Ősze Áron

Some constitutional questions in the context of secret information gathering subject to external permission by the national security services

Pro&Contra 8

No. 1 (2024) 5–22

https://doi.org/10.33033/pc.2024.1.5

Abstract: A sense of security is a basic need of individuals and society, and one of the most important functions of the state. Among the state organs, the national security services are responsible for detecting and preventing elements that threaten the security of society. However, the national security services can only fulfil these tasks if they disclose as little as possible of their activities to the public. Closely related to this is the secret information gathering subject to external permission and which carries risks of intrusion into the private sphere. Of course, these agencies cannot operate without adequate constitutional control, which is clearly difficult given the nature of their operations. In my study, I examine one possible instrument of constitutional control over the Hungarian national security services. Among these, I will analyze the external authorization procedure for the secret information gathering regulated by the Hungarian National Security Act and the legal remedies associated with this procedure.

Keywords: control, Hungarian national security services, secret information gathering, right to legal remedy

Introduction

National security services are essential for the secure existence of society. Within the state system, the structural and functional definition of these bodies is defined at the normative level, yet it is clear that secrecy pervades the functioning of the national security services. While it is true that the requirement of non-publicity is an essential element for the effective functioning of each secret service, it is also necessary that the state control over these services, because it is a guarantee of their constitutional functioning.

The publicity can be understood in several dimensions: on the one hand, we can talk about any kind of public knowledge of the national security services. This is interesting, because the national security services can carry out secret information gathering subject to external permission, under conditions defined by law, which provides a serious opportunity for intrusion into the privacy of individuals. The secret information gathering is authorized by the Minister of Justice (as a political body) or a judge (as a legal body) in cases specified by law. Another dimension of publicity is therefore the information these bodies have to make an informed decision on whether to authorize secret information gathering.

In my study, I examine some of the constitutional issues surrounding the secret information gathering subject to external permission by national security services in the Hungarian constitutional system. In this context, I analyze the detailed rules governing the authorization procedure and examine the decisions of the judge and the Minister of Justice in the authorization procedure from the point of view of legal remedies.

Secret information gathering and privacy
Privacy

As indicated in the introduction, the main activity of the national security services is the secret information gathering, which provides the opportunity to intrude into the private sphere of individuals[1]. Human beings, regardless of their communal nature, inherently have secrets and therefore seek to exclude the community from their private lives or at least strive to do so. In this respect, human existence is dual: there is a communal life and a private life[2]. Thanks to technological progress and the political aims of the state, we have become extremely vulnerable, making us naked to unwanted surveillance. The public and private spheres are increasingly demanding personal information, and modern technology enables different organizations to store, analyze and share information about us in highly complex ways.[3]

Privacy does not mean that others not having information about us, but rather about how much control we have over the flow of our own information to the outside world.[4] In other words, the problem of privacy is the extent to which an individual is in control of the information about him or her, can freely dispose of it, can exclude the outside world from a certain part of his or her life, or is obliged to tolerate the eyes and mouths of the world[5]. Privacy as a concept can be interpreted in a number of ways. Some have argued that there are two ways of approaching the conceptualization: one is to look at privacy in terms of its status, which seeks to answer the question of whether privacy is a state, a right, a claim, a means of control, or a value. While the other direction starts from the characteristics of privacy, which may be information, autonomy, identification of a person, or physical accessibility.[6]

---

[1] Note that it is not only the national security services that can collect secret information: The secret information gathering under Act CLXIII of 2011 on the Prosecution Service is a specific activity carried out by the prosecution service without the knowledge of the person concerned, which involves the restriction of the fundamental rights to the inviolability of the private home and the protection of private privacy, confidentiality of correspondence and personal data. Paragraph 25/A. (1) Act CXXII of 2010 on the National Tax and Customs Administration and Act XXXVI of 1994 on the Police (hereinafter: Act on Police) contain the same rules.

[2] Lóránt Csink and Réka Török, "The collision of national security purpose secret information gathering and the right to privacy. The present and future of Hungarian regulation," in *Liberal constitutionalism - between individual and collective interests*, ed. Agnieszka Bień-Kacała, Lóránt Csink, Tomasz Milej and Maciej Serowaniec (Toruń: Wydział Prawai Administracji Uniwersytetu Mikołaja Kopernika w Toruniu, 2017), 159.

[3] Charles Raab and Benjamin Goold, *Protecting information privacy.* (Equality and Human Rights Commission, 2011) 5.

[4] Charles Freid, "Privacy," *The Yale Law Journal* 77, no. 3 (January 1968) 482.

[5] Júlia Sziklay, "Az információs jogok történeti gyökerei a köz- és magánszféra kategóriái alapján," *De iurisprudentia et iure publico* 4, no 1. (2010): 2.

