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ELEVEN AMENDMENTS TO THE FUNDAMENTAL LAW OF HUNGARY AND THEIR JUSTIFICATIONS

SMUK, Peter[1]

Introduction

The examination and criticism of the Fundamental Law of Hungary and some of its amendments has been a popular topic in constitutional law literature until recently.[2] As one of the world's newest constitutions, it has been in force for about ten years and has already been amended eleven times. This research aims to review these amendments by analysing the reasons given by the constituent power. I consider the amending power as a participant in the constitutional discourse, and thus I evaluate the justifications for the amendments in a comprehensive perspective: what effects each of the arguments responds to or refers to. Our first perception and hypothesis is that certain elements of the justifications show a particular dynamic with the passing of the years and the changing historical-political challenges the Hungarian government has faced.

The (first) eleven amendments to the Fundamental Law

Hungary's Fundamental Law entered into force on 1 January 2012, and under Article S) the rules for constitution-making and constitutional amendment have not changed substantially: a two-thirds majority of all Members of Parliament is required for both. At the opening of the exhibition in honour of the Constitution, the Prime Minister said that the Constitution had created a "granite solid foundation" for the political system. However, in the decade since its entry into force, Parliament has amended the text of the constitution eleven times.

The first amendment (18 June 2012) raised the "transitional provisions" opposed by the Constitutional Court to the "level" of the Fundamental Law, and extended the law on the remuneration of the President of the Republic to former heads of state. The second amendment (9 November 2012) sought to introduce the institution of voter registration into the Fundamental Law, which would have allowed voters to exercise their right to vote if they registered to vote not later than 15 days before the election or referendum. The

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[2] Here I refer only to the prominent and continuous attention that *Verfassungsblog* gives to the writings and discourse of high-profile authors. available at: https://verfassungsblog.de/category/debates/restoring-constitutionalism/ (cited: 31.10.2023.)

third amendment took place just over a month later (21 December 2012). This amendment to Article P made the protection and maintenance of natural resources, in particular arable land, forests and reserves of water, and biodiversity, an obligation for the State and for everyone. The amendment stipulated as a cardinal law (requiring a two-thirds majority) the regulation of the acquisition of ownership and use of arable land and forests and of agricultural holdings.

A quarter of a year later (25 March 2013), the fourth amendment changed the text of the constitution in a more extensive way, and triggered a substantial international response.[3] Among the most notable - and controversial - elements of the amendment were: the possibility to impose a special tax to pay fines for breaches of EU obligations; the possibility for the President of the National Office for the Judiciary to transfer cases from one court to another; the restriction of political advertising to public service media; and the clarification that the Constitutional Court can only review the form (procedural issues) and not the substance of constitutional amendments. Parliament also incorporated the parts of the transitional provisions that had been annulled by the Constitutional Court; as the Constitutional Court had expected the Fundamental Law to contain all provisions relating to the level of the constitution in a single document. The amendment also covered the definition of marriage (the relationship between one man and one woman), the possibility of a new sanction for hate speech, the legal status of churches, university students' contracts, the homeless, the disciplinary and police powers of the Speaker of the Parliament. Several provisions have been included in the Fundamental Law because they had previously been annulled by the Constitutional Court when they were due to be enacted into law. Much of the criticism was contained in a motion by the Commissioner for Fundamental Rights challenging the validity and constitutionality of the amendment, but the Constitutional Court rejected it on the grounds of lack of competence.[4]

The Fifth Amendment (26 September 2013), following objections from the European Commission, restored some of the issues in the Constitution. Campaign advertising is now allowed on commercial television and radio channels, but without remuneration. A religious community is recognised as a church, with which the state may cooperate, as decided by Parliament. The amendment gives the Hungarian National Bank the power to supervise the financial intermediary system. The possibility of transferring cases

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[3] The Venice Commission adressed the amendment in its opinion nr. CDL-AD(2013)012.

[4] Decision 12/2013. (V. 24.) of the Hungarian Constitutional Court. In his dissenting opinion, Judge Stumpf, István discusses the relevance of the previous decisions of the Constitutional Court for the constitutional amending power: in his assessment, "*the review of the amendment of the Fundamental Law should have been conducted on the basis of the provisions of the Fundamental Law prior to the Fourth Amendment and the Constitutional Court's case law based on it.*" For a critical analysis of the scope of the constituent power to amend the Constitution, see DRINÓCZI, Tímea: *Újra az alkotmányozó, az alkotmánymódosító hatalomról és az alkotmányellenes alkotmánymódosításról – az Alaptörvény alapján. [Revisiting the Matter of Constitution-making and Constitution-changing Power and Unconstitutional Constitutional Amendments – Fundamental Law.]* in *„Jogtudományi Közlöny"*, Vol. 7-8. 2015. pp. 361-378. Strategies for judicial review over the amendments are traced by ALBERT, Richard: *Constitutional Amendments – Making, Breaking, and Changing Constitutions*, Oxford University Press, 2019. pp. 218-223.

between courts has been abolished, while the National Council of Judges has been established as a supervisory body of the National Office of the Judiciary.

The sixth amendment (14 June 2016) addressed the terrorist events in Europe by introducing the category of terrorist threat into the special legal order. The seventh amendment (18 June 2018) aimed to protect Hungary's constitutional identity in the context of EU migration policy.[5] According to the amendment, the protection of Hungary's constitutional identity and Christian culture is the duty of all state bodies. The European Union's exercise of competences shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.. Among other elements, the amendment also introduced ar constitutional level the administrative courts and rhe Supreme Administrative Court.

The Eighth Amendment (12 December 2019), the only one of the amendments to be adopted on the basis of an opposition motion, restored the provisions on courts to the conditions that existed prior to the Seventh Amendment, although the constitutive power had previously considered administrative adjudication to be a substantial parr of the Hungarian constirurional identity.

The ninth amendment (22 December 2020), in rhe spirit of a new type of idenrity policy, stipulates that the mother is a woman and the farher is a man; protects the right of children ro self-identity according ro their birth sex and ensures education according to values based on the constitutional identity and Christian culture of the country. Among the rules on public finance, it provides that public funds are the revenues, expenditures and claims of the State; and it establishes at the constitutional level the institution of a so-called public interest asset management foundation, which is regulated by a cardinal act and performs a public function in the public interest. The amendment reorganises the entire special legal order chapter with effect from 2023.[6] At the same time, however, the tenth amendment of the Fundamental Law of Hungary (24 May 2022) has added a new case to the rules of the special legal order. Accordingly, a state of emergency may be declared not only in the event of "an elementary disaster threatening the safety of life and property", but also in the event of "armed conflict, war or humanitarian disaster in a neighbouring country". This act has also correcred the ninth amendmenr, which will enter into force in 2023 in accordance with the new text.

The Eleventh Amendment (19 July 2022) provides that from 2024 elections of municipal representatives and mayors will be held at the same time as elections of Members of the European Parliament. The

[5] The Venice Commission dealt with the law on the administrative courts and the seventh amendment in its opinion nr. CDL-AD(2019)004.

[6] The ninth amendment has again triggered an investigation by the Venice Commission, which summarised its criticisms in its opinion CDL-AD(2021)029.

amendment also changed the designation of counties from *'megye'* to *'vármegye'* ('castle-county', it is the former name for a territorial district used from the Middle Ages until the communist regime.).

On the justifications behind the amendments to the Fundamental Law

Constitution-changing power and constitutional identity

The Seventh Amendment of the Fundamental Law gives special importance to the justifications of draft bills prepared in the legislative procedure, because these sources are the tools for the interpretation of legal acrs (Article 28 of rhe Fundamenral Law). Moreover, rhese jusrificarions are rarely presenred to the international professional public, so our review can make a significant contribution to the understanding of recent Hungarian constitutional politics.

The justifications of constitutional amendments are discussed here in relation to the subject of constitutional identity that appears in the arguments of the constituent power. A brief outline of these subjects is worth presenring ar rhe beginning.

The identity politics of the 21sr cenrury has had a major impacr on the fundamental decisions of constitutional politics in particular (in fact, on the manifestations of constitutional power). In the drafting and amendments of the Fundamental Law of Hungary, we can observe a trend towards an increasing reference to the elements of constitutional identity. These references formulated by the constitution-making power can be included in the discourse on rhe definirion of identity because consrirurional politics has factually and explicitly perceived the Constitution as a political instrument.

When defining the subject of constitutional identity, it is an acceptable idea to consider each of the constitutional text, the constitutional power and the political community as a subject in the sense that identity can be formed from their dialogue, conflicts and interaction.[7] In this way, we can describe the formation of identity as a process, which at a given moment can be considered as a particular stage in its development.

Accordingly, the Hungarian constitutional identiry can also be known from the cultural-historical values of the political community, from its historical constitution[8] and constitutional history, and from the will of

[7] TRIBL, Norbert: *Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben. [The function and applicability of constitutional identity in the supranational space.]* Szeged, Iurisperitus, 2021, intends to offer a comprehensive concept based on (inter alia):
DRINÓCZI, Tímea: *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, in: „*German Law Journal*", Vol. 21. 2020. pp. 105-130. and ROSENFELD, Michel: *The Identity of the Constitutional Subject*, in „*Cardozo Law Review*", Vol 16. 1995, pp. 1049-1109.
8 See explained: EGRESI, Katalin: *Role of the Holy Crown Doctrine and 'Historical Constitution' in the Hungarian Constitutionalism*, in Studia Juridica et Politica Jaurinensia Vol. 1. 2014

the National Assembly (qualified majority of two-thirds of the legislative representatives), which has the constitutional power at any given time. All these constitutional systems and political narratives do not, of course, exist in a vacuum, but in the European Union in particular. Furthermore, it is clear that, although the constitutive power has been manifested several times in the last decade (and in each parliamentary term since the system change in 1989), we can now only judge the current historical state of dialogue and interaction. For example, if, by changing the text of the constitution, the representatives of the constituent power wish to influence the values of society, we cannot necessarily document the achievement of this influence (for the time being).

