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The Observance of Human Rights and Freedoms during the Covert Obtaining of Information in Criminal Proceedings

Abstract: This article focuses on the analysis of problematic aspects of the system of internal control and judicial review over the protection of human rights and freedoms in the context of covert obtaining of information for the needs of criminal justice. Focusing on control measures and striking a balance between justice and human rights, the article dwells upon the effectiveness of supervision mechanisms and the factors affecting their efficiency. Analysis of legislation and case law of various European countries is therefore carried out to assess the effectiveness of control measures. Various factors that determine the effectiveness of control measures are examined. In addition, ways of solving these issues in the legislation of European countries and other jurisdictions are considered. As a result, the main problems and obstacles in ensuring the rights and freedoms of citizens while secretly obtaining information for criminal justice are identified. Furthermore, the effectiveness of mechanisms of internal control and judicial review in criminal proceedings is evaluated. Finally, a course of actions is suggested to maintain the balance of interests between criminal justice and human rights and freedoms.

Keywords: covert obtaining of information, criminal justice, human rights and freedoms, internal control, judicial review

Introduction

Against the background of the rapid development of special technologies and technical means of investigation, covert methods of obtaining information for the needs of criminal proceedings have become particularly relevant. Covert data collection in criminal proceedings is an important aspect of law enforcement; it includes various methods and techniques used to gather information without the suspects' knowledge (Rakipova et al., 2023). In connection with the development of technology and the increasing complexity of crimes, the question of the legality, ethics, and effectiveness of such methods is acute. The use of special software and artificial intelligence facilitates the search, analysis, systematization, and accumulation of information about a person's private life, which can violate privacy. However, public authorities justify such interference in privacy mainly in reference to the fight against terrorism and countering drug trafficking, human trafficking, the arms trade, and corruption.

The Universal Declaration of Human Rights provides several guarantees associated with the application of covert measures in criminal justice (Gronowska, 2022), namely the right to liberty and personal security (Article 3), the right to an effective remedy for violations of fundamental rights (Article 8), and guarantees against (unwarranted) interference with personal and family life, infringements of the inviolability of the home, confidentiality of correspondence, honour, and reputation (Article 12). Moreover, Article 8 of the European Convention on Human Rights stipulates that everyone has the right to respect for their private and family life, their home, and their correspondence. State authorities cannot interfere with the exercise of this right except in cases where interference is carried out in accordance with the law and is necessary in a democratic society for the interests of national and public security or the economic well-being of the country to prevent disorder or crime, protect health or morals, or protect the rights and freedoms of others.

Article 32 of the Constitution of Ukraine enshrines that no one can suffer interference in their personal and family life except in cases provided by law. The collection, storage, use, and dissemination of confidential information about a person without his/her consent are not allowed, except as provided by law and only in the interests of national security, economic well-being, and human rights. Every citizen is guaranteed the right to familiarize themselves with information held by state authorities, local government bodies, and institutions. Covert surveillance in Ukraine is regulated by the Criminal Procedure Code; in particular, Article 10 defines the conditions under which law enforcement agencies can intercept private communications. This provision requires judicial review and internal control, and there is a strict legislative framework on the duration of such surveillance. However,

the case law of the Constitutional Court of Ukraine reveals a gap in the supervision of prolonged wiretapping, raising questions about whether the current guarantees are sufficient to protect the privacy of citizens (Koval, 2019).

Therefore, the necessity to ensure a balance between the interests of criminal justice and human rights is considered a fundamental principle in the context of the use of covert forms and methods of obtaining information. Compliance with this principle envisages the establishment of an adequate and effective mechanism for monitoring and controlling the observance of such rights and freedoms. Methods of covert obtaining of information in criminal proceedings differ significantly in terms of their interference with and impact on confidentiality. In this article, the methods of wiretapping, interception of data (such as emails or mobile communications), and video surveillance are considered; we aim to provide a detailed analysis of the legal guarantees of the rights and freedoms of citizens during the use of these methods. The research aim presupposes the following objectives:

- To present modern approaches to and methods of covert obtaining of information during criminal proceedings (such as wiretapping, video surveillance, GPS tracking, and data interception, as well as degrees of intervention);
- To examine the specific legal framework governing covert obtaining of information in criminal proceedings in Ukraine and other European countries;
- To analyse the effectiveness of judicial review and internal control in supervising secret surveillance;
- To consider possible reforms that could improve the balance between the needs of criminal justice and the protection of human rights.

