



Legal basis for the use of covert means

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Magyar
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Abstract

Aim: The use of covert means is any information gathering intelligence operation (secret police activity) in which the authorised authorities of the State seek to obtain new knowledge in the course of administrative and criminal proceedings without the knowledge of the holder of the information, by limiting the right of self-determination.¹ In dictatorships, this form of exercise of state power is also dominated by arbitrariness. Constitutional states place the use of secret means on a public law basis. This study aims to demonstrate that it is possible to regulate acts of public authority that are at the heart of secrecy by means of legal instruments whose core is publicity.

Methodology: The objective outlined above can only be achieved if the dogmatic and moral characteristics of the legislation are harmonised with the specific characteristics of the secret police. The task is not easy. Legislation is always about the future and is always based on abstract prognosis; covert intelligence aims to discover the past, the present and the future, and the knowledge to be acquired is always unique and concrete.

Findings: The abstract nature of the regulation and the uniqueness of the intelligence operation resolve the contradiction between publicity and secrecy. What is public is the rule, what is secret is the application of the rule to a specific situation. However, legislation can become fully formalised when it no

¹ Act CXII of 2011 on the right to informational self-determination and on the freedom of information.

longer imposes limits on the operation of state power, but merely authorises it, opening the way to free discretion. In such a case, the guise of legality conceals an untrammelled power.

Value: Law that serves humanity is an effective means of preserving social order. Secret data-collection requires a limitation of rights, yet it is indispensable to combat violations (principle of necessity), provided that it does not cause more serious harm than the threat against which it is used (principle of proportionality).

Keywords: covert operation, policing function, law enforcement function, covert information collection

Introduction

The need to extend the rule of law to the secret police was accepted during the consolidation of constitutional democracies after the Second World War. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950 (hereinafter referred to as the Convention), provides: „1. *Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.* 2. *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection.*”² All the rights listed in Article 8(1) may be severely restricted in covert information collection. All the European States which have acceded to the Convention have undertaken to conduct reconnaissance only for the reasons set out in paragraph 2 and only on the basis of a legal authorisation. This is a very broad mandate, but it cannot be considered as being without limits, it is not a general clause, but a general clause to serve public interests and to protect the fundamental rights of others that justify the limitation of rights. The case-law of the European Court of Human Rights, established by Article 19 of the Convention, has ensured that the acceding States lay down in law the rules governing the restriction of fundamental rights, and that they also comply with

2 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14.

the requirements of necessity and proportionality. Democratic states cannot afford an absence of covert means, but they are subject to additional justification and accountability for their use. Such statements can be found, among others, in the judgments in *Lüdi v. Switzerland*, *Kostovski v. the Netherlands* and *McCann et al. v. the United Kingdom* (Berger, 1999).

When the need to incorporate covert information collection into the legal order arises, it is worth asking two preliminary questions, the answers to which cannot be given without clarifying the regulatory problem.³

Problem I.

The first question is: can the world of law be compared with the characteristics of the secret police (Problem I.) Law sets high standards: *'To speak of law, it is necessary to assert it against the powers that be. The rule of arbitrary authority, tyranny, is not the rule of law.'* (Horváth, 2001).

'Law is the power by which the life of human societies can be most effectively governed [...] But this power will only be a blessing to humanity if it is put at the service of higher moral values.' (Moór, 1992).

'The humanity of law is a value, it makes law righteous. In the modern concept of civil law philosophy, justice is first and foremost a value problem: law and justice are primarily a value relation [...] Only righteous law is valid, unrighteous law is not law.' (Peschka, 1972).

