue at that stage of the proceedings falls within the court's competence[4].

The foregoing is further supported by the following considerations:

As already noted, although the existence of reasonable suspicion is not equivalent to proof of the charge, the case-law of the European Court of Human Rights (hereinafter also the European Court) unequivocally requires that it be based

[4] In this regard, see, for example, also the decision of the Anti-Corruption Court of Appeal of 28 August 2025 in proceedings No. ՀԿԴ/0184/06/25.

on facts or information capable of satisfying an objective observer that the person concerned may have committed the offence alleged[5]. In this sense, reasonable suspicion presupposes not abstract assumptions or unverified information, but a minimum factual basis that is nevertheless objectively assessable. It follows that reasonable suspicion cannot be constructed on materials which, from the standpoint of the applicable legal framework, are manifestly devoid of evidentiary value—more specifically, materials that are manifestly incapable of being used in relation to the charge in question. The opposite approach would conflict with the requirement that reasonable suspicion be objective, because material that is manifestly devoid of legal value cannot be regarded as a fact or information capable of persuading an objective observer. This logic is also supported by the principle that the lawfulness of deprivation of liberty requires at least some qualitative assessment of the materials submitted, even if that assessment is limited. Accordingly, reasonable suspicion must be understood as a minimum, yet lawful and objective evidentiary threshold that cannot be crossed by manifestly circumventing the law, including through reliance on materials whose use to prove the relevant charge is manifestly excluded.

As regards Decision No. ՀԿԴ/0331/06/25 of the Court of Cassation of 23 June 2026, and, inter alia, the following positions expressed therein: *"(...) The Court of Cassation also considers it necessary to note that the criminal-procedural regulation concerning the restriction, depending on the category of the offence, on the use for substantiating a charge of video recordings, audiovisual recordings, audio recordings and other objective documents obtained with judicial authorization as a result of operational-search activities, recognized as extra-procedural documents and attached to the case materials, cannot in itself be interpreted as an absolute prohibition on their use, within proceedings concerning the judicial safeguards for the application of a preventive measure, at the level of assessing reasonable suspicion as to the accused's possible involvement in the offence imputed to him or her.*

In this regard, the Court of Cassation concurs with the conclusion of the Court of First Instance concerning the applicability of the regulation provided for in Article 97(10) of the Criminal Procedure Code of the Republic of Armenia, according to which, in the context of examining the existence of reasonable suspicion that the accused committed the alleged offence imputed to him or her, the documents of evidentiary significance attached to the motion are not to be assessed

[5] See, for example, the judgments of the European Court in Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, para. 32; Murray v. the United Kingdom, 28 October 1994, para. 55; O'Hara v. the United Kingdom, 16 January 2002, para. 34.

under the regulations of Article 97(10) of the Criminal Procedure Code in the same manner as the issue of admissibility of evidence governed by the same Article, which is a matter for subsequent stages of the proceedings (...)"[6]; we consider it necessary to make the following observations:

First, the distinction between reasonable suspicion and proof of the charge cannot support a conclusion that material which may not be used to substantiate a charge may nevertheless be freely used to establish reasonable suspicion in respect of the same charge. Reasonable suspicion is certainly not the standard for proving guilt, but, as noted above, it is the mandatory minimum basis for the procedural existence of the charge and for restricting a person's liberty. It is not an autonomous and legally neutral category detached from the charge. If, by operation of law, a specific item of factual material may not be used to substantiate a charge of an offence of minor or medium gravity, placing that material at the foundation of the preliminary, minimum, yet legally mandatory substantiation of the same charge—reasonable suspicion—creates an obvious normative contradiction. In other words, it cannot be regarded as acceptable for evidence to be unusable to prove a charge but usable to restrict a person's liberty on the basis of that same charge.

We reiterate that, in the situation under consideration, the court's application of Article 97(10) of the CPC does not entail the kind of in-depth assessment of evidence that is characteristic of the examination of a case on the merits. In such a situation, the court does not determine the person's guilt or innocence, does not assess the sufficiency of the evidence by the standard applicable to a judgment, and does not prejudge the outcome of the proceedings. The court merely resolves an obvious legal question: whether, in the face of an express statutory prohibition, the material relied upon in the motion may at all be used to substantiate reasonable suspicion in relation to the charge in question. The answer to this question follows not from a complex factual or legal analysis, but from the direct application of the statutory rule. We therefore consider that reserving this issue for later stages of the proceedings does not preserve the stage-based structure of criminal proceedings; rather, it hollows out pre-trial judicial review.

Moreover, we consider that excluding the application of Article 97(10) of the CPC at the reasonable-suspicion stage may produce a dangerous practical consequence: the criminal prosecution authority may rely, for the purpose of applying a liberty-restricting preventive measure, on materials that later will

[6] The Court of Cassation expressed similar positions in its Decision No. ՀԿԴ/0332/06/25 of 27 August 2026.

manifestly be incapable of being used to substantiate the same charge. In that event, the statutory safeguard loses its preventive function and becomes a delayed and belated form of protection. Yet the very essence of judicial review of a preventive measure is that the court should prevent, at that moment, an unfounded or unlawful restriction of liberty. If the defence can effectively raise such an argument only at a later stage, the mechanism for protecting its rights at the stage of applying the preventive measure becomes merely formal. Moreover, the prohibition on use would then fail to operate precisely where its safeguard function is most evident—at the moment a person's liberty is restricted. Such an interpretation is difficult to reconcile with the requirements of legal certainty and foreseeability of the law, since it should be foreseeable to the person that material which the law excludes from use in substantiating a particular charge cannot also be used to create a basis for depriving that person of liberty or substantially restricting it.

By way of analogy, it should be noted that if, when considering a preventive measure, the court is presented with materials from which a circumstance precluding criminal prosecution is manifestly apparent, the court cannot mechanically defer consideration of that issue to the stage at which the case is examined on the merits. In such situations, the court does not determine guilt; it performs a minimum review of the lawfulness of the restriction of liberty.

The same point can be illustrated by an obvious legal defect in the obtaining of evidence. If material obtained as a result of a search of a dwelling is presented as a basis for reasonable suspicion, but it is manifest from the motion itself or the materials attached to it that the search was conducted, for example, without the required judicial authorization, the court cannot content itself with stating that the issue of admissibility is entirely a matter for later stages of the proceedings.

These comparisons show that the issue is not the final assessment of evidence, but the minimum legal fitness of the material relied upon as a basis for restricting liberty. Just as a court cannot disregard an obvious circumstance precluding criminal prosecution merely because the case has not yet been examined on the merits, it likewise cannot disregard an express statutory restriction on the use of evidentiary material by treating it as an issue for later stages. Otherwise, the same legal defect that may later preclude use of the material to substantiate the charge would, at the pre-trial stage, permit a restriction of the person's liberty, which, as noted above, is incompatible with the safeguard logic of judicial review.

Accordingly, having regard to the foregoing considerations, we consider the above-mentioned positions developed by the Court of Cassation to be problematic and open to scholarly debate.

As regards a possible argument in relation to the issue under consideration—namely, that the offences of receiving a bribe, giving a bribe and aiding the receipt of a bribe are so closely interconnected that, when assessing reasonable suspicion, the results of operational-search measures cannot be regarded as admissible in respect of the bribe recipient while being regarded as inadmissible in respect of the bribe giver or the person who aided the latter; and that, consequently, the provisions of Articles 96 and 97 of the Criminal Procedure Code of the Republic of Armenia should be interpreted in the context of the serious offence provided for in Article 435 of the Criminal Code of the Republic of Armenia, an approach said also to be supported by Article 242(3) of the Criminal Procedure Code, under which covert investigative actions may be conducted in proceedings concerning alleged serious or particularly serious offences, as well as alleged offences of receiving or giving a bribe—it should be stated that judicial interpretation of a legal rule is a necessary means of the normal development of law, but it has constitutional limits. The court's task is to reveal the content of the rule by considering its text, purpose, systemic connections and constitutional values, not to establish a new rule in place of the legislature. From the standpoint of the constitutional order, this follows from the principle that justice is administered only in accordance with the Constitution and the laws, and that a court may not, through interpretation, go beyond the framework of regulation predetermined by law. In other words, interpretation of a statutory rule is permissible insofar as it reveals the rule's meaning, removes uncertainty or ensures constitutionally compliant application; it becomes impermissible once the court, departing from the text of the law and the will of the legislature, establishes, for example, a new procedure. Once that line is crossed, interpretation loses its law-applying character and becomes disguised law-making. In this context, we consider that interpreting the provisions of Articles 96 and 97 of the Criminal Procedure Code in the manner described above—especially where this results in a deterioration of the person's legal position—would, in the present case, cross the permissible boundary of judicial interpretation and transform such interpretation into disguised law-making.

