

**THE LEGAL JUSTIFICATION FOR COVERT INVESTIGATIVE MEASURES: A REVIEW
OF THE USE OF COVERT SEARCH IN THE CONTEXT OF HUMAN RIGHTS
PROTECTION**

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Abstract:

In order to detect serious crime, the police can use covert investigative measures, when traditional forensic methods do not yield sufficient evidence for prosecution. Such measures may only be conducted on the basis of statutory provisions and upon orders issued by the public prosecutor's office or the court, as they constitute a significant interference with human rights and fundamental freedoms. The present article deals with various investigative measures, such as covert action and surveillance, with a special focus on covert searches, which have been used in some countries, but are not yet part of the legal system of the Republic of Slovenia. It allows law enforcement authorities to conduct a search without the suspect's knowledge. Given that the Constitution of the Republic of Slovenia defines the right to privacy and personal dignity, we will analyze the legal justification of the measure and its impact on the protection of human rights and fundamental freedoms. We will mention a judgment of the European Court of Human Rights which addresses the issue of the legitimacy of these measures and their compliance with fundamental human rights, in particular with regard to the right to privacy, personal dignity and inviolability of the home.

We will focus on the need to ensure control over the use of covert investigative measures in order to prevent possible mistreatment, considering both national and international legal norms and the Case-Law of the European Court of Human Rights.

Keywords: *covert investigative measures, covert search, legality, human rights and fundamental freedoms*

1. Pre-trial proceedings

In the Republic of Slovenia, pre-trial proceedings are regulated by the Criminal Procedure Act (hereinafter the ZKP), which was adopted in 1994. It is based on the Yugoslav Code of Criminal Procedure and has undergone a number of amendments, having been amended sixteen times (Šugman Stubbs, 2015).

The Slovenian legal system provides a mixed criminal procedure, characterized by a preliminary procedure in two phases, an informal police phase and a judicial investigation phase. Thus, the police do not act completely independently in their work, but under the guidance of a law enforcement authority or a judge. The police collect information, carry out covert investigative measures (hereinafter "PPU") and urgent investigative actions under the instructions of the public prosecutor or the investigating judge, always reporting on their work to the public prosecutor who acts as a law enforcement authority and directs the work of the police, giving them instructions and guidance. The investigating judge acts as a guarantor and preserver of evidence (Bošnjak et al., 2006).

1.1 The conduct of pre-trial proceedings

Police officers often have to carry out deeper police intervention into human rights and fundamental freedoms in order to prevent danger and ensure security and respect of human rights. The more important the protected good, the deeper the interference is permissible (Žaberl et al., 2017). Police interference in the rights of an individual due to the alleged commission of a crime must be limited in time. If sufficient evidence cannot be gathered within a certain period of time to charge the perpetrator, the interference with his rights must cease. The ZKP provides, inter alia, that evidence obtained through the PPU must be destroyed if the public prosecutor does not initiate a criminal prosecution within two years of its acquisition. However, it does not specify whether this time limit is indicative or preclusive¹. The articles of the ZKP only set time limits for individual measures, but do not set time limits for the duration of the entire pre-trial procedure (Fišer, 2018).

Depending on the information gathered, the public prosecutor may decide to initiate criminal proceedings or dismiss the complaint. If the information gathered is insufficient to make a decision, the prosecutor may provide supplementary information or request it from the police. When the public prosecutor decides to initiate a prosecution, he or she files a request for an investigation or a direct indictment, which skips the investigation phase. The pre-trial procedure is definitively concluded when the investigating judge issues an order to investigate (Dežman and Erbežnik, 2003).

2. PPU in Slovenia

The ZKP provides that the police may use a PPU if there are reasonable grounds to suspect that a person has committed, is committing or is organizing the commission of a criminal offence and there are reasonable grounds to conclude that the police cannot detect, prevent or prove the offence by other means or that it would involve disproportionate difficulties (ZKP, 1994).

The police officer must send the initiative to order a PPU to the public prosecutor in sufficient time to enable him to decide on the order in good time. However, the proposal for the extension of the PPU must be sent to the public prosecutor, as a rule, 72 hours before the expiry of the measure.

Before the planned final action (implementation), the police officer shall inform the public prosecutor, who may also request to be informed of the findings already during the implementation of the measures (Regulation on cooperation between the public prosecutor's office, the police and other competent state bodies and institutions in the detection and prosecution of offenders and the operation of specialized and joint investigation teams, 2010).