The law of policing, when it adapts to the values cited above, also has to deal with contradictions. Law is only righteous if it is based on humanity (principle of values), while the measure of covert intelligence is effectiveness (principle of utility). Law is public, covert intelligence is hiding. The norm never looks at a single situation in life, but formulates an abstract legal fact, which the application of the law must examine in the context of the factual nature of the specific case. Not only is the law not retroactive, it is for the future. In contrast, covert intelligence has almost the same interest in the past, present and future. Legal certainty is guaranteed by predictability, and unpredictability is the key to effective covert intelligence. Beyond all this, perhaps the greatest contradiction is that the law creates legal relationships, the subjects of which

³ Act XI of 1987 on Legislation, which is no longer in force, describes the concept of a regulatory problem in the obligation to state reasons: *'The proposer shall attach to the draft law an explanatory memorandum in which he shall describe the social, economic and professional circumstances which make the proposed regulation necessary and shall explain the aspects of the legal solution.'* [Article 40 paragraph (1)].

are mutually conferred rights and obligations. Public authority procedures start when customers become aware that they are subject to a legal relationship, are informed of their rights and obligations, and have the right to lodge a complaint. In the case of covert investigations, no such legal relationships are established, in which case the procedure is nothing more than the sum of the acts of the intelligence services. The academic research into the content of criminal procedure is rightly dissatisfied with these concepts. *'In its abstractness, the theory of the legal relationship alone cannot determine the content of the procedure, nor can the concept of the totality of acts.'* (Erdei, 2011). The two theories can be used together to understand the content of criminal procedure (Finszter, 2019). The secret procedure is essentially characterised by the complexity of the acts, while the open procedure is dominated by the legal relations. As far as legality is concerned, there was confidence that the guarantees of criminal procedural law, which is the machinery of criminal justice, were sufficient to safeguard constitutional values. However, a number of procedural errors and miscarriages of justice have called this hope into question. The case law of the European Court of Human Rights is instructive. The investigation of cases of violations of due process has highlighted the principles that must be applied in the work of the secret intelligence services in a democratic state. To quote from the Strasbourg judgment in *Klass et al v Germany*: *'Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.'* (Tóth, 2001).

The Strasbourg judgments provide the requirements of the rule of law: the mandate must derive from the law, the law must be on the side of humanity (justice), it must use concepts that meet the requirements of clarity and predictability (legal certainty). The necessary and proportionate extent of the restriction of rights can stand in the way of arbitrariness.

Constitutional democracies have different ways of ensuring that their law enforcement, armed with secret police methods, can fight the most dangerous forms of crime without causing more damage than it seeks to prevent. There are countries in which these disguised restrictions on citizens' rights are enshrined in codes of criminal procedure (Kertész, 1989). Alternatively, the rules fall under the special mandates against organised crime and illegal drug trafficking (McEnany & Bócz, 1992). In some cases, the Act XXXIV of 1994 on the Police (hereinafter referred to as the Police Act) is a source of law. In almost all of the former socialist countries, this solution was chosen (Lammich, 1996). Until recently, many civil democracies lacked adequate legal regulation, and this has caused recurrent disruption to the operation of intelligence services

(Joubert, 1997). However, it is worth stressing that the legitimacy of social protection functions is guarded by the whole institutional system of constitutional democracy, sometimes more effectively than by specific law enforcement laws. The two together can provide truly reassuring guarantees. The current domestic solution, which has made covert information collection for law enforcement purposes part of criminal procedure, cannot be considered general today, even in states with a rich tradition of democracy.

The answer to the first question is that the characteristics of the legal world and secret police operations are comparable. The results of this analysis are presented in Table 1.

Table 1
Problem I.

Legislation	Covert information collection
Public	Classified
Abstract	Specific
Its subject: the future	Its subject: past, present and future
Predictability is a value	Unpredictability is value
Fairness is a value	Efficiency is a value
The totality of legal relations	Authoritative 'total number of acts'

Note. Edited by the author.

A comparative analysis of the nature of legislation and covert information collection will help to ensure that the legislation on covert information collection and covert means is in line with the requirements of the Legislation Act: *'The professional content and the scope of a law, and the extent of abstraction of a provision of law shall be established reasonably, in line with the nature of the sphere of life subject to the regulation, and in accordance with the provisions of this Act.'*⁴

Problem II.

The second question is: what are the differences between covert information collections carried out under the jurisdiction of the administrative police and those carried out in criminal proceedings? (Problem II.)