[6] Ruth Gavison, "Privacy and the Limits of Law," *The Yale Law Journal* 89, no. 3 (January 1980): 424.

The Hungarian Constitutional Court (hereinafter: Constitutional Court) derives the protection of personality from the right to human dignity and identifies the right to human dignity with the general right to personality and some of its named partial rights.[7] The right to privacy is one of these partial rights. Personality presupposes the quality of life in which a person is free to dispose of himself or herself, free to decide which aspects of his or her personality he or she wishes or does not wish to display to others.[8]

The functional nature of privacy refers to the role of the individual in his or her life. These functions are freedom, autonomy, self-fulfillment, the promotion of individual relationships and the strengthening of a free society. This allows for the definition of privacy in terms of fundamental rights, which are:

a. the right to liberty and security
b. the right to life and human dignity and the prohibitions that apply to it
c. freedom of information.[9]

Security vs. privacy

The Fundamental Law of Hungary (hereinafter: Fundamental Law) provides that everyone has the right to have his or her private and family life, home, communications and good reputation respected.[10] The order for the secret information gathering is subject to a national security ground. And in the use of secret information gathering, certain fundamental rights may be restricted by certain public bodies as provided for by law.[11] In the course of professional activities in the field of national security, citizens' individual rights may be violated, but this must always have a legal basis, comply with the principle of necessity and proportionality, the strict requirement of purpose limitation and be proportionate to the interests of the state.[12]

---

[7] Judit Szoboszlai, "A magánélet és a személyes adatok védelme a Dávodi ítéletek apropóján," *Fundamentum* 6, no. 2. (2002): 77.

[8] Márta Görög, "A magánélethez való jog, mint a személyiségi jog újabb, magánjogi kódexben nevesített vonatkozása," in *Számadás az Alaptörvényről*, ed. Elemér Balogh (Szeged: Magyar Közlöny Lap- és Könyvkiadó, 2016), 51.

[9] Tímea Drinóczi and Lóránt Csink, "A magánszféra, a biztonság és a nemzetbiztonság alapjogi szempontú megközelítése," in *A nemzetbiztonság kihívásainak hatása a magánszférára*, ed. Lóránt Csink (Budapest: Vareg, 2017), 27.

[10] Fundametal Law, Article VI., Paragraph (1).

[11] Ágnes Czine, "A titkos információgyűjtés néhány jogértelmezési kérdése," *Fundamentum* 10, no. 1 (2006): 119.

[12] Mihály Tóth Csaba, "A nemzetbiztonsági szakmai tevékenység és személyiségi jogok," *Szakmai Szemle* 7, no. 2 (2009): 19–20.

In addition to its findings on the protection of privacy, the Constitutional Court also dealt with issues of national security.[13] The body declared that the protection of national security interests is a constitutional goal and an obligation of the state. The sovereignty of the country and its constitutional order are fundamental values indispensable for the functioning of a democratic state governed by the rule of law. The enforcement of the country's sovereignty, the protection of its political, economic and defense interests, the detection and prevention of activities that infringe or threaten sovereignty or constitutional order are obligations of the state deriving from the constitution, which require restrictions on fundamental rights.[14] In another decision, the Constitutional Court has also stated that states have recourse to the specific capabilities of the national security services, which cannot be replaced by other organizations, to protect their national security interests. Furthermore, the specific nature of national security activities requires appropriate legal regulation to ensure that national security services do not pose a threat to the democratic legal system.[15]

The Constitutional Court has explicitly pointed out in connection with the secret information gathering[16] that state intervention may only take place in the overriding public interest and must be proportionate to the danger to be averted, and the legal disadvantage caused, and that the constitutionality of secret information gathering is judged by a stricter standard than the requirements of the rules governing open procedures. The reason for this is that the use of these instruments confers extreme power on their users and makes the persons concerned more vulnerable. This decision has therefore primarily emphasized the importance of precise and prior legal authorization, rather than ex-post substantive control.[17]

It is also worth highlighting the practice of the European Court of Human Rights (hereinafter: ECHR). In the case in question,[18] two members of a non-governmental organization referred to the ECHR alleging a violation of fundamental rights under Article 8[19] of the European Convention on Human Rights (hereinafter: Convention). In their