Upon completion of the implementation of the PPU, the police must hand over all recordings (digital record of all intercepted recordings as well as transcripts), messages and objects obtained through the application of these measures, together with a report summarizing the evidence collected, to the public prosecutor (ZKP, 1994).

PPUs comprise (ZKP, 1994):

- covert surveillance,
- obtaining information about the participants, circumstances and facts of electronic communications traffic,

¹ If the time limit expires, the evidence obtained at the end of the time limit becomes invalid and can no longer be used in criminal proceedings. The time limit is indicative and must be respected; however, if it is exceeded, there will be no serious consequences in terms of the use of the evidence, at most the person who caused the delay may be held liable (Fišer, 2018).

- surveillance of electronic communications by eavesdropping and recording, and control and securing of evidence of all forms of communication transmitted over an electronic communications network,
- the control of letters and other items,
- control of the computer system of a bank or other legal person carrying on a financial or other economic activity,
- eavesdropping and recording of conversations with the consent of at least one person involved in the conversation,
- eavesdropping and observation in a foreign person's home or other premises using technical means of documentation, and, where necessary, secret access to those premises,
- the apparent purchase, the apparent acceptance or giving of gifts or the apparent taking or giving of bribes,
- clandestine operations,
- communication of confidential information and transmission of documentation concerning deposits, deposits, account balances and transactions of the suspect, accused or other persons.

2.1 Specific features of the PPU

PPUs are used to investigate crimes that are more difficult to investigate and almost impossible to prove in any other way, which is why they are suitable for achieving a constitutionally legitimate aim (Mozetič, 2007). In this context, it should not be ignored that law is derived from facts (*ex factis ius oritur*), while law cannot be derived from a violation (*ex iniuria ius non oritur*). Thus, measures must not be carried out in violation of legal provisions, otherwise sanctions shall follow in the form of exclusion of evidence² and a prohibition of the court relying on such unlawfully obtained evidence in its decision-making (Republic of Slovenia, Supreme Court, 2022).

In order to obtain a warrant, there must be a reasonable suspicion that a crime has been committed, and other evidence cannot be obtained by other means or such means would endanger human life or health. As a rule, measures are taken at the pre-trial stage of the proceedings, when the offence has already been committed or is in progress, and in exceptional cases when the offence has not yet been committed³. They are carried out covertly, without the knowledge of the suspect, with the aim of preventing the destruction or concealment of evidence (Žaberl, 2006).

In 1997, a constitutional review of Articles 150 to 156 was initiated. In the course of its examination of the PPU and the conditions of their application, the Constitutional Court identified a number of shortcomings, including the fact that those conditions were not defined with sufficient precision.

The Constitutional Court annulled the above-mentioned articles and set a one-year deadline for the State legislature to abolish them (Decision of the Constitutional Court of the Republic of Slovenia, No. U-I-25/95, of 27 November 1997).

The Constitutional Court thus established the basic conditions for a constitutionally permissible interference with individual privacy, which the ZKP must consider when enacting the PPU, namely:

- specific definition and determination in the law;
- a judicial decision;
- a time limit for the implementation of the measure;
- the principle of proportionality⁴ - i.e. the necessity of the interference for the initiation or conduct of criminal proceedings or for national security itself (Dežman and Erbežnik, 2003).

² Exclusion of evidence is a legal principle that permits the rejection of evidence obtained in violation of human rights, fundamental freedoms, or the ZKP (Šugman, 1999).

³ "Ante Delictum" means the point that chronologically precedes the point at which the violation of a right or rule of law occurred (Fellmeth and Horwitz, 2022).

⁴ The principle of proportionality derives from Article 2 of the Constitution of the Republic of Slovenia, which provides that Slovenia is a legal and social state and that interference with human rights may be based only on a legitimate, materially justified aim and is in accordance with the principles of the rule of law (Šturm, 2011).

The implementation of the PPU is decided according to the intensity of the interference with human rights: for the least invasive measures the police can decide on their own (e.g. obtaining data on the user of a means of communication); for measures that constitute an interference with privacy without serious legal consequences, the decision is taken by the public prosecutor on the proposal of the police; and for measures that constitute a more serious interference with human rights, supervision by an investigating judge is required, who orders the measure on the initiative of the police and on the proposal of the prosecutor (Žaberl, 2006).