References of the Hungarian constitution-making power – constitutional identity and other influences

However, there is already sufficient data to examine the argumentation of Hungarian constitution-making and constitutional amendments in this field of discourse; since 2011, with the adoption of the Fundamental Law and its amendments, when and to what extent the constitution-maker has referred to certain possible sources or subjects of constitutional identity:

the national, political community,[9] or

historical or other manifestations of constitutionalism,[10] or

the constitutive power's own political will, or

the 'external' participants in the dialogue[11] (mainly the Hungarian Constitutional Court, international law or the EU).

From the frequency and coherence of the references in the explanatory parts of the parliamentary papers[12], we can expect to discover whether there is an obvious trend and a discernible subject of Hungarian

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[9] The concept of the political community is discussed by: PAP, András László: *Who are "we, the people"? Biases and preferences in the Hungarian Fundamental Law.* Available at: http://real.mtak.hu/18617/1/pap_rome_preferences_fin.pdf (cited: 31/07/2023.); and SMUK, Péter: *The Concept of the Nation in the Fundamental Law of Hungary* in „*Politeja*" Vol. 12. 2015. No. 8. pp. 93-110.
[10] The applicability of the historical constitution in modern adjudication is rather controversial, see for the debate: GÁRDOS-OROSZ, Fruzsina: *The reference to constitutional traditions in populist constitutionalism – The case of Hungary,* in "*Hungarian Journal of Legal Studies*" Vol. 1. 2021. pp. 23-51.; SULYOK, Tamás– DELI, Gergely: *A magyar nemzeti identitás az Alkotmánybíróság gyakorlatában. [Hungarian national identity in the Constitutional Court's practice]*, in: „Alkotmánybírósági Szemle" Vol.1. 2019. pp. 57-59.; SZENTE, Zoltán: *A historizáló alkotmányozás problémái - a történeti alkotmány és a Szent Korona az új Alaptörvényben [Problems of the quasi historical approach - The Historical constitution and the Holy Crown in the Fundamental Law]*, in „*Közjogi Szemle*" Vol.4. 2011. pp. 1–13.
[11] DRINÓCZI, Tímea: *Constitutional Dialogue and Legislation on Parliamentary Election in Hungary – 2010-2014,* in"Osteuropa Recht" Vol.4. 2014. pp. 452-467.
[12] We will only look at the written reasons for the legislative (constitution-making) proposals submitted, and not the arguments that have been made in parliamentary debates or public (media) discourse. Source: Parliament's database, available at: www.parlament.hu (cited: 31/07/2022)

constitutional identity. In the following overview, we have collected striking quotations from the justifications of the constitutional power - but for the purposes of this paper, we focus only on the references to the subjects of the identity discourse.

a) Reference to the nation and political community

Fundamental Law, 2011	"The National Avowal[13], which, similarly to our national prayer, is a creed, a testimony to the values that unite us, the members of the Hungarian nation." "The National Avowal, which defines the Fundamental Law as the expression of the will of the nation and which can be most personally experienced by the people..." "Hungary considers the Hungarian nation as a nation united"
Third Amendment, 2012	"According to the Fundamental Law, arable land and forests are part of the common heritage of the Hungarian nation"
Seventh Amendment, 2018	"In the parliamentary elections on 8 April, the Hungarian people once again made it clear that they do not want Hungary to become an immigrant[14] country." "The definition of the national identity of a Member State is, by definition, the most fundamental, inalienable right of the State and its constituent political community, which is primarily, but not exclusively, reflected in its Constitution. It is therefore appropriate that the political community of a State, through the constitutive power, should enshrine in its constitution certain elements of its national identity."
Ninth Amendment, 2020	"the Fundamental Law is a living framework that expresses the will of the nation" "It ensures that children are educated according to values based on Hungary's constitutional identity and Christian culture, creating a clear basis for all members of the rising generation to learn about and protect Hungary's Hungarian identity, sovereignty and the role of Christianity in preserving the nation."

[13] FEKETE, Balázs: *The National Avowal: More than a Conventional Preamble to a Constitution.* In: *Challenges and Pitfalls in the Recent Hungarian Constitutional Development.* [In:] Eds. Zoltán Szente, Fanni Mandák and Zsuzsanna Fejes. Éditions L'Harmattan, 2015, Paris, pp. 11-24.

[14] Available at: https://miniszterelnok.hu/hungary-will-never-be-an-immigrant-country/ (cited:31/07/2023)

Tenth Amendment, 2022	"...to protect the Hungarian people to the fullest extent possible from adverse economic impacts"
Eleventh Amendment, 2022	"...the use of the word *'vármegye'* strengthens the idea of national unity, the preservation of our common historical memories and the national character of Hungarian democracy."

b) Historical or other forms of constitution(ality)

Fundamental Law, 2011	"...fits into the thousand year-old history of the Hungarian historical constitution" "...neither the last parry-state parliament nor the National Round Table has the legitimacy to draw up a consolidated constitution for a democratic Hungary." "Act XX of 1949 suffers from several disabilities." "...the second sentence of the Twelve Points of the 1848 Revolution. Through this sentence, which is also a message for today, the text of the Fundamental Law is linked to the great moment in our history, 15 March 1848."
Transitional Provisions, 2011	"Hungary's new Fundamental Law opens a new chapter in history after decades of moral decay in the twentieth century"
Fourth Amendment, 2013	"The aim of the proposal is to strengthen the protection of the family as a fundamental institution of society at the level of the constitution, in accordance with historical tradition." "Parliament, as the constitution-making power, makes it clear that the Constitutional Court is not bound by its decisions adopted under the previous Constitution."
Seventh Amendment, 2018	"In line with Hungarian historical traditions, the possibility of setting up the Supreme Administrative Court with the same legal status as the Curia is once again open."

	"The separation of the administrative judiciary, in particular the existence of an independent Supreme Administrative Court, is an achievement of our historical constitution."
Ninth Amendment, 2020	"The constitutional will expressed in the National Avowal provides the provisions of the Constitution with a common set of values"
Eleventh Amendment, 2022	"Restoring the use of the word *vármegye* to the present-day Hungarian legal order will ensure that the constitutional traditions of the thousand-year-old Hungarian statehood will continue to live on in this form. ... By using the term *vármegye* it can be better emphasised that the central idea behind the organisation and structure of the Hungarian state is the defence of national sovereignty and, through it, the cornerstones of European civilisation. ... In view of the achievements of our historical constitution, the amendment changes the name of the counties *[megye]* to castle-counties *[vármegye]*."

c) When the constituent power declares its own or political determination

Fundamental Law, 2011	"...in twenty years, the Hungarian political elite has failed to adopt a constitution worthy of the Hungarian nation"
Transitional Provisions, 2011	"The Proposal contains the Transitional Provisions of the Fundamental Law of Hungary, which the Parliament, in accordance with point 3 of the Final Provisions of the Fundamental Law, adopts as a constitutive power."
First Amendment, 2012	"The decision [...] whether to adopt these transitional provisions formally annexed to the new Constitution or to adopt them separately, without burdening the basic document, in view of their transitional nature, was also a matter for the free discretion of the constitutive power."

Second Amendment, 2012	n. a.[15]
Fourth Amendment, 2013	"The National Assembly, as constitutive power, exercised this discretion when it divided up the Fundamental Law as described above, while at the same time fully complying with the mandatory provisions of the Constitution and the Fundamental Law for the drafting of the Fundamental Law and the Transitional Provisions: it adopted the two documents in its constitutive capacity, with the vote of two-thirds of all the Members of Parliament."
Sixth Amendment, 2016	"Parliament as a constitution-making power..."
Seventh Amendment, 2018	"It is the duty of the National Assembly - as the supreme body of people's representation - to enforce the will of the Hungarian people."
Ninth Amendment, 2020	"The constant threat to concepts derived from the order of Creation and, in some cases, the attempt to formulate them in a way that contradicts the original content, raises doubts as to whether the interests, rights and well-being of future generations can be protected in the context of the values of the Fundamental Law."
Tenth Amendment, 2022	"Our country must ensure that we can develop effective, rapid national responses."
Eleventh Amendment, 2022	"conducting the electoral procedures at the same time results in significant cost savings"

[15] In the absence of any other explicit reference, it can be considered as a political decision of the Parliament.

d) Reference to 'external' participants and factors in the constitutional dialogue

Fundamental Law, 2011	"The application of Law XX of 1949 [...] required frequent interpretation by the Constitutional Court"
Fourth Amendment, 2013	"The Constitutional Court annulled several provisions of the Transitional Provisions on formal grounds of invalidity in its Decision 45/2012 (XII. 29.) AB." "The previous case law of the Constitutional Court has made it clear that effective action against hate speech cannot be ensured at the level of the law, and therefore it is justified to provide a basis for such action by amending the Fundamental Law." "In this context, the Proposal also took into account the fact that several elements of previous Constitutional Court case law had already been elevared to the level of Fundamental Law by the constitution-making power."[16]
Fifth Amendment, 2013	"As a result of the decision 12/2013 (V. 24.) of the Constitutional Court, the period of debates on the new Fundamental Law has come to an end in Hungary. Accordingly, it is appropriate that the constitutional debates should be concluded in accordance with our international obligations. Therefore, in order to ensure that certain constitutional issues can no longer be used as a pretext for attacks against Hungary, the Government proposes a different solution, not deviating from its original intentions, in order to ensure the country's economic stability and the reduction of public debt, in line with our obligations of European cooperation." "In response to the European Commission's requesr, the Government proposes to abolish the possibiliry of transferring cases between courts."
Sixth Amendment, 2016	"Following the adoption of the Fundamental Law, the security environment in the transatlantic region, in Europe and in Hungary has changed radically."