4 Act CXXX of 2010 on law-making § 16/A. (1).

It is clear that law enforcement functions are less tolerant of restrictive, detailed regulation than criminal procedure. The generality of law enforcement vigilance and the specificity of criminal procedure were already perceived by classical authors. *'The authorities are obliged to investigate every quarter to see if there are any malicious actors. This is not a criminal investigation, but a public safety investigation.'* (Vuchetich, 2007).

It is also clear that while law enforcement functions serve complex and hardly definable goals, criminal procedure has a mission that is well understood in practice and effectively supported by theory: to enforce the state's criminal claims through the administration of justice. Győző Concha wrote the following on this: *'Freedom of action and enjoyment of the goods of each member of society, and the removal of obstacles to the satisfaction of human needs in the existing social relation, are the preconditions of order. It is this precondition, not order itself, which the police create by constant vigilance, by effective prevention, by assisting in the restoration of law and order, by the effective removal of unlawful conditions [...] The police, by its discretionary and watchful nature, must adapt itself to circumstances which vary from hour to hour. This falls more within the remit of government and public administration.'* (Concha, 1903).

The different responsibilities of the administrative police for public security and the different role of the judiciary in the maintenance of law and order are reflected in the way the law is applied. A review of the Hungarian past can be instructive in tracing this. From 1949 until the mid-1950s, the world of proletarian dictatorship was characterised by a complete lack of legal foundations for the activities of the secret police. This system has allowed criminal law to be used directly to take down political opponents. The "scripts" of the conceptual trials were written in the preparatory procedure. The judicial authorities had no control over such investigations. As András Szabó rightly observed in a study of the period, *'... the coherence of the facts is established outside the legal judgement, in a sphere beyond the control of the law'* (Szabó, 1974).

The silence of law in the police administration was broken by Decree-Law No 22 of 1955 on the police. It describes the tasks of the police, but says nothing about the means and methods they can use to carry them out. The monopoly on legitimate physical violence does not even appear at the level of authorisation. In comparison, Decree-Law No 17 of 1974 on the protection of the State and public security went further when it dealt with the internal order of the State and the fight against crime:

*'Article 4 For the protection of the internal order of the State:
- to investigate crimes against the state, social and economic order of the People's Republic of Hungary, against peace and humanity, against the persons and property of citizens, and other crimes; to prevent their commission;*

- to expose the plans and activities of the powers opposed to our country, their organisations, other foreign organisations, to overthrow, undermine or weaken the social or economic order of the Hungarian People's Republic and to prevent their harmful work.

Article 5 (1) In the course of the fight against crime, care is to be taken to prevent and detect criminal offences, to prevent the commission of criminal offences in preparation or in progress, and to control persons subject to punishment. (2) The means and methods specified by law can be used to detect criminal offences. Coercive measures specified by law can be taken against the perpetrators of criminal offences.' There was obviously a reference to the Criminal Procedure Act, but the methods remained obscure. With regard to state security, the decree-law just cited was even more restrictive, the principle of trust was particularly strong, to the extent that not only the activities but even the very existence of the political police were considered state secrets. According to Article 1 of the Council of Ministers Decree 39/1974 (XI. 1.) on the Police, '*The Police is responsible for the protection of state and public security, the protection of traffic order, the protection of specific persons and objects, and the performance of administrative police tasks assigned to its competence.*'

The promulgation of the Constitution of the Republic on 23 October 1989 could have given particular impetus to the even temporary legislation, but codification was not forthcoming⁵ (Révész, 2007). Due in no small part to the so-called Danube-gate scandal⁶ that broke out in the first days of 1990, Act X of 1990 on the transitional regulation of special secret service means was passed in January 1990. This Act established organisational and procedural guarantees. It removed the secret services from the control of the Ministry of the Interior and made the use of certain secret means of restricting fundamental rights subject to authorisation by the Minister of Justice. The four secret services (information, national security, military security, military intelligence) were created by the Council of Ministers Decree 26/1990 (II. 14.) on the transitional regulation of the performance of national security tasks. The decree entrusted the management of the services to a Security College headed by the Prime Minister. The first democratically elected government changed this to state that '*the Prime*

5 There is also research evidence that in the summer of 1989, a proposal was made by the Minister of the Interior to establish the legality of secret service activity, but the legislation that would have made it a reality was not ultimately enacted.