II. Purposes of Preventive Measures and Their Assessment.

The purposes of preventive measures, which take the form of preventing the accused from absconding or committing an offence, or ensuring compliance with the obligations imposed on the accused by the Criminal Procedure Code of the Republic of Armenia or by a court decision[7]*, are predictive in nature. In other*

[7] For the obligations imposed on an accused by law, see Article 43(2) of the Criminal Procedure Code of the Republic of Armenia.

words, as the Court of Cassation has also noted, the legislature uses the term "may"[8]*, thereby emphasizing that, when deciding whether to select a preventive measure, the "manifestations of improper conduct by the accused" listed in Article 116 of the Criminal Procedure Code need not already have occurred; rather, there must be a risk or probability that, if no preventive measure is applied, they will occur. This does not, however, mean that where the above-mentioned acts have already been committed by the accused no preventive measure should be applied on the ground that it would be too late. On the contrary, in such cases the application of a preventive measure will be more than sufficiently substantiated and reasoned. In other words, the law should not allow an accused person first to engage in improper conduct and only thereafter consider whether a preventive measure should be applied, because, depending on which of the acts listed in Article 116(2) of the Criminal Procedure Code the accused has committed while remaining at liberty, the application of a preventive measure, including detention, may in some cases indeed be belated.*

Thus, as also follows from the case-law developed by the Court of Cassation, the purposes of preventive measures are predictive and probabilistic in nature because they concern future events. Such predictions must be substantiated by specific materials obtained in the criminal proceedings, which ultimately determine whether the application of a preventive measure, including detention, is justified. This also serves as a safeguard against any presumption in favor of detention and is a condition for ensuring that its application satisfies the requirement of adequate justification. It is precisely for this reason that, when choosing the type of preventive measure, all positive and negative factors relating to the accused's possible conduct must be weighed and balanced[9], and only thereafter may a final conclusion be reached as to the type of preventive measure to be applied[10].

At the same time, it should be reiterated that the assessment of the purposes of a preventive measure cannot be based on abstract presumptions. The gravity of the offence attributed to the accused, the public resonance of the case, or the severity of the expected punishment may be regarded only as auxiliary factors; by themselves, they are insufficient to establish a risk of absconding, obstructing the proceedings, or committing an offence. Such risks must be assessed through the

[8] See Article 116(2) of the Criminal Procedure Code of the Republic of Armenia.
[9] This also follows from the requirement laid down in Article 116(3) of the Criminal Procedure Code of the Republic of Armenia.
[10] Insofar as relevant, see, inter alia, paragraph 14.1 of Decision No. ՀԿԴ/0124/01/23 of the Court of Cassation of 19 July 2024 concerning Vladimir Asatryan, and paragraph 12.1 of Decision No. ՀԿԴ/0233/06/23 of the Court of Cassation of 28 June 2024 concerning Vardan Mamikonyan.

combined consideration of the person's conduct, social ties, family situation, employment, prior conduct, criminal record, procedural discipline and the specific facts of the case. In other words, a risk must not merely be abstractly conceivable; it must be individually substantiated by the materials of the proceedings.

Independent and Separate Assessment of the Purposes of Preventive Measures.

A key element in assessing the lawfulness of the application of preventive measures is the requirement that their purposes—that is, the corresponding risks—be substantiated independently and separately. Although in practice those risks may be interrelated to some extent, they nevertheless constitute circumstances with different legal content, each of which has its own standard of substantiation and is subject to an independent assessment. A review of judicial practice shows that there are numerous cases in which courts, for example, effectively establish the existence of a risk that the accused will commit an offence solely on the basis of the same circumstances on which they relied when assessing the likelihood of obstruction of the proceedings[11]. Such an approach, in substance, merges the substantiation of different risks without identifying the separate factual bases necessary for each of them. By contrast, the case-law of the European Court consistently requires that deprivation of liberty be justified by "relevant and sufficient" reasons that are individualized and directed to substantiating the specific risk concerned[12]. It follows from this requirement that the existence of one risk cannot be mechanically inferred from circumstances relied upon to substantiate another risk, without identifying additional relevant factors and factual information and undertaking further analysis. The European Court has repeatedly criticized approaches in which domestic courts confine themselves to general or repetitive formulations without distinguishing and substantiating the specific risks. In particular, in Smirnova v. Russia, the Court held that such a formalistic approach does not satisfy the requirements of Article 5 of the Convention because it fails to ensure a genuine and individualized assessment of the risks[13]. Similar positions have been expressed in other cases, where it has been emphasized that the gravity of the charge or the nature of the case may have only an auxiliary role and cannot,

[11] See, for example, the decision of the Anti-Corruption Court of 10 December 2024 in proceedings No. ՀԿԴ/0002/01/23.

[12] See, for example, the judgment of the European Court in Buzadji v. the Republic of Moldova, 5 July 2016, paras. 100–104.

[13] See, for example, the judgment of the European Court in Smirnova v. Russia, 24 October 2003, paras. 61–64.

either alone or in combination, substitute for the factual substantiation of the specific risks[14].

It follows from the foregoing that the possible logical connection between the purposes of preventive measures does not make the substantiation of those purposes interchangeable. In other words, considering risks together cannot replace separate substantiation of each risk, since mechanically identifying them with one another would in practice eliminate the independent content of each purpose prescribed by law. Each purpose must therefore be assessed not abstractly or mechanically, but on the basis of a combination of specific circumstances arising from the materials of the proceedings and relating to that particular risk. Accordingly, an approach under which circumstances relied upon to substantiate one risk are automatically extended to other risks should be regarded as inconsistent with the requirements of lawfulness. The purposes of preventive measures must therefore be viewed not as abstract categories capable of interchangeable or combined substantiation, but as a system of risks requiring independent substantiation, in which the justification of each element is a mandatory precondition for the lawfulness of the preventive measure.

Assessment of the Purposes of Preventive Measures Where the Limitation Period for Bringing a Person to Criminal Liability Has Expired.

It should be noted that, unlike the Criminal Procedure Code of the Republic of Armenia adopted in 1998, Article 135(2) of which provided, inter alia, that detention could be applied to an accused only where there was reasonable suspicion that he or she had committed an offence for which the maximum term of imprisonment exceeded one year—thus making the existence of reasonable suspicion of an offence punishable by more than one year's imprisonment an additional mandatory condition for selecting detention as a preventive measure—the Criminal Procedure Code of the Republic of Armenia that entered into force on 1 July 2022 adopted a completely different approach to this issue. In place of that rule, Article 118(3) of the Current Code provides that, where the offence attributed to the accused does not carry a penalty involving deprivation of liberty, detention may be applied only if the accused violates the conditions of an alternative preventive measure already applied to him or her. Thus, unlike the Criminal Procedure Code adopted in 1998, the Current Code does not exclude selecting detention as a preventive measure even where the offence attributed to the person does not carry a penalty involving deprivation of liberty; however, it makes such

[14] See, inter alia, the judgments of the European Court in Letellier v. France, 26 June 1991, para. 51, and Ilijkov v. Bulgaria, 26 July 2001, para. 81.

detention possible only where the accused has violated the conditions of an alternative preventive measure already applied to him or her. This approach of the legislature is logical, since otherwise, where the act attributed to a person does not carry a penalty involving deprivation of liberty (or, as provided under the Criminal Procedure Code adopted in 1998, where the maximum term of imprisonment is less than one year), the accused, knowing that the stricter preventive measure of detention can under no circumstances be applied, could engage in any form of unlawful conduct during the criminal proceedings. In our assessment, such a result cannot be regarded as lawful[15].

