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The Duration for Conducting Covert Investigative Actions as a Criterion for Determining the Intensity of Interference with the Right to Personal Life

The duration prescribed by the Criminal Procedure Code for conducting covert investigative actions is applicable in the context of fair balancing and harmonization of public and private interests. During covert investigative activities, intense interference occurs with the rights protected by the Constitution. The validity period is the criterion that determines the intensity of the intervention.

The paper aims to present alternative ways to change the content of criminal procedural numbers. On the one hand, it demonstrates the risks posing increased interference with the implementation of covert investigative action, and on the other hand, the work discusses the ways to solve the problem. Taking into account the time limits and the list of crimes that allow for the performance of these actions, the legislative requirement for the use of covert investigative actions as an extreme measure shall be observed.

In a legal state, the personal space of every person should be protected and inviolable. The legislative guarantees ensure that a legitimate goal in a democratic society is achieved not to violating the principle of a legal state.

Keywords: Covert investigative actions; The inviolability of private life; Protected sphere; List of crimes.

1. Introduction

The development of new mechanisms to carry out covert investigative activities also increases the risks of illegal interference in the protected sphere.¹ The advancement of electronic data processing systems has made it easier to gather high volumes of information and provide easy access. The latter generates a negative possibility of excessive and arbitrary intervention in rights such as freedom of expression, privacy, and inviolability of communication, which is contrary to the basic principle of a democratic society.²

Covert investigative actions follow the Criminal Procedure Code of Georgia ('the CPC') XVI¹ Chapter. Before the current edition, the chapter experienced some legislative changes. At each stage, the goal of a legislator was to approach international standards of procedural norms and strengthen

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¹ Report of the Special Rapporteur “On the Promotion and Protection of the Right to Freedom of Opinion and Expression”, 17.04.2013, 2, <<https://shorturl.at/ek258>> [26.02.2025].

² General Assembly, United Nations, Resolution on “The Right to Privacy in The Digital Age”, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/449/47/PDF/N1344947.pdf?OpenElement>> [26.02.2025].

judicial control to achieve maximum protection of human rights.³ In the implementation of covert investigative measures, intensive intervention is introduced in the sphere protected by the Constitution of Human Rights. Thus, this area needs special attention.⁴

Taking measures to protect internal security within the borders of a sovereign state should be based on fair balancing and harmonization of public and private interests. In this context, the time limit prescribed by the Criminal Procedure Code for carrying out covert investigative actions following the list of crimes is subject to discussion. The European Court of Human Rights has developed the necessary legislative requirements to establish internal legislation to prevent abuse of power.⁵ The court shall determine the time limit for interference with the right and the nature of the crime.⁶ Based on the legal nature of the investigative action, the secrecy, it is essential to have a specified time limit referring to the duration of interference with the right.⁷ Also, the issue should be assessed considering the type of crimes to get covert investigative action permitted. Since the list of crimes protects a particular legal good from encroachment, the systematic consideration underlines how proportional the current term is to the protected good.

2. Right to privacy

2.1. The scope protected by Article 15 of the Constitution of Georgia

Article 15 of the Constitution of Georgia guarantees the rights to personal and family life, personal space, and inviolability of communication. The Constitutional Court converted the rights ensured by Article 15 into the right to privacy and interpreted it as an expression of human dignity. The inviolability of personal life is an integral part of the basic idea of freedom.⁸

Article 15 protects people's personal, private space and the right to communication, free from control by the state or other individuals.⁹ According to Article 8 of the European Convention on Human Rights and Fundamental Freedoms, "everyone has the right to respect his personal and family life, his residence and correspondence." The protected sphere consists of several components: a. Right to personal and family life; b. Confidentiality of personal space and communication; c. Inviolability of residence and/or other property. Although it is possible to distinguish these rights, each component is adjusted to the protection of the basic right to privacy, and ensuring the freedom of personal life is the

³ Law No. 2634-RS of August 1, 2014 "On Amendments to the Criminal Procedure Code of Georgia". See explanation note <<https://info.parliament.ge/file/1/BillReviewContent/198084?>> [26.02.2025].

⁴ Nicholson M., Implementation of the National Strategy for Protection of Human Rights in Georgia 2014-2020, UNDP, 2019.

⁵ Romanchenko and Kharazishvili v. Georgia, [ECtHR], App. Nos. 33067/22 and 37832/22, February 18, 2025, para. 47.

⁶ Ibid.

⁷ Khodeli M., Secret Eavesdropping of telephone conversations in criminal proceedings (according to Georgian and German law), Tbilisi, 2019, 232 (in Georgian).

⁸ Decision of the Constitutional Court of Georgia of October 24, 2012, No 1/2/519, in the case "Georgian Young Lawyers Association and Georgian Citizen Tamar Chugoshvili vs. Parliament of Georgia." II, 2.