6 The name is a journalistic invention, a reference to the so-called Watergate wiretapping scandal in the United States in 1972, which led to the downfall of then US President Richard Nixon. The scandal demonstrated that certain organs of the State Security Service, in particular the Internal Intelligence Group III/III of the Federal Ministry of the Interior, continued to monitor these political forces by secret service means even after the constitutional recognition of the activities of opposition parties.

Minister directs the services responsible for national security and information through the Political State Secretary of the Prime Minister's Office, who is responsible for these tasks.'

These transitional solutions were gradually replaced first by the Police Act, then by Act CXXV of 1995 on National Security Services, Act CXXII of 2011 on the National Tax and Customs Administration and Act CLXIII of 2011 on the Public Prosecutor's Office. These organisational laws have defined the procedural rules for intelligence activities carried out under administrative (law enforcement) powers in the collection of covert information. A regulatory change was introduced by Act XC of 2017 on Criminal Procedure, which made intelligence for law enforcement purposes a full part of criminal procedure by establishing the institution of preparatory proceedings and disguised means. The recent experience of the Hungarian secret police services offers an explanation as to why there is a place for covert means in the procedural code. The taxonomic place of detection and investigation is highly problematic. According to some views, criminal investigation is an integral part of law enforcement administration, but the division of labour also organisationally separates the public security police (*la police bas*), which is responsible for maintaining order and sworn to intervene immediately, and the security police (*la haute police*), which helps to restore law and order. Another dividing criterion is that *'...law enforcement does not provide social order but punishment [...] the rule of law, ultimately maintained by the court, gives to the individual as well as to the state power that sense of security which we call security'* (Concha, 1905).

Decision 2/2007 (I. 24.) AB quotes the case law of the European Court of Human Rights: *'In its decisions, the Court has pointed out the minimum requirements which must be satisfied by the rules governing the use of secret means. It has stressed that it is precisely because interference with fundamental rights is secret and because the use of such means gives the executive 'unforeseeable' possibilities that it is essential that the procedures themselves should provide sufficient guarantees for the exercise of the rights of the individual. This in turn requires states to place the emphasis on establishing precise and detailed rules that are comprehensible and accessible to citizens. Legislation must make clear the powers of the authority using such means, the nature of the measures and the way in which they are exercised. The Court of Justice has also pointed out, in the context of the requirement of clarity, that the law must specify the cases and circumstances which justify intervention and the conditions under which it is to be carried out. They must also include, as a minimum safeguard, conditions capable of determining the persons concerned, provisions on the documentation of the application and the preservation and destruction of the documentation.'*

The authorities must not be given too wide a discretion in deciding whether to apply the measure (e.g. Case of Valenzuela Contreras v. Spain, judgment of 30/06/1998, Reports 1998-V).'

In the domestic literature, doubts have also been raised about the solutions governing covert information collection.

The broader concept of covert information collection includes national security, counter-terrorism and law enforcement covert activities, the purpose of which is not to prepare the ground for criminal proceedings (although the information obtained may be used as such in the future), but to lay the foundations for official measures that can be taken by national security, counter-terrorism and law enforcement authorities. These official measures can be used to reduce the risks to national security, to avert terrorist threats and threats to public security, to protect the participants in criminal proceedings and members of the prosecuting authority, to protect persons cooperating with the judiciary and to control crime prevention. (The indirect aim of intelligence may also be to protect the human resources, means and methods available to covert information collection and to ensure their use.) This broader area of covert information collection can be called non-criminal intelligence, all the more so because most of the measures that can be included do not follow the rules of criminal procedure. The basis for non-criminal intelligence may be conduct that does not violate a criminal prohibition, may not even be illegal, but which risks endangering protected social interests or is otherwise essential to the achievement of the intelligence objective.⁷