Alongside the foregoing considerations, it should also be borne in mind that the condition laid down in Article 118(3) of the Current Code concerning the absence of a penalty involving deprivation of liberty is, from a legal standpoint, equivalent to the situation in which the limitation period for bringing a person to criminal liability has expired, since in that event the imposition of punishment on the person is excluded. It follows that expiry of the limitation period is not, in itself, an independent basis for applying detention to a person as a preventive measure, and detention may be applied only where the accused objects to the termination of criminal prosecution on the ground that the limitation period has expired (Article 12(4) of the CPC) and, at the same time, during the continuing criminal proceedings, violates the conditions of the alternative preventive measure applied to him or her.

Assessment of the Purposes of Preventive Measures Where the Limitation Period for Bringing a Person to Criminal Liability Has Not Yet Expired but Is Approaching Expiry.

We also consider it necessary to address the question of what legal significance the fact that the limitation period for bringing a person to criminal liability has not yet expired but is approaching expiry may have, or what counterbalancing factor it may constitute, when assessing the purposes of a preventive measure.

In this regard, it should first be noted that, as already stated above, preventive measures are subject to common conditions of lawfulness, while the purposes (grounds) for applying each of them may vary in intensity, reflecting different degrees of risk. Determining that degree of risk is of key importance when deciding on a preventive measure. In other words, although the fact that only a relatively short period remains before the limitation period for bringing a person to criminal liability expires does not preclude the possibility of selecting detention as a

[15] It should also be noted, having regard to Article 123(5) of the Current Code, that the rule laid down in Article 118(3) also applies when deciding whether to select house arrest as a preventive measure.

preventive measure, it is a weighty factor in assessing the accused's possible conduct: in substance, it indicates a reduction in the degree of risk that the accused will engage in improper conduct. Thus, where such a weighty factor is present, the absence of another comparably weighty countervailing factor may itself provide a basis for declining to select the most severe preventive measure—detention—because the opposite conclusion may be incompatible both with the principle of the public nature of proceedings under Article 15 of the Criminal Procedure Code of the Republic of Armenia and with the principle of proportionality enshrined in Article 78 of the Constitution, in the context of assessing the correspondence between the aim pursued and the means used to achieve it.

Accordingly, the fact that the limitation period for bringing a person to criminal liability is approaching expiry is not a neutral circumstance when deciding on a preventive measure. It reduces the real prospect of punishment and, consequently, the incentives for the accused to engage in possible improper conduct. In such situations, therefore, the court must subject to stricter scrutiny whether a sufficient public interest still exists to justify the continuation of deprivation of liberty. The opposite approach may result in an interference whose intensity in practice exceeds the substantive criminal-law prospect that remains in the proceedings.

Conflict of Interests
The author declares no ethical issues or conflicts of interest in this research.
Ethical Standards
The author affirms this research did not involve human subjects.

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DOI: https://doi.org/10.46991/SL/2026.SP2.091

THE PRINCIPLE OF NE BIS IN IDEM IN ARMENIA'S NEW CRIMINAL PROCEDURE CODE: EUROPEAN STANDARDS, DOMESTIC IMPLEMENTATION, AND INTERPRETIVE RISKS

Ani Danielyan*

Abstract. The prohibition of repeated criminal prosecution or punishment for the same act - traditionally expressed as ne bis in idem - is both a guarantee of fair trial and an institutional rule of finality of criminal prosecution. This article examines the way in which the principle is incorporated into Article 25 of the Criminal Procedure Code of the Republic of Armenia and evaluates whether that provision and its implementation are compatible with Article 4 of Protocol No. 7 to the European Convention on Human Rights and with the relevant case law of the European Court of Human Rights. The article argues that the Armenian rule generally follows the Convention model, but its practical application depends on several interpretive distinctions: the difference between a procedural refusal to initiate prosecution and a merit-based determination of criminal responsibility; the distinction between public and private prosecution; and the treatment of administrative or disciplinary sanctions that are, in Convention terms, criminal in substance. On this basis, the article proposes a structured judicial test for Armenian courts and investigative bodies. The central recommendation is that Article 25 should be interpreted through the combined lenses of finality of the prosecution, substantive identity of facts, autonomous criminal character of the act, and the existence of a sufficiently integrated response where parallel proceedings are permitted.

Keywords - *ne bis in idem; double jeopardy; Armenian Criminal Procedure Code; Article 25; European Convention on Human Rights; finality of decisions; public and private prosecution; parallel punitive proceedings.*

1. Introduction

The rule against double jeopardy has a long legal history.[1] In contemporary criminal justice, the principle is not merely a technical rule on the repetition of

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The article received 19 August 2026,
reviewed 27 September 2026,
accepted for publication 17 October 2026

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proceedings. It expresses a deeper constitutional idea: once the state has finally resolved a person's criminal responsibility for a particular set of facts, that person should not remain indefinitely exposed to renewed prosecution, punishment, or procedural pressure for the same factual conduct.

Article 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR) gives this guarantee an international legal basis. Under paragraph 1, a state may not subject a person to a further criminal trial or punishment for an offence already resolved by a final acquittal or conviction under that state's law and criminal procedure.[2] Article 14(7) of the International Covenant on Civil and Political Rights also protects against double jeopardy.[3] In Armenia, Article 68 of the Constitution prohibits another trial for the same act. It also permits statutory procedures for reconsidering a case on the basis of new circumstances, facts discovered subsequently, or a fundamental procedural defect capable of changing the result.[4]

The new Criminal Procedure Code of the Republic of Armenia develops this constitutional guarantee in Article 25. The provision is important not only because it restates the rule of ne bis in idem, but also because it determines which prosecutorial and judicial acts preclude renewed criminal prosecution. It further addresses two practically sensitive questions: whether the discontinuance or non-initiation of public prosecution prevents private prosecution, and how courts should treat administrative or disciplinary sanctions that are equivalent to punishment.

This article examines those questions from the perspective of ECHR case law and Armenian constitutional and cassation practice. Its central research question is the following: how should Article 25 of the Armenian Criminal Procedure Code be interpreted so that the domestic prohibition of repeated prosecution remains consistent with the minimum Convention standard while preserving the higher level of protection guaranteed by Armenian law?

The article makes three arguments. First, Article 25 should be read as protecting not only against repeated punishment, but also against repeated prosecution and trial where the first proceedings ended in a final merit-based determination of criminal responsibility. Secondly, a procedural act that does not examine the facts attributable to a concrete person cannot automatically be treated as a final acquittal

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[1] J. Hunter, "The Development of the Rule against Double Jeopardy", The Journal of Legal History 5 (1984), pp. 1–19, at pp. 3–4. https://doi.org/10.1080/01440368408530792.
[2] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4(1).
[3] International Covenant on Civil and Political Rights, Article 14(7).
[4] Constitution of the Republic of Armenia, Article 68.

or conviction for the purposes of ne bis in idem. Thirdly, where the same conduct gives rise to criminal and administrative or disciplinary proceedings that are also criminal in Convention terms, Armenian courts must apply the European Court's integrated-proceedings test and must ensure that the cumulative response is foreseeable, coordinated, and proportionate.

2. Methodology and scope

The article applies a doctrinal and comparative legal methodology. It reconstructs the content of the ne bis in idem guarantee by analyzing constitutional provisions, the Criminal Procedure Code of Armenia, decisions of the Constitutional Court and the Court of Cassation, and the case law of the European Court of Human Rights. The article does not attempt an empirical assessment of Armenian prosecutorial practice. Its focus is normative and interpretive.

Drawing on the constitutional commentary cited below, the article distinguishes four related but separate prohibitions contained in the broader principle: the prohibition of repeated punishment, repeated conviction, repeated trial, and repeated criminal prosecution for the same act.[5] These elements are closely interconnected, but they are not identical. A person may be protected by the principle even before a second conviction or punishment occurs, because Article 4 of Protocol No. 7 is also directed against the burden of renewed criminal proceedings themselves.

3. Normative foundations of the principle

The principle of ne bis in idem rests on two mutually reinforcing foundations. The first is individual security. A person who has been finally acquitted or convicted should be able to rely on the finality of that legal outcome and should not be forced to defend again against the same factual accusation. The second is institutional legitimacy. Criminal justice loses authority if the state can repeatedly reopen or reframe the same factual accusation until it achieves the desired outcome.