⁹ Kublashvili K., Fundamental Human Rights and Freedoms, the fifth edition, published by "Lawyers' World", Tbilisi, 2019, 144 (in Georgian).

common goal of all three.¹⁰ On the one hand, the state has a positive obligation to secure respect for personal life and the effective exercise of this right, which, in turn, envisages the suppression of circumstances hindering the free development of a person. On the other hand, the state undertakes a negative obligation not to interfere with the rights protected by the Constitution. The latter implies the protection of the personal space of any individual from arbitrary interference by the state authorities.¹¹

2.2. Key Aspects of the Right to Privacy

The constitutional right to personal life gives the individual the freedom to choose a form of communication with the outside world, their places, values, and attitudes. It is the basis of the independent development of each individual.¹² Having a personal life is a right of every person. According to Girk, all the rights ensure the domination of the entity in any part of its sphere.¹³

The right to personal life covers private, intimate, and social spheres.¹⁴ This right is often referred to as “The Right to Be Alone,” which means determining oneself feelings, emotions, and thoughts in relationships with others.¹⁵ Basically, this right ensures a feeling in a person that he is free.¹⁶ According to the “theory of spheres”, the intimate sphere is the main area of personal life, which is inviolable and protected. The private or personal sphere can be restricted, taking into consideration strictly defined prerequisites, while the social sphere is the least protected area that cannot be isolated from the environment.¹⁷ It seems to be within the range of full or partial publicity.¹⁸

The idea of personal life provides a person with the right to control information related to it, restrict access to this information, monitor the spreading of this information, and make a decision about circulating it.¹⁹ Only the individual can maintain the intimacy sphere.²⁰

The right to personal life, including each of its components, is related to the individual's ability to self-determine; He must consider the personal aspect of his life and avoid judgment by society. The law should facilitate the enforcement of this decision and protect it as much as possible.²¹

¹⁰ Khodeli M., Secret listening to telephone conversations in criminal proceedings (according to Georgian and German law), Tbilisi, 2019, 191

¹¹ Constitutional Court Decision of December 26, 2007 in Case No. 1/3/407, “Georgian Young Lawyers Association and Citizen of Georgia Ekaterine Lomtadidze vs. Parliament of Georgia”, II, 7.

¹² Ruling of the Constitutional Court of June 10, 2009, on the case N1/2/458 “Citizens of Georgia Davit Sartania and Aleksandre Macharashvili v. the Parliament of Georgia and the Ministry of Justice of Georgia, II. 1.

¹³ Von Gierke O., Deutsches Privatrecht, Band 1, Allgemeiner Teil und Personenrecht, Vol. 1. Duncker & Humblot, 1895, 702.

¹⁴ Bichia M., Personal Life Protection According to Georgian Civil Law, Tbilisi, 2012, 121 (in Georgian).

¹⁵ Bichia M., the idea of protecting personal life from the origin to the present, Revaz Gogshelidze – 65th anniversary collection, examiner. Meridian,” 2022, 448.

¹⁶ Craven Jr, J. B., “Personhood: The Right to Be Alone.”, Duke Law Journal, 1976, 6.

¹⁷ Khodel M., Covert surveillance of a telephone conversation in the criminal process (According to Georgian and German Law), Tbilisi, 2019, 41.

¹⁸ Ibid., 95-96.

¹⁹ Bichia M., the idea of protecting personal life from the origin to the present, Revaz Gogshelidze – 65th anniversary collection, Meridian, 2022, 454-455.

²⁰ Kublashvili K., Basic Rights, Tbilisi, GCI, 2003, 112 (in Georgian).

One creates their personal space and determines which issues should remain inviolable from people outside this space.²² A person needs to have the right to be an independent member of society and build relations with the people that he has chosen.²³

2.3. The Principle of Coherence as the Limit of Interference in the Spheres of Protection

Covert investigative actions conducted in the criminal process always trigger intervention in the private space. It should be inadmissible to encroach on a person's personal and family life, housing and communication issues, or dignity and reputation by arbitrary or illegal interference.²⁴ Any interference with the right to privacy shall be defined as a constitutional purpose when it is necessary to achieve the goal.²⁵ The Constitution and the Criminal Procedure Code establish the principle of coherence, which limits the use of covert investigative actions. According to the second part of Article 15 of the Constitution of Georgia, "rights may be restricted only under the law to ensure state or public safety in a democratic society, or to protect the rights of others." The principle of coherence consists of 4 elements: 1. Legitimate public Purpose, 2. Usability, 3. necessity, and 4. Proportionality. The principle of coherence imposes the highest constitutional barrier on all actions of the state and excludes arbitrariness.²⁶ If all four elements of the principle of coherence are met, then interference with the basic right is justified.

2.3.1. Legitimate Public Purpose

If there is a purpose to protect constitutional legal goods, the right to privacy may be restricted.²⁷ Achieving a public goal should justify interference in the protected sphere. Article 15 of the Constitution lists some legitimate objectives: in a democratic society, it is necessary 1. State 2. Ensuring public safety, 3. Protection of the rights of other people. In turn, providing national or public security under Article 1432(2) of the GCPC, preventing disorder or committing crimes, certifying the economic well-being of the country, or protecting the rights and freedoms of other people are the legitimate goals for which a covert investigative action is justified.

A democratic and legal state is based on the fair determination of the private and public interest, balancing the interest of the state and a particular individual, which in turn involves establishing a reasonable and accurate scope for the sphere protected by each particular right at the legal level.²⁸ The

²¹ Bichia M., the idea of protecting personal life from the origin to the present, Revaz Gogshelidze – 65th Anniversary Collection, Meridiani, 2022, 452 (in Georgian).

²² Decision of the Constitutional Court of December 26, 2007 on N1/3/407 case "Georgian Young Lawyers' Association and Citizen of Georgia – Ekaterine Lomtadidze v. the Parliament of Georgia", II, 3.