[13] Decision 8/1990. (IV. 23.) of the Constitutional Court; Decision 46/1991. (IX. 10.) of the Constitutional Court; Decision 50/2003. (XI. 5.) of the Constitutional Court; Decision 36/2005. (X. 5.) of the Constitutional Court.
[14] Decision 13/2001. (V.14.) of the Constitutional Court, 2001, 177, 196.
[15] Decision 16/2001. (V. 25.) of the Constitutional Court, 2001, 207, 213.
[16] Decision 2/2007. (I. 24.) of the Constitutional Court, 2007, 65, 78.
[17] Réka Török, "Nemzetbiztonsági célú információgyűjtés és magánszféra," in *A nemzetbiztonság kihívásainak hatása a magánszférára*, ed. Lóránt Csink (Budapest: Vareg, 2017), 199.
[18] Szabó and Vissy v. Hungary 37138/14. 12 January 2016
[19] European Convention on Human Rights, Article 8., Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public

argument, they submitted that the Counter-Terrorism Centre was authorized under the Act on Police[20] to gather secret information both on suspicion of specific crimes and for national security purposes in order to combat terrorism and to assist Hungarian citizens in trouble outside the territory of Hungary. In their view, they could be subject to measures that are unjustified and disproportionate to the protection of privacy, especially in the absence of judicial control.[21]

In its decision, the ECHR set out in detail its position in relation to the secret information gathering. The ECHR stressed that, in striking a balance between the interests of national security and the right to privacy, public authorities have a certain degree of discretion. It is also stipulated that the person concerned does not necessarily need to know in advance about the secret surveillance, but national legislation must be sufficiently clear to make it obvious to citizens under what conditions and circumstances the authorities are entitled to enter the private sphere secretly in order to protect national security.[22] The ECHR also points to the problem of the lack of prior judicial authorization in relation to the regulation of secret information gathering.[23] It also stipulates that either an independent body must authorize the surveillance or the activities of the authorizing body must be subject to judicial review or review by an independent body. Accordingly, in this area, the independent court will, as a general rule, carry out the control, with other arrangements being the exception and subject to scrutiny. However, prior authorization of such measures is not an absolute requirement, as where there is extensive ex post judicial oversight, this may also compensate for the shortcomings of the system.[24]

On control of national security services in general: problems of effectiveness

One of the fundamental elements of national security activity is that the whole process is confidential, often closed to the uninitiated, which has a strong impact on institutional culture, and publicity-secrecy is in constant conflict.[25] Publicity is therefore a demand and

safety or the economic well-being of the country, 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.

[20] Act on Police, Chapter VII.

[21] Csink and Török, "The collision of national security purpose secret information gathering and the right to privacy. The present and future of Hungarian regulation," 71.

[22] Szabó and Vissy v. Hungary 37138/14. 12 January 2016, 57. and 60-62.

[23] Szabó and Vissy v. Hungary 37138/14. 12 January 2016, 73.

[24] Szabó and Vissy v. Hungary 37138/14. 12 January 2016, 77.

[25] Péter Szűcs and István Solti, "A magyar nemzetbiztonsági szféra és a nyilvánosság," *Nemzetbiztonsági Szemle* 2, no. 2 (2014): 74.

a right of society against power, which is a basic condition for the democratic functioning of the state. This requirement applies to the whole of the state organization, with certain limitations. However, in the case of the national security services, publicity is severely limited in order to ensure their effective functioning.

The secret services are capable of obtaining, analyzing and protecting information that threatens the security of the state and society, thanks to their specific functioning and their specialized tools and methods. This is why their work is the focus of particular attention and why it is important to ensure that the legality, professionalism and effectiveness of their professional activities are properly monitored.[26] A fundamental prerequisite for the control of national security services is the establishment of a clear and well-defined legal framework and set of rules, and the correction of these rules where necessary. Public perception is that there can be serious obstacles to the control of national security services, and there is a fair amount of skepticism in this respect due to understandable public constraints. The real limitations and difficulties are related to the basic forms of national security services' activities. The primacy of the requirements of conspiracy has the consequence of concealing from unauthorized persons the specific goals of the services' activities, information on the procedures and means used, the sources and information they bring, and other data classified exclusively according to the services' internal rules.[27] In addition, the Constitutional Court has also pointed out that the bodies subject to control have a special legal status, which makes it considerably more difficult to carry out an effective control. Such constraints include the need for secrecy, the specialized nature of the sector and the pressure of circumstances by other states.[28]

Control over national security services is a two-way street. On the one hand, it must guarantee that the various national security services carry out their activities in compliance with the provisions of the constitution and the law, without exceeding their powers, and in the interests of the security of the state. On the other hand, it must also provide the necessary guarantees for the secret services to carry out their activities on a purely professional basis, independently of the interests of the various political parties and other pressure groups outside the national security services.[29]

---

[26] Jenő Izsa, "A titkosszolgálatok tevékenységének általános jellemzői, ellenőrzésük és irányításuk kérdései," *Szakmai Szemle* 7, no. 2 (2009): 9.

[27] Jenő Izsa and Zsolt Szilágyi, "A nemzetbiztonsági szolgálatok parlamenti ellenőrzésének elvi *és* gyakorlati kérdései," *Szakmai Szemle* 5, no. 3 (2007): 9.