[16] However, there is no reference to this in the specific cases of *„constitutionalisation”*. This ”*pattern of 'constitutionalisation' of provisions of ordinary law excludes the possibility of review by the Constitutional Court*” argues the Venice Commission in CDL-AD(2013)012, 81.; and the way *„restoring the supremacy of the elected parliament”* is introduced by Stumpf (2014) p. 299–317.

Seventh Amendment, 2018	"The mass immigration and the activities of pro-immigration forces in Europe threaten Hungary's national sovereignty. Brussels [...] threatens the security of our country and would forever change the population and culture of Hungary." "The expression of the general right to privacy in the Fundamental Law provides the highest level of legal recognition, which also corresponds to the protection guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union." "In its Decision No 13/2016 (VII.18.) the Constitutional Court emphasised..." "The Constitutional Court also concluded in its Decision 1/2017 (I. 17.) ..." "the decision of another State or a supranational organisation may not result in the resettlement of persons belonging to a foreign population."
Eighth Amendment, 2019	"Both in the domestic professional circles and in the European Union, the project has been severely criticised. [...] The present proposal would, in line with the government's statements, restore the paragraphs of the Fundamental Law relating to the courts to the situation prior to the Seventh Amendment to the Fundamental Law."
Ninth Amendment, 2020	"However, the new, modern ideological processes in the Western world, which raise doubts about the gender identity of men and women, threaten children's right to healthy development as enshrined in the Fundamental Law." "The proposal defines the concept of public money in order to replace the divergent approaches in the practice of constitutional bodies by a uniform one." "The framework for the interpretation is provided by Act XLIII of 1913 and the related public international law precedents."
Tenth Amendment, 2022	"The war between Russia and Ukraine has created a humanitarian situation not witnessed since the Second World War and has changed the economic situation in Europe."

Conclusions

In its 2011 manifestation, the constituent power used the term nation and the reference to the nation extensively both in the text of the constitution and in the justification, which is a significant indication of the need for a source of legitimacy for the constitution-making process, but also of the intention to designate the subject of the constitution-making process. Although this was accompanied by a formal legal reference (to the competence of the National Assembly as the constitutive power), at the historic moment of constitution-making, the government majority in the National Assembly sought to ensure the widest and deepest legitimacy for the opening of a 'new chapter in history' by referring to the political community. The reference to the historical constitution and to tradition is similarly strong in the 2011-12 manifestations. This returns later only in one strong case, the creation of the Supreme Administrative Court. The latter is severely degraded by the fact that, although it is called an achievement of our historic constitution by the drafter (and should have been given special protection as such), it is simply removed from the constitutional text by the Eighth Amendment, in the midst of domestic and especially European criticism. The restoration of the name 'castle-county' in 2022 is also intended to take account of the historic constitutional foundations.

As the series of amendments progresses, following the re-election of the (same) governing political majority, the references of the subject of constitution-making to other actors in the constitutional dialogue multiply. First to the decisions of the Constitutional Court, and then increasingly to influences outside the Hungarian political system (the European Union, the security situation, Western ideological trends). It can be observed that, while references to the practice of the Constitutional Court are generally more precise, international references are more political in nature. However, references to the practice of the Constitutional Court are generally absent in cases where the Constitutional Court has annulled certain legal provisions by a previous decision and the qualified majority in Parliament has introduced certain provisions into the Fundamental Law in response to this.

In recent manifestations of the constituent power, the reference to national values and the values of the political community seems to be growing (and even exceeding the intensity seen when the Fundamental Law was drafted). Even if the definition of the political community and the democratic legitimacy based on it have a number of problems of principle. There are also elements here that could be said to be specific to the constitution-maker's desire to preserve values in the constitutional text, and thus to make them part of the constitutional identity, in contrast to the tendencies emerging in the political community/society.

Whether these efforts can really be 'value-savers', and what impact[17] they have on society, is a matter for later analysis.

[17] *„Is the Fundamental Law worthy of the Christian heritage bequeathed to us? The Fundamental Law has taken up this ambition, but it does not undertake the impossible. It reflects the values of society, from which the law cannot permanently depart on serious issues. It is capable of anchoring a consensus in the face of threats, but it is not capable of replacing the missing consensus. Legal propositions behind which consensus disappears cannot be sustained for long. The real question, therefore, is whether there is, can be, and can be renewed, a public consensus behind the values indicated by the Fundamental Law..."* SCHANDA, Balázs: *Az Alaptörvény 50. jubileumának esélye. Szent István öröksége és az Alaptörvény. [A chance to celebrate the 50th anniversary of the Fundamental Law. The legacy of Saint Stephen and the Fundamental Law.]*, in: *„Iustum Aequum Salutare"*, Vol.4. 2016. p. 71, 73.

DEMOKRATIEINTERPRETIERUNG AUF DER EBENE DER EU UND DIE RECHTSSCHÖPFENDE TÄTIGKEIT VON EUGH

HEGEDŐS, Soma[18]

Einleitung

A: Die Zielsetzung der Untersuchung

Eine Kardinalkritik in Bezug auf die Funktionsweise der EU ist, dass die EU eine „antidemokratische" Institution sei, sowie, dass die Bürgerschaft der Mitgliedstaaten ihre Entscheidungen kaum beeinflussen kann. Von diesem kritischen Aspekt - als Leirfrage - ausgehend wird die Beziehung zwischen Demokratie und der EU unten – umfassend - untersucht. Eine zenrrale – aber nicht alleinige – Aspekt dieser Untersuchung ist die genaue Betrachtung des Status und der Kompetenzen des EuGH und zwar vor allem aus zweierlei Gründen: Zum einen ist ein entscheidender Punkt der Kritiken die rechtsschöpfende Tätigkeit des EuGH seit den Sechzigern bis heute ohne ausreichende (demokratische) Legitimation. Zum anderen kann man mit der Prüfung seiner rechtsfortbildenden Tätigkeit und seinen zur Rechtsschöpfung führenden Urteilsfeststellungen auch die Problematik der Demokratie und der EU im Zeitalter der Globalisierung besser begreifen. In den ersten zwei Kapiteln werden – teilweise fokusierend auf die Probleme der wirtschaftlichen Globalisierung und Integration - noch weitere spezielle Demokratiedilemmata dargestellt, damit man über die Legitimation der Funktionsweise der EU ein vollständigeres Bild bekommen und weitere Prüfschritte zur Untersuchung der Demokratieproblematik der EU unternehmen kann.

B. Die Grundzüge der Demokratie-Interpretierung in der modernen Staatstheorie

Zahlreiche moderne Theoretiker - beispielsweise der ungarische Gyula Moór[19] - sehen die Demokratie nicht nur als einen bloßen politikwissenschaftlichen Begriff, oder eine Organisationsmethode von Gewalt an, sondern als einen komplexeren Ausdruck, der auch die gesamtgesellschaftlichen Beziehungen erklären kann. Die Theorien, die sich auf den pluralistischen Charakter der Gesellschaften und des politischen Spektrum bzw. auf die Elitebildung fokusieren, haben auf viele kritische Punkte hingewiesen und in vielen Fällen die Durchfürbarkeit der Demokratie infragegestellt. Nach ihren Thesen werden gewisse enge

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[18] Jurist, Masterstudent an der Universität zu Köln (Staatsrecht mit Bezügen zum Europa-, und Völkerrecht

[19] Vgl. Gyula Moór: A demokrácia örvényei. In: Erdei-Fischer-Horváth: A demokrácia. Egyetemi Nyomda, Budapest, 1945, s. 96. ff.

Elitegruppierungen – früher oder später – unmittelbaren Einfluss auf die politischen Entscheidungen haben. Hier ist die Demokratie-Vorstellung von Joseph Schumpeter zu erwähnen, in deren Mittelpunkt der Konkurrenzkampf und der marktwirtschaftliche Wettbewerb stehen. Schumpeter sieht das von den Elitetheorien beleuchtete Problem darin so aufgelöst, dass die um die politische Macht kämpfenden Eliten auch für die Voten der Einzelnen kämpfen müssen. Und die Individuen können eben durch diesen um ihre Voten durchgeführten Wettbewerb („Konkurrenzkampf") Einfluss auf das öffentlichen Leben erwerben.[20] Hans Kelsen hat es so gehalten, dass diese Konfrontation der Gerichte sowohl gegenüber der Gesetzgebung als auch gegenüber der Regierung nicht stichhaltig sei. Die strenge Trennung der Gewalten schränkt eben die Erfüllbarkeit des Volkswillens ein.[21] Laut Giovanni Sartori sollte die Volksherrschaft nach wie vor im Fokus einer demokratischen Staatsorganisation stehen. D. h., man muss auf solche Fragen eine sinnvolle Antwort geben, wie: Was ist ein Volk überhaupt und wie kann das Volk den entscheidenden Einfluss auf die Herrschaft behalten?[22] In der Auffassung von Jürgen Habermas kann die Lösung dieser Probleme durch die Institution eines Parlaments verwirklicht werden.[23] In der Demokratie-Interpretation von Habermas ist wesentlich, dass die zivile Gesellschaft eine tatsächliche Kontrolle über die politische Sphäre und Verwaltung ausübt und das Parlament – als Teil der Zivilgesellschaft - eine zentrale Rolle in diesem Kontrollmechanismus spielt.