²³ Decision of the Constitutional Court of February 29, 2012, on the case N 2/1/484 in the case "Georgian Young Lawyers' Association~ and Citizen of Georgia Tamar Khidasheli v. the Parliament of Georgia.

²⁴ International Pact on Civil and Political Rights, Legislative Herald of Georgia, 16/12/1966, Article 17.

²⁵ Decision No 2/1/484 of 29 February 2012 of the Constitutional Court of Georgia on the case "Georgian Young Lawyers' Association" and Citizen of Georgia Tamar Khidasheli v. the Parliament of Georgia, II, 9.

²⁶ Kublashvili K., Fundamental Human Rights and Freedoms, Fifth Edition, vol. 11, no. 1, 2019. "Lawyers' World", Tbilisi, 2019, 65 (in Georgian).

²⁷ Ibid., 151.

²⁸ Decision No 1/2/384 of the Constitutional Court of Georgia of 2 July 2007 on the case "Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia".

protection of the constitutional order of the country and national security, public order, and prevention of crime is the obligation of a democratic and legal state. To ensure the mentioned areas, interference with the right to privacy is permitted.²⁹ If a state intervenes in a protected sphere, the intervention must contribute to the achievement of any legitimate goal.³⁰ The state is obliged to take all possible measures to prevent the serious threat of destabilization of democratic institutions.³¹ To combat these threats, the state has the ability to secretly control, eavesdrop, and monitor those individuals from whom the aforementioned threat emanates.³² The effectiveness of the protection of public interest is due to the hidden nature of investigative measures, which exclude the inviolability of the rights of persons who violate the constitutional order of the country, the security of a democratic society, and the rights or freedoms of third parties.³³

2.3.2. The Effectiveness of the Selected Action

Interfering in a protected sphere should contribute to achieving a legitimate goal. If the goal can theoretically be achieved, its utility becomes obvious.³⁴ A measure that cannot ensure the achievement of a goal is not acceptable.³⁵ According to the Federal Constitutional Court of Germany, the measures provided by the legislation should not be groundless and useless at the very beginning; to get the desired result, there must be selected an effective, suitable measure.³⁶

Discussing the utility of the measure, there should be a logical connection between the legitimate purpose and the form of restriction of rights.³⁷ In other cases, interference with a right is not an appropriate means of achieving a legitimate goal, which means that the right has been restricted unjustifiably and arbitrarily.³⁸

2.3.3. The Necessity Criterion

“Necessary” means less than 'strictly necessary' and more than 'useful' or 'desirable'.³⁹ State bodies have a certain range of views, which depends on the nature of the legitimate goal and the type

²⁹ Decision N1/3/407 of 26 December 2007 of the Constitutional Court of Georgia on the case – “Georgian Young Lawyers' Association and Citizen of Georgia – Ekaterine Lomtadidze v. the Parliament of Georgia”.

³⁰ Craven Jr, J. B., “Personhood: The Right to Be Let Alone.”, Duke Law Journal, 1976, 715.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Khodeli M., Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 187.

³⁵ Ibid.

³⁶ Ibid., 68, see Citation: BVerfGE 67, 157, 175; Dorsch, Effizienz der Überwachung der Telekommunikation, 2005, 13.

³⁷ Decision No 3/3/600 of 17 May 2017 of the Constitutional Court of Georgia on the case “Citizen of Georgia Kakha Kukava v. the Parliament of Georgia”.

³⁸ Decision No 2/2/1428 of the Constitutional Court of Georgia of 15 July 2021 on the case “Koba Todua v. the Parliament of Georgia”

³⁹ Trevel S., Human Rights in Criminal Proceedings, Oxford University Press, Tbilisi, 2009, 562. See. Quote: Handyside v. The United Kingdom [ECtHR], App. No. 5493/72, December 7, 1976 §48, 49; Klass and

of specific intervention that should ensure the achievement of the above goal.⁴⁰ If the executive body chooses another effective means, which does not restrict the basic right or restricts it less, this action cannot be necessary to achieve a legitimate goal.⁴¹ Relevant bodies must make accurate choices to realize the set goal.⁴²

The criterion of necessity is interpreted by Article 1432(4) of the CPC of Georgia as the principle of subsidiarity. According to the mentioned norm, a covert investigative action may only be applied if other alternative means cannot be used to obtain tangible evidence for the investigation, or the above-mentioned requires making a lot of unjustifiable effort.

If the part of the protected sphere is restricted, interference with the right appears to be irrelevant.⁴³ “The restriction should not result in a higher degree of restriction of a person's right, which is extremely necessary for the existence of a democratic society.”⁴⁴ Interfering in the protected sphere, the selected action is necessary if there are no other, less radical, and relatively flexible means that can produce the same results as the selected action.⁴⁵

2.3.4. The Proportionality of Restriction on the Right

The last, fourth element of verification of coherence is proportionality. The principle of proportionality admits that human rights are not absolute and, considering broad public interest, they can be restricted.⁴⁶ The test of proportionality requires checking the best interest of protection, the severity, and the need for interference in the right⁴⁷ as well as the compliance between the limited and the protected goods, etc.