3. Legal conditions for the application of special measures ordered by the investigating judge

In order to obtain information and other knowledge about the offence, the investigating judge may order special measures for so-called catalogue offences, which are set out in Article 150(2) of the ZKP (ZKP, 1994):

1. offences against the security of the Republic of Slovenia and its constitutional order, as well as offences against humanity and international law, for which the law prescribes a sentence of imprisonment of five years or more;
2. kidnapping under Article 134 of the Criminal Code (hereinafter referred to as KZ-1);
3. solicitation of persons under the age of fifteen for sexual purposes under Article 173a of the Penal Code;
4. abuse of prostitution under Article 175;
5. displaying, possessing, producing and transmitting pornographic material pursuant to Article 176;
6. unlawful production of and trafficking in narcotic drugs, illicit substances in sport and precursors for the manufacture of narcotic drugs under Article 186;
7. facilitating the use of illicit drugs or substances in sport pursuant to Article 187;
8. extortion under Article 213;
9. insider dealing under Article 238;
10. unauthorized acceptance of gifts under Article 241;
11. unjustified giving of gifts under Article 242;
12. money laundering under Article 245;
13. smuggling under Article 250;
14. defrauding the public purse under Article 257a;
15. bribe-taking under Article 261;
16. giving a bribe under Article 262;
17. accepting a benefit for unlawful intervention under Article 263;
18. the giving of gifts for unlawful mediation under Article 264;
19. criminal association under Article 294;
20. the illicit manufacture and trafficking of weapons or explosive substances under Article 307;
21. unlawful handling of nuclear or other dangerous radioactive substances under Article 334;
22. other offences punishable by law by a term of imprisonment of eight years or more (general clause).

The investigating judge can order special investigative measures only if certain legal conditions are met. First, there must be a reasonable suspicion that a person has committed, is committing or is preparing to commit a serious offence for which such measures are provided. The principle of proportionality must also be considered, which means that the use of these measures is only permissible if evidence cannot be obtained by less severe means or if obtaining it would constitute a serious threat to human life or health. Their application must be limited in time and must end as soon as the reasons for their application cease to exist; prolongation is permissible only for compelling reasons and within the maximum duration laid down by law. Exceptionally, an oral order for the execution of PPUs may be made if a written order cannot be obtained in time and if there is a risk of delay (ZKP, 1994).

4. PPUs in the Republic of Slovenia

Many of the means and methods that are now defined by the ZKP as legal, permitted and, last but not least, as investigative tasks, have been used for similar purposes many times and in many places and for a very long time, even longer than some of the investigative acts that have been known so far (Čas, 1996).

4.1 Covert surveillance

Under this measure, the police observe and follow a suspect in a covert manner. It may use technical means of audio, photo and video documentation to document the person's movements. Covert observation, tracking and recording are methods of police work by which a suspect is observed and followed with the intention of catching him or her in the act of committing a crime or of detecting him or her after the commission of a crime. A person may also be filmed in order to prove with whom the person met, when and where he or she met (Žaberl, 2006).

Exceptionally, secret surveillance may also be ordered against a person other than the suspect if it can be reasonably inferred that the surveillance of that person would lead to the identification of the suspect, whose personal data are unknown, to the suspect's residence or location, or to the residence or location of a person who is the subject of a detention order, house arrest order, arrest warrant or arrest warrant, but has absconded or is in hiding, and the police officers are unable to obtain this information by other means or it would involve disproportionate difficulties (ZKP, 1994).

4) Article 149a (4) sets out the offences in respect of which a secret surveillance measure may be ordered (ZKP, 1994):

1) offences punishable by law by imprisonment for a term of five years or more;