Diese oben genannten Beispiele zeigen, dass ein lebhafter Diskurs über die Interpretationsmöglichkeit und die Durchführbarkeit von Demokratie stattgefunden hat. Das „Sortiment" der Vorstellungen über die institutionelle Realisation der Demokratie „reicht von rousseauistischen über elitenbezogene und pluralistische sowie partizipationsorientierte Demokratiemodelle bis hin zu den Spielarten marxistischer Staatstheorie", allerdings darf das Erfordernis der Demokratie nicht ins „staatstheoretische Ungewisse führen" – stellt Winfried Veil fest.[24] Daraus folgt die Frage, was jene festen Gedankengrundlagen sind, aus denen ein demokratisches Institutionsgefüge konfiguriert werden kann, das auch über rechtliche Bindekraft verfügt. Laut Veil ist ein entscheidender Punkt, dass das Volk „der Träger der Herrschaft" sein und bleiben solle. Zwar kann das Volk – technisch – tatsächlich nur durch Institutionen die Herrschaft ausüben aber die Tätigkeiten und die Beschlüsse dieser Institutionen müssen in irgendeiner Weise auf das Volk zurückgeführt werden. „Der Grundsatz der Volkssouveränität schreibt also nicht eine ganz bestimmte Ausgestaltung der Staatsorganisation vor. Vielmehr sind die legitimationsstiftenden Komponenten Bausteine, die in ihrer

[20] Vgl. Schumpeter, Joseph A.: Kapitalismus, Sozialismus und Demokratie. A. Francke Verlag, Tübingen, 2018. S. 365. ff.
[21] Ehs, Tamara: Die neue Machtverteilung. Von der Demo- zur Juristokratie? In.: Momentum Quartely – Zeitschrift für sozialen Fortschritt, 2012/4., S. 237.
[22] Vgl. Sartori, Giovanni: Demokratietheorie.Wissenschaftliche Buchg., Darmstadt, 1992. 16. ff.
[23] Vgl. Jürgen Habermas: Faktizität und Geltung. Frankfurt am Main, Suhrkamp, 1992. S. 430. ff.
[24] Veil, Winfried: Volkssouveränität und Völkersouveränität in der EU. Nomos, Baden-Baden, 2007., 43.

Zusammensetzung variiert werden können, solange ein Mindestlegitimationsniveau nicht unterschritten wird." – schreibt Veil. Also ist das wichtigste innere Prinzip der modernen Verfassungsdemokratie die Volkssouveränität, ergänzend mit der Auffassung über den Gesellschaftsvertrag, die Legitimation der Herrschaft, die Volksvertretung und die Gewaltenteilung, die miteinander in einen engen Zusammenhang gestellt werden können. Die Grundlage dieses Gefüges ist das Individuum, das auf die von Natur aus gegebene Freiheit verzichtet, um – durch die Wirkungskraft des Gesellschaftsvertrages – bürgerliche Freiheiten bekommen zu können. Auf diesen bürgerliche Freiheit besitzenden Individuen wird der Staat aufgrund ihrer Selbstbestimmung und Selbstverwaltung errichtet. Das herausragende Moment der Selbstbestimmung und Selbstverwaltung ist die Gesetzgebung.

Die Gesetzgebung ist nicht nur wegen ihres Ergebnises d. h. wegen der Entscheidung bzw. der Urteile wesentlich. Immanenterweise präsentiert sie die Freiheit und Gleichheit der Individuen. Obgleich die Individuen wirklich nicht gleich sind, aber ihre Stellungnahmen, die sie im Laufe des Entscheidungsfindungsprozeßes eingenommen haben, d.h durch die Institution des Wählens macht sie doch gleich. Die praktische Art der Entscheidungsfindung ist das Mehrheitsprinzip, sowie seine Varianten (qualifizierte mehrheitliche Quoten).[25] Das Mehrheitsprinzip „bietet die größte Chance, dass die Auffassungen möglichst vieler auch zur Geltung kommen und auch die verhältnismäßig größte Wahrscheinlichkeit für Vernunft und Gerechtigkeit." – schreibt Veil.[26]

Allerdings ist ein wichtiger, praktischer Aspekt, dass die Gesetzgebung in den parlamentarischen, repräsentativen Demokratien durch die Parlamente geschehen kann. Die Einzelnen nehmen – zumindest in den meisten Fällen – nicht unmittelbar an der Gesetzgebung teil, sondern an der Auswahl der Akteure der Legislative. Mit der Formulierung von Veil hält man die liberal-demokratischen Theorien über die Legitimation der Wahlen für „den legitimierenden Urschöpferakt". Im Endeffekt ist es der Siedepunkt der Volkssouveränität. Veil sieht die Relevanz des Parlamentes darin, dass es zum einen das Ergebnis des Schöpferakts des Einzelnen (Legitimationsobjekt), zum anderen das Fundament aller sonstigen staatlichen Institutionen und Rechtsnormen ist (Legitimationssubjekt). Letztere stammt aus den ihren allgemeinen Kompetenzen folgenden Wahl-, Kontroll-, und Rechtserschaffungsbefugnissen der Parlamente. Trotzdem sind die Parlamentswahlen und das Stimmrecht des Einzelnen kein solches Mittel, das die Demokratie allein abzusichern vermag.[27]

[25] Vgl. dazu Veil a.a.O., S. 45. Ff. und 62 ff.
[26] Veil a.a.O., 50.
[27] Vgl. dazu Veil a.a.o., S. 127. ff.

Demokratiedilemma auf der Ebene der EU

A. Das Europäische Parlament und die europäischen Völker

Veil – die Situation vor dem in Kraft treten der Lissabon-Vertäge prüfend – sieht das so, dass die Realisierung der Demokratie auf EU-Ebene unter den heutigen gesellschaftlichen und politischen Umständen keineswegs möglich sei. Genauer gesagt, zweifelt er daran, ob überhaupt die Möglichkeit eines richtigen europäischen repräsentativen Systems vorliegen könne. „(…) findet demokratische Repräsentation durch das Europäische Parlament nicht statt. Repräsentation erfordert nämlich mehr als die bloße Anwendung parlamentarischer Mehrheitsregeln."[28] Das Problem besteht einerseits im Mangel an einem europäischen „Demos", anderseits ist auch das Europäische Parlament nicht dazu geeignet, das Demos zu repräsentieren. Die europäischen Völker sind nicht einheitlich, weder kulturell, noch sprachlich noch politisch, so kann der Diskurs, der zum Funktionieren der Demokratie unabdingbar notwendig ist, nicht stattfinden. Es fehlt im Wesentlichen an der zur demokratischen Meinungsbildung wichtigen „Bühne", zur Diskussion der Angelegenheiten auf Unionsebene. Die Spannung zwischen dem Europäischen Parlament und der Demokratie entsteht dadurch, dass die Kompetenzen des Europäischen Parlaments sehr begrenzt innerhalb der EU sind. Aus diesem Grund kann das EP, den vom Demos durch die Wahlen ausgedrückten Volkswillen nur eingeschränkt zur Geltung bringen.

Das andere grundlegende Problem ist der Verlauf der Europawahlen. Das Ergebnis der Stimmabgabe spiegelt mehr die inneren Beziehungen der einzelnen Staaten, den Zustand „Regierung-Opposition" – wieder, als das Ergebnis jener gesellschaftlichen-politischen Dispute, die über die gemeinsamen „europäischen" Themen stattgefunden hätten – erörtert Veil.[29] Ein weiteres Dilemma ist die demokratische Legitimation der Institutionen und Handlungen der EU, genauer gesagt deren Mangels an Legitimation. Da die Subjekte des Völkerrechtes in erster Linie die Staaten sind und die demokratische Legitimation von den von Völkern begründeten Staaten abgeleitet werden kann, soll die EU als spezieller sui generis Staatenverbund eine Parallelität zwischen ihren Handlungen und dem Volkswillen aufweisen. Allerdings kann diese Parallelität in Bezug auf alle Hauptorgane der EU nur schwach oder gar nicht nachgewiesen werden, meine Veil. Zwar stellt Veil fest, dass die demokratische Legitimation nicht eine „Alles oder Nichts" Frage sei, vielmehr eine „mehr oder weniger" Relation, trotzdem bestreitet er, ob überhaupt der akzeptabele Mindestgrad der Legitimation jeglicher EU-Organe noch vorhanden sei.[30] Umsonst kann man die institutionellen Grundlagen der EU mit völkerrechtlichen Verträgen, sowie Volksabstimmungen

[28] Veil a.a.o., S 157.
[29] Vgl. dazu Veil a.a.O., S. 133. ff.
[30] Vgl. dazu Veil a.a.O., S. 272 ff.

legitimieren, wenn die vertraglichen Fundamente nicht mehr mit dem tatsächlichen politischen Betrieb der EU vereinbart werden können. „Das von den Gemeinschaftsverträgen errichtete politische System deckt aber die laufende Willensbildung der Gemeinschaftsorgane in legitimatorischer Hinsicht nicht mehr ab.” – schreibt Veil.[31]

B. *Demokratieverflechtung*

Das sogenannte Lissabon-Urteil des deutschen BVerfG hat versucht, auf diese Frage eine Antwort zu geben. Ein Bundestagabgeordneter hat 2008 eine Verfassungsbeschwerde gegen den von Deutschland ratifizierten Vertrag von Lissabon, bzw. das Bundesgesetz zum Vertrag von Lissabon eingereicht. Nach der Verfassungsbeschwerde wird der staatliche Charakter Deutschlands mit dem Vertrag von Lissabon gefährdet, zudem – unter anderem – wurde die Verletzung des Demokratiegebotes und das eigentliche Fehlen der demokratischen Legitimation der EU moniert. Das BVerfG hat in seiner besonders detaillierten Begründung dargelegt, dass auch der Vertrag von Lissabon das Problem des Demokratiedefizites nicht lösen kann. Paradoxerweise wurde zugleich gesagt, dass die EU keine „Demokratie-Fähigkeit” besitzt und, darüber hinausgehend, darf sie keinen höheren Grad der Demokratie disponieren, als ihre Mitgliedstaaten. Nach Marcus Höreth als eine Folgerung des Urteiles wird die Problematik der sog. Demokratieverflechtung genannt. Laut Begründung bleiben die Subjekte der demokratischen Legitimation weiterhin die Völker der Mitgliedstaaten. Die EU kann von der Legitimation durch die mitgliedstaatlichen parlamentarischen Demokratien nicht abrücken, aus diesem Grund – und aus der Gebundenheit an das deutsche Verfassungsrecht - folgt, dass der Wirkungskreis der mitgliedstaatlichen Parlamente auf keinen Fall vollständig ausgehöhlt werden darf. Nach der Auffassung des deutschen BVerfGes ist die Demokratie ein solches Staatssystem, in dem der Mehrheitswille von den Parlamenten, die durch die auf den gleichen Stimmrechten beruhenden Wahlen gewählt werden, in Form der Gesetzgebung und der Regierungsbildung kontinuierlich zur Geltung kommen kann. Der Rahmen dieses Gefüges wird dadurch gegeben, dass es vor allem ein „Volk” gibt, sowie eine öffentliche Publizität, die für das Volk die Diskussionen und den Wettbewerb zwischen der Regierung und der Opposition transparent abbilden kann. Das Parlament kommt mit der mehrheitlichen Entscheidung der Wahlen zustande, was vor allem den Wahlwillen des Bürgertums abbildet und die Kapazität hat, den Volkswillen zu offenbaren. Das deutsche BVerfG hat in seiner Demokratieauffassung auf die parlamentarische Souveränität fokusiert und ausgesagt, dass das Institutionssystem der EU diesen Anforderungen nicht entspricht, weil die „außerrechtlichen

[31] Veil a.a.O., S. 273.