The broader concept of covert information collection includes the gathering of information for law enforcement purposes, which is systematically carried out in criminal proceedings. However, it is questionable that preparatory proceedings can be initiated without suspicion of a criminal offence [Act XC of 2017 on Criminal Procedure, Section 340 (1)]. The absence of suspicion can either condemn law enforcement to inaction or, on the contrary, force it to pursue a total deterrent. [„*In the course of a preparatory proceeding, to determine if the suspicion of a criminal offence can be established, covert means subject to the permission of a judge may be used against a person who a) might be the perpetrator of the criminal offence...*” Act XC of 2017 on Criminal Procedure, Section 343 (1)] The absence of suspicion renders both the necessity and proportionality requirements meaningless. If there is no suspicion based on facts, how can it be determined which facts are to be known and whether disguised means are necessary to know them. Nor can it be decided without suspicion

7 Decision 13/2001 (14 May 2001) of the Constitutional Court.

whether the significance of the offence justifies the use of disguised means. The absence of suspicion renders law enforcement authorities, and ultimately the judiciary, defenceless against the arbitrary use of power, and removes the verifiability that law enforcement in a constitutional state can only be legitimised by the need for criminal justice.

The regulatory functions of policing and law enforcement require different branches of law. Public security is the domain of administrative law, while the law of criminal procedure is the domain of law enforcement, as shown in Table 2.

Table 2
Problem II.

Regulatory functions of policing	Law enforcement functions
Patrolling presence	Investigation
It aims to protect public security and national security, counter-terrorism, crime prevention, the use of secret police forces	It aims to enforce a criminal claim through the administration of justice by establishing the truth in legal proceedings
The use of covert information collection	Method of using covert means
Government task	Judicial task

Note. Edited by the author.

There is one more question: under what conditions can covert information be collected for law enforcement purposes when suspicion is not even necessary to initiate criminal proceedings? One can only welcome the fact that the police may use covert means to detect, interrupt, identify, apprehend, obtain evidence or recover property derived from a crime only as provided for in the Criminal Procedure Act [Section 63(4) of the Police Act]. However, how can the following legal provision be interpreted: ‘*Covert information collection for the purpose of preventing the commission of a criminal offence may be carried out where there are reasonable grounds for believing that it is likely to lead to the acquisition of information relating to the commission of a criminal offence, the analysis and evaluation of which will reveal the intentions of the perpetrators and enable them to prevent or suppress the commission of such offences.*’ [Section 65 (1) of the Police Act]. This legal reference is no more than a general authorisation, which opens the door to discretion rather than regulation.⁸

⁸ In its decision 47/2003 (X. 27.), the Constitutional Court stated in detail the requirement of legal certainty in the case of the unconstitutionality of crime prevention control: ‘*The consequence of the uninterpretability of a norm or the fact that it allows for different interpretations is that it creates an unpredictable situation for the addressees of the norm. Moreover, the over-general nature of the text of the rule also creates the possibility of subjective, arbitrary application of the law.*’

Law enforcement researchers should be allowed to extend their research to the world of secrets, looking for solutions that can help bring legality and effectiveness closer together. Work has already been done in the domestic literature that distinguishes between operational and strategic intelligence (Nyeste, 2016). An operational tactical action can often only be successful by limiting fundamental rights, while a strategic action is an analytical and evaluative processing of information already acquired, in which no covert information collection is allowed. There is a need for legislation that clearly separates the two areas. At present, the most comprehensive tasks of strategic intelligence are carried out by the National Information Centre:

*'The National Information Centre shall examine the security and criminal situation in Hungary, ... g) shall prepare information reports and background and risk analyses related to the national security, terrorist threat and criminal situation in Hungary, to certain elements thereof, and to specific risks and criminal offences, for the cooperating organs with a view to facilitating the lawful, professional and effective performance of tasks falling within the competence of those organs and for the prosecution service with a view to facilitating the lawful, professional and effective performance of tasks specified under point a) ab ...'*⁹

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