During the research, the effectiveness of such control measures is assessed in terms of ensuring a balance between justice and human rights. Consequently, the factors influencing their efficiency and methods of solving these issues in the legislation of selected European countries are investigated.

1. Literature review

Since modern crime has become complex and technological, the covert obtaining of information in criminal investigations gains particular importance in the context of human rights protection. However, there is an insufficient amount of literature that addresses in detail the main issues related to the covert obtaining of data. Although much research focuses on general principles and methods (Suleymanli, 2023), discussions of the problems with the covert obtaining of information remain underdeveloped, such as covert data collection and its ethical aspects in countries with different legal systems. Researchers such as Smith (2000), Bloustein and Gavison

(1980), Koval (2019), Kubuj (2022), Leiva (2024), Yuhno (2013), Zafar (2024) have dedicated significant attention to the scholarly development of issues related to ensuring judicial and internal control over interventions in private life.

Covert obtaining of information can be classified into various types, including surveillance, wiretapping, installation of video surveillance, and the use of undercover agents. Legislative regulation of covert data collection varies by jurisdiction, making comparative analysis difficult. Studies conducted in several countries demonstrate that the regulation of covert data collection often faces challenges related to privacy protection. For example, in the UK, legislation such as the Electronic Communications Privacy Act provides for certain restrictions on wiretapping and surveillance (Stoykova, 2024). In Ukraine, it is regulated by the Criminal Procedure Code of Ukraine (2013), which establishes clear rules and requirements for the application of such methods. The ethical aspects of covert data collection are also debatable. Consideration of the ethics of such methods involves the analysis of their impact on public confidence in law enforcement agencies. Many researchers point to the risk of the abuse of such methods, which can lead to unlawful interference in citizens' private lives (Kubuj, 2022). It is also important to introduce control and reporting mechanisms to prevent possible abuse.

A comparative analysis of the covert data collection procedures in different countries shows that the most effective systems combine technical capabilities with clear regulation and ethical standards. For example, in Austria, the use of covert obtaining of information is regulated by strict laws that protect the rights of citizens and prevent abuse (Leiva, 2024). At the same time, in countries with less developed legal systems, there is a greater risk of misuse of such methods. In addition, there are certain challenges that complicate the study of covert data collection: firstly, there is a lack of open information sources due to the specifics of law enforcement activities. Secondly, ethical and legal aspects can be so sensitive that many researchers avoid in-depth analysis of them (Zafar, 2024). This creates a gap in knowledge that needs to be filled, and covert data collection in criminal proceedings requires a comprehensive analysis. Regulation, ethical issues, and comparison of case law in different countries emphasize the need to achieve a balance between the effectiveness of investigations and the protection of individual rights. Further research should focus on developing new methods that will ensure maximum effectiveness without compromising human rights.

2. Materials and methods

During the study, general scholarly (empirical and general logical) and legal methods (specific sociological research, content analysis, the statistical-mathematical method, and comparative legal, formal-legal, and alternative methods) were utilized. A comparison of the key provisions of international acts on human rights guarantees

and the national legislations of Ukraine, Moldova, Lithuania, Estonia, and Germany helped identify similarities and differences in the regulation of the covert obtaining of information in criminal proceedings. Various forms of judicial, internal, and public control to ensure the balance of state and societal interests in upholding human rights and freedoms were examined.

The components of the covert obtaining of information were analysed, identifying specific elements of regulation and its trends. The method of specific sociological research was implemented through monitoring information sources that address various aspects of intrusions into private life, the capabilities of special services, and the effectiveness of control over their activities. Document analysis was also employed, using official communications from state bodies and institutions in Ukraine, judicial practice, and public opinions on the effectiveness of control over law enforcement activities. Based on statistical data from the State Judicial Administration, the High Anti-Corruption Court of Ukraine, and the Office of the Prosecutor General, trends in the increase of cases involving covert methods of obtaining information were studied, using a statistical-mathematical method.