Voraussetzungen" allzu unterentwickelt sind. Aus diesem Grund kann man die Demokratie auf EU-Ebene nicht mit der nationalstaatlichen Stufe gleichsetzen. – führt Höreth aus.[32]

C. *Wirtschaftliche Globalisierung und Demokratie*

Auch die Machtstrukturen verändern sich mit der Europäisierung der Wirtschaft und der Gesellschaften, wo die Machtausübung zum „Regieren" wird, das Regieren entterritorialisiert wird, meint Richard Münch. Die Durchführbarkeit der Demokratie erschwert sich mit der Relativierung der Machtausübung über konkretes Gebiet und konkretes Volk. Es gibt im Zentrum der Politik nicht mehr den demokratischen Willen, der sich durch die politischen Dispute ausformt, sondern die Entscheidungen werden vom Wettbewerb, der den Sachverstand besitzenden Fachinstitutionen determiniert. Dementsprechend – nach Münch – vollzieht der EuGH das Programm der europäischen Liberalisierung und Individualisierung, d. h. der Integration, deren zentraler Handlungsbeauftragter er ist.[33] „Die Institutionalisierung des transnationalen europäischen Rechtsraumes ist in erheblichem Umfang das Werk des Europäischen Gerichtshofes." – meint Münch. [34]

Wegen der steigenden Bedeutung der der EU ähnlichen internationalen wirtschaftlichen Kooperationen fragen sich die Wissenschaftler immer mehr über die Möglichkeiten der Durchsetzbarkeit der Demokratie auf internationaler Ebene, „jenseits des Staates". Drei wichtige Aspekte sind hier von grosser Bedeutung: Der Mangel an einer zentralen Macht (Regierung) und des Parlamentes und die transnationale Transformation des öffentlichen Diskurses. Diese drei Eckpunkte scheinen auch im Bezug auf die demokratische Qualität der EU entscheidend zu sein, die unter den wichtigsten internationalen Zusammenschlüssen – wegen ihrer breiten Aufgabenbereiche und politischen Einflüsse – den grössten Demokratiebedarf hat.

Richterrecht, Juristokratie, Weltkonstitutionalisierung

A. *Richterrecht: die politische Aktivismus des Richters?*

Die Problematik des Richterrechts ist eine Achillesferse für die demokratische Handlungsweise der unterschiedlichen richterlichen Foren (siehe z. B.: bei Dworkin). Die Tätigkeit der Verfassungsgerichte,

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[32] Marcus Höreth: Die Demokratieverflechtungsfalle – Warum die EU nach dem Lissabon-Urteil demokratisch defizitär bleiben muss. In: Lhotta – Ketelhut – Schöne: Das Lissabon-Urteil. Springer Fachmedien, Wiesbaden, 2013., S 48 ff.

[33] Vgl. Münch a.a.O., S. 108.

[34] Vgl. Dingwerth, Klaus - Blauberger, Michael - Schneider, Christian: Postnationale Demokratie. VS Verlag für Sozialwissenschaften / Springer Fachmedien Wiesbaden GmbH, Wiesbaden, 2011. S. 23. ff. und 204. ff.

sowie der internationalen Gerichtshöfe wurde durch die richterliche „Rechtsschöpfung" nunmehr so wesentlich, dass man über ein spezielles Phänomen der sog. „juristokratischen" Tendenzen sprechen kann.

Das Richterrecht ist ein altes Problem für die Rechts, - und Staatstheorie. Für Friedrich Carl von Savigny, der eine wichtige Rolle in der Deutung des Richterrechtes gespielt hatte, wurzelt das Recht im „Volksgeist", als das Ergebnis einer geschichtlichen Entwicklung. Der politische Aktivismus richtet sich nach der Auffassung von Philipp Heck letzendlich auf die Beeinflussung der Gesetzgebung. Also in dem Fall, wenn die Rechtsbildung durch die richterliche Rechtssprechung geschieht, wird dem Richter quasi eine „politische Funktion" verliehen. Dies kann für die moderne Demokratien wichtige Grundprinzipien verletzen; das sind die Konzeptionen über die Rechtssicherheit/Rechtstaatlichkeit und das mit der Rechtsstaatsidee verbundene „geschriebene Recht" bzw. „kodifizierte Recht" und die Idee der Gewaltenteilung. Obwohl die Ursachen der Abweichungen grundsätzlich historisch sind, kann der wesentliche „unüberwindbare" Unterschied zwischen den „common law" und „civil law" Rechtskreisen immer Sache von theoretischen Disputen sein.[35] „(…) evolution of both a codified and a judge made system of law is characterized by a constant interplay between legislative and judicial action." – schreibt Sauveplanne[36], der meint, "a system of law must be created and developed by the interaction between legislature and judiciary."[37]

Es gibt unterschiedliche Ansichten, die Substanz des Richterrechtes zu bestimmen. Der Richter interpretiert das Recht nach eigenen Anschauungen praktisch gegen das Gesetz. Mit den Wörtern Bernd Rüthers „der Richter stellt sich in einen Gegensatz zu gesetzlichen Wertungen". Die verbreitetere Ansicht allerdings ist, dass das Richterrecht nichts anderes ist, als Rechtsfortbildung in einer „rechtsleeren" Domäne. Diese sind „unentdeckte Räume", die vom Gesetz noch nicht geregelt wurden. Eine dritte „weiterentwickelte" Auffassung über das Richterrecht ist, wenn der Richter die Lücken mit Wertungen ausfüllen soll. Zum Beispiel im Fall der Generalkauseln. Mit dieser Ansicht verwandt ist der vierte Typ: ein Begriff, der unterschiedliche Bedeutungen (Inhalt) haben könnte und daher vom Richter konkretisiert wird.[38]

B. *Richterrechttypologie und Lückenproblematik*

Das Richterrecht bildet sich in allen Rechtsordnungen anders heraus und ist von anderer Bedeutung. In den zwei, für die EU so wichtigen Rechtsordnungen, in der französischen und deutschen gibt es Diskrepanzen

[35] Vgl. Rüthers, Bernd: Die unbegrenzte Auslegung. Mohr Siebeck, Tübingen, 2017., S. 1. ff. und 457 ff.; und J.G. Sauveplanne: Codified and judge made law. The Role of Courts and Legislators in Civil and Common Law Systems. North-Holland Publishing Company, Amsterdam, Oxford, New York, 1982.

[36] Sauveplanne a.a.O., S. 25

[37] Sauveplanne a.a.O., S. 28

[38] Vgl. Rüthers dazu a.a.O., S. 458 f.; und vgl. Walter, Kondrad: Rechtsfortbildung durch den EuGH. Duncker & Humblot, Berlin, 2009., S. 41. ff.

im Vergleich im Bezug auf das Richterrecht. Man kann begrifflich das „Interpretieren" von der „Rechtsfortbildung" (Rechtsschöpfung) in der deutschen Rechtstheorie abtrennen. Der grundsätzliche Unterschied ist der „Schöpfercharakter" der Rechtsfortbildung. D. h., der Richter übertritt mit der Rechtsfortbildung die Textrahmen der Rechtsnorm, während er im Fall des Interpretierens nur den Textinhalt erkennt. Die Problematik der Rechtslücke (siehe dazu mehr: II. A.) steht im Zentrum der Rechtsfortbildung, d. h. eine Lücke, die nicht vom Text des geschriebenen Rechts gedeckt ist. Diese Lücken können verschiedenen Typs sein: Einige Lücken sind die Ergebnisse einer bewussten Entscheidung vom Gesetzgeber, der das Ausfüllen der Rechtslücken der richterlichen Rechtssprechung der Legislative überlässt. In anderen Fällen ist die Lückenhaftigkeit der Regelung überhaupt nichr absichtlich. Der Richrer kann die Lücken mit seinen Beschlüssen soz. praeter legem (oder pactum) ausfüllen, in diesem Fall wird die Regelung im Endeffekt vom Richter ergänzt. Die Entscheidung des Richters steht nicht gegen den möglichen Inhalt des Textes, obwohl sie nicht darauf basiert. Der Beschluss geht im Fall der „contra legem (pactum)" Rechtsfortbildung über den Wortlaut des Gesetzes (oder des Vertrages) hinaus, oder steht im konkreten Fall dem Gesetz diametral gegenüber. Sowohl die Rechtsfortbildung, als auch die „Interpretierung" kann in der französischen Rechtsordnung im Rahmen der sog. „Interprétation" stattfinden. Zudem ist ein wesentlicher Unterschied im Vergleich zum deutschen System, wo auch die Interpretierung zur Rechtsschöpfung führen kann. Die Praxis des EuGH fokusiert auf die „Interprétation"-Auffassung, also – wie im französischen Recht – es macht keinen terminologischen Unterschied zwischen den beiden. Allerdings ist eine inhaltliche Distinktion möglich und zwar ist die Trennlinie zwischen der Auslegung und Rechtsfortbildung, dass die Auslegung innerhalb des Rahmens des möglichen Wortsinnes noch zumindest mit einer Sprachfassung „abgedeckt" werden kann. Dagegen entspricht die Rechtsfortbildung semantisch nicht mehr dem Wortsinn, entweder ergänzt sie die vertraglichen Vorschriften, oder die richterliche rechtsschöpfende Tätigkeit kann nicht mehr mit dem Vertragszweck parallelisiert werden. Ernsthafte Kritiken richten sich konkreter auch gegen die richterliche Rechtsetzung des EuGH teilweise auch aus diesem Hinsicht. Nach einigen Stellungnahmen sollten die Grenzen seiner rechtsschöpfende Tätigkeit, bzw. seine speziellen Befugnisse ausdrüklich in den Verträgen bestimmt werden. Man darf daher das „Vertragswerk" des Unionsrechtes nur als unvollständig betrachten und die Rolle des EuGH als „Legislatorgan" nur beschränkt akzeptieren.[39]