Armenian legal doctrine and judicial practice have linked the principle to the idea that, once a person's criminal liability for a particular act has been finally resolved, the criminal-law relationship between the person and the state comes to an end. The Court of Cassation has described the principle as a guarantee against

[5] *Commentary on the Constitution of the Republic of Armenia*, eds. G. Harutyunyan and A. Vagharshyan (Yerevan: Iravunk, 2010), p. 272.

renewed criminal prosecution, conviction, and punishment for the same act.[6] In another decision, the Court explained that after the final termination of the criminal relationship, the act forming the content of the criminal accusation can no longer be treated, in legal terms, as an existing criminal act for the purpose of renewed prosecution.[7]

The constitutional weight of the principle is reinforced by its non-derogable character under Article 4(3) of Protocol No. 7. War or a qualifying public emergency cannot justify suspension of this guarantee through Article 15 of the Convention.[8] This feature distinguishes ne bis in idem from many procedural guarantees that may be subject to limitation in exceptional circumstances. It confirms that the rule is not a mere procedural convenience but a fundamental protection against the abusive multiplication of criminal proceedings.

4. The European Court's three-stage test

The case law, as organized in the Court Registry's Guide on Article 4 of Protocol No. 7, can be examined through three questions. Does the Convention treat each procedure as criminal? Do both accusations rest on the same, or substantially the same, facts? Has the state subjected the person to a separate criminal process despite an earlier final determination? The last question also requires consideration of integrated proceedings and permissible reopening.[9]

4.1. Whether the proceedings are criminal in nature

The first issue is whether the relevant proceedings are criminal. This question is answered autonomously under the Convention. Domestic classification is relevant but not decisive. Proceedings that are described as administrative or disciplinary in national law may still be criminal in Convention terms if their substance so requires.

Under Engel, national classification is the starting point. The court then examines what kind of offence is alleged and how severe a sanction the person

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[6] Court of Cassation of the Republic of Armenia, David Babayan case, decision of 8 June 2012, KD1/0043/01/11, para. 23.

[7] Court of Cassation of the Republic of Armenia, Gevorg Khnusyan case, decision of 31 October 2014, YeED/0030/01/12, para. 23.

[8] Protocol No. 7 to the ECHR, Article 4(3).

[9] *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, 10 February 2009, paras. 52–53, 82–84 and 107–108; *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016, paras. 130–134; *Mihalache v. Romania* [GC], no. 54012/10, 8 July 2019, paras. 49 and 88–98. See also Council of Europe/European Court of Human Rights, Guide on Article 4 of Protocol No. 7 (updated 28 February 2026), sections II–V, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_4_protocol_7_eng.

risks incurring.[10] The second and third criteria can operate independently; if neither is conclusive on its own, they may be considered together. A related but distinct inquiry under Article 7 asks whether a measure constitutes a penalty. That inquiry starts with its connection to a criminal conviction and considers its purpose and practical character, its treatment in domestic law, the procedure used to impose and enforce it, and its severity.[11]

This autonomous approach is particularly significant for Armenian law because the same conduct may trigger disciplinary liability, administrative liability, and criminal liability. A formal domestic label cannot be the sole basis for excluding the protection of Article 4 of Protocol No. 7. The Court of Cassation has also applied this logic. In the David Babayan case, the Court considered disciplinary isolation imposed on a serviceman and reasoned that, although the measure was classified domestically as disciplinary, the nature of the conduct and the punitive character and severity of the sanction brought it close to a criminal accusation in Convention terms.[12]

4.2. Whether the second case concerns the same facts

The second issue concerns the facts underlying each accusation. In Sergey Zolotukhin v. Russia, the Grand Chamber rejected an approach dependent on the legal elements or labels of the offences. The relevant overlap is expressed in the Court's formulation "identical facts or facts which are substantially the same".[13]

This approach prevents states from avoiding the guarantee by changing the legal label attached to the same conduct. The proper comparison is between the factual description examined in the first proceedings and the factual basis of the new accusation. The comparison concerns the events attributed to the individual, their temporal and geographical relationship, and the circumstances that the prosecution must establish to support each accusation.[14]

For Armenian courts, this means that the phrase "same act" in Article 68 of the Constitution and Article 25 of the Criminal Procedure Code should be applied as a factual test. The court should not ask only whether the legal qualification is the

[10] *Engel and Others v. the Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, paras. 82–83; Sergey Zolotukhin v. Russia [GC], no. 14939/03, 10 February 2009, para. 53.
[11] *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06, 34163/07 and 19029/11, 28 June 2018, para. 211; see also Council of Europe/European Court of Human Rights, *Guide on Article 7 of the European Convention on Human Rights* (2024), pp. 7-13.
[12] Court of Cassation of the Republic of Armenia, David Babayan case, decision of 8 June 2012, KD1/0043/01/11.
[13] *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, 10 February 2009, paras. 82-84.
[14] Sergey Zolotukhin v. Russia [GC], no. 14939/03, 10 February 2009, paras. 82–84.

same. It should ask whether the factual nucleus of the accusation is the same. If a later prosecution merely reformulates the same factual conduct under a different legal provision, the protection of ne bis in idem is engaged.

4.3. Whether there has been a prohibited duplication of proceedings

The third issue is whether there has been a prohibited repetition of proceedings. The guarantee applies where the first proceedings ended in a final acquittal or conviction and the second proceedings concern the same facts. The notion of finality corresponds to the traditional concept of res judicata: a decision is final when ordinary remedies have been exhausted, waived, or have expired.[15] Extraordinary remedies, such as reopening proceedings or restoring a missed time limit, do not usually prevent a decision from becoming final for the purposes of Article 4 of Protocol No. 7.[16]

However, finality alone is not enough. The earlier disposition must also qualify as an acquittal or conviction. Mihalache v. Romania requires attention to what the authority actually decided and the consequences for the individual. The relevant question is whether an authority empowered to decide the merits evaluated the evidence and resolved the person's criminal responsibility for the alleged events; a judicial judgment is not indispensable.[17]

Mihalache also identifies practical evidence of a decision on the merits. Investigative steps followed by an evidentially reasoned disposition can show that the authority resolved the accusation rather than merely closed a file. These are indicators to be assessed in context, not a compulsory checklist of investigative acts.[18] Conversely, closure for a procedural reason may leave criminal responsibility undecided, as the limitation ruling in Smokovic illustrates.[19]

This distinction is crucial when interpreting Article 25. The Convention inquiry asks whether a final disposition resolved the merits of the accusation. A separate domestic inquiry asks whether Armenian law gives the particular act preclusive effect even without such a determination. Failure to meet the Convention threshold cannot, by itself, remove a bar that Article 25 establishes. Courts should therefore identify the domestic protection before considering whether the Convention requires any additional safeguard.[20]

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[15] Sergey Zolotukhin v. Russia [GC], no. 14939/03, 10 February 2009, para. 107.
[16] Sergey Zolotukhin v. Russia [GC], no. 14939/03, 10 February 2009, para. 108.
[17] *Mihalache v. Romania* [GC], no. 54012/10, 8 July 2019, paras. 88–89 and 95–97.
[18] Mihalache v. Romania [GC], no. 54012/10, 8 July 2019, para. 98.
[19] *Smokovic v. Croatia* (dec.), no. 57849/12, 12 November 2019, paras. 43–45.
[20] Criminal Procedure Code of the Republic of Armenia, Law HO-306-N of 30 June 2021, Article 25(2); European Convention on Human Rights, Article 53.

5. Article 25 of the Armenian Criminal Procedure Code

Article 25(1) protects the effect of a final judgment: within Armenian jurisdiction, the state cannot try or punish the individual again for the act resolved by that judgment. Article 25(2) separately bars renewal of prosecution following a final decision declining to initiate prosecution or discontinuing it.[21]

This formulation generally reflects the Convention structure. It covers final judicial determinations and also certain prosecutorial decisions that terminate or preclude prosecution. In this respect, Armenian law may provide a level of protection that is at least as strong as the Convention minimum. The Convention requires protection after a final acquittal or conviction; domestic law may extend equivalent protection to other final prosecutorial acts.