3. Results

3.1. Interference in private life through covert measures to collect information: Statistics and trends

According to the statistics of the Judicial Authority (2024), there is a trend of increasing use of covert measures in Ukraine. This is particularly evident when comparing their quantity with the number of criminal cases sent to court for consideration. After the introduction of the new Criminal Procedure Code of Ukraine in 2013, Ukrainian law enforcement agencies submitted 156,878 criminal cases to courts for consideration. During the same period, investigative judges issued 108,243 permits for covert measures, which typically included several different forms of control. Over the following years, until the imposition of martial law, there is a consistent trend of an increasing number of covert information-gathering measures. Table 1 provides the statistical data from the official website of the judiciary.

Table 1. Statistics on the number of criminal cases submitted to courts and rulings on the use of covert measures, 2015–2021 (before the introduction of martial law).

Year	Number of criminal cases	Number of covert measures used
2015	130,414	117,232
2016	116,745	119,456
2017	132,894	152,185

2018	131,398	154,705
2019	125,761	137,388
2020	121,742	148,664
2021	115,919	144,675

These figures indicate that measures for the covert obtaining of information related to interference in private life and communication has gradually lost its exceptionality and is used more often. This development is concerning in terms of a substantial decrease in the number of investigated cases where individuals who committed crimes are apprehended. The trend of increasing interventions in private life through covert investigation is also evident in specialized agencies created to counter corruption: the National Anti-Corruption Bureau of Ukraine, the Specialized Anti-Corruption Prosecutor's Office, and the High Anti-Corruption Court of Ukraine. The statistical data from these agencies demonstrate that in 2019, prosecutors and detectives submitted 626 motions for permission to conduct covert investigation, obtaining approvals in 520 cases and facing 69 rejections. In 2020, such motions increased to 2,164, with 1,985 approved and 212 rejected. In 2021, 2,384 motions were submitted, with 2,061 approved and 312 rejected. In 2022, 2,243 motions were submitted, with 2,036 approved and 180 rejected. In 2023, 3,246 motions were submitted, with 2,765 approved and 480 rejected (High Anti-Corruption Court of Ukraine, 2024a).

Particular concern arises from comparing the number of cases sent by the National Anti-Corruption Bureau for consideration with the number of permits obtained for covert measures. In 2020, 1,985 permits for covert measures were obtained, and only 85 cases were sent to court. This means that for every case where the guilt of an individual or individuals was established, there were 23 permits issued by investigative judges. In the following years, this ratio was 1:33 in 2021, 1:24 in 2022, and 1:21 in 2023. However, these figures do not account for the number of covert measures carried out at the prosecutor's and detectives' discretion, the granting of permits by a single court decision for a whole complex of covert measures, or a failure to conduct covert investigations. Another trend of judicial control is observed when comparing the number of permits granted by investigative judges for covert measures with the number of refusals to conduct them. The proportional weight of approvals granted by investigative judges is approximately 85%.

3.2. The legal framework of covert obtaining of information in Ukraine

In the legislation of Ukraine, the main regulatory acts that govern the organization, conduct, and documentation of covert obtaining of information and the storage, use, and destruction of information obtained as a result of such measures are the Criminal

Procedure Code of Ukraine (2013) and the Instruction on the Organization of Covert Investigations and the Use of Their Results in Criminal Proceedings (2012). Key mechanisms aimed at balancing the interests of criminal justice and human rights in the application of such measures include the introduction of internal control and judicial review in legislation, which involves the following elements:

- 1) Placing all covert measures related to interference in private communication exclusively under judicial control;
- 2) Minimizing the possibility of conducting covert measures in urgent cases without the permission of the investigative judge;
- 3) Dual control over covert measures, involving the consent of the prosecutor for the submission of a motion by the investigator to be considered by the investigative judge;
- 4) Assigning exclusive authority to the prosecutor to make decisions on monitoring the commission of a crime (controlled and operational purchases, controlled delivery, special investigative experiments, and simulation of the crime scene);
- 5) Assigning to the investigative judge decisions on the use of materials obtained during covert investigation in another criminal proceeding;
- 6) The prosecutor's decision to terminate covert measures and use or destroy their results;
- 7) Notifying individuals about the conduct of covert investigation against them after the completion of the pre-trial investigation.

