

X I A N F A   Y I N S I Q U A N   Y A N J I U

# 宪法隐私权 研究

张 军 著



中国社会科学出版社

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## 图书在版编目 (CIP) 数据

宪法隐私权研究/张军著. —北京: 中国社会科学出版社, 2007. 6

ISBN 978 - 7 - 5004 - 6249 - 1

I. 宪… II. 张… III. 隐私 - 人身权 - 研究  
IV. D913. 04

中国版本图书馆 CIP 数据核字 (2007) 第 090302 号

出版策划 任 明  
责任编辑 官京蕾  
责任校对 张报婕  
封面设计 弓禾碧  
技术编辑 李 建

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出版发行 中国社会科学出版社

社 址 北京鼓楼西大街甲 158 号 邮 编 100720

电 话 010 - 84029450 (邮购)

网 址 <http://www.csspw.cn>

经 销 新华书店

印 刷 北京奥隆印刷厂

装 订 三河鑫鑫装订厂

版 次 2007 年 6 月第 1 版

印 次 2007 年 6 月第 1 次印刷

开 本 710 × 980 1/16

印 张 16

插 页 2

字 数 266 千字

定 价 29.00 元

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# 序

隐私，作为一个现代社会高频率出现和使用的词汇日益广泛地受到媒体和公众的关注，这在侧面意义上反映了隐私对于人的密切性和广泛性，并且随着社会的发展和文明的进步，人类隐私意识日益强烈，对隐私保护的要求也日渐增长。隐私，作为一种与个人生活密切关联的法益或民事权利也在世界范围内得到比较广泛认同和不同程度的法律保护。

然而，伴随着社会发展和政府职能的不断扩张，隐私或隐私权在遭受着不断发生的来自于民事主体的侵权威胁的同时，也面临着以国家为代表的公权力的日益严重的威胁或侵害。如何在保障国家权力的有效性和增进社会公益性的前提下，提升整个社会对个人隐私的尊重和保护意识，对个人隐私施以全面有效的立体法律保护，是世界各国面临的共同问题。正是关注并痛感于个人隐私所遭遇的双重威胁和侵害，不少国家已经或正在通过宪法或宪法判例将其确认为宪法权利，并通过更加细化的行业保护和部门立法以确保个人隐私免遭威胁和侵害。

现代社会的不断发展，一方面使得国家权力和职能范围在不断扩大，国家强制的范围和手段也在很大程度上自觉不自觉地得到扩张；另一方面公民的权利意识和保护要求也在不断增长。在此背景下，宪政与法治所不能回避的一个核心问题依然是保障公民权利和限制国家权力。如何在保障公民权利和履行国家职能过程中寻求两者之间的平衡与协调乃是国家立法、执法和司法中不可回避的任务。隐私权与国家权力以及其他基本权利之间的紧张和冲突的关系问题，正是现代法治国家面临的诸多命题之一。隐私权虽然产生和发端于新闻媒体和平等主体的威胁与侵害，但就威胁和侵害的广度、深度和强度而言当首推以国家为代表的公权力，因其强大而广泛且手段众多，较之其他主体更加难以控制和约束。在国家立法、行政执法、刑事司法、行政司法以及以国家为裁判主体的民事司法活动中均存在威胁与侵害个人隐私或隐私权的巨大可能性，对这些领域内国家权力的法律控制和对个人隐私的法律保护是立法者无法回避的两个内在统一的重要目标。对上述相关问题的理论