[28] Decision 9/2014. (III. 21.) of the Constitutional Court, Reasoning [64].

[29] Attila Gulyás, "Politikai és jogi kontroll a nemzetbiztonsági szervek felett," in *A nemzetbiztonság kihívásainak hatása a magánszférára*, ed. Lóránt Csink (Budapest: Vareg, 2017), 125–26.

Secret information gathering subject to external permission Permission as a possible means of control

Pursuant to the provisions of Act CXXV of 1995 on National Security Services (hereinafter: Act on National Security Services), the national security services can collect secret information in order to fulfil their tasks[30] as defined by law. The national security services can use the special means and methods of secret information gathering only if the data necessary for the performance of their tasks cannot be obtained by other means.[31]

Based on an external permission, national security services

a. with the exception of public places and places open to public, can secretly search a home, other premises, fenced area or, with the exception of means of public transport, a vehicle, and objects used by the person concerned, and may record, using technical means, the things observed,
b. with the exception of public places and places open to public, can secretly surveil and record, using technical means, events in a home, other premises, fenced area or, with the exception of means of public transport, a vehicle, and may place the technical means necessary for this at the place of operation,
c. can secretly open a postal item or other sealed consignment linked to an identifiable person and intercept, verify and record its content,
d. can secretly intercept and record the content of communications conducted through an electronic communications network or device using an electronic communications service, or through an information system,
e. can secretly gain knowledge of data processed in an information system, record, using technical means, the things observed, enter the necessary electronic data in the information system, place the necessary technical means, with the exception of public places and places open to public, in a home, other premises, fenced area, or with the exception of means of public transport, a vehicle or an object used by the person concerned, and interfere with an information system to avert a cyber threat.[32]

A submission for permission for secret information gathering under can be filed by the director-general of the national security service.[33] In the course of the performance of national security tasks specified in the act[34] the secret information gathering can be permitted by a

[30] For the exception: Act on National Security Services, Section 4. *h)*; Section 8., Paragraph (1) *d)–e)*.
[31] Act on National Security Services, Section 53., Paragraph (1)-(2).
[32] Act on National Security Services, Section 56., Paragraph (1).
[33] Act on National Security Services, Section 57., Paragraph (1).
[34] Act on National Security Services, Section 5. b), d), h)-j) and Section 6. d), i), l)-n).

judge designated for this task by the president of the Budapest-Capital Regional Court. In all other cases provided for by law, the Minister responsible for justice authorizes the collection of secret information. The judge and the Minister responsible for justice (hereinafter jointly: permitting officer) adopt a decision within 72 hours after filing the submission. He or she shall uphold or dismiss, as unfounded, the submission. No appeal can be accepted against this decision.[35] Unless otherwise provided in the Act on National Security Services, the permitting officer permits secret information gathering for no longer than 90 days at a time. Unless otherwise provided in the act, in justified cases, the permitting officer can extend this time limit by another 90 days upon a submission by a director-general.[36]

As we can see, the right of authorization is shared between the "representatives" of the executive and the "representatives" of the judiciary. One could say that the minister proceeds on behalf of an essentially political body, while the judge is involved in the authorization process on behalf of an independent branch of power. In this context, the Constitutional Court has stated that, on the one hand, national security tasks cannot be compared with the collection of secret information for law enforcement purposes under the Act on Police, which requires a judicial authorization. The prevention and protection of national security risks require political decisions[37] and as such fall within the competence of the executive power. This justifies that the Minister of Justice should act as the authorizing authority for the gathering secret information when applying the Act on National Security Services.[38]

Another question that arises in the context of authorization is what the permitting officer considers when decide on permission. Put another way, can mere legality considerations be taken into account in the authorization procedure? The answer to this question is most probably in the negative. Indeed, in addition to the legal criteria, considerations of expediency must be weighed, i.e. whether the conditions for the secret information gathering laid down by law are met. This in turn requires a political assessment. In this sense, no

[35] Act on National Security Services, Section 58., Paragraph (1)-(3).

[36] Act on National Security Services, Section 58., Paragraph (4).

[37] It is also worth quoting the dissenting opinion of Péter Paczolay, Judge of the Constitutional Court: 'I do not agree, therefore, that the justification for a system of authorisation shared between the court and the Minister could be based on the mere fact that the prevention of national security risks requires a political decision, and that the authorisation of the Minister responsible for justice is therefore an appropriate institutional solution. The essential question of constitutionality, that is to say, the question of the restriction of fundamental rights, is whether the national security interests and risks, which are also determined on the basis of political considerations, sufficiently justify in the specific case the restriction of the individual's fundamental rights. The resolution of the conflict between the alleged national security interest and individual fundamental rights under the rule of law does not require a political assessment, but an examination of the necessity and proportionality of the restriction of rights. The institutional guarantor of this assessment is the court." Decision 32/2013. (XI. 22.) of the Constitutional Court, Reasoning [155].

