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ЄВРОПЕЙСЬКА КОНВЕНЦІЯ З ПРАВ ЛЮДИНИ ЯК МІНІМАЛЬНИЙ ЄВРОПЕЙСЬКИЙ СТАНДАРТ ДЛЯ НАЦІОНАЛЬНОГО ЗАКОНОДАВСТВА ПРО СПЕЦІАЛЬНІ СЛУЖБИ: ПОРІВНЯЛЬНИЙ АСПЕКТ

Анотація. *Кінець XX-го століття характеризується стрімким прийняттям державами-членами Ради Європи законодавчих актів про спецслужби, в яких правовою основою діяльності розвідувальних та контррозвідувальних органів, крім інших законів, є конституції. Актуальність роботи пов'язана з необхідністю дослідження нормативно-правових актів, що регулюють діяльність органів розвідки та контррозвідки. У статті за допомогою порівняльно-правового методу досліджено особливості імплементації положень Конвенції про захист прав людини і основоположних свобод 1950 у законодавство про спецслужби на прикладі деяких держав-членів Ради Європи. Установлено, що чинні законодавчі акти відрізняються як за формою, структурою та змістом, так й за різними підходами до визначення правовими приписами порядку дотримання прав і свобод людини під час здійснення розвідувальних та контррозвідувальних заходів. Розглянуто норми конституцій різних держав, що значною мірою відтворюють положення Конвенції 1950. Доведено, що відповідні конституційні положення щодо підстав обмеження прав і свобод людини містяться й у законодавстві про акти про спецслужби зі значними розбіжностями. Обґрунтовано, що законодавчі акти про розвідку обов'язково мають включати відсильні норми до міжнародних договорів у сфері прав людини. Наведено приклади із законодавства деяких держав-членів Ради Європи стосовно різних підходів до визначення принципів діяльності спецслужб, проаналізовано тенденції поширення конвергенції принципів, покладених в основу їх діяльності. Запропоновано, з огляду на досвід українських законодавців, не лише включати в законодавчі акти про спецслужби принципи законності та поваги до прав і свобод людини, а також детально розкривати їх зміст, враховуючи особливості діяльності спецслужб. Розглянуто різні доктринальні підходи щодо категорій "національна безпека" та "державна безпека", на підставі узагальнення яких запропоновано власне бачення їх змістового наповнення. Зроблено висновок, що не всі держави-члени Ради Європи належним чином імплементують положення Конвенції 1950 у національне законодавство про спецслужби. Наведене актуалізує запозичення кращих практик і досвіду держав-членів, які не залишили це питання поза увагою.*

Ключові слова: Рада Європи, основоположні свободи, спецслужби, національна безпека, державна безпека.

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EUROPEAN CONVENTION ON HUMAN RIGHTS AS THE MINIMUM INTERNATIONAL STANDARD FOR NATIONAL LEGISLATION ON SPECIAL SERVICES: A COMPARATIVE ASPECT

Abstract. *The end of the 20th century is described by the rapid adoption of legislation on special services by member states of the Council of Europe. In these adopted acts, the legal framework for the activities of intelligence and counterintelligence bodies, among other laws, is the constitution. The relevance of the study lies in the necessity of investigating the regulations governing the activities of intelligence and counterintelligence bodies. The study examines the specific features of the implementation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 in the legislation on special services on the example of some member states of the Council of Europe. It is established that the current legislative acts differ in form, structure, and content, as well as different approaches to determining the legal requirements for the observance of human rights and freedoms during the implementation of intelligence and counterintelligence activities. The constitutional provisions of different states are explored, which largely reproduce the provisions of the 1950 Convention. It is proved that the relevant constitutional provisions on the grounds for restricting human rights and freedoms are contained in the legislation on special services, but with significant differences. It is justified that intelligence legislation must include references to international human rights instruments. The study gives examples from the legislation of some member states of the Council of Europe on different approaches to defining the principles of intelligence services. Furthermore, the paper analyses the tendencies of spreading the convergence of the principles underlying the activities of intelligence services. It is proposed, considering the experience of Ukrainian legislators, not only to include the principles of legality and respect for human rights and freedoms in the legislation on special services, but also to disclose their content in detail, factoring in the specific features of special services. Different doctrinal approaches to the categories of "national security" and "state security" are considered, based on the generalisation of which the individual vision of their content is proposed. It is concluded that not all member states of the Council of Europe properly implement the provisions of the 1950 Convention into national intelligence legislation. The above mainstreams the borrowing of the best practices and experiences of Member States which have not ignored this issue.*

Keywords: Council of Europe, Fundamental Freedoms, special services, national security, national security.

INTRODUCTION

The presence of a strong and effective national legal framework for the functioning of special services is a hallmark of the country as a legal and socially oriented state. However, this framework should be based on the maximum possible number of international legal standards and include tools and mechanisms for their implementation. The scientist Ju.O. Voloshyn [1] spoke very aptly about this, noting that "in the process

of its development, national constitutional law is constantly subject to "external" control, as a result of which public international law becomes part of the national. This can be called a kind of "filter" that allows to avoid negative elements and control domestic lawmaking through the lens of *general international standards of legal ideas* and certain "channels" of influence" [1]. One source of such standards is the Convention for the Protection of Human Rights and Fundamental Freedoms[1], better known as the European Convention on Human Rights (ECHR), which was opened for signature in Rome on November 4, 1950 and entered into force in 1953. For the member states of the Council of Europe (CoE), this is a basic document that proclaims certain rights enshrined in the Universal Declaration of Human Rights[2].