2) the offences referred to in Article 150, paragraph 2, subparagraph 2 of the ZKP and the offences of stalking pursuant to Article 134a, misuse of personal data pursuant to Article 143, paragraphs 3, 4, 5, 6 and 7, fraud pursuant to Article 211, paragraphs 1, 3 and 4, organization of money chains, unauthorized gambling and unauthorized fixing of the results of sporting competitions pursuant to Article 212, attack on an information system pursuant to Article 221, paragraphs 2, 3 and 4, of the ZKP, as well as the offences of fraud pursuant to Article 221, paragraphs 2, 3 and 4 of the ZKP, and the offences referred to in Article 150, paragraph 2, subparagraph 2 of the ZKP. Article 221, abuse of an information system under Article 237, abuse of position or trust in economic activity under Article 240, abuse of official position or official rights under Article 257, public incitement to hatred, violence and intolerance under Article 297, prohibited crossing of the border or territory of a State under Article 308, and torture of animals under Article 341(2), (3) and (4) of the KZ-1);

3) the offences of threatening under Article 135, concealment under Article 217(1), (2) and (3), forgery or destruction of business documents under Article 235, forgery of documents under Article 251, special case of forgery of documents under Article 252 and betrayal of secret information under Article 260. In cases where the statutory penalty for the above offences is less than five years' imprisonment, the court may base its decision on the information obtained in this way only if it has led to the prosecution of other offences referred to in points (1) and (2) of this paragraph.

The duration of the measure may not exceed two months, but may be extended by a written order for two months at a time, but not exceeding six months or twenty-four months, for compelling reasons. The police shall send monthly reports on the progress of the measure and the information obtained to the authority which ordered the measure. The authority which ordered the measure may at any time, on the basis of this report or ex officio, if it considers that there are no longer grounds for applying the measure or that it is being applied in contravention of its order, order by written order that the measure be discontinued. The measure shall be discontinued as soon as the grounds on which it was ordered no longer exist (ZKP, 1994).

4.2 Covert action

Where there are reasonable grounds to believe that a person has committed any of the offences referred to in Article 149a(4) of the ZKP or is involved in criminal activity in relation to those offences, and there are reasonable grounds to believe that other measures would not be possible or would involve disproportionate difficulties in gathering evidence, covert action may be used against that person. It shall be carried out by involving covert agents and collecting information about the person and his

criminal activity on a continuous or repeated basis. The covert agent may be a police officer, a police officer of a foreign country or, exceptionally, if the covert operation cannot otherwise be carried out, another person. The covert agent may, subject to the conditions laid down in this Article, be involved in legal transactions by means of doctored documents, and may also, subject to the conditions laid down in this Article, use technical devices for the transmission and recording of voice, photography and video-recording in the collection of information. The measure shall be ordered in writing by the investigating judge on a written proposal from the public prosecutor, and may last for a maximum period of two months. On compelling reasons, the duration of the measure may be extended by two months at a time by written order, up to a maximum of 24 months in total, and up to a maximum of thirty-six months in total in the case of application of the measure for offences referred to in Article 151(2) of the ZKP. In executing the measure, the covert police officer may not provoke criminal activity (ZKP, 1994).

Covert work differs from covert surveillance in that the covert worker makes direct contact with the suspect, which necessitates concealing the suspect's identity. For the purposes of covert investigative measures, the Director General of Police may order the production of a false or assumed identity and the assumed ownership of police assets, while ensuring their traceability. The use of these identities shall be supervised once a year by the head of the specialized public prosecutor's office or by the authorized prosecutor, without disclosing the identity of the police officers. The identities may also be issued to foreign covert agents upon request, and the entire procedure is regulated by an internal act of the Minister (Čas, 2019).

5. Entry into a private residence and a house search of the premises without a court order

The right to inviolability of the home⁵ is enshrined in Article 36 of the Constitution of the Republic of Slovenia, which provides that an official may enter a foreign dwelling or premises without a court order and, exceptionally, conduct a search without the presence of witnesses, if this is strictly necessary in order to directly apprehend the perpetrator of a criminal offence or to protect people and property (Constitution of the Republic of Slovenia, 1991). A search of a residence and other premises may be conducted if there are reasonable grounds to suspect that a person has committed a criminal offence and it is likely that the search will lead to the apprehension of the suspect or the discovery of evidence or objects relevant to criminal proceedings. In Slovenia, house and body searches are in principle carried out on the basis of a prior written issued by an investigating judge. During the search, two adult persons must be present as witnesses (ZKP, 1994).