The more difficult question concerns the scope of prosecutorial acts covered by Article 25. Under the former Criminal Procedure Code, the refusal to initiate a criminal case was, in certain circumstances, treated as falling within the protective sphere of ne bis in idem. The Constitutional Court addressed the issue in Decision DCC-1236 of 17 November 2015, and the Court of Cassation developed similar reasoning in the Ashot Malkhasyan case.[22] The logic of that practice was that a refusal to initiate proceedings could sometimes be person-specific and could involve a substantive assessment of facts, thereby producing effects comparable to a final termination of prosecution.

The new Code requires a distinction between non-initiation of criminal proceedings and non-initiation of criminal prosecution. Under Article 179, where a report fails to satisfy the statutory conditions, the investigator does not draw up the protocol initiating proceedings and instead notifies the supervising prosecutor in writing. This procedure should not be described as a protocol declining to initiate prosecution, nor automatically equated with the final prosecutorial decisions protected by Article 25(2).[23]

Accordingly, the legal effect of a non-initiation protocol should be determined by substance rather than by title. If the document merely records that there is no procedural basis for opening a case at that stage, it should not bar later prosecution. If, however, a domestic procedural act contains a reasoned, person-specific

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[21] Criminal Procedure Code of the Republic of Armenia, Law HO-306-N of 30 June 2021, Article 25(1)–(2), https://arlis.am/hy/acts/232980 (consolidation effective from 30 October 2026; accessed 1 November 2026).

[22] Constitutional Court of the Republic of Armenia, Decision DCC-1236, 17 November 2015; Court of Cassation of the Republic of Armenia, Ashot Malkhasyan case, decision of 5 June 2015, YeAKD/0051/11/14, para. 50.

[23] Criminal Procedure Code of the Republic of Armenia, Articles 173(2)–(3) and 179; compare Article 25(2). Official text: https://arlis.am/hy/acts/232980.

assessment of the alleged conduct and finally resolves the issue of criminal responsibility, courts should consider whether treating it as outside Article 25 would undermine the guarantee of finality.

A practical judicial test can be formulated as follows. The court should first ask whether Article 25 independently bars renewed prosecution. For the additional Convention inquiry, Mihalache's substantive approach can be translated into the following questions:[24]

- Did the prior act concern a concrete person and a concrete factual allegation?
- Was the competent authority empowered to assess the facts and the person's involvement?
- Were relevant evidence and factual circumstances examined?
- Did the act contain reasons addressing guilt, innocence, or the absence of criminal responsibility?
- Had the act become final under ordinary domestic remedies?
- Would renewed prosecution expose the person to the same factual accusation despite a prior final merits-based resolution?

An affirmative answer to these questions indicates that Article 25 should apply. A negative answer, especially where the prior act was purely procedural, indicates that the principle is not engaged.

6. Reopening and review: the limits of the guarantee

The prohibition of repeated prosecution does not foreclose every later reconsideration. Article 68(2) of the Constitution permits review on specified grounds involving new circumstances, subsequently discovered facts, or a fundamental procedural defect capable of changing the result.[25] Article 4(2) of Protocol No. 7 also permits reopening through domestic criminal procedure, but only on grounds capable of affecting the outcome: new or newly discovered facts, or a fundamental defect in the earlier proceedings.[26]

This exception must be construed narrowly. It protects the integrity of criminal justice where finality was achieved on an incomplete or fundamentally defective basis, but it does not allow ordinary dissatisfaction with the outcome to be disguised as reopening. The purpose of reopening is to correct exceptional injustice, not to give the prosecution a second opportunity to improve its case.

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[24] Proposed analytical questions derived from Mihalache v. Romania [GC], no. 54012/10, 8 July 2019, paras. 95–98, read alongside Article 25(2) of the Armenian Criminal Procedure Code.
[25] Constitution of the Republic of Armenia, Article 68(2).
[26] Protocol No. 7 to the ECHR, Article 4(2).

Article 25(3)–(4) distinguishes between review in favor of the person and review to the detriment of the person. Review aimed at improving the person's position does not constitute repeated trial in the relevant sense. This follows from the protective function of ne bis in idem: a guarantee designed to protect the individual should not be interpreted as preventing the correction of a conviction or punishment in the individual's favor. By contrast, review that worsens the person's position after finality must be justified strictly by the recognized grounds of fundamental defect, new circumstance, or newly discovered circumstance, within the time limits laid down by the Code.

7. Public and private prosecution under Article 25(5)

Article 25(5) provides that the refusal to initiate or the discontinuance of public criminal prosecution is not an obstacle to the initiation of private criminal prosecution. This creates an interpretive tension because Article 4 of Protocol No. 7 does not distinguish between public and private prosecution. From the Convention perspective, the decisive issue is not who initiates the prosecution but whether the person is exposed to repeated criminal proceedings concerning the same facts after a final acquittal or conviction.

The compatibility of Article 25(5) therefore depends on the reason why public prosecution was refused or discontinued. If public prosecution ended because the case was procedurally classified as one that should be pursued only by private prosecution, that termination does not necessarily involve any merit-based assessment of the accused person's guilt or innocence. In that situation, private prosecution may be understood not as a repetition of a finally resolved criminal accusation, but as the procedurally proper channel for the initial determination of the accusation.

Smokovic v. Croatia provides a useful analogy concerning procedural termination. There, the limitation period expired without a ruling on the factual accusation or the applicant's responsibility. The Court therefore did not treat the termination as an acquittal or conviction.[27] Its relevance here lies in that distinction; it did not decide the compatibility of Armenia's public-to-private prosecution mechanism.

Applying that logic, Article 25(5) should be interpreted narrowly. It is compatible with the Convention where the refusal or discontinuance of public prosecution is purely procedural and is based on the conclusion that the matter belongs to private prosecution. It would be more difficult to justify renewed private

[27] *Smokovic v. Croatia* (dec.), no. 57849/12, 12 November 2019, paras. 43–45.

prosecution where the public authority had already conducted a substantive examination, assessed the evidence, and finally determined that the person did not commit the act or that the act did not constitute a criminal offence. In such a case, the formal distinction between public and private prosecution should not nullify the protection of finality.

This interpretation also respects the idea that the Convention establishes minimum guarantees, while domestic law may provide stronger protection. If Armenian law treats certain prosecutorial decisions as barring renewed prosecution even where the Convention would not require that result, domestic authorities remain bound by the higher domestic standard. The only exception expressly identified in Article 25(5) should therefore be confined to cases where public prosecution ended for the specific procedural reason that the matter is subject to private prosecution.

8. Administrative and disciplinary sanctions under Article 25(6)

Article 25(6) addresses another sensitive issue: where a person is convicted and it becomes clear that an administrative or disciplinary measure equivalent to punishment has already been applied for the same conduct, the measure must be revoked and considered when imposing the criminal sentence.

This provision reflects an attempt to reconcile Armenian criminal procedure with the European Court's case law on parallel proceedings. The Convention does not impose an absolute ban on all combinations of criminal, administrative, or disciplinary responses to the same conduct. The decisive issue is whether the combination produces a prohibited duplication of proceedings or punishment.

In A and B v. Norway, the Grand Chamber developed the requirement of a "sufficiently close connection in substance and in time". Different procedures can constitute a coherent response where each addresses a distinct aspect of the wrongdoing, their combination is predictable, and the authorities coordinate their evidential work. The later sanction must account for the earlier one so that the combined burden remains proportionate. A substantive connection does not dispense with the need for a temporal connection.[28] The Court applied and further developed this approach in later cases, including Galovic v. Croatia.[29]

For Armenian courts, Article 25(6) should therefore not be treated as a simple sentencing-credit rule. It should be applied as part of a broader Convention-based assessment. The court must determine whether the administrative or disciplinary

[28] *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016, paras. 130–134.
[29] *Galovic v. Croatia*, no. 45512/11, 31 August 2021, para. 113.

measure is criminal in substance under the Engel criteria. If it is not criminal in Convention terms, Article 4 of Protocol No. 7 may not be engaged. If it is criminal in substance, the court must then examine whether the two proceedings were sufficiently integrated.

The following questions translate the A and B factors into a proposed checklist for applying Article 25(6):

- Did the administrative or disciplinary and criminal proceedings pursue genuinely complementary purposes?
- Was the possibility of dual proceedings foreseeable to the person?
- Were the proceedings coordinated to avoid unnecessary duplication of fact-finding and evidence assessment?
- Were the procedures linked closely enough in time, with any delay adequately explained?
- Was the earlier sanction expressly considered in the later criminal sentence?
- Did the total burden imposed on the person remain proportionate?