International legal standards must be outlined in national legislation, in particular in constitutions (fundamental laws), and in legislation on the functioning of special services. A comparative analysis of the legislation of the CoE member states indicates that both the constitutions and the laws on the secret services of most countries include international legal standards and in some way define them with consideration of national legal customs and traditions. However, the constant complaints of citizens of individual states with subsequent appeals to the European Court of Human Rights (ECHR) about illegal actions of special services that violated their constitutional rights and freedoms raise legitimate questions – why ECHR decisions in favour of citizens-plaintiffs indicate non-compliance and violations of the ECHR provisions by special services; what is the content of the implementation of the provisions of the ECHR in the national legislation on special services; how are international standards reflected in national legislation (perhaps they are not considered whatsoever or are reflected partially, incompletely, or there may be different interpretations of the essence and content of some categories that denote problems of national security and its provision by special bodies)? This study is supposed to find answers for all these questions.

The Contracting States of the ECHR have undertaken to guarantee to everyone under their *jurisdiction* the rights and freedoms set forth in its first section (Articles 8, 10, 11)[3]. Thus, as Professor V.V. Mytsyk [2] points out, "the jurisdiction of the state, and not citizenship or territory, is decisive for the provision and protection of convention rights and freedoms". Implementing the provisions of the ECHR, the Member States of the Council of Europe state in the preambles or first articles of their constitutions (fundamental laws) that person, their life and health, honour and dignity, immunity, and security are recognised as the highest social value; that affirmation, provision, and guarantee of human rights and freedoms is the main duty of the state, the content and direction of its activities[4].

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14. (1950, November). Retrieved from https://rm.coe.int/1680063765.

[2] The Universal Declaration of Human Rights. (1948, December). Retrieved from https://www.un.org/en/universal-declaration-human-rights/.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14, op. cit.

[4] Constitution of the French Republic. (1958, October). Retrieved from https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur; Basic Law for the Federal Republic of Germany. (1949, May). Retrieved from https://www.bundestag.de/gg; Constitution of the Republic of Poland. (1997, April). Retrieved from

With regard to rights that may be restricted under international law, the ECHR prescribes that they may, as an exception, be partially restricted if they are "prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others" (Articles 8, 10)[1]. These legal restrictions may be exercised by "members of the armed forces, of the police or of the administration of the State" (Article 11)[2]. However, if the security or intelligence services, having legitimate grounds for interfering in a person's private life, exceed their authority, "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity" (Article 13)[3]. These convention rules are reflected in the constitutions of the CoE member states, which state that national law enforcement and special bodies may partially restrict human rights and freedoms, but only based on law and in the interests of national security.

1. GENERAL PROCEDURE FOR IMPLEMENTING THE ECHR PROVISIONS IN LEGISLATION ON SPECIAL SERVICES

The emergence of the first legislative acts on the activities of special services (mid-20th century)[4] signified dismantlement of conventional and established notions of their activities from exclusively specialised, closed, secret structures to ordinary state bodies with special powers, which should function within the legal framework, *inter alia*, based on international law and constitutional provisions. An essential feature of the end of the 20th century was the rapid adoption of legislation on special services by the CoE member states, which necessarily determined that the legal framework for intelligence and counterintelligence bodies, among other laws, is the constitution. It is the constitutional and legal provisions that establish the basic principles of ensuring human and civil rights and freedoms during the functioning of special services, outline the main components of the competencies of public authorities that manage, control, and supervise their activities. These provisions constitute the legal framework for the regulation of public relations in special services. However, constitutional, and legal regulation cannot cover the entire sphere of outlined social relations. Apart from the provisions of constitutional law, they are also governed by the provisions of other branches of law, in particular civil, labour, administrative. Nowadays, the world has already developed a certain array and continues to grow the number of regulations governing the activities of intelligence and

https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm; The Constitution of the Republican Romania. (2003, October). Retrieved from http://www.cab1864.eu/upload/constituA_ia_rom.pdf; Constitution of the Republic of Bulgaria. (1991, July). Retrieved from https://www.parliament.bg/bg/const; The Constitution of the Russian Federation. (1993, December). Retrieved from www.constitution.ru/; Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14. (1950, November). Retrieved from https://rm.coe.int/1680063765.

[2] *Ibidem*, 1950.

[3] *Ibidem*, 1950.

[4] Central Intelligence Agency Act. (1949, June). Retrieved from http://legcounsel.house.gov/Comps/CIA49.pdf; National Security Act. (1947, July). Retrieved from https://www.ncsc.gov/training/resources/nsaact1947.pdf

counterintelligence. Comparing the legislation of the CoE member states in legal regulation of the organisation and activities of special services, one can immediately notice a huge variety of acts in form, structure, content, and differing approaches to defining legal requirements, principles, tasks, functions, powers, control, supervision by their activities, etc. However, with regard to the general features of the implementation of the ECHR provisions, the procedure is almost the same in almost all legislative acts. Firstly, the studies on the legal framework of the intelligence service, among other legal sources, emphasise "the respective international regulations", and, secondly, the observance of human rights and freedoms in intelligence acts is a blanket reference to national constitutions and laws, the content of which is similar to that in Article 5 of the Law of Ukraine "On the Security Service of Ukraine"[1]: "in exceptional cases in order to stop and disclose state crimes, certain rights and freedoms of a person may be temporarily restricted in the manner and within the limits set forth by the constitution and laws". Table 1 below reveals the chronology of the adoption of constitutions (fundamental laws), legislative acts on the activities of intelligence agencies and state security bodies by some CoE member states as member states of the ECHR.