However, despite the aforementioned controls, ensuring the balance of interests and compliance with the 'exceptionality' of covert information-gathering measures that are applicable in exceptional cases remains problematic.

The Parliamentary Commissioner for Human Rights (Ombudsman) of the Verkhovna Rada of Ukraine is advised about the lack of information in the investigation of the restriction of the rights and freedoms of individuals during covert investigation. This includes ensuring that law enforcement agencies adhere to the requirements for informing individuals about interventions in their private lives (Business Ombudsman Council, 2024). No investigations into issues related to the use of covert obtaining of information as a means of pressuring businesses, raiding, intercepting insider information and restricted-access information, banking, or commercial secrecy have been conducted by the Business Ombudsman Council (2024).

The absence of information in state institutions regarding the effectiveness of the use of special measures related to interference in private life indicates a lack of purposeful state activity aimed at establishing an adequate control mechanism for ensuring respect for rights and freedoms in this area. The formality of internal control and judicial review over compliance with guarantees of rights and freedoms is

apparent. Consequently, considering the constant increase in the number of measures involving interference in private life, they are no longer viewed as exceptions from general forms of evidence-gathering but rather as routine procedures.

Due to the existence of these problems, the National Human Rights Strategy (the Strategy) (Verkhovna Rada of Ukraine, 2021a) sets forth the task of creating mechanisms to minimize abuses during covert investigations as one of the strategic directions to ensure the right to privacy (Paragraph 6). It also aims to provide access to such mechanisms for every individual who has experienced such an interference. In accordance with Section 2 of the Strategy, it involves ensuring progress in the implementation of Ukraine's international agreements in the field of human rights, including the association agreements between Ukraine on the one hand and the European Union, the European Atomic Energy Community, and EU Member States on the other. It also encompasses the realization of the Sustainable Development Goals of Ukraine for the period until 2030 and the improvement of Ukraine's standing in international human rights rankings.

During the development of the Strategy, the principles introduced by Regulation (EU) 2016/679 of the European Parliament (2016) on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (the Regulation (2016)) were applied. The protection of individuals during the processing of personal data is a fundamental right provided for in Article 8 of the Charter of Fundamental Rights of the European Union and in Article 16 of the Treaty on the Functioning of the European Union (European Union, 2010). These acts consider the right to the protection of personal data regarding its function in society. In other words, it should be balanced with other fundamental rights according to the principle of proportionality and observance of all fundamental rights and freedoms, such as respect for private and family life, home and communication, freedom of thought, conscience, and religion, freedom of expression and information, freedom of enterprise, and the right to an effective remedy and a fair trial, as well as cultural, religious, and linguistic diversity. Moreover, special attention is paid to compliance with the procedure. The legal basis for conducting an investigation should meet the following requirements: a written form, clarity and unambiguity, the signature of the authorized person, the justification for its application, the inclusion of information on the right to an effective legal remedy, and possibilities for reviewing such a decision (Point 129).

At the same time, the National Strategy for the Development of Civil Society in Ukraine for 2021–2026 (Verkhovna Rada of Ukraine, 2021b) does not envisage the creation of mechanisms aimed at minimizing abuses during covert investigation or providing access to such mechanisms for individuals who have experienced such an interference. Moreover, the implementation of the National Human Rights Strategy has not influenced the introduction of relevant changes to the criminal procedural legislation of Ukraine. The existing system of covert obtaining of information

in Ukraine requires significant reform to eliminate the identified gaps and ensure reliable protection of individual rights. Specific legislative measures need to be taken to provide clearer guidance and strengthen control mechanisms. The objectives of the National Human Rights Strategy should be prioritized to align Ukraine's practice with international human rights standards, promoting greater accountability in the use of covert investigative actions.