If these conditions are met, Article 25(6) can operate consistently with the Convention. If they are not met, merely revoking or crediting the earlier administrative or disciplinary measure may be insufficient. The court may need to conclude that the criminal proceedings themselves violate the prohibition of repeated prosecution or punishment.

9. Proposed interpretive model for Armenian practice

The analysis above suggests that Armenian courts should apply Article 25 through a structured sequence. The proposed sequence combines the cited Convention tests with the independent domestic safeguards discussed above. It is intended to guide reasoning; its effect on consistency in practice has not been empirically tested.

First, the court should identify the factual nucleus of the first and second proceedings. This requires comparison of the facts, not merely the legal provisions invoked. The identity of the act should be assessed by reference to the same person, the same conduct, and facts linked in time and space.

Secondly, the court should determine whether both proceedings are criminal in nature. Domestic labels are relevant but not conclusive. The court should apply the Engel criteria and should examine the purpose, severity, and legal effects of any administrative or disciplinary measure.

Thirdly, the court should determine whether the first act was final. Finality requires that ordinary remedies have been exhausted, waived, or have expired. The possible availability of extraordinary review does not normally prevent finality.

Fourthly, the court should identify any bar under Article 25 and then determine whether the first act was equivalent to an acquittal or conviction under the Convention. This requires attention to substance. A decision or act should be treated as protective where it contains a merit-based, person-specific assessment of the alleged conduct. A purely procedural act may fall outside the Convention threshold while still barring renewal under domestic law.

Fifthly, if parallel proceedings are involved, the court should examine whether they formed a sufficiently integrated whole. The test should include complementary purpose, foreseeability, coordination, temporal connection, and proportionality of the cumulative response.

Finally, where reopening is invoked, the court should verify that the case falls within the narrow grounds recognized by the Constitution and Article 4(2) of Protocol No. 7. Reopening must not become a disguised form of repeated prosecution.

This model is designed for practical use. It respects the Convention's autonomous concepts, preserves Armenia's constitutional wording on the "same act", and avoids an overly formal approach to prosecutorial acts. It also gives investigative bodies and courts a checklist capable of guiding decisions at the early stages of proceedings, where violations of ne bis in idem often begin.

CONCLUSION

Effective implementation of ne bis in idem under Article 25 requires Armenian courts to apply the Convention's substantive standards while preserving any broader domestic protection. The decisive considerations are the identity of the underlying facts, the nature of the proceedings, and the substance and finality of the earlier decision. Formal changes in legal classification or the mode of prosecution should not circumvent an applicable prohibition on renewed proceedings.

Accordingly, this article proposes a restrictive interpretation of the transition from public to private prosecution and a substantive assessment of parallel punitive proceedings. Crediting an earlier sanction cannot, by itself, remedy prohibited duplication, while reopening must remain within legally defined grounds and limits. The proposed interpretive model provides a structured basis for protecting finality and legal certainty in Armenian criminal procedure.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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DOI: https://doi.org/10.46991/SL/2026.SP2.104

PROSPECTS OF THE APPLICABILITY OF ARTIFICIAL INTELLIGENCE IN THE CONTEXT OF THE RIGHT TO DEFENSE

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Abstract. This article examines how artificial intelligence can support the exercise of the right to defense in criminal proceedings and the legal conditions governing its use by advocates in Armenia. Through doctrinal and comparative analysis of Armenian legislation, European human-rights standards, professional guidance and selected foreign judgments, it considers both defense counsel's use of AI and the deployment of automated systems by investigative and prosecutorial authorities. It argues that AI can strengthen defense capacity by assisting legal research, reviewing extensive case material and preparing drafts, particularly where counsel's resources are limited. These benefits depend on safeguards addressing three connected concerns: disclosure of confidential client and pretrial information, unreliable or fabricated legal outputs, and the opacity of systems used against the accused. The article proposes a graduated approach that links the sensitivity of information to the security of the tool, while retaining personal responsibility for verification and legal judgment. For Armenia, it recommends professional guidance, continuing education, access to secure infrastructure, procedural disclosure obligations and protocols informing clients about confidentiality risks. It concludes that effective integration requires advocates to develop the ability both to use AI responsibly and to challenge its evidentiary role in proceedings.

Keywords - *Artificial intelligence, right to defense, criminal proceedings, equality of arms, professional secrecy, legal hallucinations, human oversight, algorithmic transparency.*

1. Introduction

Every generation of lawyers meets a technology that reorganizes the profession. Printed law reports, then electronic databases changed where lawyers look for the law and how quickly they find it. Generative artificial intelligence differs in kind rather than degree. It does not merely retrieve text but produces it. It reads,

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The article received 02 September 2026,
reviewed 26 October 2026,
accepted for publication 28 October 2026

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summarizes, compares and drafts at a scale and speed that no individual practitioner can match, and it is already embedded in the tools lawyers use every day. In its concluding report of December 2025, the American Bar Association (ABA) task force described AI as an established component of legal practice rather than an experimental addition.[1]

The premise of this article is that AI is a tool of the future which the defense bar must integrate rather than resist. The question is not *whether* defense lawyers will use it but *how*. There is a specific reason for urgency in criminal matters: the state is not waiting. Investigative and prosecutorial authorities increasingly rely on automated tools for surveillance, data analysis, identification and risk assessment.[2] A defense bar that declines to engage with the same technology does not preserve the old balance between the parties. It lets that balance tilt further toward the prosecution.

The defense lawyer, however, is not an ordinary user of technology. The advocate is the guardian of the client's confidences, an officer who owes candor to the court, and the counterweight to the state's power in the adversarial process. Each of these roles generates a limit on how AI may be used: confidentiality, accuracy and equality of arms. These limits are not arguments against AI. They are the conditions that make its use legitimate.

2. The Normative Frame

2.1 The right to defense and equality of arms

Armenia's constitutional guarantees encompass trial fairness under Article 63 and legal assistance provided by an independent, self-governing legal profession under Article 64. Article 67 specifies protections for the accused, including sufficient preparation time and facilities, communication with counsel and the opportunity to examine witnesses.[3] These protections correspond to Article 6(3)(b)–(c) of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) has interpreted these provisions in ways that bring two requirements into focus here.

The first concerns privacy in the lawyer–client relationship. In the Court's established approach, a trial cannot meet the requirements of fairness unless the accused can consult counsel without outsiders listening.[4] In *Michaud v France* it

[1] ABA Task Force, Year 2 Report (December 2025); LawSites (16 December 2025). Full details of shortened source citations appear in References.
[2] Završnik, 'Criminal Justice' (2020), 567.
[3] Armenian Constitution (2015 amendments), arts 63, 64, 67.
[4] S v Switzerland (1991), para 48.

placed lawyers' obligation of secrecy among the foundations of democratic justice.[5]

The second is equality of arms, including access to the evidence and adequate facilities to examine it. The difficulty of examining large digital collections has already reached Strasbourg. In *Sigurður Einarsson and Others v Iceland* the prosecution had used e-discovery software to filter a vast collection of seized electronic data into a smaller set of "tagged" documents. This suggests a case for giving the defense a meaningful opportunity to search, or request searches of, material filtered by the prosecution. The Court accepted that refusing the defense an opportunity to search the full collection could affect its right to adequate facilities, and it treated judicial review of such requests as an important safeguard, although it found no violation on the facts.[6] *Rook v Germany* involved roughly 45,000 intercepted telephone calls and some 14 million seized electronic files, and again the Court found no violation.[7] Yet both cases show where criminal practice has arrived: once a case file is measured in millions of items, the practical capacity to process it becomes part of the substance of the right to defense.

2.2 The emerging European framework

In December 2018, the Council of Europe's Commission for the Efficiency of Justice (CEPEJ) adopted its European Ethical Charter, the first European instrument addressing AI in justice. Its five principles concern the protection of fundamental rights, avoidance of discriminatory effects, reliable and secure data, transparent and fair operation, and continued control by users. Under the last principle, professionals retain the freedom to examine and reject a system's output.[8] In December 2025 the CEPEJ added guidelines on generative AI for courts. They prefer tools that remain under the judiciary's own control, require legal citations to be checked automatically against official sources, and ask courts to tell the parties where AI supported a decision.[9] Although addressed to courts, these guidelines set a benchmark the defense can invoke.