Table 1. Chronology of the adoption of constitutions (fundamental laws), legislative acts on the activities of intelligence agencies and state security bodies by some CoE member states

Country	Signing of the Convention 1950	Adoption of the Constitution	Adoption of the law on intelligence	Adoption of the law on the state security agency
Azerbaijan	25.01.2001	12.11.1995	13.01.2016	13.01.2016
Armenia	25.01.2001	05.07.1995	28.12.2001	28.12.2001
Bulgaria	07.05.1992	12.07.1991	01.10.2015	01.01.2008
Bosnia and Herzegovina	24.04.2002	21.11.1995	22.03.2004	22.03.2004
Great Britain	04.11.1950	Constitutional laws	26.05 1994	27.04.1989
Germany	04.11.1950	08.05.1949	29.11.1990	20.12.1990
Georgia	27.04.1999	24.08.1995	27.04.2010	08.07.2015
Spain	24.11.1977	07.12.1978	06.04.2002	13.03.1986
Latvia	10.02.1995	06.07.1993	04.06.1991	05.05.1994
Lithuania	14.05.1993	25.10.1992	17.07.2000	20.01.1994
Moldova	13.07.1995	29.07.1994	23.12.1999	23.12.1999
Poland	26.11.1991	02.04.1997	09.06.2006	24.05.2002
Russia	28.02.1996	12.12.1993	08.07.1992	03.04.1995
Romania	07.10.1993	21.11.1991	12.01.1998	24.02.1992
Turkey	04.11.1950	07.11.1982	01.11.1983	04.03.2010
Ukraine	11.09.1997	28.06.1996	22.03.2001	25.03.1992
France	04.11.1950	04.10.1958	02.04.1982	22.12.1982
Croatia	06.11.1996	22.12.1990	01.04.2002	05.07.2006
Estonia	14.05.1993	28.06.1992	01.03.2001	01.03.2001

Table 1 demonstrates that legislation on special services in almost all countries, except Ukraine, Latvia and Russia, was adopted after the accession to the ECHR, while

[1] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

in Latvia and Russia – in addition to the adoption of constitutions. Considering the constant amendments to the fundamental laws and the analysis of the current versions of the constitutions, it can be argued that in these three states the general classical approach is generally followed, when the provisions of the ECHR are first implemented in the constitution and then in national intelligence legislation.

Analysing and comparing the current legislation on the activities of the secret services of the CoE member states, it can be stated that the rules of international law play an important role in the development and improvement of national legislation. Thus, the Law of the Republic of Lithuania "On Intelligence" states that "In performing their assignments, intelligence institutions shall be guided by the Constitution of the Republic of Lithuania, the Law of the Republic of Lithuania on the Basics of National Security, this Law, other legal acts and international treaties to which the Republic of Lithuania is a party"[1]. Similarly, the provisions of international treaties are legally defined by the core of the legal framework for the activities of special services of other countries[2]. However, in the intelligence legislation of France (articles D.3126-1-D.3126-4)[3], Great Britain[4], Russia[5], USA[6] (many CoE member states have developed their legislation on intelligence on the example of US acts) and other states, the legal framework for the activities of intelligence agencies is determined exclusively by the constitution and the provisions of national legislation.

Furthermore, under Russian legislation, the Federal Security Service (FSB) may use the provisions of international treaties in its activities, while intelligence agencies may not. According to Croatian legislation, the legal framework for the activities of security and intelligence agencies is exclusively the Constitution of the Republic of Croatia, national laws, and other regulations[7]. Therefore, some CoE member states, which are parties to numerous international human rights treaties, do not consider it their duty to include a reference rule referring to the provisions of existing international treaties in national legislation on the activities of special services. The Ukrainian experience is indicative in this context. Despite the fact that Article 9 of the Constitution

[1] Law on Intelligence of the Republic of Lithuania No XI-2289. (2012, October). Retrieved from https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.450750

[2] Law of the Republic of Moldova "On the Security and Intelligence Service" No 753-XIV. (1999, December). Retrieved from http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=311721; Federal Law of the Russian Federation No 40-FZ "On the Federal Security Service". (1995, April). Retrieved from http://www.consultant.ru/document/cons_doc_LAW_6300/; Law of Georgia No 2984 "About the Intelligence Service of Georgia". (2010, April). Retrieved from https://matsne.gov.ge/ru/document/view/92248?publication=12; Law of Georgia No 2983 "On Intelligence Activities". (2010, April). Retrieved from https://matsne.gov.ge/ru/document/view/92242?publication=2

[3] Defense Code (France). (2004, December). Retrieved from https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071307

[4] Intelligence Services Act 1994 of the Parliament of the United Kingdom. (1994, November). Retrieved from http://www.legislation.gov.uk/ukpga/1994/13/contents

[5] Federal Law of the Russian Federation No 5-FZ "On External Intelligence". (1996, January). Retrieved from http://svr.gov.ru/svr_today/doc02.htm

[6] Central Intelligence Agency Act. (1949, June). Retrieved from http://legcounsel.house.gov/Comps/CIA49.pdf

[7] Act on the Security Intelligence System of the Republic of Croatia. (2006, June). Retrieved from https://www.soa.hr/en/about-us/security-intelligence-system-of-the-republic-of-croatia/

of Ukraine[1] states that "current international agreements, the binding force of which has been approved by the Verkhovna Rada of Ukraine, shall form part of the national legislation of Ukraine"[8], in the Laws of Ukraine "On Security Service of Ukraine" 4) and "On the Foreign Intelligence Service of Ukraine" (Article 2) also stipulates that the legal framework for their activities are international agreements, the binding nature of which has been approved by the Verkhovna Rada of Ukraine[2]. Such duplication provides ample opportunities for the implementation of the provisions of international treaties, including the ECHR, in the national legislation on the activities of special services.