3.3. Legislation of EU Member States on mechanisms aimed at achieving a balance of interests

The issues of the exceptionality of covert forms and methods of obtaining information, the sufficiency of grounds for interference in private life, and the establishment of mechanisms for restoring violated rights of individuals subjected to such measures are relevant not only for Ukraine but also for EU countries and other nations worldwide. European countries have introduced various approaches in their legislation to implement mechanisms aimed at achieving a balance of interests (OECD, 2007; Yuhno, 2013). Thus Article 126 of the Criminal Procedure Code of the Republic of Estonia (2004) introduces principles of public control alongside conventional forms of surveillance and control over covert investigations. Law enforcement agencies are mandated to submit quarterly reports on the application of investigative measures. Based on this information, the Ministry of Justice publishes a report annually covering the quantity and nature of open materials related to the investigation, the number of permits issued for covert investigation categorized by types, and the number of individuals notified of the covert investigation and the number for whom a notification was postponed for over a year. In this regard, the Estonian legislation allows for the filing of appeals against court decisions granting permission for such investigations due to failure to provide the notification or a refusal to disclose information obtained during the covert investigation. Furthermore, the person subject to such measures has the right to access all materials collected concerning him/her, including audio and video recordings and photographs. In addition, in Estonia, Article 126 of the Criminal Procedure Code mandates notifications about covert investigations be sent after their completion, regardless of whether the investigation in the case is concluded. However, Ukrainian legislation does not require sending notifications about the covert investigation if the case is not submitted to court.

The legislation of the Republic of Kazakhstan (1994) provides a measure to avoid formalism. When considering a motion for covert investigation, the investigative judge has the authority to initiate the relevant verification if there are doubts about the accuracy of the information. The covert investigation based on the ruling of the investigative judge may be terminated by the decision of the judge upon the prosecutor's resolution. Moreover, the person who was subject to such measures has the right to appeal to the court for compensation for inflicted damage.

The control mechanism introduced in the Criminal Procedure Code of the Republic of Moldova (2003) also deserves attention. In cases where the prosecutor or investigative judge determines that the rights and freedoms of an individual were substantially violated during the covert investigation, they declare the covert measure invalid and report this to the competent authorities. The prosecutor's decision can be appealed to a higher-ranking prosecutor, while the judge's decision is not subject to appeal. The legislation of the Republic of Moldova establishes a mandatory requirement to record information about the equipment used, the conditions and methods of its application, and the sealing of the data storage device on which the events are documented. Furthermore, notifying the person about the actions taken against him/her is not considered a mere formality of sending a letter with relevant information; on the contrary, it imposes an obligation on the investigative judge and prosecutor to verify the results of the conducted measure for compliance with human rights and freedoms, accompanied by the respective conclusion.

In the legislation of Germany (Letwin, 2023), the key principle is the application of the proportionality principle in determining the form of covert obtaining of information. Some covert measures, such as monitoring correspondence or conducting surveillance in personal dwellings, may be carried out exclusively only if the accused is one of the addressees of the correspondence or a resident of the dwelling. Judicial control over the results of such measures is introduced, along with the possibility of challenging the permission for their conduct in certain cases. The results of telecommunications monitoring are subject to judicial review. Moreover, the Code of Criminal Procedure (CCP) of Germany (German Federal Ministry of Justice, 1987) establishes principles of public (civil) control during the application of telecommunications surveillance. In particular, it is stipulated that the federal states and the Federal Attorney General publish an annual report to the Federal Justice Ministry which compiles an overview of the measures conducted. The report includes the number of criminal proceedings in which covert measures were appointed; the number of decisions on communication surveillance, including initial decisions and extensions and decisions regarding phone or internet communication surveillance; and criminal offences for which this measure was applied.

A special approach is implemented in the German CCP regarding control measures related to interference with private communication in a person's residence. Decisions on the application of measures that are implemented without the knowledge of the individuals involved are made by a panel of judges and, in urgent cases, by the presiding judge. Such decisions lose legal force if not confirmed by the panel within three days. The court that issued the authorization is informed of the results of the implemented measure. In cases where the grounds for the measure are no longer valid, it is terminated by a decision of the panel of judges.