[38] Decision 32/2013. (XI. 22.) of the Constitutional Court, Reasoning [105].

distinction can be made between a minister (as a political body) and a judge (as a legal, independent body). The minister cannot allow permission on the basis of mere expediency or political considerations if the legal conditions for granting it are not met. To look at the issue another way: if the legal conditions are met, the permission may be granted, but this does not necessarily mean that the permitting officer will grant the permission, since he or she will refuse it without justification. It is therefore necessary that the judge should also examine the expediency criteria, because if he or she did not, the judge would be incapable of exercising the right to allow a permission. At the same time, it is also necessary for the minister to examine the legality conditions. Consequently, legal and political control are clearly intertwined. There is also the question of the information that the judge or minister has to allow the permission. There is no question that the minister, as a member of the Government that controls the operation of the national security services, is likely to have more information that would allow a decision to be made on the basis of expediency.

Issues relating to judicial authorization

According to the Act on National Security Services, there is no right of appeal against the decision of the permission officer.[39] In order to interpret this from a legal remedy point of view, it is first necessary to examine the procedure by which the judge adopts this decision. Without wishing to be exhaustive, let us look at some of the classic procedures falling within the jurisdiction of the courts. In criminal procedures, the court judges on the basis of an accusation.[40] The Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: Act on Civil Procedure) shall apply to court procedures, if taking the judicial path is allowed by law and no Act requires the application of other rules. The court adjudicate legal disputes falling within the scope of this Act upon request to that effect.[41] The procedures shall be initiated by the plaintiff against the defendant by filing a statement of claim.[42] Act I of 2017 on the Code of Administrative Court Procedure (hereinafter: Act on Administrative Court Procedure) shall apply to administrative court actions seeking to adjudicate administrative disputes and to other administrative court procedures.[43] Separate administrative lawsuits and other administrative court procedures are governed by Part Five

[39] Act on National Security Services, Section 58., Paragraph (3).
[40] The Act XC of 2017 on Criminal Proceedings (hereinafter: Act on Criminal Proceedings), Section 6., Paragraph (1).
[41] Act on Civil Procedure, Section 1., Paragraph (1)-(2).
[42] Act on Civil Procedure, Section 169., Paragraph (1).
[43] Act on Administrative Court Procedure, Section 1., Paragraph (1).

of the Act on Administrative Court Procedure. There is no doubt that the authorization procedure does not fall under any of the procedural acts referred to.

However, there is also the legal institution of non-litigation procedures. non-litigation procedures are most characterized by the handling of cases of a private nature, which either do not involve litigation or, although there may be an underlying dispute between opposing parties or the enforcement of an existing right, do not require the application of the rules of litigation. The latter distinction was, of course, undoubtedly valid in a legal context which is different from today's in this respect.[44] Non-litigation procedures consist of successive procedural steps, the parties to which are the court or notary and the persons who are entitled to take part in the procedure on the basis of their interests. In addition, the subject-matter of the non-litigation procedures is a civil matter, and their purpose is to administer justice on the basis of the procedural rules laid down for that purpose.[45] Thus the judge's authorization procedure cannot be construed as a non-litigation procedure either.

According to the provisions of the Fundamental Law, everyone has the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests,[46] which is also expressed in law: there is a right of legal remedy against the court's decisions, unless an exception is provided by law.[47] The right to legal remedy is a fundamental right,[48] the possibility to appeal against the decision on the merits to another body or to a higher forum within the same organization.[49]

However, it is important to note that the Act on National Security Services excludes appeals as an ordinary means of legal remedy. However, there are also extraordinary

---

[44] Tamás Éless, Edit Juhász, Imre Juhász, Mátyás Kapa, Zsuzsanna Papp, Zsuzsanna Somlai, Kristóf Szécsényi-Nagy, Kinga Tímár, Ádám Tóth, Judit Török and István Varga, *A polgári nemperes eljárások joga* (Budapest: ELTE Eötvös Kiadó, 2015), 19.

[45] Ferenc Bacsó, Salamon Beck, Mihály Móra and László Névai, *Magyar polgári eljárásjog* (Budapest: Tankönyvkiadó, 1962), 430.

[46] Fundamental Law, Article XVIII., Paragraph (7).

[47] Act of 2011. CLXI. on the Organisation and Administration of Courts (hereinafter: Act on Courts), Section 13., Paragraph (2).