However, the legislative definition of the fact of inclusion of international agreements in the legal framework of the activities of special services does not guarantee the implementation or compliance with the provisions of these agreements. The case law of the ECHR indicates that, despite the commitment of States parties to fully implement the provisions of the ECHR into national legislation, the problem remains relevant. It is no coincidence that the Committee of Ministers of the Council of Europe adopted the Copenhagen Declaration on 12-13 April 2018[3], which declared that "Ineffective national implementation of the Convention, in particular in relation to serious systemic and structural human rights problems, remains the main challenge confronting the Convention system. The overall human rights situation in Europe depends on States' actions and the respect they show for Convention requirements" (Article 12). The Copenhagen Declaration contains a complete list of actors on which the effectiveness of the implementation of the ECHR provisions at the national level depends: "Effective national implementation requires the commitment of and interaction between a wide range of actors to ensure that legislation, and other measures and their application in practice comply fully with the Convention. These include, in particular, members of government, public officials, parliamentarians, judges and prosecutors, as well as national human rights institutions, civil society, universities, training institutions and representatives of the legal professions" (Article 14)[4].

Thus, again, there are numerous legitimate issues, namely: how the current legislation on special services correlates with the provisions of the ECHR; how and with what tools can its convention provisions be implemented in the legislation of different states on the activities of special services? It is possible to put forward a scientific hypothesis that the legislative acts of each individual state, having their essential features, reproduce the ECHR provisions differently and with large discrepancies in legal requirements. That is, it is necessary to analyse specific legislation on the special services of a particular country on other criteria, not only on the fact that the laws indicate the

[1]Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[2] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12; Law of Ukraine No 3160-IV "On the Foreign Intelligence Service of Ukraine". (2005, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3160-15/ed20150715

[3]Copenhagen Declaration. (2018, April). Retrieved from https://zib.com.ua/files/Copenhagen%20Declaration.pdf.pdf

[4] Case of Patricia Hope Hewitt and Harriet Harman v. the United Kingdom. Application No 12175/86. Report of the European Commission of Human Rights. (1989, May). Retrieved from https://www.bailii.org/eu/cases/ECHR/1989/29.html

unconditional implementation of international agreements. Such other main criteria, in our opinion, are the categories "law", "principles", and "national security" in the phrases "based on law", "principles of intelligence", and "national security".

2. CATEGORY "LAW" THROUGH THE LENS OF THE ECHR PROVISIONS AND NATIONAL LEGISLATION

The ECHR states that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law" (Article 8)[1]. What does "in accordance with the law" mean? The creation of a legal framework in some states was not without problems, as some political circles did not consider it possible to define the secret activities of the secret services, especially their methods, forces, and measures, in open legislation. However, the fact of ratification of the ECHR and the complaint of citizens with a subsequent appeal to the ECHR on illegal actions of the secret services forced the parliaments of some states to adopt laws in intelligence services. In this context, the United Kingdom is a typical example of the creation of a legal framework for the activities of intelligence and counterintelligence services in accordance with the decisions of the European Court of Human Rights. In August 1985, Patricia Hope Hewitt and Harriet Harman[2] appealed to the ECHR against the British secret services, which, in their view, contrary to Articles 8, 10, 11, and 13 of the ECHR, had been monitoring them illegally and unjustifiably for a long time. The European Commission of Human Rights, having examined the case on the merits, found that there had indeed been a violation of the ECHR provisions, justifying its legal position by Articles 10 and 11 of the ECHR, which stated that restrictions on rights could be established solely by law. At that time, secret surveillance units used the provisions of the Maxwell Fyfe Directive, which gave special services the right to interfere in a citizen's private life by covertly monitoring them or tapping their telephone conversations. The ECHR did not find good grounds to consider this Directive as law, so it upheld the complaint of citizens whose rights had been violated. Apparently, to prevent such losses in court cases, the decision of the European Court of Human Rights became a kind of stimulus for the development and adoption of legislation on counterintelligence (MI-5) and intelligence (MI-6) by the British Parliament in 1989 and 1994, respectively[3].

The question arises, what does the ECHR, whose decisions belong to case law, understand by the terms "law" and "prescribed by law"? The answer can be found in its judgment in The Sunday Times v. The United Kingdom, which states that The Court observes that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law… In fact, the applicants do not argue that the expression "prescribed by law "necessitates legislation in every case; their submission is that legislation is required only if – as in the present case – the common-law rules are so

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14. (1950, November). Retrieved from https://rm.coe.int/1680063765

[2] Case of Patricia Hope Hewitt and Harriet Harman v. the United Kingdom. Application No 12175/86. Report of the European Commission of Human Rights, op. cit.

[3] Intelligence Services Act 1994 of the Parliament of the United Kingdom (1994, November). (2020). Retrieved from http://www.legislation.gov.uk/ukpga/1994/13/contents