C. *Vom Richterrecht zur Juristokratie*

Das Problem ist, dass die Rechtsauslegungbefugnisse der Verfassungsgerichte und der internationalen Gerichte immer stärker mit Skepsis betrachtet werden. Das Richterrecht, das als Ergebnis der richterlichen

[39] Vgl. dazu Walter a.a.O., S. 45 ff. (45-111.) und Mittmann, Patrick: Die Rechtsfortbildung durch den Gerichtshof der Europäischen Gemeinschaften und die Rechtsstellung der Mitgliedstaaten der Europäischen Union. Peter Lang GmbH, Frankfurt am Main, 2000., S. 235-244. und S. 269.

Rechtsauslegung entsteht, erlangt nach einigen kritischen Betrachtungen nahezu so grosse Bedeutung, dass man schon über systemumfassende Veränderungen, d.h. über den Übergang von Demokratie zur Juristokratie, von der Rechtsstaatlichkeit zur sog. juristokratischen Regierungsform sprechen kann. Béla Pokol ungarischer Verfassungsrichter hat diese Tendenz vor allem auf der Ebene der Tätigkeit des Verfassungsgerichtes nachgewiesen. Diese Tendenz hat nach Pokol politische und rechtstheoretische Gründe. Rechtstheoretischer Grund sei zum Beispiel die Rückkehr des weltlichen Naturrechts, sowie die Stärkung der Auffassung über die auf moralphilosopischer Argumentation basierenden Menschenrechte – schreibt Pokol.[40] Man kann unter anderem auch die Ausbreitung der Rechtsauslegungsmöglichkeiten von den Gerichren her klassifizieren, die die srarke Bindung der Rechrssprechung an den Gesetzestexr gelockerr haben. Die Grundlage dieser Wandlung ist, dass die Richter im Laufe der Interpretation nicht mehr das gesucht haben, was die subjektive Absicht der Gesetzgebung gewesen ist, sondern dass was aufgrund der „objektiven Rationalität" Ziel gewesen sein könnte. Eine dritte Seite dieser Veränderung ist die strukturelle Stärkung der Verfassungsgerichte gegenüber den Parlamenren. Die Verfassungsgerichte konnten mit actio popularis, d. h. mit den gegen die Parlamente anwendbaren einem dem Vetorecht ähnlichen Mittel, Entscheidungen der Parlamente revidieren. „Auf diese Weise verwandelt sich die Triple-Struktur der Politik/Staatsverwaltung/Justiz in die doppelte Struktur der durchpolitisierten Justiz (mit dem Verfassungsgericht an der Spitze) und der unterworfenen öffentlichen Verwaltung. Die demokratischen Wahlen und die durch sie entstehende legislative Mehrheit funktionieren nur als legitimierender Schleier über die tatsächliche Machtausübung." – schreibt Pokol.[41]

D. *Juristokratische Tendenzen auf der internationalen Bühne*

Man kann die besondere Bedeutung und die immer stärker werdende Tendenz der richterlichen Rechtsschöpfung auch auf internationaler Ebene wahrnehmen. Von Bogdandy und Venzke meinen, dass die Arbeit der internationalen Gerichte von „internationaler Gerichtsbarkeit" in einfache Streitbeilegungsverfahren umbenannt werden sollte.[42] Der Grund dafür ist, dass diese internationalen richterlichen Foren wirklich mehr Funktionen erfüllen, als nur das Schlichten diverser Streitigkeiten zwischen Staaten. Diese Funktion besteht zum einen darin, dass das Rechtsgefühl, d. h. die normative Kalkulation und das Rechtsbewusstsein der Staaten und der internationalen Organisationen stärker wird.

[40] Vgl. Béla, Pokol: Der juristokratische Staat: die Zerlegung seiner Aspekte. Nemzeti Közszolgálati Egyetem, Working papers on state, Governance and Administration. 2016/11. http://archiv.uni-nke.hu/uploads/media_items/bela-pokol-der-juristokratische-staat-die-zerlegung-seiner-aspekte-von-bela-pokol.original.pdf, S. 18. Ff. (2018. október 12.)

[41] Pokol a.a.O. S. 3.

[42] von Bogdandy, Armin – Venzke, Ingo: „Internationale Streitbeteiligung" oder „internationale Gerichtsbarkeit"? In: Arbeitspapiere, Goethe Universität Frankfurt am Main, 2016/4., http://publikationen.ub.uni-frankfurt.de/frontdoor/index/index/docId/39019 (2018. október 15.)

Zu diesem Thema gehört gleichermaßen, dass die staatlichen Akte aufgrund der Rechtsprechung der internationalen Gerichte nach einem völkerrechtlichen Maßstab überprüft werden und wenn sie dieser Überprüfung standhalten, zugleich legitimiert werden können, beispielsweise dadurch, dass sie den internationalen Standards entsprechen. Das ist die „Kontroll und Legitimation"-Funktion nach von Bogdandy. Die wichtigste Rolle der internationalen Gerichtshöfe ist die Rechtsschöpfung, die mit den zwei anderen, oben genannten Funktionen in einem engen Zusammenhang steht. Zwei Typen der Rechtsschöpfung werden von von Bogdandy unterschieden: Der eine ist die richterliche Rechtsschöpfung in konkreten Streitfällen. Solche ist zum Beispiel die breitere Interpretation des Verbotes der Gewaltanwendung nach Artikel 2. der UNO-Charta im sog. Nicaragua-Urteil vom Internationalen Gerichtshof. Der andere Typ der Rechtsschöpfung ist die systemweite und bewusste Tätigkeit solcher internationalen, meistens „regional tätigen", sowie spezialisierten Gerichte, die das Rechtssystem in der mit Ihnen verbundenen Sphäre mit Prospektivität bestimmen wollen. Beispiele sind dafür gewisse Verfahrensregelungen seitens des Europäischen Gerichtshofes für Menschenrechte – schreibt von Bogdandy.

Tamara Ehs meint, dass diese auf supranationalischer Ebene erscheinenden juristokratischen Tendenzen auch mit der rechtsschöpfenden Tätigkeit des EuGH verbunden sind. Nach Ehs hat zwar der EuGH gegen die Politik das Recht „des letzten Wortes", aber dem EuGH fehlt das demokratische Moment.[43] Ehs stellt fest, dass der EuGH zum einen – innerhalb der EU – ein europäisches Verfassungsrecht schaffen will, zum anderen auch politischen Aktivismus aufzeigt. Die wichtigen Mittel dieses politischen Aktivismus sind die Resolutionen in Vorabentscheidungsverfahren, mit denen der EuGH tief hinter die mitgliedstaatlichen Grenzen reichen kann. Allerdings sollte die Rolle des EuGH auch in den weiteren internationalen Relationen geprüft werden, da das nach Ehs kein alleiniger Darsteller einer weltweiten Verfassungsordnung ist. Solche weiteren „Elemente" sind beispielsweise noch das WTO und IMF. Im Zentrum dieser Weltkonstitutionalisierung steht die Errichtung eines Systems, das auf den modernen neoliberalen Grundlagen der Weltwirtschaft beruht und das gegen die Ordnung der volksstaatlichen Nationalwirtschaften gerichtet ist. Darüber hinaus entspricht es nicht den Prinzipien der demokratischen Repräsentation.