The requirements of the German CCP regarding the conduct and documentation of covert investigations concern restrictions on access to certain information. Thus

it is prohibited to seize documents (including electronic ones) that fall under the right to refuse to provide testimony and those related to providing legal, medical, psychotherapeutic, or psychiatric assistance to the individual. However, if they were used in the commission of a criminal offence or were the subject of a crime, this prohibition is invalid. Moreover, partial restrictions are established regarding individuals who are carriers of professional secrecy. In the German procedural legislation, decisions on the use of information obtained during a covert investigation are made considering the criteria of absolute and relative prohibition. The distinction depends on whether the recorded conversation pertains to the internal sphere of private life or communication with a representative (lawyer) and close relatives; in such cases, there is an absolute prohibition on using the obtained information. In other cases, the possibility of using the obtained information containing professional secrecy is resolved based on the principle of proportionality in restricting the rights and freedoms of the individual under investigation for a crime.

Apart from that, there is an obligation to inform individuals whose interests were affected and whose residences were visited by the covert investigator about the application of covert measures. Sending such a notification is carried out by the prosecutor and entails the obligation to explain the possibilities for protecting one's rights. However, if such measures contradict the legitimate interests of the affected persons or if the restriction of their rights was insignificant, the notification may not be issued.

3.4. Limits of state interference in private life in ECHR case law

A significant number of cases related to interference in private life have been examined by the ECHR, with special attention given to cases involving data interception per se, i.e. mass surveillance. The term 'mass surveillance' is used to describe measures employed in the investigation of crimes, searches for missing persons, and gathering intelligence and counterintelligence data. It does not limit the definition to a specific group of individuals under observation, and the applied criteria are often quite vague (Council of Europe, 2015). When examining the legislation on the grounds for conducting covert measures in the case of *Roman Zakharov v. Russia*, the ECHR recognized the formulation 'events or actions (inaction) creating a threat to state, military, economic, information, or environmental security' as one that provides the authorities with 'virtually unlimited discretion', thus opening up broad possibilities for abuse (Judgment of the ECHR, 2015). In this context, the ECHR paid attention to criteria such as reasonable suspicion, the existence of factual grounds for suspicion against a specific person, and strict necessity. The Court also emphasized that defining the scope of individuals subject to surveillance should be based on individual suspicion, supported by relevant facts and materials. Surveillance is justified only when conducted to obtain crucial information during a specific (individual) operation. In the case of *Azer Ahmadov v. Azerbaijan* (2021),

the Court emphasized that decisions on conducting covert obtaining of information must include the personal data of the individual under surveillance. Otherwise, it violates their right to private life guaranteed by the European Convention.

In the case of *Big Brother Watch and Others v. the United Kingdom* (2021), the applicants – three non-governmental organizations, an international researcher of privacy and freedom of expression, and journalists – claimed that they were likely subjected to surveillance by the intelligence services of the United Kingdom during journalistic investigations. The ECHR slightly softened its position, acknowledging the possibility of mass interception of metadata as a preventive measure, provided that such interception is not of a mass nature and is limited to combating serious crime, applying the principle of strict necessity. The Court examined such aspects of monitoring as mass interception of telecommunications, exchange of intelligence information between countries, and obtaining communication data (billing information) from operators and telecommunications providers. However, in this case, the Court recognized the relatively broad discretion of intelligence services regarding data interception and sharing such information with other states.

In the context of judicial review of the protection of human rights and freedoms in this area, the findings of the ECHR in the case of *Zoltán Varga v. Slovakia* (2021) are also noteworthy. In this case, two extremely important aspects were considered, namely the assessment of judicial control over granting permission for covert surveillance measures, and inaction regarding the destruction and leaking of information obtained by intelligence services. According to the case materials, the Slovak Intelligence Service (SIS) conducted surveillance in the applicant's apartment based on court permits, later revoked by the court (Vaško, 2022). Moreover, part of the materials ended up on the internet. Thus the Court noted that when reviewing the submissions of the intelligence service, judges did not investigate the grounds for the use of special technical control measures, and the permission was granted based on the intelligence agency's impression of the suspect. Insufficiently clear jurisdictional rules, the absence of procedures for implementing existing norms, and deficiencies in their application during covert investigation led to the conclusion that the intelligence agency enjoyed unlimited authority, which was not accompanied by safeguards against arbitrary interference, as required by the rule of law.