Security Service Act 1989 of the Parliament of the United Kingdom. (1989, April). Retrieved from http://www.legislation.gov.uk/ukpga/1989/5/contents

uncertain that they do not satisfy what the applicants maintain is the concept enshrined in that expression, namely, the principle of legal certainty "(paragraph 47)[1], "a norm cannot be regarded as a" law "unless it is formulated with sufficient precision to enable the citizen to regulate his conduct)" (paragraph 49)[3]. That is, a rule of law can be qualified as a law if it is adequately and precisely formulated, is clear to the citizen and allows them to regulate their behaviour. It should be noted that the CoE member states, considering the clarification of the ECHR on the concept of "law", have developed and adopted a set of legislative acts that, to a certain extent, regulate intelligence, counterintelligence, and law enforcement intelligence operations, as well as within the framework of which measures are taken to restrict the constitutional rights and freedoms of person and citizen. However, judging by the ECHR decisions, the current legislation of individual states does not yet meet the ECHR requirements. Thus, the decision of the European Court of Human Rights of December 4, 2015 in the case[2] states that Russian law does not clearly define the categories of people whose telephone and other conversations can be tapped, does not fully list situations in which tapping should be stopped, does not prescribe in detail by legal provisions the procedure for issuing permits for its implementation. Oversight of the legality of covert law enforcement intelligence measures does not meet the ECHR requirements for the independence of the oversight body, the adequacy of its powers to conduct effective oversight, and its openness to public scrutiny[4]. The judgment of 12 January 2016 in case[3] stated that one of the problems with Hungarian legislation was the lack of sufficient safeguards against the abuse of covert surveillance. The case[4] found that the judicial procedures for granting covert surveillance permits under Russian law could not guarantee that the measures had not been taken recklessly, irregularly, or without due and appropriate consideration.

The Republic of Belarus, as a candidate for membership in the Council of Europe, is one of the few states that still does not have a law on intelligence activities. Over the last twenty years, the draft law has been included in the work plan of the parliament three times, but the case has not been discussed and considered. Currently, only the Decree of the President of the Republic of Belarus "On Foreign Intelligence issues"[5], which defines the legal framework of its activities do not consider the rules of international law. Obviously, as soon as Belarus becomes a full member of the Council of Europe and joins the ECHR, the question of considering and adopting such a law will at once be on the agenda. Thus, the category "law" in the ECHR does not mean any particular law, even the direct law on the secret service, but provides a set of legal provisions contained in various legislative acts that allow the secret services to interfere in the private life of individuals and citizens to ensure national security. In Ukraine, such provisions are found in the Laws of Ukraine "On the Security Service of Ukraine", "On the Intelligence Bodies of Ukraine", "On

[1] Case of The Sunday Times v. the United Kingdom. Application No 6538/74. Judgment European Court of Human Rights. 1979. (1979, April). Retrieved from https://www.bailii.org/eu/cases/ECHR/2015/1065.html

[2] Case of Roman Zakharov v. Russia. Application No 47143/06. Judgment European Court of Human Rights, 4 December, 2015. (2015, December). Retrieved from https://www.bailii.org/eu/cases/ECHR/1979/1.html

[3] Case of Szabo and Vissy v. Hungary. Application No 37138/14. Judgment European Court of Human Rights. (2016, January). Retrieved from https://www.bailii.org/eu/cases/ECHR/2016/579.html

[4] Case of Dudchenko v. Russia. Application No 37717/05. Judgment European Court of Human Rights. (2017, November). Retrieved from https://www.bailii.org/eu/cases/ECHR/2017/965.html

[5] Decree of the President of the Republic of Belarus "On Foreign Intelligence Issues" No 116. (2003, March). Retrieved from http://kgb.by/ru/ukaz116/

Law Enforcement Intelligence Operations", "On Counterintelligence Operations"[1], etc. Similar laws exist in other states. It is quite clear that the quality, specificity, completeness, and clarity of these legal provisions determine the effectiveness of the implementation of the ECHR provisions at the national level.

3. PRINCIPLES OF ACTIVITY OF SPECIAL SERVICES THROUGH THE LENS OF THE ECHR PROVISIONS AND NATIONAL LEGISLATION

The articles of the ECHR, which set out the conditions for the possible restriction of human rights and freedoms, are the basic or general principles for the activities of special services, when the latter apply measures that may affect a person's private life. However, there are principles that are explicitly defined in the legislation on special services or intelligence. These principles determine the essence, content, purpose of the secret services and the main trends of its development in a particular state in a particular period of time, as well as reflect the content and direction of its activities in a democratic society. The principles enshrined in the legislation on special services are conditioned by the political, economic, social, and other needs of the safe existence of a particular society or are implemented from international treaties to which the respective state is a party. If the state has created, for example, an intelligence community, the principles ensure the functioning of a stable, harmonious system of intelligence agencies, as the integrated use and application of special methods, forces, and means helps to effectively protect individuals, society, and the state not only from external threats, but also from possible arbitrariness of some officials of special services. Therefore, prescribing a list of principles of special services in the legislative act is a conscious necessity, albeit insufficient if there is no emphasis on their content.

The list of principles of activity in the legislative acts of different states differs, because each state has its specific opinions on the nature, content, and purpose of the secret services. Thus, the Law of Ukraine "On Intelligence Bodies of Ukraine"[2] enshrines the following principles: legality; respect and observance of human and civil rights and freedoms; continuity; combination of explicit and implicit methods and means within the limits defined by the law; delimitation of spheres of activity of intelligence bodies, interaction, and coordination of their activity; independence and efficiency in providing intelligence; non-partisanship; controllability and accountability to the relevant state authorities within the limits provided by law. However, the Law of Ukraine "On Security Service of Ukraine"[3] defines another list of principles, which includes legality, respect for human rights and dignity, non-partisanship, and responsibility to the people, a combination of unity and collegiality, transparency, and conspiracy.