Criminal Procedure Act 218. Article 218 provides that police officers may, even without a court order, enter another person's home and other premises and, if necessary, search if the occupant of the home so wishes, if someone calls for help, if it is necessary to apprehend the perpetrator of a crime, who has been caught in the act itself, or if it is necessary for the safety of persons and property, if there is anyone in the dwelling or other premises who, by order of a competent public authority, is to be arrested or brought into custody or has taken refuge there for the purpose of law enforcement. A certificate of search shall be issued forthwith to the occupier of the dwelling stating the reason for the entry into the dwelling or other premises. A search of the house and the person may be carried out without witnesses being present⁶ and, after the search has been carried out, the public prosecutor and, in the case of ongoing proceedings, the examining magistrate must be informed without delay (ZKP, 1994).

In cases of warrantless entry and search of a dwelling, this is an exception that must be conditional on the occupant's consent or the existence of one of the "exigent circumstances", and the

⁵ This doctrine is constitutionally grounded in the Fourth Amendment to the United States Constitution ("freedom from searches and seizures") and in the longstanding English common law principle that a person's home is their castle (Šturm, 2002).

⁶ An investigation may be carried out without witnesses if it is not possible to ensure their immediate presence and any delay would pose a risk. Similarly, police officers may search a person without a search warrant and without witnesses being present when executing an arrest warrant or when arresting a person on suspicion of possessing an offensive weapon or of discarding, concealing, or destroying objects that may serve as evidence in criminal proceedings (ZKP, 1994)

scope of the police officer's conduct on the premises must therefore be strictly limited and conditional on the circumstances that trigger it. A police officer may carry out a visual or cursory search of the premises, but as a general rule may not open or search cupboards, drawers or other enclosed spaces⁷. In Slovenia, neither the police nor any other state authority may carry out searches of which the owner or occupier of the dwelling is unaware (covert searches). The police are not allowed to carry out searches of the premises, but they are not allowed to open or search cupboards, drawers or other enclosed spaces (Klemenčič et al., 2002).

6. "Covert Search"

Covert Search is a type of investigative measure that can be used to obtain information in criminal proceedings and is carried out in cases of extreme urgency when information about the crime or the perpetrator cannot be obtained by other means (Khyzhniak et al., 2022). This measure allows police officers to physically enter private premises without the permission or knowledge of the owner or occupant and to secretly search the premises; usually such an entry requires a covert entry (Wilkes, 2002). Police officers can search the premises and collect evidence that can later be used in the context of obtaining a search warrant, which is then used to seize that evidence. For example, if the police suspect that a person is involved in drug trafficking, they can obtain a search warrant and enter the suspect's home without his knowledge to search for evidence. Covert search warrants were first legally mandated by the USA Patriot Act⁸ (LSD Law, 2025).

Main features of the Covert Search Action (Chat GPT, 2025):

- it is carried out without the suspect's knowledge;
- most often requires a specific court order;
- used in serious crimes where the suspect's knowledge of the search could jeopardize the investigation (destruction of evidence);
- covers intrusions into private premises (home, office), electronic devices or online accounts;
- usually carried out by specialized units (e.g. covert police or intelligence agents).

6.1 Types of covert investigations

There are types of covert investigations, which differ primarily in the scope of police powers. In the first method, police officers enter the suspect's home on the basis of a court order and, without the suspect's knowledge, visually inspect the premises, take photographs, examine documents, access electronic devices and data, and make copies - but they are not permitted to seize any items. The scope of the search is strictly limited by the contents of the court order. The second method also permits the surreptitious seizure of evidence specified in the court order⁹. This approach is mainly used in complex criminal cases where there is a risk of evidence being destroyed. Covert searches thus enable the police - without the knowledge of the suspect and possible accomplices - to determine the extent of the criminal activity, identify the individuals involved, locate illicit assets and protect potential victims (Federal Law Enforcement Training Centers, n.d.).

The investigator is obliged to inform the prosecutor of the decision to carry out certain covert investigative measures, as well of the results of those measures. The prosecutor has the authority to prohibit the execution of a measure or to terminate its further implementation. The investigator in charge of the criminal investigation may order covert investigative measures, whereby authorized operational

⁷ The "Plain View" doctrine allows police officers to seize evidence if it is clearly visible and that are allegedly incriminating to a person in a search of the person's home, person or electronic devices (Legal Information Institute, 2021).

⁸ "The Patriot Act" allows investigators to use measures that have been used before to fight organized crime and drug trafficking (Department of Justice, n.d.).