和实践层面的研讨也就成为达成上述目标的一种重要前提和内容，由此而言，宪法视野下的隐私权问题有其研究和探讨的独有价值。

学者们从民法或普通法上的角度关注和研究隐私权颇多，并出现了一定数量和质量的研究成果，但在宪法甚至整个公法领域对隐私权的研究还相当薄弱，专事宪法隐私权研究的专著尚未见到。尽管一些法治比较发达的国家发生或提供了有关隐私权保护的诸多宪法案例和经验素材，有些学者也对此进行了积极有益的探讨，但无论是从学术研究还是从司法实践角度看，这种关注和研究的广度、深度和系统化程度还远远不够。宪法隐私权问题是最具争议性和价值性的命题之一，也是司法实践中不断提出的尖锐的研究课题之一，作者旗帜鲜明地以“宪法隐私权研究”为题有其独特的研究视角、学术眼光和勇气，借用博士论文和专著的形式能够对宪法隐私权作专门系统的研究和探讨更是难能可贵。宪法隐私权虽为公民基本权利之一种类型，然而要对宪法隐私权作全面系统的解读和研究是无法回避宪法权利的诸多基本理论问题的，且其中有相当问题尚有争议，也意味着对这个问题的研究存在相当的难度和复杂性，这就必然要求作者不仅有扎实宽厚的基础知识和理论功底，而且要有对社会生活的深刻敏锐的感知与思考。作者在书中对宪法隐私权问题进行了比较系统的考察和研究，提出了一系列有创建性的观点并作了深入的剖析和论证，特别是在宪法隐私权的界定、宪法隐私权存在的必然性与现实性、隐私权与新闻自由的冲突与平衡、隐私权与国家权力冲突的表现及其协调原则、宪法隐私权的社会功能与法律功能及其与民法隐私权的联系与区别等问题上提出了不少有价值的观点和见解。当然，在上述肯定之余，书中也必然会存在不足和疏漏，如对隐私权在刑事诉讼各个环节中的具体保护问题、隐私权与政府信息公开等问题以及更为细化的隐私权行业保护和立法保护问题的研讨尚可更加深入。

我相信，本书作为宪法隐私权研究的系统性论著，无论是对隐私权研究的深入，还是对宪法权利理论的完善和具体化都有其独到的价值和贡献。

李龙于珞珈山

2006年10月25日

## 内 容 摘 要

我们生活在一个充满隐私的世界里，隐私的价值正日益广泛地受到人们的重视和追求，保护个人隐私已经成为维系人格尊严和个性自由不可缺少的重要条件。“社会物质文明愈发达，交际手段和传播媒介愈现代化，人们愈觉得有必要保留只属于自己的内心世界的安宁”，离开个人隐私的日子将无法想象！

隐私权更是一个伴随人权发展和文明进步不断发展和充实的权利范畴。作为法律权利的隐私权研究在我国民法领域已取得相当成果，但宪法领域的隐私权研究尚属起步阶段。宪法隐私权的研究往往交织着诸多未有定论的宪法基础理论问题并涉及多学科背景，从而使得问题的研究变得更为复杂和更有价值。

全书包括导论和正文七个部分以及后记。导论主要概括介绍了隐私和隐私权研究的背景，阐明了从宪法角度研究隐私权的意义，说明了本书写作中主要采取的研究方法。

第一章，通过对隐私权保护相对成熟的国家隐私权发展的判例、案例和规范考察并结合我国隐私权研究，揭示和分析了隐私、作为法律权利的隐私以及作为宪法权利的隐私产生发展的过程与现状，概括归纳了隐私权的基本含义及其发展态势。一是对作为法律权利的隐私权作了基本界定，以期建立本书分析论证的概念基础；二是概括分析了隐私权已经或正在成为国际社会广泛承认与保护的公民基本权利的趋势；三是揭示和论证了隐私和隐私权的发展在世界范围内的共同性和差异性，以期对隐私权的发展和研究有一个合理的预期。

第二章，从法理基础、宪法学依据和规范依据三个层面对隐私权何以必要以及何以可能成为宪法权利进行了多角度的分析和论证。一是从宪法权利的价值角度，对目前有关隐私权存在的法理基础的主要观点如人格权理论、独处权理论、亲密关系自治理论、信息理论和控制理论进行了概括、比较和评述，提出人格权理论在各种理论中更具有合理性，并进一步阐释了宪法隐

私权存在和发展的共性价值和基础——人格尊严，对人格权理论作出一定修正。二是从宪法权利规范的特征角度，分析了隐私权作为宪法权利所具有的条件，论证了隐私权不仅是应然的宪法权利，而且是某些国家宪法规范中的实然权利。三是从各国宪法规范入手，对《世界宪法全书》涉及的124个国家中部分国家宪法中的隐私或私生活保护规范进行了列举，分析论证了隐私作为宪法权利的实然性和应然性。四是从国际法规范角度，对重要的国际条约和区域性国际条约的隐私或私生活保护规范进行了列举和分析，概括归纳了隐私权的国际法保护的样态和趋势。借重于上述分析和论证使得本书对宪法隐私权的论证建立在一个相对宽厚的基础之上。