At the same time, the Law of the Republic of Lithuania "On Intelligence" [4] defines

[1] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12; Law of Ukraine No 2331-III "On the Intelligence Bodies of Ukraine". (2001, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2331-14#Text; Law of Ukraine No 2135-XII "On Law Enforcement Intelligence Operations". (1992, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2135-12

[2] Law of Ukraine No 2331-III "On Intelligence Agencies of Ukraine". (2001, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2331-14

[3] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

[4] Law on Intelligence of the Republic of Lithuania No XI-2289. (2012, October). Retrieved from https://e-

two groups of principles: general and special. The general principles include 1) lawfulness; 2) allegiance to human rights and fundamental freedoms; 3) precedence of public and national interests; 4) accountability to the main government institutions of the State in charge of ensuring national security. The legislator outline the special principles as follows: 1) political neutrality – intelligence institutions and intelligence officers may not use the powers granted to them so that they wilfully interfere, by their active or passive conduct, in the democratic processes taking place in the State and participate in political decision-making; 2) prohibition of publication of activity methods – the methods of activities of intelligence institutions are not public and may not be disclosed to persons not engaged in intelligence and counterintelligence or not exercising control or coordination of these activities; 3) timeliness – intelligence information must be provided to institutions ensuring national security within a reasonable time limit; 4) objectivity – intelligence information may not be distorted and biased; 5) clarity – intelligence information must be provided in a manner that would prevent it from being interpreted ambiguously and differently.

Notably, Article 6 of the Law of Georgia "On Intelligence"[1] and Article 5 of the Law of Georgia "On the Intelligence Service of Georgia"[2] provide a significant list of principles, namely: legality; strict observance and respect for human rights and freedoms; objectivity and impartiality; political neutrality; accountability; unity and centralisation; purposefulness; efficiency; continuity; planning; privacy. The Law of the Russian Federation "On Foreign Intelligence"[3] also attracts attention, in which the principles of its activity define distribution of powers of federal executive bodies, which are part of the security forces of the Russian Federation; legality; respect for human and civil rights and freedoms; control over the President of the Russian Federation and the Federal Assembly; combination of explicit and implicit methods and means (Article 4). The legislation emphasises the strict observance of the above principles, emphasises their mandatory observance by both individual staff and bodies in general. Sometimes the most important principles are outlined in a single article. For example, in the Law of Ukraine "On Security Service of Ukraine"[4], despite the fact that the principle of "non-partisanship" is mentioned together with others in Article 3, it is also covered in detail in Article 6. It should be noted that the disadvantage of the laws on special services of some states is that they do not define the principles[5] of their activities. The principles should be defined in the legislative act, although not all, but only those that are directly inherent in the activities of special services. For example, the expediency of including such principles as continuity, accountability, unity, centralization, non-partisanship, etc. in the legal framework for regulating the activities of special services is questionable. They do

seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.450750

[1]Law of Georgia No 2983 "On Intelligence Activities". (2010, April). Retrieved from https://matsne.gov.ge/ru/document/view/92242?publication=2

[2]Law of Georgia No 2984 "About the Intelligence Service of Georgia". (2010, April). Retrieved from https://matsne.gov.ge/ru/document/view/92248?publication=12

[3] Federal Law of the Russian Federation No 5-FZ "On External Intelligence". (1996, January). Retrieved from http://svr.gov.ru/svr_today/doc02.htm

[4]Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

[5] Law on the Organization and the Operation of the Romanian Intelligence Service No 14. (1992, February). Retrieved from https://www.sri.ro/fisiere/legislation/Law_SRI.pdf

not reflect the specific features of the activities of special services, especially their essence, content, and purpose. Such principles are inherent in the activities of any other state body. Instead, the principles that ensure the rule of law, guarantee the observance of the constitutional rights and freedoms of person and citizen, must be reflected in the legislation on special services, as well as in the legislation on the activities of law enforcement agencies. A comparative analysis of the above provisions of the legislation of the CoE member states suggests that legislators, compared to other principles, give preference to the rule of law and respect for human rights and freedoms.

Obviously, it is insufficient to simply define the principles without covering their content in the legislation on special services, as such an approach cannot guarantee the proper protection of human and civil rights and freedoms in the implementation of activities by special services. In this context, Article 5 "Activities of the Security Service of Ukraine and Human Rights" of the Law of Ukraine "On Security Service of Ukraine"[1] can be cited as a positive example, which covers the content of the principle of respect for human rights and freedoms, namely inadmissibility of disclosure of information about a person's personal life; humane treatment of a person and respect for their dignity; consideration of the conditions under which rights and freedoms may be temporarily restricted; strict observance of the established order of restriction; liability for unlawful restriction of legal rights and freedoms; measures to restore violated rights or freedoms or compensation for moral and material damage; prosecution of perpetrators; terms and forms of providing written explanations to a citizen regarding the restriction of their rights or freedoms; the possibility of appealing to the court with regard to illegal actions of officials (officers) and security agencies, etc.

It is not entirely clear whether all legislators include the principle of legality in foreign intelligence regulations without any reservations or explanations. As a rule, intelligence agencies operate outside the national territory, in violation of foreign legislation. Therefore, intelligence cannot follow the principle of legality, considering its activities abroad. Furthermore, intelligence is sometimes prohibited from conducting its activities against the citizens in its own state. Thus, "application of methods and means of intelligence activities against citizens of the Russian Federation in the territory of the Russian Federation is inadmissible"[2]. Finally, the most compelling argument is that since intelligence agencies are not law enforcement, it is legally incorrect to include the principle of legality in a foreign intelligence regulation without any clarification, to put it mildly. The inclusion of this principle in the legal act is expedient only with reservations, such as: "in case of application of intelligence measures on the territory of the state" or "in case of application of methods and means of law enforcement intelligence operations", etc.