Proportionality implies keeping a balance between an individual's rights and public interests.⁴⁸ It also means providing sufficient guarantees to avoid an arbitrary covert investigative action.⁴⁹ Proportionality is the best tool for determining the severity and intensity of the intervention, and the

others v. Germany [ECtHR], App. No 5029/71, September 6, 1978 § 42; Silver and others v. The United Kingdom [ECtHR], App. No. 5947/72, October 24, 1983, § 97.

⁴⁰ Ibid., Leander v Sweden [ECtHR], App. No. 9248/81, 26 March 1987, § 59.

⁴¹ Dorsch C., *Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO*, Freiburg, Schriftreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht, 2005, 14.

⁴² Ibid.

⁴³ Decision No 2/2/516,542 of the Constitutional Court of Georgia of 14 May 2013 on the case “Citizens of Georgia – Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze, and Vakhtang Maisaia v. the Parliament of Georgia”.

⁴⁴ Ibid., II. 19.

⁴⁵ Kublashvili K., *Fundamental Human Rights and Freedoms*, Fifth Edition, “Lawyers' World”, Tbilisi, 2019, 64 (in Georgian).

⁴⁶ Meurmishvili B., *Covert Investigative Actions*, in the book – *Criminal Procedure Law of Georgia*, Private Part. Tbilisi, “Meridiani”, 2017, 519-520 (in Georgian).

⁴⁷ Mezvrishvili N. in: *Commentary of the Criminal Procedure Code of Georgia*, group of authors, examiner. “Meridiani”, Tbilisi, 2015, 435 (in Georgian).

⁴⁸ Albrecht H. J., Dorsch C., & Krüpe C. R., *Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b stop und anderer verdeckter Ermittlungsmaßnahmen*. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, 2003, 435.

⁴⁹ Ibid.

selected action is relevant to the intensity of the intervention.⁵⁰ There are two opposing things of interference – a right that has been restricted, and a significant public interest.⁵¹ For example, by eavesdropping on covert telephone communication, the constitutional right is restricted – the inviolability of personal space and communication is compromised, and the limited good is sacrificed to improve public safety. It is necessary to weigh the legal goods in each case, whether the meaning of any of them is non-objective and disproportionately evaluated.⁵²

“The principle of coherence involves restrictive regulation of the right as a useful and necessary means of achieving a valuable public (legitimate) goal. At the same time, the intensity of restriction of the right must be proportional to the public purpose to be achieved. It is not permitted to attain a legitimate goal at the expense of increased restriction of human rights.”⁵³

Ultimately, all four of the above criteria justify that the principle of coherence was observed when interfering with the right. The latter imposes the highest constitutional barrier on all actions of the state and fully excludes the arbitrariness of the government when interfering with the sphere protected by the basic right.⁵⁴

3. Duration of Covert Investigative Actions

Carrying out a covert investigative action, depending on the legal nature of the investigative action, requires a specified period limiting the duration of interference with the right.⁵⁵ The European Court of Human Rights has developed the necessary legislative requirements to establish internal regulations to prevent abuse of power.⁵⁶ The court considers determining the time limit for interference with the right and the nature of the crime.⁵⁷

Before the legislative amendment of 2022, Section 1433(12) of the CPC stipulated that the ruling of the judge on holding a covert investigative action would be issued for not more than one month, and the extension of this period was permitted for no more than two months based on a prosecutor's motivated petition, and following a petition of the General Prosecutor of Georgia, for not more than three months. This entry has formed a mixed definition. In particular, by the precise definition, the one month for conducting a covert investigative action was added to the two months for the first time, and then the 3-month period, which would ultimately be read as no more than 6 months.

⁵⁰ Kublashvili K., Fundamental Human Rights and Freedoms, Fifth Edition, Exam. “Lawyers' World”, Tbilisi, 2019, 64 (in Georgian).

⁵¹ Ibid., 64-65.

⁵² Ibid.

⁵³ Decision No 3/1/512 of 26 June 2012 of the Constitutional Court of Georgia on the case “Danish citizen Heike Chronicle v. the Parliament of Georgia”.

⁵⁴ Kublashvili K., Fundamental Human Rights and Freedoms, Fifth Edition, Exam. “Lawyers' World”, Tbilisi, 2019, 65 (in Georgian).

⁵⁵ Khodeli M., Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 232 (in Georgian).

⁵⁶ Romanchenko and Kharazishvili v. Georgia, [ECtHR], App. Nos. 33067/22 and 37832/22, February 18, 2025, para. 47.

⁵⁷ Ibid.

However, in practice, the norm was defined as limited, and the maximum term for conducting this action was 3 months.⁵⁸ Following court practice, the norm was misinterpreted as limited. Based on the Venice Commission, the six-month duration is not seen as excessive.⁵⁹ According to the literature, such a norm shouldn't allow for mixed interpretation, especially when it comes to procedural deadlines.⁶⁰ Moreover, extending deadlines leads to an increase in the intensity of the interference in the right.