Armenia's signature on 27 January 2026 makes the Council of Europe AI Framework Convention (CETS No 225) particularly relevant to future domestic regulation. This was the first international treaty devoted specifically to governing

[5] Michaud v France (2012), paras 117–119, 123.
[6] Sigurður Einarsson and Others v Iceland (2019), App no 39757/15.
[7] Rook v Germany (2019), App no 1586/15.
[8] CEPEJ, European Ethical Charter (2018).
[9] CEPEJ, Generative AI Guidelines (2025), CEPEJ(2025)18Final.

AI.[10] Article 8 addresses transparency and oversight, while Article 10 concerns protection against discrimination. For criminal proceedings, Article 14 is especially relevant: effective remedies must be accompanied by sufficient information to challenge a decision in which AI played a substantial part. Article 15 adds procedural protection when a system has a significant impact on human rights. Armenia had not ratified the Convention when this article was written. Nevertheless, signature entails an interim duty under Article 18 of the Vienna Convention on the Law of Treaties to refrain from conduct that would undermine the Convention's object and purpose.

The EU AI Act offers a comparative model. Its high-risk regime covers specified law-enforcement applications and systems supporting judicial research and interpretation of the facts and applicable law. A separate prohibition addresses predictions of individual offending derived exclusively from profiling or personality characteristics.[11] Armenia is not bound by the Act, but it offers a ready template for domestic regulation.

2.3 Professional regulation

Professional bodies have responded faster than legislators. In July 2024, the ABA issued Formal Opinion 512, explaining how established ethical obligations govern generative AI. Lawyers remain responsible for competent work, protection of confidences, communication with clients, honesty before courts, appropriate supervision and fees that are reasonable.[12] The European professional response includes the October 2025 generative-AI guide issued by the Council of Bars and Law Societies of Europe (CCBE). It advises lawyers not to enter confidential client data into AI systems without contractual and technical safeguards, to verify outputs before relying on them, to be open with clients who would object to AI use, and to guard their independence against bias and over-reliance.[13]

Armenian law contains the building blocks but no AI-specific rules. The Law on the Advocacy protects the advocate's professional secret, covering both the information the client entrusts and the content and nature of the advice given, without limit in time (Article 25). It also obliges advocates to keep improving their professional knowledge (Article 19).[14] To the author's knowledge, the Chamber of Advocates had not adopted guidance on AI at the time of writing. That gap is an

[10] Council of Europe, AI Framework Convention, CETS No 225; Armenia signature announcement (28 January 2026).
[11] EU AI Act, Regulation 2024/1689, art 5(1)(d); Annex III, points 6 and 8(a).
[12] ABA, Formal Opinion 512 (29 July 2024).
[13] CCBE, Generative AI Guide (2025), ss 4.1–4.4.
[14] Armenian Law on Advocacy (2004, as amended), arts 19, 25.

opportunity: the Armenian bar can shape the rules before practice hardens around them.

3. The Case for Integration: AI as an Instrument of the Defense

3.1 Research capacity

The most immediate use of AI is legal research: locating and summarizing case law, mapping statutory frameworks, and comparing approaches across jurisdictions. The empirical evidence supports cautious optimism. In a randomized controlled trial, participants using GPT-4 completed legal tasks substantially faster, while the quality of their work improved only modestly. Where it helped, the weakest performers gained the most.[15] That equalizing effect matters for the defense bar, which in Armenia as elsewhere consists largely of small practices and individual advocates working without research staff. Richard Susskind argues that clients want outcomes, not the particular processes lawyers have traditionally used to produce them.[16] On that view, a tool that frees the lawyer's time for judgment and advocacy is a gain for the client.

3.2 Volume, time and equality of arms

A modern criminal file may contain interrogation transcripts, phone extractions, video footage, financial records and expert reports running to thousands of pages. The prosecution has investigators and technical units, while the defense often has one advocate. AI tools can index such material, trace how a witness's account changes from one interview to the next, assemble timelines and flag inconsistencies. This is precisely the comparative reading that, done by hand, consumes the time the right to defense is meant to secure. Practice in the United States shows the potential: public defenders have used AI tools to manage discovery at scale, and in one reported case a defense team used facial recognition on body-camera footage to locate an exculpatory witness.[17] Where the prosecution uses software to filter the evidence, as it did in the Icelandic case discussed above, a comparable ability to search the material is necessary if the parties are to participate on meaningfully equal terms.

[15] Choi, Monahan and Schwarcz, 'Lawyering' (2024), 147.
[16] Susskind, How to Think About AI (2025).
[17] Russell, 'AI's Complex Role' (2025).

3.3 Drafting and strategy

AI can also serve as a drafting assistant by structuring a motion on a preventive measure, anticipating the prosecution's counter-arguments, rehearsing a cross-examination, or preparing an Armenian working translation of a Strasbourg judgment available only in another language. Used this way, it does not replace the advocate's judgment. It gives that judgment more material to work with. One caution belongs here rather than later. Language models tend to agree with their users, and research shows they often fail to correct a user's mistaken legal premise.[18] A defense lawyer who asks a model to confirm a favored theory will usually receive confirmation. The better practice is to instruct it to argue against the defense's position.

3.4 From permission to competence

The ABA's commentary on professional competence has, since 2012, required attention to technological developments, including their advantages and dangers. The CCBE similarly places technological literacy within the lawyer's professional skill set.[19] **The Armenian duty to keep improving professional knowledge points the same way. Within a short horizon, competence in criminal defense will include AI literacy in two directions: the ability to use these tools well, and the ability to challenge them when the state uses them.**

A serious objection deserves an answer. AI outputs can seem *flat*: statistically plausible text that lacks the texture of the particular case, the client's circumstances and the meaning that legal reasoning gives to facts. Mireille Hildebrandt has shown that data-driven "law as computation" predicts from patterns in past data and does not reason in the contestable, meaning-giving way that law requires.[20] The objection is correct, but its conclusion is human oversight, not abstention. This is exactly the CEPEJ principle of user control. AI is strong where scale matters: reading, sorting, comparing. The advocate remains decisive where judgment matters: weighing evidence, choosing arguments and deciding what matters to this client.

[18] Dahl and others, 'Large Legal Fictions' (2024), 64.
[19] ABA Model Rules, r 1.1, cmt 8; CCBE, Generative AI Guide (n 14), s 4.2.
[20] Hildebrandt, 'Law as Computation' (2018), 12.

4. First Limit: Confidentiality and the Secrecy of the Pretrial Investigation

4.1 Why confidentiality is structural

Confidentiality is not one ethical rule among many. It is the condition for the client's candor and therefore for effective defense. Its constitutional and Convention foundations were set out above, and Article 25 of the Law on Advocacy gives it statutory form. The difficulty is technical. Anything typed into a cloud-based AI service leaves the lawyer's control. It is processed on a provider's servers, often abroad, and depending on the terms of service may be retained, reviewed by staff, used to train future models, or disclosed in response to legal process.

4.2 United States v Heppner

The first judicial decision to confront this problem squarely arose in a criminal case. Facing fraud and false-statement charges in New York's Southern District, Bradley Heppner used Claude, Anthropic's consumer chatbot, to develop written material about his defense. His prompts drew partly on information obtained from counsel; he subsequently gave counsel the resulting documents. Judge Rakoff ruled on 17 February 2026 that the documents fell outside both the protection for lawyer–client communications and the work-product doctrine.[21] Three considerations supported that conclusion. Communicating with a chatbot was not a consultation with a lawyer. Confidentiality was also absent: the service terms permitted collection of user information, its reuse in model training and its release to outsiders, including public authorities. Finally, counsel had neither commissioned nor directed the exercise. The documents therefore did not embody a strategy developed by the lawyers or work undertaken at their request. The court left open whether use directed by counsel, on the model of experts or interpreters retained by the lawyer, might be treated differently.