In recent years, Ukrainian scientists have increasingly resorted to the analysis of problems related to the necessity of improving, clarifying the legislative definition of the principles of law enforcement and special services. Thus, V.M. Halunko [3] proposes to legally define the principles of law enforcement as follows: the rule of law; legality; priority of human and civil rights and freedoms; equality; prohibition of abuse of power; justice; data protection and respect for private information; compliance with the

[1] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

[2] Federal Law of the Russian Federation No 5-FZ "On External Intelligence". (1996, January). Retrieved from http://svr.gov.ru/svr_today/doc02.htm

requirements of confidentiality of information during the execution of requests; transparency; openness to external verification, transparency to inspections and supervision; accessibility of administrative power and administrative services, e-government and the use of e-mail; efficiency and effectiveness; mutual responsibility of the state and person [3]. V.D. Firsov [4] is more categorical on this matter, believing that "the legislative definition of intelligence activities, as well as the regulation of its implementation in Ukraine, are outdated and do not meet modern global trends in intelligence activities", therefore, it is necessary to bring regulatory regulation of intelligence activities in line with practical activities of intelligence agencies and general world trends in intelligence regulation" [4]. Agreeing with the above opinions, it can be stated that before the inclusion of a principle in the law, it must be scientifically substantiated in detail. If the relevant principle is subject to legislative consolidation, its content in the law must be disclosed and defined in detail by law.

Summarising the above, the violation of human rights and freedoms by the secret services contrary to the ECHR provisions may well be a formal legislative designation only of a list of principles, without their detailed coverage, or vague, and sometimes even ambiguous interpretation of the principles of activities in the law, concerning, first of all, those which provide observance of the constitutional rights and freedoms of the person and the citizen.

4. NATIONAL SECURITY AS A BASIS FOR RESTRICTING THE RIGHTS AND FREEDOMS OF PERSON AND CITIZEN

The ECHR states that rights and freedoms are not subject to any restrictions, except those established by law and necessary in a democratic society to ensure certain interests, the full list of which is contained in Articles 8, 10, and 11 of the ECHR[1]. Among all others, the interest of *national security* comes first, followed by territorial integrity, public safety, prevention of riots or crimes, protection of health or morals, protection of reputation or rights of others, prevention of disclosure of confidential information, or to maintain authority and impartiality of the court. That is, the ECHR clearly distinguishes the interest of national security from other interests. This was aptly noted by Hans Bourne and Ian Lei, who argued that the secret services and intelligence agencies acted solely in the interests of *national security*; legislative consolidation of their areas of competence should be different from the areas of competence of law enforcement agencies; the special powers of special services and intelligence cannot be used in ordinary situations where there is no serious threat to *national security* [5]. They propose a distinction between threats to national security and criminal acts: "Terrorism and espionage are criminal acts that directly undermine and even contradict democratic processes, as well as threaten the integrity of the state and its key institutions. However, organised crime is something else" [5].

This gives rise to several legitimate questions. What does the category "national security" include? How special services and intelligence should ensure such an overarching phenomenon? When do legal grounds for restricting human rights and freedoms upon ensuring national security appear? Notably, the concept of "national security", despite many scientific developments in this area, is still an understudied

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14. (1950, November). Retrieved from https://rm.coe.int/1680063765

category. The ECHR, summarising the case law, in its decisions on specific cases found that there are grounds to consider the following activities as threats to national security, namely: espionage; terrorism; incitement to terrorism; subversive activities in relation to parliamentary democracy; activities of separatist and extremist organisations that threaten the unity or security of the state by violent or undemocratic means; incitement to breach of oath by servicemen [5]. Therefore, the ECHR tends to consider threats to national security in the context of the possible commission or preparation for the commission of specific crimes.

Some states interpret threats to national security directly in the legislation on special services in order to give the latter an indication of when and under what circumstances the existing special forces, methods, and means can be used. Thus, Article 5 of the Law "On Intelligence and Security Services of Bosnia and Herzegovina"[1] states: "For the purpose of this Law," threats to the security of Bosnia and Herzegovina "shall be understood to mean threats to the sovereignty, territorial integrity, constitutional order, and fundamental economic stability of Bosnia and Herzegovina, as well as threats to global security which are detrimental to Bosnia and Herzegovina, including… ", further listing the components of crimes, namely: terrorism; espionage; sabotage; organized crime; illegal drug, arms and human trafficking; illegal international proliferation of weapons of mass destruction, and the components thereof, as well as materials and tools required for their production; illegal trafficking of internationally controlled products and technologies; acts punishable under international humanitarian law; and organized acts of violence or intimidation against ethnic or religious groups within Bosnia and Herzegovina. Thus, the legislator of Bosnia and Herzegovina, like the ECHR, also tends to consider specific crimes as a threat to national security, although the first part of the article was about sovereignty, territorial integrity, constitutional order, and the fundamentals of economic stability.

Numerous studies acknowledge that national security belongs to key categories and, at the same time, is understudied [6; 7], still not being scientifically separated from such related concepts as state security, national security protection, state security protection, etc. Thus, V.F. Smolianiuk [8] proposes to distinguish the system of national security from the system of national security protection, emphasising that the former is a more complex entity. Therewith, "both systems are in a state of dynamic development. They have not acquired their final forms. This could not happen, considering the complexity of nation-building processes in modern Ukraine, insufficient definition of national interests, the superficial nature of their legal consolidation, as well as the lack of experience (traditions) of national security of independent Ukraine" [8]. Scholars A. Yanchuk, P. Pryhunov, and V. Kolesnik [9] note that the constitutional provisions on national security and its protection "require immediate improvement and clarification", because "it is not clear from the text of the Constitution of Ukraine[2] what the interests of national security are and how they differ from the interests of the state… Can they restrict human rights only in the interests of national security and not in the interests of the state? Are the interests of national security separate from the interests of the state?