After the 2022 legislative amendment, the above-mentioned norm changed. Today, according to Article 1433(121,123) and 125 of the GPC, a covert investigative action is carried out for no more than 90 days. If the period has expired and the purpose for which a covert investigative action is intended to be achieved, the validity period may be extended by 90 days. This is the second stage of the implementation of the action. The law establishes the third stage of the investigative action, when the 90-day period for the second stage has expired and the above goal is still not fulfilled. At this time, the General Prosecutor of Georgia or his/her deputy is authorised to submit a petition. The period set for the third stage is 90 days. Thus, the CPC establishes two stages of the extension of the term, and the duration of validity may include 270 days. For comparison, the 4th sentence of the first paragraph of Article 100e of the German CPC establishes a maximum of 3 months, and the extension of this period is allowed for the next a more than three months, if there is a relevant material basis.⁶¹ Germany defines a shorter period of time to conduct investigative action and sets two steps to continue it. According to Article 100-2 of the French Criminal Procedure Code, a warrant for carrying out the above investigative action can be issued for a maximum of 4 months. The extension of this order is permitted only in compliance with material requirements and for the same duration. In consistent with this record, the term of covert surveillance in France is 4 months, which is supposed to continue. In Georgia, this term is 9 months, and there has been instituted only two steps of its extension.⁶²

The legislative amendment, as the legislator interpreted, serves to increase the effectiveness of covert investigative action and ensures state and public safety, effective investigation of crime, and proper protection of human rights.⁶³ The problem that resulted in starting to make amendments was an unjustifiable provision of judicial practice regarding setting a sufficient period for conducting covert investigative action for grave crimes such as terrorism, sabotage, war crimes, which set the maximum term of 3 months and not 6 months, which would exclude the effectiveness of the investigation.⁶⁴

⁵⁸ Akubardia I., Control mechanisms on covert investigative activities, Revaz Gogshelidze – 65th Anniversary Collection, "Meridian", 2022, 225 (in Georgian).

⁵⁹ Venice Commission, Urgent opinion on the Draft Law on the Amendments to the Criminal Procedure Code adopted by the Parliament of Georgia on 7 June 2022, Opinion no. 1092/2022, §47

⁶⁰ Khodeli M., Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 233 (in Georgian).

⁶¹ Khodeli M., Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019., 279 (in Georgian).

⁶² Ibid.

⁶³ Explanatory card on the draft constitutional law of Georgia "On Amendments to the Criminal Procedure Code of Georgia", <https://info.parliament.ge/file/1/BillReviewContent/298437?> [26.02.2025].

⁶⁴ Ibid.

3.1. Term as a Determining Criterion for the Intensity of Interference in the Protected Area

It is necessary to determine the importance of the duration of the covert investigative action and the intensity of the intervention.

The Constitutional Court discussed the period as a determining criterion for the intensity of interference in the protected area by the right to privacy, applying the case “Georgian Young Lawyers' Association” and the Georgian citizen Tamar Khidasheli v. the Parliament of Georgia. The disputed norm was Article 8(2) of the Law of Georgia on Operative-Investigative Activities, which provided for the extension of operative-investigative activities to six months by the prosecutor. In this case, the court interpreted the time limit considering the scope of the public authorities' power. The intensity of interference in the right depends on the competence of the prosecutor, how conscientiously he/she accede to extend the term, taking into account the restriction of the inviolability of a person's communication, and personal life. The duration of a covert investigative measure is directly related to the severity of interference with the right to privacy. If the duration of validity increases, the intensity of intervention also escalates, which endangers the person's right to privacy.⁶⁵

After making the 2014 legislative changes, the norm in the CPC (Article 1433(12) was interpreted in various ways. In addition to the principle of coherence, the state is obliged to intervene under the law, corresponding to the principle of determination.⁶⁶ The European Court of Human Rights has repeatedly indicated that covert investigative actions constitute serious interference in freedom of privacy, so “they should follow a law that ought to be particularly accurate in this section.”⁶⁷ The importance of this principle was discussed by the Constitutional Court of Georgia in Decision N1/3/407 of 26 December 2007. The disputed norm was the first sentence of Article 9(2) of the Law of Georgia on Operative-Investigative Activities, which dealt with interference with the right to inviolability of the telephone notification, or the information received through other technical means. The connection 'or' used in the norm generated ambiguity.⁶⁸ This case points to the importance of a clear interpretation of the norm, which restricts the right to privacy. The court noted that compliance with the Constitution, based on which there is interference with the right to inviolability of personal life, is assessed by a much stricter standard than any other norm.⁶⁹ This is caused by: a) the hidden nature of the interference in the right because people do not know when a covert investigative action is taking place against them; b) the object is not involved in the trial which is assessing the necessity of the measure to be taken against him, and he/she is not informed about its legality; also,

⁶⁵ Decision N2/1/484 of the Constitutional Court of Georgia of 29 February 2012 on the case – “Georgian Young Lawyers Association” and Citizen of Georgia Tamar Khidasheli v. the Parliament of Georgia (in Georgian).

⁶⁶ Kublashvili K., Fundamental Human Rights and Freedoms, Fifth Edition, vol. 11, no. 1, 2019. “The World of Lawyers”, Tbilisi, 2019, 152 (in Georgian).

⁶⁷ Kopp v. Switzerland, [ECtHR], App. No. 23224/94, March 25, 1998, para. 72

⁶⁸ Kubashvili K., Fundamental Human Rights and Freedoms, Fifth Edition, vol. 11, no. 1, 2019. “World of Lawyers”, Tbilisi, 2019, 153.