[48] The essence of the right of legal remedy requires the legislator to provide for the possibility of appeal to another body or to a higher forum within the same organisation in respect of substantive, adjudicative decisions of public authorities. According to the Constitutional Court, the requirement to provide a remedy applies to decisions on the merits. The decisive factor in determining which decision constitutes a decision of substance is the subject-matter of the decision and its effect on the person concerned, that is to say, whether the situation and rights of the person concerned have been substantially affected by the decision. In other words, from the point of view of the fundamental right to legal remedy in constitutional court procedures, the substantive, decisive character of a decision is relative to the decisions considered as such by the substantive law: it is determined by the subject matter and the impact of the decision under examination on individuals. Decision 9/2013. (III. 6.) of the Constitutional Court, Reasoning [28].

[49] László Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* (Budapest: Osiris Kiadó, 2001), 576.

remedies, which are regulated in detail in the procedural law.[50] They have in common that they can only be brought against a final decision and on the grounds laid down by law.[51] However, since the authorization procedure does not constitute ordinary judicial or non-litigation procedures, other legal remedies provided for in the procedural acts are excluded.

But can the decision of the permission officer really not be contested? The direct constitutional complaint must be examined in this context.[52] According to the Act CLI of 2011 on the Constitutional Court (hereinafter: Act on the Constitutional Court) a person or organization affected by a specific case may submit a constitutional complaint to the Constitutional Court against a judicial decision, if the decision on the merits of the case or the decision adopted in conclusion of the court procedures:

a. violates the petitioner's rights guaranteed by the Fundamental Law, and
b. the petitioner's possibilities of seeking redress have already been exhausted or there is no legal remedy available.[53]

We will not examine all these conditions, but merely point out that, regardless of the substantive and procedural law applied, any decision of a court ruled by the Fundamental Law or the Act on Courts can be the subject of a constitutional complaint.[54] Thus, a constitutional complaint can be lodged *de iure*, but may face obstacles. Firstly, because the permission officer does not inform the person concerned of its procedure or of the fact of the secret information gathering.[55] Secondly, the Act on the Constitutional Court imposes strict substantive requirements for the submission of a constitutional complaint, which the person concerned by the secret information gathering is unlikely to be aware of.

Following the practice of the Constitutional Court, it can be said that the rule that only a constitutional complaint against a judicial decision can be lodged does not violate the fundamental right to legal remedy. The legislature is essentially free to decide on the introduction, content and limits of the means of legal remedy, and this and the practice of the law enforcement authorities in relation to it cannot be subject to constitutional review.

---

[50] Act on Civil Procedure, Chapter XXIX.; Act on Criminal Proceedings, Chapter XC.; Act on Administrative Court Procedure, Chapter XIX.

[51] Ervin Belovics and Mihály Tóth, *Büntető eljárásjog* (Budapest: HVG-ORAC Lap- és Könyvkiadó, 2017), 518 –19.

[52] In general, a constitutional complaint is not a normal legal remedy, but a special legal protection instrument. It also follows from the function of the Constitutional Court that it cannot become a "super-court", i.e. a constitutional complaint cannot be used to review court decisions as a quasi-higher court. Botond Bitskey and Bernát Török, *Az Alkotmányjogi panasz kézikönyve* (Budapest: HVG-ORAC Lap- és Könyvkiadó, 2015), 25.

[53] Act on Constitutional Court, Section 27., Paragraph (1)

[54] Adnrás Varga Zs., "Bírói döntés ellen irányuló alkotmányjogi panasz," in *Az alkotmánybírósági törvény kommentárja*, ed. Kinga Zakariás (Budapest: Pázmány Press, 2022), 324.

[55] Act on National Security Services, Section 58., Paragraph (6)

This includes the constitutional complaint.[56] In connection with this, the Constitutional Court also states that the right to legal remedy guaranteed by the Fundamental Law requires that the possibility of effective and efficient legal remedy be guaranteed, so that a violation of the fundamental right can be established not only if the possibility of legal remedy has been completely excluded,[57] but also if the legal remedy otherwise guaranteed by the legislation cannot be exercised effectively and efficiently for other reasons, for example, if it is precluded by the provisions of the detailed rules, thereby depriving or formalizing the right to legal remedy.[58] It is therefore an interesting question whether the right to legal remedy of a person concerned by the secret information gathering is infringed in this case.

Issues related to ministerial authorization

As we have seen, the Minister of Justice appears as the executive branch's authority to permit the secret information gathering. As a representative of the executive branch, the minister is clearly a political actor in the organization of the state. As with the judicial authorization procedure, there is no right of appeal against the minister's decision. However, unlike the judge's decision, the minister's decision can give rise to the possibility of an administrative court action,[59] which requires a detailed analysis of the rules of the Act on Administration Procedures in order to determine the nature of the minister's authorization procedure.