[1] Law on the Intelligence and Security Agency of Bosnia and Herzegovina. (2004, April). Retrieved from https://www.legislationline.org/download/id/1199/file/35d065b27c243a9098a01793763f1b86.pdf

[2] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

That is, there is an urgent need for regulatory improvement of the definition of "national security", the definition of the main functions of the latter, which should be provided by the state: defence, protection, guardianship" [9].

Studies offer various ways to improve the system of national security, one of which is "the development of a hierarchical tree of national security goals, which will be achieved by identifying and implementing appropriate methods that form a single systemic idea of national security policy" [10]. Furthermore, "National security activities are now addressing a far wider array of phenomena than in the past, both in the Western world and beyond. We take as our starting point the assumption that national security cannot be completely divorced from 'traditional' interpretations, in which policy is shaped by agencies, ministries and other institutions tasked with the protection of national interests from exogenous threats" [11]. That is, the modern realities are filled with a completely different meaning than in the past, and this significantly expands the scope of phenomena that are currently covered by the category of "national security". Dexter Fergie aptly and humorously notes that "When the two-word phrase became a national obsession, it turned everything from trade rules to dating apps into a potential threat to the United States", that "In the United States, "national security" is the preoccupation that never has to explain itself" [12]. Researchers at the Council of Bars & Law Societies of Europe (CCBE) [13] also point out that the European Court of Human Rights (ECtHR) has not sought to define national security. Case law from the ECtHR has focused instead on the conditions which justify an interference with an individual's rights on grounds of national security. The European Commission of Human Rights believes that national laws do not require a complete definition of the concept of 'the interests of national security'. It justified its position by underlining the fact that "many laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice"[1]. In other words, it is not the very notion of national security or "national security interests" that is important for the ECHR, but the conditions under which there has been an interference with human rights for reasons of national security protection [14-16].

V.O. Antonov [17] believes that the concept of national security is based on three fundamental categories: "interest", "threats", "protection". The forms, methods, and means of ensuring national security largely depend on their content". In other words, special services, using specific forms, methods, forces, and means in their activities to perform their objectives, must proceed from the constitutional definitions of forms, methods, and means of national security protection. Professor O.N. Yarmysh [18] emphasises that "issues of national security are always a priority in the system of functioning of any state. The importance of this function is growing in modern world, due to the necessity of responding to a range of destructive globalisation challenges"; "National security and defence legislation does not meet the threats to Ukraine's national security and requires development, revision, or clarification". His proposal to amend the Constitution of Ukraine[1] with the section "National Security" is very reasonable.

Considering the above, national security and state security, as stated in Article 1 of the Law of Ukraine "On National Security", differ in that the former covers "protection

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

of state sovereignty, territorial integrity, democratic constitutional order, and other national interests of Ukraine from real and potential threats" [1], while state security covers "protection of state sovereignty, territorial integrity, and democratic constitutional order and other vital national interests from real and potential threats of *non-military nature*"[1]. It is threats of a *non-military nature*, as noted by the Ukrainian legislator, which distinguish state security from national security. In this way, a direct reference is made to the fact that these threats arise from entities that encroach on state sovereignty, territorial integrity, and democratic constitutional order, and in actions, activities, or inaction which express signs of crimes, including: espionage, terrorism, intelligence and subversive or separatist and extremist activities, drug distribution, human trafficking. Admittedly, such threats should be countered only by state security bodies, which constitute special purpose state authorities with *law enforcement functions*[2].

With regard to national security, it is ensured by counteracting threats that constitute "phenomena, trends, and factors that render impossible or complicate or may render impossible or complicate the fulfilment of the national interests and preservation of the national values of Ukraine" (Clause 6)[2]. These threats usually arise from foreign individuals or legal entities whose actions, activities, or inaction do not express direct signs of crime, but the nature of which is clearly unfriendly, mercantile, and sometimes provocative and hostile. Only intelligence agencies can counter these threats, because, firstly, the threats are external in nature, and, secondly, only intelligence has in its arsenal the full set of necessary forces and means to counter these threats. It is no coincidence that the legislator in Article 6 of the Law of Ukraine "On Law Enforcement Intelligence Operations" provided the intelligence agencies with the opportunity to perform law enforcement intelligence operations, apart from protecting their security, also to procure intelligence information[3].

CONCLUSIONS

Thus, the uncertainty of the category of "national security", as well as the vagueness of the place and role of state security and intelligence in its protection are factors of possible violation of constitutional rights and freedoms of person and citizen contrary to the ECHR provisions. The comparative analysis demonstrates different approaches of the legislators of the CoE member states to the implementation of the provisions of the ECHR in the national legislation on special services. Simple replication or transfer is clearly insufficient to really guarantee the protection of human rights and freedoms by the secret services. Constitutions or individual laws should set forth a detailed understanding of the category of national security, as well as related categories that are directly associated with its protection. It is impossible for the legislation on special services to be limited only to enumeration of principles of their activities. It is necessary to thoroughly outline each principle based on previous scientific development by a legal provision, to prevent vagueness and ambiguity, to consider the areas of national and state

[1]Law of Ukraine No 2469-VIII "On National Security of Ukraine". (2018, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2469-19

[2] Law of Ukraine "On the Security Service of Ukraine" No 2229-XII. (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

[3] Law of Ukraine "On Law Enforcement Intelligence Operations" No 2135-XII. (1992, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2135-12

security protection on the part of law enforcement agencies, intelligence, and counterintelligence bodies. This is especially true of the principle of respect for and observance of human and civil rights and freedoms.

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