The law is not settled. A Michigan federal magistrate judge reached a different conclusion that same month: work-product protection covered documents a litigant acting without counsel had developed with AI assistance. On that reasoning, using software as an instrument did not amount to sharing material with another person.[22]

[21] United States v Heppner, 2026 WL 436479 (SDNY, 17 February 2026).
[22] Warner v Gilbarco, Inc, 2026 WL 373043 (ED Mich, 10 February 2026).

4.3 Lessons for a civil-law system

Armenian law does not use the American doctrine of privilege, but *Heppner*'s reasoning transfers. First, whether information remains confidential depends on whether it was disclosed to a third party on terms that permit further disclosure. That is a question about the tool, its tier and its contract. Second, the Armenian advocate's duty of secrecy is personal and active. Entering identifiable client information into a consumer chatbot may itself constitute a breach, whether or not anyone later seeks to obtain it. Third, personal data law applies. Armenia's personal-data statute limits transfers abroad where the destination's protection is inadequate. A list identifying jurisdictions with adequate protection is maintained by the Personal Data Protection Agency.[23] Because most AI services process data outside Armenia, feeding client files into them is also a cross-border transfer.

The secrecy of the pretrial investigation adds a further layer. The Criminal Procedure Code permits confidentiality restrictions on pretrial case material; counsel may consequently be subject to a duty of non-disclosure. Uploading interrogation records, expert opinions or other investigative materials to a public AI tool is a disclosure to a third party, whatever the lawyer's intention. The same concern extends to the personal data of witnesses and victims, which may include health or other sensitive information.

4.4 A graduated model

These considerations do not require a ban. They require a graduated approach that matches the sensitivity of the information to the security of the tool, as summarized below.

Table 1. A graduated model for the use of AI by defense counsel

Tier	Information	Acceptable tools	Safeguards
1	General legal questions with no case facts (e.g. ECtHR case law on Article 5)	Any reputable tool, including consumer services	Verify every authority
2	Anonymized or hypothetical facts	Preferably enterprise tools, consumer tools only with training disabled	Remove names, dates, places and unique details, consider re-identification risk
3	Identifiable client information, defense strategy, pretrial investigative materials	Only enterprise tools with contractual confidentiality, zero data retention and no training on inputs, or locally hosted models under the lawyer's control	Inform the client; document the tool and its terms; never use consumer tools

[23] Armenian Law on Protection of Personal Data (2015).

5. Second Limit: Accuracy, Hallucination and the Duty of Candor

5.1 The nature of the problem

A language model constructs a response from patterns that make particular sequences of words probable. This process does not itself establish that the cited law is authentic. A convincing answer may thus attribute invented language or a ruling to an authority, or cite a case that was never decided. Empirical studies quantify the risk. Researchers at Stanford and Yale found that general-purpose models answering verifiable questions about US federal cases hallucinated between 58 and 88 percent of the time, often failed to correct false premises, and could not reliably tell when they were wrong.[24] A follow-up study found that even specialized legal research tools built on verified databases gave incorrect or misgrounded answers to roughly 17 to 33 percent of queries.[25]

5.2 The courts' response

The first widely reported case, *Mata v Avianca* (2023), concerned lawyers who submitted six fictitious precedents supplied by ChatGPT. Their reliance on those authorities resulted in sanctions.[26] Since then the pattern has spread across jurisdictions. In *Ayinde*, the Divisional Court of England and Wales dealt with two cases together: in one, 18 of 45 authorities cited did not exist, and in the other, five fictitious cases had been relied on. The court rejected reliance on freely accessible chatbots as a dependable research method. Responsibility for checking the underlying authorities remains with the lawyer. A deliberate submission of false material may attract contempt proceedings and, in some circumstances, criminal liability for perverting the course of justice.[27] In *Noland v Land of the Free*, the discovery that an opening brief contained invented quotations in 21 out of 23 instances led California's appellate court to sanction counsel in the amount of $10,000 and make a referral to the State Bar.[28]

The problem has reached the bench. In October 2025, following a Senate inquiry, two United States federal judges acknowledged that orders issued from their chambers contained AI-generated errors, in one case produced by a law clerk using Perplexity and in the other by an intern using ChatGPT.[29] The scale of the phenomenon is captured by a database maintained by the researcher Damien

[24] Dahl and others (n 19).
[25] Magesh and others, 'Hallucination-Free?' (2025), 216.
[26] Mata v Avianca, Inc (2023), 678 F Supp 3d 443.
[27] Ayinde; Al-Haroun [2025] EWHC 1383 (Admin), paras 6–7, 25–27.
[28] Noland v Land of the Free, LP (2025), 114 Cal App 5th 426.
[29] Volokh, 'Two Federal Judges Apologize' (24 October 2025).

Charlotin. It recorded roughly 700 decisions at the end of 2025 and 2,086 by September 2026, from more than sixty jurisdictions.[30]

6. Third Limit: AI Deployed Against the Accused

The third limit reverses the perspective. It concerns not the defense lawyer's own use of AI but the tools the state deploys against the accused: risk scores, facial recognition, and forensic and analytical software. These systems are often proprietary, and their workings may be hidden from the defense and the court alike. Legal scholarship has identified the core problem. Rebecca Wexler has shown how trade-secret claims shield forensic software from scrutiny in criminal cases, Andrea Roth argues that machine outputs are a form of testimony that should be tested like the account of a witness, and Brandon Garrett and Cynthia Rudin propose a presumption in favor of interpretable "glass box" systems in criminal justice.[31] European scholars frame the same problem in Convention terms, as a threat to the fairness guarantees of Article 6 and to equality of arms.[32]

Judicial responses illustrate the consequences. In the Dutch SyRI litigation, The Hague's District Court found the risk-profiling system incompatible with Article 8 ECHR. The opacity of its models and the resulting inability to check them were central to the finding.[33] A further Strasbourg judgment concerned a peaceful demonstrator identified through facial-recognition software and then arrested. That use of the technology breached the guarantees in ECHR Articles 8 and 10.[34] For the defense lawyer, the practical lesson is to ask in every case whether an AI system contributed to the evidence and, if it did, to seek disclosure of how it works and how reliable it is.

7. Toward an Armenian Framework: Recommendations

The analysis suggests five measures.

1. **Guidance from the Chamber of Advocates.** The Chamber should adopt AI guidance modeled on the CCBE guide, incorporating the tiered confidentiality model, a mandatory verification rule for all authorities and quotations, and a standard of transparency toward clients.

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[30] Charlotin, AI Hallucination Cases Database (accessed 28 September 2026); Bloomberg Law (29 December 2025).
[31] Wexler, 'Life, Liberty, and Trade Secrets' (2018), 1343; Roth, 'Machine Testimony' (2017), 1972; Garrett and Rudin, 'The Right to a Glass Box' (2024), 561.
[32] Završnik (n 3); Quattrocolo, Artificial Intelligence, Computational Modelling and Criminal Proceedings (2020), ch 4.
[33] SyRI, ECLI:NL:RBDHA:2020:1878 (5 February 2020).
[34] Glukhin v Russia (2023), App no 11519/20.

2. **Training.** AI competence, covering both use and challenge, should become part of advocates' mandatory continuing education.
3. **Secure infrastructure.** Individual advocates cannot negotiate zero-retention contracts with global AI providers. The Chamber could procure secure tools collectively.
4. **Procedural reform.** The Criminal Procedure Code should require disclosure when AI systems are used in investigation or in producing evidence, and should guarantee the defense information sufficient to challenge them.
5. **Client protocols.** Advocates should warn clients at the outset about the confidentiality risks of their own AI use.

8. Conclusion

Artificial intelligence is here, it is improving quickly, and it will change the practice of criminal defense. Its capacity to read, compare and draft at scale can strengthen the right to defense, particularly for the small practices that make up most of the Armenian defense bar, and it may soon be indispensable to meaningful equality of arms. Integration is therefore happening. But the terms of integration are set by duties the profession already has. Confidentiality requires that client information and pretrial materials go only into tools that keep them confidential. Candor requires that every authority be verified by the lawyer who signs the document. And the defense lawyer's role as the state's counterweight requires the capacity to demand transparency from AI systems used against the accused. The task for the Armenian bar, legislator and courts is to build these duties into practice while the rules are still being written.

Conflict of Interests

The author reports no ethical concerns arising from this study and has no conflicts of interest to disclose.

Ethical Standards

This study did not include research involving human participants.

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