⁶⁹ Decision No 1/3/407 of 26 December 2007 of the Constitutional Court of Georgia, on the case “Georgian Young Lawyers' Association and Citizens of Georgia – Ekaterine Lomtadidze v. the Parliament of Georgia,” II, 13.

he/she does not have the opportunity to protect their personal space from unlawful interference of the state; c) it is difficult to protect the legitimate interests of the so-called “third parties”.⁷⁰ That is why the specified degree of protection should be much higher when restricting the area of personal life, and the law “must interpret the specific purpose, objectives, and grounds of interference with the right. The rule of interference has to be univocal and accountable providing the clear idea of when and how their right can be restricted.”⁷¹ The law shall establish the scope of action to the public authorities, which is a prerequisite for the timely and effective exercise of judicial control. Thus, “a legislative regulation that raises the risk of making a mistake, contradicts the requirement for accuracy and transparency of the law.”⁷²

The significance of the covert investigative validity was highlighted in the case “Kennedy v. United Kingdom”. The European Court of Human Rights explains that the time limit, which should be imposed on the implementation of covert investigative action, is the minimum legislative guarantee that can prevent us from taking risks of power abuse. Without adequate and effective legislative guarantees, such as imposing a term of covert actions, interference is not “necessary in a democratic society” to achieve a legitimate goal. In each specific case, the context of ensuring national security and serious crime shall be taken into consideration. The scale and complexity of the crime in specific cases may take a relatively long period to carry out a covert action. However, there should be sufficient legislative guarantees for the powers granted to the internal authorities not to be abused/excessive. Such a legislative guarantee shall have a permanent control mechanism during the taking of covert measures and a continuous, substantiated discussion about the ruling on the deadline.⁷³

3.2. Current Timeline for the Expected Risk Management

The subject of discussion is the legislative amendment in relation to the timeline of covert investigative actions, and whether it improved the pre-amendment activities.

When it is inevitable to confront private and public interests that give rise to a conflict, there is always a need to make a fair balance. Accordingly, the state is obliged to create a system that can get the relationship between the government and the person into balance. The right to privacy is the basis of human freedom, and to develop a democratic society, the protection of this right must be promoted perfectly. Unequivocally, protecting public safety is a crucial task, but this should not lead to an increased violation of constitutional rights. The Constitution does not provide for the protection of legitimate interests in the way of violating the right. The state should be able to maintain a balance between interests in a way of perfectly conducting investigations, prevents it, and protects the right to privacy.⁷⁴

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid., 28.

⁷³ Kennedy v. United Kingdom, [ECtHR], App. No. 26839/05, 18 May, 2010, para. 143.

⁷⁴ Submission of the President of Georgia N07-1/14; 23.06.2022, <<https://info.parliament.ge/file/1/BillPackageContent/35447?>> [26.02.2025].

The Parliament of Georgia responded to these motivational remarks. The Committee of Legal Issues did not support the motivational remarks submitted by the President of Georgia on the amendment to the CPC and considered it justified to adopt the law through its original edit. The conclusion of the Committee was based on the reasoning that in order to achieve a legitimate goal, such as maintaining public order and an effective fight against crime, the period of covert investigative action may be extended as many times as needed.⁷⁵ One of the sources of this argument was the decision of the European Court of Human Rights – “Roman Zakharov v. Russia”. The court had a discussion not only about the discretion of intergovernmental bodies, but also underlined that the discretion should act to provide the “guarantees for adequate protection.”⁷⁶ This means taking internal or external control mechanisms over covert investigative actions. But the Venice Commission considered the issue controversial whether the court, parliament, and the Personal Data Protection Agency can provide effective control over covert investigative action.⁷⁷

The event-carried notification may be sent to the object of a covert investigation, since the notification obligation will be deferred as many times as needed for the interests of litigation. To provide a person with the inviolability of their personal space, the legislation must be convincing and clear. After the amendment is made, a person may not have information on the covert action carried out against him/her for a long time, which excludes the protection of the constitutional right by the person himself/herself.⁷⁸

Following the conclusion of the Venice Commission regarding the latest legislative amendment, the record suggests a total of 270 days. Additionally, in the context of international criminal cooperation, it is permitted to extend the term further. Also, according to Article 1433(127)(b) of the CPC, to investigate certain crimes, the period of covert measures may be extended as many times as needed. This list includes, for example, murder (Article 108 of the CPC) and hostage. In an attempt to correct the misinterpretation of the legal norm, a legislative regulation exceeded the six-month limit. The term allows for more expansion than it can be necessary for the investigation. According to the Venice Commission, the term is excessive. The record does not distinguish the crimes with an element of terrorism or hostile state interference from common crimes⁷⁹ that invite criticism. Such legislative regulation makes it difficult to comprehend the need for longevity, which leads to a significant and inadequate increase in the term of covert measures.⁸⁰

According to the article, the term can be extended as many times as the legitimate purpose allows. This approach raises risks of exceeding power and interfering with the right to privacy. A stricter standard than any other norm defines the explicitness and accuracy of procedural criminal

⁷⁵ Legal Issues Committee Conclusion “On Amendment to the Criminal Procedure Code of Georgia” On the Law of Georgia (2022 On 7 June, N1614-VIII0b-Xmp) On the Motivated Remarks of the President of Georgia (N07-1/14; 23.06.2022); <<https://info.parliament.ge/file/1/BillReviewContent/304789>> [26.02.2025].

⁷⁶ Roman Zakharov v. Russia, [ECtHR], App. No. 47143/06, December 4, 2015.

⁷⁷ Ibid.