第三章，对宪法隐私权的主体、内容、客体和法律特征及相关问题进行了基本分析和定位。一是将宪法隐私权的主体定位于自然人，把法人、死人和集体排除在隐私权主体资格之外，揭示了隐私权受侵害的精神实质；二是将隐私权的客体定位于私人信息、私生活安宁和私密事务的自我决定三个基本方面。强调隐私权保护之核心在于私生活的安宁、自治以及人格尊严的价值蕴涵，凸现了宪法隐私权所表征的个人独立于以国家为代表的公权力的特点。隐私空间则作为维系私生活安宁的基本条件加以阐述。把宪法隐私权的主要特征概括归纳为私人秘密性、精神利益性、无涉公害性、复合性四个基本方面，实际上也从权利特征角度对隐私权进行了必要的定位和限制。

第四章，归纳总结了宪法隐私权所具有的社会功能和法律功能。社会功能主要表现为：（1）尊重和维护人的尊严，促进私生活的自由；（2）培养和促进良好的个性，营造幸福和谐的生活；（3）划清国家、社会与个人的界限，构建和谐互动关系；（4）维护公共利益和共同的价值选择，塑造共同的价值理念。法律功能主要表现为：（1）隐私权的防御功能；（2）隐私权的保护功能；（3）隐私权的价值功能。隐私权虽然受到世界各国的广泛重视和认同，但在包括我国在内的某些国家尚未成为宪法规范中的权利，故对宪法隐私权功能的探讨既有实然的意义和价值，又有应然的成分和因素。本章结合隐私权在私法领域与公法领域不同的保护和研究现状，有针对性地提出和分析了作为宪法权利的隐私权与作为民法权利的隐私权的关联与区别问题，试图透过隐私权揭示两种领域权利的区别与互动，澄清有关民法权利与宪法权利的某些误区，提升了人们对作为宪法权利的隐私权的认识，以期通过宪法规范和其他部门法规范建立隐私权的统一协调保护。

第五章，隐私权作为宪法权利是一种可以而且应当加以限制的基本权利，本章从公共利益、权利保障和价值选择三个层面对隐私权限制的基本理由进行了讨论和分析，并结合各国宪法判例或案例、宪法规范、学理归纳出隐私权限制的若干原则和规则。主要有：一是基于公共利益的考量对隐私权给予必要的限制，但限制本身应受到严格的法律限制。由于公共利益在内容和对象上的不确定性，使得权力在公共利益的合法形式下容易被滥用和利用。因此，公共利益的含义必须具体明确并经过严格的法律论证和正当程序。二是基于特定国家共有的价值选择可以对隐私权进行必要限制。这些价值包括宗教、公共道德等社会规范和价值形态。三是基于对个人权利的保障应对隐私权进行必要限制。权利的保障不仅是指对他人权利的保障，在更深的意义上也包含着对主体自身权利的保障。限制隐私权的本身就是一种隐私权保障，没有这种限制也就意味着隐私权缺乏保障。在此基础上，本章提出了包括实体与程序在内的隐私权限制的具体原则：比例原则、价值平衡原则、法律保留原则和正当程序原则。公权力人物隐私权的限制问题是作为论题之下的一个相对具体的问题提出，本章对公权力人物隐私权的限制的意义和理由进行了分析和讨论，并提出和论证了公权力人物隐私权限制的若干制度。

第六章，隐私权作为宪法权利的具体形态之一反映和代表了特定的价值追求，但毕竟只是作为宪法保护的诸多价值之一存在，故其必然存在与其他基本权利和价值的某种紧张与冲突关系。隐私权与新闻自由、知情权的冲突即为主要冲突之一，本章以此为主线归纳、分析了这些权利冲突的表现、特征和相互关系。特别论证了新闻自由在国家宪政构架中的监督功能、信息功能和权利保障功能等特殊功能和地位，提出了平衡权利冲突或价值冲突的三个具体原则：利益平衡、价值平衡、规范协调原则。

第七章，主要论证了宪法隐私权的规范保障和救济保障及其相互关联，概括分析了我国隐私权特别是宪法隐私权保护的现状与问题，提出了增强对宪法隐私权的认识、加强对隐私权的宪法保护的若干建议和意见。隐私从应然权利到法律权利的转换是权利演进中的重大突破，从法律权利再向实然权利的转换更是权利演进中的实质飞越，本章提出了完善我国隐私权的宪法保障的若干构想和意见：一是在宪法中明确规定宪法隐私权。书中提供了修宪或重新制定宪法的两套方案，其要义就是增加个性发展自由、隐私或私生活保护、隐私信息、私生活安宁、私密事务的自我决定条款，结合现行《中华人民共和国宪法》的住宅保护、通讯自由、人身自由保护条款，形成相