⁹ For the purposes of gathering evidence, police officers may install a so-called "Trojan horse" on a suspect's computer, i.e. software that covertly enables remote access to the device and allows monitoring of the user's activities, such as keystrokes, communication, file access and other sensitive data (Own-source).

units of the police and other authorities carry out the tasks on their behalf. Despite these legal powers, the implementation of such measures by operatives remains challenging in practice. Ensuring compliance with applicable legislation and respect for human rights in the conduct of these activities is essential to preventing potential abuse and misconduct by authorized criminal investigators providing operational and investigative support in criminal proceedings (Khyzhniak et al., 2022).

7. Judgment of the European Court of Human Rights - *Benedik v Slovenia*

The European Court of Human Rights (ECHR) is an international judicial body established under the European Convention on Human Rights, adopted by the Council of Europe in 1950. The Convention is the fundamental international treaty for the protection of human rights and fundamental freedoms in Europe. The signatory states are responsible for protecting and guaranteeing the rights and freedoms set out in the Convention and its Protocols (European Convention on Human Rights, 1950).

In the judgement *Benedik v Slovenia* (No 62357/14, 24 April 2018), the ECHR examined the lawfulness of an interference with the right to privacy in the context of a criminal investigation into sexual offences against children. The Court emphasized the need for adequate prior judicial oversight and clearer safeguards, which subsequently led to a change in the relevant legislation.

Based on information received from abroad, the Slovenian police identified a dynamic IP address used to download child pornography. Without prior judicial authorization, the police requested the personal data of the user associated with this IP address from the internet service provider. Although the subscriber of the internet connection was the applicant's father, it was subsequently revealed that the applicant himself had in fact downloaded the child pornography files. Criminal proceedings were initiated against him.

The ECHR found that the State's failure to ensure judicial oversight in accessing the identifying data of the IP address user constituted a violation of the applicant's right to respect for private and family life under Article 8 of the European Convention on Human Rights.

The Court stressed that the disclosure of a person's identity data associated with a dynamic IP address constitutes an interference with privacy. Such interference must be based on clear and foreseeable legal provisions that include adequate procedural safeguards - in particular, independent supervision such as prior judicial authorization. The Slovenian legislative framework at the time did not provide for such safeguards, as it allowed the police to access personal data directly, without judicial involvement. In the ECHR's view, this fell short of the standards required by the Convention and the applicant was therefore awarded costs of the proceedings in the amount of EUR 3,522 (ECHR, 2018).

At the time of the present case, Slovenia had the Criminal Procedure Act of 1994, which, *inter alia*, provided for the use of covert investigative measures. The Act allowed investigative authorities to access personal data without prior judicial review in cases where they deemed the measure necessary. However, judicial review was often only formally provided, without clear safeguards to protect individuals' right to privacy.

Currently, Slovenia has in force an amendment to the Criminal Procedure Act (ZKP-P), which has introduced significant changes regarding covert investigative measures, in particular:

- narrowing the catalogue of offences (Articles 149a - secret surveillance, 149b - obtaining traffic data related to the suspect's communications, 149c - securing traffic data related to the suspect's communications, 149c - obtaining subscriber data related to the owner of a communication device, and 156 - obtaining the suspect's bank details) against which individual measures may be applied;
- raising the standard of proof for individual measures to reasonable grounds for suspicion;
- additional conditions for the order, requiring justification of the proportionality of the individual measure, i.e. necessity and proportionality;
- the possibility to order a measure against a third party (ZKP, 1994).

Conclusion

Many individuals have encountered covert investigative measures in their lifetime without realizing it, which highlights a key feature of these measures - their discretion. It allows information to be gathered about an individual in a way that would not otherwise be possible, thus making a significant

contribution to the effective resolution of crime. However, the implementation of these measures imposes on investigators a strict obligation to comply with the legal framework, as they must simultaneously safeguard fundamental human rights. The line between the legitimate use of covert investigative techniques and the impermissible interference with an individual's privacy is a fine one. The key here is to ensure adequate protection of human rights and fundamental freedoms, which must always be upheld against excessive interference by state authorities in the personal liberty and privacy of individuals. Given these challenges, it is essential that law enforcement agencies comply with strict legal standards and are subject to robust oversight to prevent abuse. Striking a balance between effective crime prevention and the protection of individual rights is a key challenge for modern democracies.

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