In the context of the use, retention, and destruction of information, the Court found that despite the higher court's annulment of the decisions on granting permission for covert investigation, the illegally obtained materials were not destroyed but continued to be stored in the SIS electronic information system, despite the higher court determining the need for their destruction. The Court also noted that crucial aspects regarding access to such materials, the examination of their content and scope, and timelines for their destruction could not be assessed due to the classified nature of the order regulating these issues. Moreover, there was no

established body with the authority to oversee the actions of the intelligence service in executing court-issued surveillance permits (Paragraphs 162–170).

3.5. Measures aimed at ensuring human rights and freedoms

Among the measures aimed at ensuring rights and freedoms during the covert obtaining of information, attention should be paid to the following aspects:

- The implementation of consistent monitoring and enforcement of the Regulation (2016);
- The existence of powers in relevant authorities and officials for investigating, correcting, applying sanctions, and issuing permits;
- Providing consultations on the right to present the facts of such violations before a court.

These measures also extend to the possibility of imposing temporary or final restrictions, including a ban on processing the obtained information. It is worth noting that the Regulation (2016) emphasizes that each measure must be justified, necessary, and proportionate, taking into account the circumstances of each individual case, avoiding unnecessary costs and excessive inconvenience for the individuals involved. Such a mechanism can be effective only in cases where a comprehensive approach is ensured, which should include the following elements:

- 1) Clear criteria for the application of covert investigation depending on the severity and category of the criminal offence, serving as the basis for balancing the interests of criminal proceedings and guarantees of human rights;
- 2) The differentiation of responsibilities among investigating judges, prosecutors, and heads of pre-trial investigation bodies in making decisions on the application of covert obtaining of information measures;
- 3) Providing the authorized persons making decisions on intervention in private life the opportunity to familiarize themselves with materials confirming the grounds for their implementation;
- 4) The implementation of post-measure control, assessing the results, and examining compliance with human rights during the investigation;
- 5) Providing timely information to the affected persons about the limitations on their rights and freedoms, explaining the procedure for challenging the decision made, and compensating for any damages incurred;
- 6) Establishing control over the storage, use, and destruction of information obtained during the covert investigation, including specific retention periods for such information;
- 7) The mandatory analysis of covert measures' effectiveness by law enforcement agencies;

- 8) Introducing the obligation for law enforcement agencies to publish general data on the application of covert measures involving restrictions on rights and freedoms, disseminating such information to the public, governmental authorities, and local government bodies.

4. Discussion

The issue of judicial review and internal control and its effectiveness has received significant attention, particularly in cases considered by the ECHR related to the collection, processing, and use of personal data by law enforcement agencies, as well as interception of telephone conversations. In this regard, it is important to define the criteria for the concept of private life and the permissible limits of state intervention. The boundaries and content of the concept of private life remain a subject of ongoing debate. In the case of *Niemietz v. Germany* (1992), the ECHR noted the difficulty in providing a comprehensive definition of the term 'private life'. At the same time, the positions of scholars on this matter are quite diverse. Thus Davies defines private life as the 'boundary beyond which society should not penetrate' (1996, p. 9). Smith describes it as 'the intention of each of us to have a physical space where we could be free from external interference, from interested third parties, from the demand to account for our thoughts, affairs [...] it is the place where we can control our personal data' (2000, p. 11). In contrast, Gavison (1980) identifies three elements of privacy, namely secrecy, anonymity, and confidentiality, which can be relinquished by the individual's own choice or due to external interference. Moreover, four components of this right are distinguished as follows (Electronic Privacy Information Centre and Privacy International, 2002):

- 1) Informational privacy (collection and processing of personal data, such as banking and medical confidentiality);
- 2) Physical privacy (protection of the human body from external interference, including compulsory drug testing, DNA analysis, or examination of internal organs);
- 3) Communication privacy (integrity of postal messages, telephone conversations, email, and other means of communication);
- 4) Territorial privacy (integrity of living spaces, workplaces, and shared public spaces).