对完善的隐私权宪法规范保护；二是把宪法隐私权落实和体现于各个部门法领域，遵循系统考量之下的分类和分行业保护原则，构建隐私权保障的法律规范体系；三是在“国家尊重和保障人权”总体原则下，把隐私权的规范保障与救济保障结合，构建和完善有实效的基本权利救济机制，使宪法隐私权借助于经常性的权利救济机制获得及时充分的保障。

# Abstract

We are living in a world full of privacy, the value of which has increasingly drawn people's attention and pursuit. Protecting personal privacy has become an indispensable condition for maintaining self-respect and individual freedom. "The more developed of social materials civilization, and the more advanced of communication means and mass medias, the more necessary people feel it is to keep the quietness of one's own internal world." It is beyond imagination having days without privacy.

The right to privacy is one of the right categories, which are the result of continuous development of human right and civilization. As a legal right, the research on the right to privacy has achieved great success in the civil law field, but the research in the constitutional field is still on the rudimentary stage. Due to its uncertainty of the basic constitutional theory and its multidisciplinary background, the research on the right to privacy has become more complex and more valuable.

The dissertation has seven parts which include introduction and body, as well as the postscript. The introduction part mainly introduces research background of privacy and the right to the privacy, clarifies the significance of the research on the right to the privacy from the perspective of constitution, and explains the major research methods in the dissertation.

Through the comparative analysis of cases and regulations on privacy right in some countries where privacy protection is relatively mature, Chapter 1 combines current research in privacy right in our country and reveals the nature, definition and development of privacy right which is a legal right as well as a constitutional right. Specifically, first, Part One provides clarifications on the definition of privacy right which constitutes the conceptual foundation for the dissertation analysis. Second, Part One points out that protection of the right to privacy has become a tendency which is gradually accepted and protected as a basic right of human in

the international society. Third, Part One reveals the world wide similarities and differences in the development of the right to privacy so that we can have reasonable expectation on future research and development of the right to privacy.

Chapter 2, from jurisprudential, constitutional and prescriptive perspectives, provides the reasoning and discussions on why and how the right to privacy is a constitutional right. Firstly, from the view of the value of the constitutional right, it generalizes compares and comments on the main viewpoints in the present jurisprudence basis of the existence of the right to privacy, such as the theory of the right to personality, the theory of the right to be alone, the theory of self-governed intimacy, information theory and control theory, which suggests that the theory of right of personality is more reasonable in all theories and further explains the common value and basis - personal dignity, of constitutional right to privacy's existence and development. Thus it attempts to modify the theory of right of personality. Secondly, from the perspective of the characteristic of the articles of constitutional rights, it analyzes the conditions the right to privacy has as constitutional right, arguing that the right to privacy is not just constitutional right as it ought to - be but also the right as it to - be in some countries' constitutional norm. Thirdly, beginning with all nations' constitutional norms, it lists the protection norms of the privacy and private life in 124 countries mentioned in Collections of the World's Constitutions, analyzing and reasoning the "existent state" and "expected state" of the right to privacy as constitutional right. Fourthly, from the perspective of international law prescriptive, it lists and analyzes the protective articles of privacy and private life in the important international treaties and regional treaties, and generalizes and induces the models under the international protections and trends of the right to privacy. By virtue of the above analysis and arguments, the dissertation provides a relatively broad foundation for the explorations on the constitutional right to privacy.

Chapter 3, provides a basic analysis and orientation of constitutional right to privacy in terms of subject, content, object, legal nature and relevant problems. Firstly, it views the subject of constitutional right to privacy as a nature person, excluding the legal person, the dead people and the collectivity from the subject qualification of the right to privacy, thus revealing the essentials of the violation of the right to privacy. Secondly, regarding the object of the right to privacy as in

three basic aspects as personal information, quietness of private life and private affairs, it emphasizes that the core of the protection of the right to privacy is in the value implications of the quietness of private life, self – government and personal dignity, highlighting the nature that individuals embodied in the constitutional right to the privacy are independent of the public right force represented by the country, explaining the privacy space as the basic condition of maintaining life quietness. And then it sums up the main features of the constitutional right to privacy in the following four aspects: personal privacy, personal interests, without public damage and compound. Actually, it gives the necessary orientations and restrictions of the right to privacy from the perspective of rights' features,