⁷⁸ Submission of the President of Georgia N07-1/14; 23.06.2022, <<https://info.parliament.ge/file/1/BillPackageContent/35447?>> [26.02.2025].

⁷⁹ Ibid.

⁸⁰ Venice Commission, Urgent opinion on the Draft Law on the Amendments to the Criminal Procedure Code adopted by the Parliament of Georgia on 7 June 2022, Opinion no. 1092/2022, §47-50.

norms.⁸¹ The record should furnish the person with information about the state's invasion of his personal life to avoid undermining the individual's confidence in the state, which contradicts the principle of a legal state. "Each member of a society organized as a legal state anticipates that the goods are distributed in society fairly."⁸²

The norm crossing the boundaries of the protected sphere must pass the test for coherence. The appeal of a covert investigative action will always meet the criteria for a legitimate purpose and utility because it is usually found to serve a public purpose that requires carrying out the covert investigative action.

Considering the hidden nature of the action, it is always effective, however, it is disputed whether the current timeline can exceed the requirements of necessity and proportionality. Based on Article 1432(4) of the CPC, a covert investigative action may be applied only if tangible evidence of the investigation cannot be obtained by any other alternative means or requires a great deal of effort. This record indicates that if evidence of substantial importance can be gained by less intensive investigative action without encroachment on human rights⁸³, any covert investigative measure should not be taken. The latter is used in extreme cases when it is the only means of obtaining evidence – ultima ratio. There is a strong connection between the principle of the Ultima ratio and fundamental rights. Interfering with a fundamental right needs to seek the least intrusive means.⁸⁴ The above-mentioned is expressed in the positive aspects of the principle of subsidiarity,⁸⁵ which is determined by two criteria: 1. It should not be possible to obtain evidence of substantial significance by other, less intense means, or 2. It is possible, but it unjustifiably requires a lot of effort.⁸⁶ The latter may include large financial costs, unequal redistribution of resources, procrastination of the process using time-stretched investigative action, etc.⁸⁷

Concerning the criterion of proportionality, it is necessary to assess the composition of the crimes to which it is allowed to carry out a covert investigative action within the above timeframes. Whereas, taking into account the category and nature of the crimes, and the reality in the country, the 9-month period for conducting a secret investigative action can be considered reasonable. The list of crimes protects a particular legal good from encroachment, which requires assessing the proportionality of the applicable term.

⁸¹ Decision No 1/3/407 of 26 December 2007 of the Constitutional Court of Georgia, on the case "Georgian Young Lawyers' Association and Citizens of Georgia – Ekaterine Lomtadze v. the Parliament of Georgia," II, 13.

⁸² *Izoria L.*, Restriction of Human Rights and the Principle of Moderation, Protection of Human Rights in National and International Law, Proceedings Collection, Tbilisi, 2002, 46 (in Georgian).

⁸³ *Khodel M.*, Covert surveillance of telephone conversations in criminal proceedings (according to Georgian and German law), Tbilisi, 2019, 212.

⁸⁴ *Melander S.*, Ultima ratio in European criminal law, European Criminal Law Review, Vol. 3, #1, 2013, 49.

⁸⁵ *Van Kempen P.H.*, Criminal justice and the ultima ratio principle: Need for limitation, exploration and consideration. Overuse in the criminal justice system. On criminalization, prosecution and imprisonment/Le recours excessif au système de Justice pénale. Aux sanctions pénales, aux poursuites pénales et la détention, Cambridge/Antwerp/Chicago: Intersentia, 2019, 10.

⁸⁶ *Mezvrishvili N.* in: Commentary of the Criminal Procedure Code of Georgia, group of authors, examiner. "Meridiani", Tbilisi., 2015, 436 (in Georgian).

⁸⁷ *Ibid.*

3.3. List of Crimes

Taking covert investigative measures requires defining some formal and material prerequisites. Following the second part of Article 1433 of the CPC, the implementation of covert investigative measures is allowed only if an investigation has been launched or criminal prosecution is carried out due to an intentionally committed crime and particularly serious offences provided by specific articles and paragraphs of the Criminal Code of Georgia (CPC), which are listed under sub-paragraph (a) of the above norm.

The list of crimes includes both severe crimes and less serious crimes. Also, it covers not only intentional but also some criminal negligence.⁸⁸ In accordance with the literature, covert investigative actions are not allowed to look into criminal negligence. Defining an exhaustive list of the composition of a particular crime as a prerequisite for carrying out covert investigative activities is one of the guarantees of adherence to the principle of coherence when interfering with basic human rights.⁸⁹ This issue is regulated in different countries where covert telephone tapping can only be used in the case of a limited number of serious crimes.⁹⁰ For example, in Germany, this is regulated by the first paragraph of Article 100a of the CPC.⁹¹ Based on the above norm, to initiate a covert investigative action, there must be specific compositions of a serious crime, either its preparation or attempt.⁹² According to Article 100-2 of the French Code of Criminal Procedure, covert telephone tapping can be carried out for crimes with a prison sentence of two years or more.⁹³ This measure limits the number of crimes during which a covert investigative action may begin and serves to ensure the principle of proportionality.⁹⁴ Since the legislation of Georgia considers a much wider range of crimes, it is difficult to find its application as an extreme measure to conduct covert investigative action.⁹⁵ Hence, such legislation, due to the intensity of interference in the right, requires reducing the mentioned list of crimes.⁹⁶

⁸⁸ *Akubardia I.*, Control mechanisms on covert investigative activities, Revaz Gogshelidze – 65th Anniversary Collection, “Meridiani”, 2022, 220 (in Georgian).