While the definition of private life remains a subject of debate in international law and in ECHR case law, it is also essential to establish the limits of state intervention in the sphere of privacy. Typically, ECHR decisions on defining these limits and justifying them employ terms such as 'legality', 'necessity in a democratic society', and 'proportionality', which cannot be considered clear guidelines. As a result, motions for

wiretapping or electronic surveillance are rarely rejected. From the law enforcement perspective, such measures are deemed necessary for successful crime prevention, and in these circumstances, a court cannot be a guarantee against abuse. Therefore the only way to minimize abuses is to ensure transparency in decision-making procedures for conducting the covert investigation, guaranteeing objectivity in investigating the grounds for their application, providing justification for decisions to permit such measures, control over their implementation, and the recording, preservation, use, and destruction of items, objects, and information obtained during their application.

Furthermore, the exceptionality of covert obtaining of information in terms of interference with private life remains declarative. Despite the provision in Part 2 of Article 246 of the Criminal Procedure Code of Ukraine that such covert measures may be carried out as exceptions when information about a criminal offence and the person who committed it cannot be obtained in any other way, this requirement is reduced to a mere citation in procedural documents. Moreover, control mechanisms by law enforcement agencies, courts, and state institutions in ensuring guarantees of human rights and freedoms are absent.

According to the official data, the State Judicial Administration does not separate information on permits granted for interference in private life, the effectiveness of judicial control, and the record of motions issued (State Judicial Administration of Ukraine, 2024). Prosecution authorities maintain a general record of the number of motions sent to courts seeking permission for covert investigation and the results of their consideration. In this regard, a record of prosecutors' decisions on monitoring criminal activities, the outcomes of the implemented measures, and their utilization for the interests of criminal justice is not conducted. Issues related to the effectiveness of using such measures, potential abuses, and specific guidelines on the application of covert measures have not been studied, and prosecutors have not been held accountable for violations during the organization and implementation of such covert measures (Office of the Prosecutor General of Ukraine, 2024). Similarly, the National Police, the Bureau of Economic Security, the National Anti-Corruption Bureau, the State Investigation Bureau, the High Anti-Corruption Court of Ukraine, and the State Judicial Administration maintain only a general record of the number of submissions for permission to conduct covert measures, the number of granted permissions, and refusals (Bureau of Economic Security, 2024; High Anti-Corruption Court of Ukraine, 2024b; National Anti-Corruption Bureau of Ukraine, 2024a; National Anti-Corruption Bureau of Ukraine, 2024b; National Police of Ukraine, 2024).

Conclusions

Balancing the interests of criminal justice and human rights during covert investigations remains relevant and requires continuous improvement at the

state level and through the adoption of international acts implementing specific standards regarding the scope, grounds, and conditions of interference in private life and the use and destruction of the obtained data. Ensuring guarantees of the rights and freedoms of citizens during covert obtaining of information in the interests of criminal justice is an important aspect of the legal order. The analysis of the current state of legislation demonstrates that the existing mechanisms of internal control and judicial review do not always provide a sufficient level of protection of citizens' rights and freedoms. However, with improvement and effective application, these mechanisms can help strike a balance between the interests of criminal justice and the rights and freedoms of citizens.

It is therefore necessary to improve legislation and develop and apply new technologies to ensure effective control over covert obtaining of information. The state should develop and implement an effective mechanism for judicial review and internal control over the organization, conduct, recording, use, storage, and destruction of information. In addition, it is important to involve civil society and human rights organizations in monitoring human rights observance in criminal proceedings. Thus the main task is to ensure adequate protection of the rights and freedoms of citizens in the context of technology development by strengthening supervision, enhancing the effectiveness of law enforcement agencies, and improving the mechanisms of internal control and judicial review. Such mechanisms may involve the establishment of certain state institutions for external control over covert obtaining of information and an expansion of public control over the grounds for and results of covert investigation.

This article offers a unique look at the human rights issues involved in covert obtaining of information, focusing on its controversial aspects. Through comparative analysis of practices in different countries and assessment of Ukrainian legislation, the study reveals aspects of regulation that have been ignored. In addition, it offers recommendations for possible reforms aimed at increasing the protection of human rights in Ukraine.

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