Chapter 4, induces and summarizes the social and legal functions the constitutional right to privacy possesses. The social functions are mainly manifested in the following aspects: (1) respecting and maintaining person's dignity for promoting the freedom of private life; (2) training and fostering good personalities to build a happy and harmonious life; (3) making a clear distinction among the government, society and individual to construct a harmonious and interactive relationship; (4) maintaining the public interests and common value options to pursue the common values. The legal functions are mainly manifested: (1) the defensive function of the right to privacy; (2) the protective function of the right to privacy; (3) the valuable function of the right to privacy. Although the right to privacy is widely valued and agreed throughout the world, it is not accepted in some countries' constitutions including China. Therefore, the discussion on the functions of constitutional right to the privacy has the meaning of "expected state" and significance, even more has the "existent state" elements and factors. Combining the different protections and researches results in the fields of private law and public law, this dissertation proposes and analyzes the relations and differences between the right to privacy as constitutional right and as civil right, attempting to reveal the difference and interaction of two fields through the right to privacy, clarifying some errors in understanding between the civil right and constitutional right, advancing people's awareness of the right to privacy as constitutional right, so as to establish the united and harmonious protection of the right to privacy by means of the constitutions and other laws.

Chapter 5, holds the view that the right to privacy is the basic right which

can be and should be restricted. The paper discusses and analyzes the basic reasons of restrictions for the right to privacy at three levels: public interests, right security and value choice. And it concludes with a couple of principles and rules of the restriction of the right to privacy after studying constitutions, cases, and doctrines. The main points: Firstly, considering public interests, we should give the right to privacy a necessary restriction, but the restriction itself should be confined within the strict law. Because of the uncertainty of public interests in terms of contents and objects, power can be easily abused in the name of public interests. Thus, the concept of public interests must be cleared through the strict legal enactment and due process. Secondly, in the light of given countries' common value choice, we may render a necessary restriction on the right to privacy. These values include social and value forms including the ones related to the religion, public morality etc. Thirdly, because of the security of personal rights, we should present the right to the privacy a necessary restriction. The protection to such right is not only to secure others' rights, but in the profound meaning, it includes to secure the subjects' own rights. The restriction on the right to privacy itself is a sort of protections for the right to privacy. Without such restriction, the right to privacy will lead to uselessness. Based on this view, the dissertation proposed the concrete principles of restriction on the right to privacy: the principle of proportion, the principle of value balance, the principle of legal preservation and the principle of proper procedure. The restriction on the right of privacy for the public officials is another issue presented. The research analyzes and discusses the significances and reasons about the restriction on these officials' rights to privacy, by suggesting how to apply the restriction on their rights to privacy.

In Chapter 6, the right to privacy as one of the concrete modalities of constitutional right reflects and represents a special pursuit of value. However, it exists as only one of values which are under the protection of the Constitution. Therefore, its existence is necessary and reflects the tight and conflict relationship between the right to privacy and other basic rights and values. Two of the major conflicts are the conflicts between the right to privacy and news freedom and the conflicts between the right to privacy and the right to know. Based on the two conflicts, the dissertation induces and analyzes the manifestations, features and interrelations of these rights conflictions. Particularly, it demonstrates the supervision function, in-

formation function, and right protection function of the news freedom in the framework of national constitution and politics. Then it suggests three specific principles of balancing right conflicts or value conflicts: interests balance, value balance and prescriptive harmony.

Chapter 7, argues about the legal protections and remedies on the constitutional right to privacy and their interrelations, analyzes general right to privacy in China, especially the protection of the constitutional right to privacy, and proposes to enhance the knowledge of the constitutional right to privacy and to strengthen the constitutional protection on the right to privacy. It has been an important breakthrough on right to privacy from the expected right to legal right. Even more it is a substantial update from legal right to right with the meaning of "existent state". This part presents several suggestions in improving the constitutional protections on the right to privacy in China: Firstly, to enact the constitutional right to privacy in the Constitution. The paper provides two sets of schemes for constitution amendment or re-enactment, with the goal to increase self-decided items for developing freedom of personality, the protection of privacy and private life, privacy information, quietness of private life and private affairs. Based on the articles of the housing protection, communication freedom and protection of personal freedom in current Constitution, the author attempts to propose a better constitutional protection on the right to privacy. Secondly, to apply the constitutional right to privacy in other legal fields, through the classification and individual protection among all industries to construct a legal system to protect the right to privacy. Finally, in the general principle of "respect from the nation and protections to human rights", combining the legal protections with the legal remedies, the author attempts to construct substantial basic right and relief mechanism so that the constitutional right to privacy could be received a timely and adequate protections.

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