The Act on Administration Procedures defines the concept of client as follows: Party means any natural or legal person or any organization whose rights or lawful interests are directly affected by the case, with respect to whom an official register holds data or who (which) is subjected to administrative audit.[60] In the course of its procedures, the authority applies the provisions of this Act in administrative cases (hereinafter: case) falling under the scope of this Act, as well as in the course of administrative audits. For the purposes of the Act on Administration Procedures, a case means the process in the course of the administration of which the authority, in making its decision, establishes the rights or obligations of the party, adjudicates his legal dispute, establishes his violation of rights,

[56] Decision 3020/2018. (I. 26.) of the Constitutional Court, Reasoning [37] or Beáta Kovács, "XXVIII. Tisztességes eljáráshoz való jog," in *Alapjogi kommentár az alkotmánybírósági gyakorlat alapján*, ed. Lóránt Csink (Budapest: Novissima Kiadó, 2021), 355–56.

[57] Decision 36/2013. (XII. 5.) of the Constitutional Court, Reasoning [61]

[58] Decision 14/2015. (V. 26.) of the Constitutional Court, Reasoning [31]

[59] Act CL of 2016 on General Public Administration Procedures (hereinafter: Act on Administration Procedures), Section 114., Paragraph (1).

[60] Act on Administration Procedures, Section 10., Paragraph (1).

verifies a fact, status or data, or operates a register, as well as enforces decisions concerning these.[61] And an authority means an organ, organization or person which (who) has been authorized to exercise public authority by an Act, government decree or, in an administrative case of a local government, by a local government decree, or has been designated by law to exercise public authority. The authority may not be relieved of cases falling within its subject-matter competence.[62]

But can the minister's authorization procedure be included in the scope of the Act on Administration Procedures? In this case, the answer is to be found as to the procedural rules under which the Minister grants the permission, since the Act on National Security Services does not contain any provisions on this. It is not difficult to conclude that the person concerned is not a party and that the authorization procedure is a matter for the case, since these do not fall within any of the definitions of the Act on Administration Procedures. On this basis, it is not possible to bring an administrative action against the minister's decision, nor is it possible to use the constitutional complaint described in the section on judicial authorization, which is more clearly a matter of concern from the point of view of the right to a legal remedy.

However, even if it were possible to bring an administrative action against the minister's decision, this would be limited by the following circumstances: 1) the Minister is not under an explicit obligation to state reasons under the Act on National Security Services;[63] 2) The action must be brought by filing a statement of claim containing. And the Act on Administrative Court Procedure lays down strict substantive requirements for the administrative procedure.[64] Thus, the same observations can be made as in the context of the constitutional complaint against the judge's decision.

In summary, to certain fundamental rights derived from the private sphere, the right to legal remedy as a fundamental right is also subject to strong restrictions in the activities of the national security services, which is a problematic point from the point of view of constitutionality control. In this context, the need for and importance of objective legal protection must also be stressed. Indeed, two aspects of legal protection can be distinguished: one is objective, and the other is subjective. The subjective legal protection is the protection of the rights and legitimate interests of the administrator, i.e. the party,

---

[61] Act on Administration Procedures, Section 7., Paragraph (1)-(2).

[62] Act on Administration Procedures, Section 9.

[63] It is worth pointing out that the Act on Courts, the court is obliged to give reasoning for its decision, unless otherwise provided for by law, but the Nbtv. does not contain such a provision. However, no such requirement is found in the Minister's decision, which implies that, unlike the Minister, the judge is obliged to state the reasons for his decision to authorise or refuse the secret information gathering. Section 13., Paragraph (1).

[64] Act on Administrative Court Procedure, Section 37., Paragraph (1)-(2).

while the objective legal protection is the enforcement of rights by the administrative bodies. The two levels of protection are expressed in the right to legal remedy, which is otherwise the basis of legal protection.[65]

Conclusion

It is clear from the above that examining national security services is both an exciting and extremely complex task. The dominant activity of the national security services is the secret information gathering, and I have looked at the rules governing the granting of authorizations. The right to authorize is shared between the judge and the minister, and there is no right of appeal against their decisions. With regard to the judge's decision, it can be stated that there is a *de iure* possibility to lodge a constitutional complaint to the Constitutional Court, but *de facto* this possibility is conceptually excluded. There is no possibility to appeal against the decision of the Minister at all. It is therefore clear that the right of legal remedy of the persons concerned is limited.

References

Bacsó, Ferenc and Salamon Beck and Mihály Móra and László Névai. *Magyar polgári eljárásjog*. Budapest: Tankönyvkiadó, 1962.

Belovics, Ervin and Mihály Tóth. *Büntető eljárásjog*. Budapest: HVG-ORAC Lap- és Könyvkiadó, 2017.

Bitskey, Botond and Bernát Török. *Az Alkotmányjogi panasz kézikönyve*. Budaepst: HVG-ORAC Lap- és Könyvkiadó, 2015.

Czine, Ágnes. "A titkos információgyűjtés néhány jogértelmezési kérdése." *Fundamentum* 10, no. 1 (2006): 119–25.