E. EuGH als „konstitutionalisierende Gewalt" und Urteile

Die internationale Fachliteratur – vor allem im Bezug auf die Urteile aus den 1960-70ern - nimmt die Funktion des EuGH auch als supranationale „konstitutionalisierende Gewalt" wahr und denkt überdies

[43] Ehs, Tamara: Die neue Machtverteilung. Von der Demo- zur Juristokratie? Momentum Quartely – Zeitschrift für sozialen Fortschritt, 2012/4., 233-247. https://www.momentum-quarterly.org/ojs2/index.php/momentum/article/view/1669/1333 , 234. (2018. október 15.)

auch über die Notwendigkeit einer „supranationalen Demokratie“ nach.[44] Der Grund dafür ist, dass der Ablauf der rechtlichen Integration mit den öffentlichen demokratischen Debatten und auf den nationalstaatlichen Ebenen laufenden politischen Entscheidungsprozessen nicht vereinbart werden zu können scheint. In diesem Bereich spielt der EuGH auch eine wichtige Rolle in der Verteidigung der Grundrechte („guarantor“ oder guardian of rights“ bei Kelsen) und diese Rolle hat ihm zugleich auch eine politische Funktion verliehen, indem diese – sog. „nebeligen“ - Rechte Konkretisierung bzw. soz. Wertauffüllungen beanspruchen. Ein anderer Grund dafür ist, dass die EU eine komplexe Rechtsordnung aufbauen sollte, da die Gründungsdokumente bedeutende Ziele anvisiert haben und so kann der EuGH als eine „positiv“ gesetzgebende Gewalt aufreten. „The ECJ has been deciding issues of political governance, defining democracy at European and national level, and contributing (…) to the creation of a European demos. Of course, (…) its role is decisively problematic in terms of democratic legitimacy.” – schreibt Hinarejos. Einige wichtige konstitutionalisierende – und auch aus dem Hinblick der Demokratie umstritte - Urteile sind die folgenden: Der EuGH hat 1963 im Fall „Van Gend en Loos“ (C – 26/62) mit dem Prinzip der „unmittelbaren Wirkung“ zugleich auch den Vorrang des Unionsrechtes ausgesagt. Nur ein Jahr später hat er auch über das EU-Recht als über eine „selbständige Rechtsordnung“ disponiert und auch ihre Suprematie wurde „proklamiert“ („Costa/ENEL“ – C – 6/64). Diese Entwicklungen sind daher von grosser praktischen Bedeutung, weil der Gerichtshof sich später im Fall „Simmenthal II.“ (C – 106/77, 1977) dafür ausgesprochen hat, dass auch die nationalen richterlichen Foren unionsrechtswidriges mitgliedsstaatliches Recht für 'nicht anwendbar‘ erklären können. Die Stauder-, und „Internationale Handelsgesellschaft“ - Entscheidungen (C – 29/69, 1969, C – 11/70 1970) waren wegen der „gemeinschaftsrechtlichen“ Konstitutionalisierung der Grundrechte wichtige Anfangspunkte. Demzufolge sollten die fundamentalen Grundrechte vom EuGH geschützt und ein integrierter Teil der allgemeinen Rechtsgrundsätze des Unionsrechtes werden. Abschließend ist es noch sinnvoll, auch die Fälle „Les Verts“ (C – 190/84 1988) und „Opinion 1/1991“ (C - zu erwähnen. Der EuGH hat mit diesen Entscheidungen über eine Gemeinschaft „based on rule of law“ und über die Gründungsverträge als Verfassungschartas formuliert.[45]

[44] Vgl. Christiansen, Thomas- Reh, Christine: Constitutionalizing the European Union. Palgrave Macmillan, Basingstoke, Hampshire, 2009. s. 62. ff.

[45] Vgl. dazu Christiansen – Reh a.a.O., S. 62. ff. (61-82.); und vgl. dazu Alicia Hinarejos a.a.O. , S. 4 ff. und 95 ff.

Die Rechtfertigungsversuche der rechtsschöpfenden Tätigkeit des EuGH

A. Das Kompetenzdilemma des EuGH: „effet utile“ und die Ultra-vires-Handeln

Eines der grössten Dilemmas im Bezug auf den Kompetenzkreis des EuGH, sowie das von ihm geschaffene Richterrecht, ist die Zweiheit der Grenzen und des Zwanges, der auf Rechtsschöpfung gerichteten Tätigkeit des EuGH. „Der EuGH balanciert stets bei seiner Rechtsprechung zwischen Kompetenzgrenze und Kompetenzpflicht (…). Einerseits darf er kompetenzrechtlich nur gewisses Richterrecht schaffen, anderseits ist er aber genau berufen, das Notwendige und Mögliche zu entwickeln." – schreibt Michel darüber.[46] Diese Spannung hängt eng mit der eigenartigen Lückenproblematik des Gemeinschaftsrechts zusammen. In erster Linie stellte sich die Frage der Kompetenzen der souveränen Mitgliedstaaten, ob die Lückenhaftigkeit der neuen europäischen Rechtsordnung nicht absichtlich ist? Die Antwort des EuGH auf diese Frage war u.a. im seinen Costa/ENEL- und van Gend & Loos – Rechtssprüchen angelegt. Sein „nein“ bedeutete, dass das Unionsrecht ein neues komplettes Rechtssystem, sogar „eine neue Völkerrechtsordnung“ ausmachen solle. Zwar ist die Rolle des Integrationsgebotes und seine Auslegunsmittel, die sog. „effet utile“-Formel in der Arbeit des EuGH ziemlich umstritten, sie kann aber ihre Grundkonzeption der Rechtfertigungslogik der richterlichen Rechtsschöpfung gut darstellen. Mit der Anwendung – unter anderem - des effet utile teleologischen Auslegungsprinzipes hat der EuGH nach dem Muster der französischen Conseil d‘Etat versucht, die maximal „nützliche Wirkung“ zu erreichen, um diese selbständige Rechtsordnung ausgestalten zu können. „Moreover, the fact that, within the „schematic effet utile" orientation of the ECJ, the national law surroundings of EC law are not considered may ultimately lead to the paradoxical result that the combined application of EC and national law in a given specific case does not promote the effet utile of the applicable European legislation." – schreibt Schmid über die andere Seite dieser Problematik.[47] Der Zwang zur Rechtsentwicklung des EuGH folgt vor allem aus der Aufgabe der Rechtsauslegung und Rechtsanwendung, die ihm von den Gründungsverträgen als Verpflichtungen vorgeschrieben sind. D. h., die Schaffung des Richterrechtes ist in gewissen Fällen ausdrücklich notwendig. Allerdings sollte es wichtige Grenzen geben, die die Grenzen der Verbands-, bzw. Organkompetenz des EuGH markieren und ihre Überschreitung bedeutet ein sog. Ultra-Vires-Akt. Die richterliche Rechtsfortbildung darf keine sog. „Kompetenz-Kompetenz"-Befugnis bedeuten, da die begrenzte Einzelermächtigung sich als – wiewohl nicht allgemeine, aber – wichtige Gebundenheit meldet. D. h., der EuGH darf solche Kompetenzen, die in den Verträgen nicht festgelegt sind, weder vorschreiben noch entziehen und muss die sog. „Verfassungsidentität“

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[46] Michel, Morten Alexander: Die Kompetenzentwicklung des Europäischen Gerichtshofes in seiner jüngeren Rechtsprechung und ihre Integrationseffekte in den Mitgliedstaaten. Shaker Verlag, Aachen, 2002., 159.

[47] Christoph U. Schmid: The ECJ as a Constitutional and a Private Law Court. Bremen : ZERP an der Univ. Bremen, Bremen, 2006. S. 24.

der Mitgliedstaaten respektieren.[48] Trotzdem wurden zahlreiche solche richterlichen Entscheidungen seit den 1960zigern getroffen, bei denen die richtige Wahrung dieser Schranken streitig geworden ist. Die Entscheidungen (Franchovich-, Brasserie du pecheur-Urteile)[49] über die Errichtung der sog. europäischen Staatshaftung dienen als gute Beispiele. Die Essenz dieser EU-Beschlüsse besteht darin, dass die einzelnen Mitgliedstaaten gegenüber ihren Staatsbürgern mit der Ermöglichung des Anspruch auf Schadenersatz bezüglich der angemessenen Übernahme und Anwendung des Unionsrechtes verantwortlich gemacht wurden. Die Errichtung der Institution der Staatshaftung ist wieder ein ernsthafter Schritt in die Richtung der Integration gewesen und die zugleich auch Streit hervorgerufen hat, oh der EuGH überhaupt über angemessene Kompetenzen zu einem solchen Schritt verfügt? Zu einer vollständigen Prüfung der Kompetenzen des EuGH gehört die Aufdeckung zahlreicher weiterer Teilbereiche (Subsidiarität, effet utile, usw.), jedoch müssen wir uns auf die folgenden Bemerkungen einschränken: Die Schaffung eines solchen Richterrechtes, das die der Staatshaftung ähnlichen Rechtsfortbildung folgt, kann nach Michel nur in jenen Fällen akzeptiert werden, wo sie solchen Zielen dient, die nicht im Gegensatz zu den in den Gründungsverträgen offenbarten Willen der Mitgliedstaaten stehen, außerdem bringen sie die Rechtsstaatlichkeit und die Wirksamkeit des Europarechtes voran. Michel sieht das Problem darin, dass solche Urteile absolut nur ausnahmweise vorkommen sollten, dagegen ist der EuGH einerseits – mit den Worten von Michel - der „Wegbrecher der Integration", andererseits „der Notgesetzgeber" der EU. Der EuGH hat nunmehr ein gewisse quasi Kompetenz, die dadurch legitimiert wird, dass die Mitgliedstaaten solche Entscheidungen des EuGH einfach stillschweigend akzeptieren.[50] „Dennoch muss man aus rechtstaatlicher Sicht wie aus Rechtssicherheitsgründen die Akzeptanzkompetenz als echte Organkompetenz des EuGH ablehnen." – schreibt Michel.[51]

B. Die rechtliche Grundlage: die „Wahrung des Rechts zu sichern"

Die Grundlage des Richterrechtes, das im Rahmen der rechtsschöpfenden Tätigkeit des EuGH geschaffen wird, wird von einer permissiven Interpretation der Wendung „sichert die Wahrung des Rechts" in der Fachliteratur gegeben[52] und sie umfängt nach dieser Interpretation auch die richterliche Rechtsfortbildung des Unionsrechtes. Diese breite Interpretation wird damit begründet, dass der Richter nicht nur im sog.

[48] Vgl. dazu Walter a.a.O., S. 45 ff. und 320 ff.; und Streinz: EUV/AEUV. 3. Aufl. C.H.Beck, München, 2018., S. 210. Rn. 14-16.; und dazu auch Schmid a.a.O., S. 22-28.
[49] (C-6/90 und C-9/90 1991) (C-46/93 und C-48/93 1996)
[50] Vgl. dazu Michel a.a.O., S. 157. ff. und 162. ff.
[51] Michel a.a.O., S. 170.
[52] Vgl. dazu Michel a.a. O., S. 24. ff; und Calliess-Ruffert-Blanke: EUV-AEUV: dasVerfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar. 5. Aufl., C.H. Beck, München, 2016. S. 311. ff. Rn. 12-18 ; und dazu auch Streinz a.a.O., S. 209 f. RN. 12-16.