⁸⁹ *Khodeli M.*, Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 80. see quote: Schmitt, in: Meyer-Goßner, StPO, 59. Aufl, 2016, § 100a, Rn. 15

⁹⁰ *Schwartz P.M.*, Evaluating Telecommunications Surveillance in Germany: The Lessons of the Max Planck Institute's Study. George Washington Law Review, 72 (2003), 1247.

⁹¹ Up there.

⁹² *Khodeli M.*, Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 79.

⁹³ Code de Procédure pénale, légifrance, 31.12.1957, 100.

⁹⁴ *Albrecht H. J., Dorsch C., Krüpe C. R.*, Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO und anderer verdeckter Ermittlungsmaßnahmen. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, 2003, S. 20

⁹⁵ Democracy Research Institute (DRI), Operative-Technical Agency Mandate in Carrying out Covert Investigative Actions, Risks and Challenges, 2020, 12.

⁹⁶ *Akubardia I.*, Control Mechanisms on Covert Investigative Actions, Revaz Gogshelidze – 65th Anniversary Collection, “Meridiani”, 2022, 221 (in Georgian).

The issue is of special relevance as the legislative timeline is the same for all of them. To reduce the scope of the discretion of law enforcement agencies⁹⁷ the current timeline needs to be proportional to the composition of crimes, in addition to the changes on the list. Regarding this fact, some models may be considered: 1. reducing the list according to the category of crime that can be considered less serious crimes in disposition. However, this may raise some challenges. For example, less serious crimes can gain a much higher public interest, which requires introducing intrusive mechanisms. Thus, limiting it to a category would be a very superficial approach. 2. Some specific crimes should be removed from the list, as they fail to meet the context of serious crime. Based on interviews with prosecutors and the statistics of the Supreme Court, there are no motions for the application of covert investigative action against a number of them. If the goals established by the Code of Criminal Procedure are achieved by performing other investigative actions for specific crimes, there is no necessity for the legal record to be applied; It provides the relevant authorities to carry out intensive intervention in the protected area. The norm, if it is not effective, will never become necessary. 3. Timelines shall be modified according to the category of crimes: the imposition of one and the same 270-day period concerning less severe crimes, negligent and particularly serious crimes, shall not be considered as a concomitant and proportional legal record. The current term may be viewed as an inherently important and successful path related to particularly serious crimes in the country, which requires intense struggle. For example, following the legislative amendments of 2022, this “list” was added to the Parts 1 and 2 of Articles 142 and 1421 of the Criminal Code, which consider the violation of human equality and racial discrimination. According to the Venice Commission, these are not the categories of crimes that involve very extensive action.⁹⁸ Thus, providing law enforcement with a long-term opportunity to carry out intervention in a protected sphere will not pass the coherence test and cannot come into compliance with the principle of subsidiarity.

4. Conclusion

The time limit set for conducting a covert investigative action is a guarantee that unreasonable and arbitrary interference cannot occur with fundamental rights. The establishment of a specific timeframe consistent with the composition of the crimes shall ensure the reduction of the intensity of the use of such investigative measures that violate fundamental rights.⁹⁹ Each standard discussed above must be applied in the implementation of a covert action cumulatively and not alternatively¹⁰⁰, which generates a whole chain of control over the implementation of the action. The assumption of the principle of coherence admits the possibility of carrying out an intervention in a protected sphere;

⁹⁷ Venice Commission, Urgent opinion on the Draft Law on the Amendments to the Criminal Procedure Code adopted by the Parliament of Georgia on 7 June 2022, Opinion no. 1092/2022, §42

⁹⁸ Ibid.

⁹⁹ *Albrecht H. J., Dorsch C., & Kriipe C. R.*, Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b stop und anderer verdeckter Ermittlungsmaßnahmen. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, 2003, 20

¹⁰⁰ *Khodeli M.*, Covert Surveillance of Telephone Conversation in Criminal Proceedings (According to Georgian and German Law), Tbilisi, 2019, 213 (in Georgian).

However, the norm should be remembered that “a man is also a right.”¹⁰¹ The law must be sufficiently accurate, unambiguous, clear, and perceptive. When it comes to the regulatory norm of covert investigative actions, the standard must be much higher. The principle of coherence requires a rational assessment of the opposing goods, which implies that the value of the protected legal good is greater than the opposing good.¹⁰² Therefore, it is necessary to have a tight timeline, consistent with the nature of the actions that infringe on specific legal goods; However, the list of crimes should be reduced in line with the intensity of the current timeline. “Every member of a society organized as a legal state expects that the distribution of goods in society will be fair.”¹⁰³

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¹⁰¹ *Zoidze B.*, The Trial of Knowledge of the Practical Presence of Law: Predominantly in Human Rights, Tbilisi, 2013, 15 (in Georgian).

¹⁰² *Loladze B.*, *Pirtskhalaishvili A.*, Basic Rights, Comment, Tbilisi, 2023, 60 (in Georgian).

¹⁰³ *Izoria L.*, Restriction of Human Rights and the Principle of Moderation, Protection of Human Rights in National and International Law, Proceedings Collection, Tbilisi, 2002, 46 (in Georgian).

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