[65] Enikő Katalin Kazsamér, "A közigazgatási jogorvoslati rendszer *és* a jogvédelem hatékonyságát elősegítő tényezők a változások mentén," *MTA Law Working Papers* 2019, No. 1 (2019): 5.

Drinóczi, Tímea and Lóránt Csink. "A magánszféra, a biztonság és a nemzetbiztonság alapjogi szempontú megközelítése." In *A nemzetbiztonság kihívásainak hatása a magánszférára*, edited by Lóránt Csink, 25-77. Budapest: Vareg, 2017.

Éless, Tamás and Edit Juhász and Imre Juhász and Mátyás Kapa and Zsuzsanna Papp and Zsuzsanna Somlai and Kristóf Szécsényi-Nagy and Kinga Tímár and Ádám Tóth and Judit Török and István Varga. *A polgári nemperes eljárások joga.* Budapest: ELTE Eötvös Kiadó, 2015.

Freid, Charles. "Privacy," *The Yale Law Journal* 77, no. 3 (January 1968): 475–93. https://doi.org/10.2307/794941

Gavison, Ruth. "Privacy and the Limits of Law," *The Yale Law Journal* 89, no. 3 (January 1980): 421–71. https://doi.org/10.2307/795891

Görög, Márta. "A magánélethez való jog, mint a személyiségi jog újabb, magánjogi kódexben nevesített vonatkozása." In *Számadás az Alaptörvényről*, edited by Elemér Balogh, 51–64. Szeged: Magyar Közlöny Lap- és Könyvkiadó, 2016.

Gulyás, Attila. "Politikai és jogi kontroll a nemzetbiztonsági szervek felett." In *A nemzetbiztonság kihívásainak hatása a magánszférára*, edited by Lóránt Csink, 125–43. Budapest: Vareg, 2017.

Izsa, Jenő and Zsolt Szilágyi. "A nemzetbiztonsági szolgálatok parlamenti ellenőrzésének elvi *és* gyakorlati kérdései," *Szakmai Szemle* 5, no. 3 (2007): 5–30.

Izsa, Jenő. "A titkosszolgálatok tevékenységének általános jellemzői, ellenőrzésük és irányításuk kérdései," *Szakmai Szemle* 7, no. 2 (2009): 5–18.

Kazsamér, Enikő Katalin. "A közigazgatási jogorvoslati rendszer *és* a jogvédelem hatékonyságát elősegítő tényezők a változások mentén," *MTA Law Working Papers* 2019, no. 1 (2019): 2–13.

Kovács, Beáta. "XXVIII. Tisztességes eljáráshoz való jog." In *Alapjogi kommentár az alkotmánybírósági gyakorlat alapján*, edited by Lóránt Csink, 320–60. Budapest: Novissima Kiadó, 2021.

Lóránt, Csink and Réka Török. "The collision of national security purpose secret information gathering and the right to privacy. The present and future of Hungarian regulation." In *Liberal constitutionalism - between individual and collective interests*, edited by Agnieszka Bień-Kacała, Lóránt

Csink, Tomasz Milej and Maciej Serowaniec, 159–84. Toruń: Wydział Prawai Administracji Uniwersytetu Mikolaja Kopernika w Toruniu, 2017.

Raab, Charles and Benjamin Goold: *Protecting information privacy.* (Equality and Human Rights Commission, 2011)

Sólyom, László. *Az alkotmánybíráskodás kezdetei Magyarországon.* Budapest: Osiris Kiadó, 2001.

Sziklay, Júlia. "Az információs jogok történeti gyökerei a köz- és magánszféra kategóriái alapján," *De iurisprudentia et iure publico* 4, no 1. (2010): 1–8.

Szoboszlai, Judit. "A magánélet és a személyes adatok védelme a Dávodi ítéletek apropóján," *Fundamentum* 6, no. 2. (2002): 76–82.

Szűcs, Péter and István Solti. "A magyar nemzetbiztonsági szféra és a nyilvánosság," *Nemzetbiztonsági Szemle* 2, no. 2 (2014): 72–92.

Tóth, Mihály Csaba. "A nemzetbiztonsági szakmai tevékenység és személyiségi jogok," *Szakmai Szemle* 7, no. 2 (2009): 19–42.

Török, Réka. "Nemzetbiztonsági célú információgyűjtés és magánszféra." In *A nemzetbiztonság kihívásainak hatása a magánszférára.* edited by Lóránt Csink, 181-204. Budapest: Vareg, 2017.

Varga Zs., Adnrás. "Bírói döntés ellen irányuló alkotmányjogi panasz." In *Az alkotmánybírósági törvény kommentárja.* edited by Zakariás Kinga, 315–38. Budapest: Pázmány Press, 2022.