„common law" Rechtskreis, sondern auch in der europäischen Rechtstradition mehr als bloß „das Mund des Gesetzes" war. Auch das BVerfG hat sich mit dieser Frage in seinem UStRil-Urteil beschäftigt und sich auf die Überlieferungen des Gemeinen Rechts, des Römischen Rechts bzw. des englischen common law berufen. Es hat das festgestellt, dass die Gründungsverträge auch aus der Perspektive der europäischen rechtsgeschichtlichen Traditionen interpretiert werden sollen. Ein weiteres Auslegungsargument ist, dass die EU vor allem eine „Rechtsgemeinschaft" ist, und als solche, braucht es die aktive integrierende Tätigkeit des EuGH, damit das die Harmonie des Gemeinschaftsrecht verbürgen kann. „(…) muss der EuGH in gewissen Grenzen zur Verwirklichung des Rechts Normen schaffen dürfen um das Recht zu sichern, wenn diese Sicherung im Wege der Auslegung nicht zu erreichen ist." – schreibt Walter.[53]

Der Versuch der demokratischen Legitimierung der Tätigkeit von EuGH

A. Die Unabhängigkeit und die jüngsten Urteile des EuGH

Die herausragende Bedeutung des EuGH innerhalb der EU kommt aus seinem umfangreichen Wirkungsbereich, sowie aus sonstigen organisatorischen Umständen. Solch ein „organisatorischer Umstand" ist, dass mehrere Mitglieder des Organismus EU einander in den unterschiedlichen Verfahren ergänzen und kontrollieren, ihre Arbeit sich in einer speziellen Wechselwirkung verwirklicht. Daraus folgt, dass die klassische These der Gewaltenteilung sich in diesem Bezug nicht durchsetzt. Der EuGH verfügt über eine ziemlich große Unabhängigkeit und wesentliches Kompetenzpotenzial konzentriert sich in seiner Hand. Aus Hinsicht der Mitgliedstaaten ist die Position des EuGH noch stärker: Die Judikatur des EuGH schränkt sowohl die nationalen Parlamente, sowie die Verfassungsgerichte, als auch die nationalen Gerichte stark ein. Die nationalen (Verfassungs-) Gerichte müssen auf das Unionsrecht, sowie auf die Urteile des EuGH Rücksicht nehmen und darüber hinaus sogar anwenden, wenn die gerichtliche Rechtsauslegung dem Unionsrecht entsprechen soll. Aus diesem Grund verlagert sich das Machtpotenzial von den Mitgliedstaaten hin zum EuGH. Die demokratische Legitimation dieses Machtpotentials wird sowohl in der organisatorischen Struktur der EU, als auch aus Richtung der Mitgliedstaaten beansprucht.

„Insbesondere im Hinblick auf die enorme Bedeutung und Autorität des EuGH und EuG im institutionellen Gefüge der EU scheint die Frage nach deren demokratischer Legitimation unausweichlich und von grundsätzlicher Bedeutung zu sein. (…) Diese beiden Fundamentalprinzipien beeinflussen sich gegenseitig, und sind untrennbar miteinander verbunden und bauen ein Spannungsverhältnis zueinander

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[53] Walter a.a.O., S. 145.

auf." – schreibt Kathrin F. Baltes.[54] Die Kritiker des EuGH lassen nach Baltes ein sehr wichtiges Postulat außer Acht, die richterliche Unabhängigkeit. Die Anforderung der Unabhängigkeit zieht eine Grenzlinie für die Erweiterung der demokratischen Legitimation des EuGH. Das Erfordernis der Unabhängigkeit wurde auch in den jüngsten Urteilen[55] des EuGH bekräftigt. Nach der Rechtssprechung des EuGH ist die richterliche Unabhängigkeit „von grundlegender Bedeutung" und ein wichtiger Eckpfeiler der modernen rechtsstaatlichen Demokratie und im Vergleich zu den zwei anderen Staatsgewalten schreibt sie eine spezielle Anforderung der Judikative vor. Der Richter, der im gegebenen Fall Entscheidungen treffen soll, sollte vollständig unabhängig von anderen Organisationen und politischen und sonstigen Einflüssen sein. Der Richter soll auf die Gesetze Rücksicht nehmen und darf bei der Ausübung seines Amtes von niemandem angewiesen werden und seine Entscheidungen dürfen nicht von anderen (nicht gerichtlichen) Organen überprüft werden. Der EuGH hat vor kurzem in seinem Urteil ausgesprochen, dass die unabhängige Einrichtung des Gerichtes sowohl auf der Ebene der Union als auch auf der mitgliedstaatlichen Ebene unerlässlich ist. Sehr wichtig ist, dass der EuGH auch den – auf der Charta basierende - Grundrechtschutz fest mit der richterlichen Unabhängigkeit zusammengebunden hat und zugleich als Bedingung einer „reibungslosen" justiziellen Kooperation bestimmt hat. Zu der richterlichen Unabhängigkeit gehört die„völligen Autonomie" – hat der EuGH betont. Ein entscheidendes Moment ist also die Unabhängigkeit gegenüber nationalstaatlicher Einflüsse.

B. „Zeitgemäße" Legitimationsmodelle

Man muss zur umsichtigen Festsetzung der Position des EuGH die Legitimationswesenart der EU untersuchen. Die Errichtung der mit den Nationalstaaten analog einhergehenden demokratischen Legitimation ist – ohne Zweifel – problematisch im Bezug auf die EU. Allerdings, betont Baltes, gibt es zwar kein einheitliches „europäisches Demos", aber das „Volk" – im Einklang mit den europäischen gesellschaftlichen Tendenzen - ist nicht monistisch, kollektiv, sondern soll pluralistisch, individuell interpretiert werden.[56] Das ist daher ein entscheidender Punkt, weil die EU auf einer sog. dualistischen Legitimationsbasis beruht. Der simultane Status der mitgliedstaatlichen und europäischen Staatsbürgerschaft ermöglicht die demokratische Legitimation sowohl auf EU-Ebene, die von der Institution des Europäischen Parlaments präsentiert wird, als auch auf der Ebene der Mitgliedstaaten, die – außerhalb

[54] Baltes, Kathrin F.: Die demokratische Legitimation und die Unabhängigkeit des EuGH und des EuG. Peter Lang, Frankfurt am Main, 2011., S. 3.
[55] (Rechtssachen C 64/16, EU:C:2018:117 und C 216/18 PPU, EU:C:2018:586.)
[56] Baltes a.a.O., S. 65.

des EP – vom Ministerrat und dem Europäischem Rat realisiert wird. Während nach einigen die mitgliedstaatliche Legitimationsbasis, nach anderen die „europäische" Legitimationsbasis Vorrang hat. Der EuGH hat sich schon in seinen früheren Urteilen (z.B.: 138/79, Roquette Fréres vs. Rat) eher für die Letztere ausgesprochen, mit der Begründung, dass das EP „(altough limited), it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly." Baltes unterstreicht ihre Gleichwertigkeit, als die Entwicklung der EU von Baltes als ein solcher „dynamischer Prozess" bezeichnet wird, „der nicht auf ein konkretes, starres und ausnahmloses Prinzip beschränkt werden kann."[57]

Laut der Klassifikation von Baltes kann die demokratische Relation zwischen der EU und den Staatsbürgern grundsätzlich durch zwei unterschiedlich logische Mechanismen, ferner durch die Kombination derselben geschaffen werden. Der erste Mechanismus ist die sog. „Legitimationsrückkopplung", die darauf fokusiert, ob die Machtausübung auf den bürgerlichen Willen, bzw. auf dessen Initiative zurückgeführt werden kann. Unterschiedliche Schemata wurden als Methoden der Rückkopplung bearbeitet, z.B. die Schemata der „Legitimationsketten" oder des „Kontrollmodells". Im Fokus der Legitimationsketten steht das Volk, als die ständige und kontinuierliche Quelle der Staatsgewalt. Zwar gibt es Abweichungen zwischen den einzelnen unterschiedlichen praktischen Formen (institutionelle, formelle, persönliche, inhaltliche Legitimation, usw.), aber - nach der allgemeinen Form des Schemas – das Volk soll das Parlament wählen und dem im wesentlichen alle anderen öffentlich-rechtlichen Anstalten untergeordnet sind: Die Regierungsmacht ist durch ihre parlamentarische Verantwortlichkeit – und in einzelnen Fällen auch durch konkretes Weisungsrecht - und durch Rechtsvorschriften, die vom Parlament als Legislative konstituiert werden begrenzt. Die Legitimationskette beruht auf dieser Dependenz. Es ist sichtbar, dass die Jurisdiktion schwieriger in die Legitimationskette eingefügt werden kann, so ist es auch schwieriger sie auf den Volkswillen zurückzuführen. Die Spannung kann ausschließlich nur in der Ausgestaltung der strengen Gesetzesbindung von richterlichen Amtsbefugnissen in diesem Legitimationsverständnis aufgelöst werden. Diese Verkettung ist deshalb leicht angreifbar und darüber hinaus entsteht ein weiteres Problem, die Legitimationskette kann auf der Ebene der EU – ungeachtet der Dualität der nationalen, sowie Unionsstaatsbürgerschaft – nur „schwerlich" aufgezogen werden. Aus dem Lösungsversuch dieses Dilemmas sind die weiteren Modelle, die – im Endeffekt – mehr oder weniger als Ergänzungen des Schemas der Legitimationskette dienen, entstanden. Die sog. personale Legitimation ist daher wichtig in diesem Themenbereich, weil ihre Theoretiker meinen, dass die Legitimationskette allein eben darum nicht maßgeblich ist, weil der Bewegungsraum der Richter nie vollständig eingeschränkt werden darf, zum Beispiel

[57] a.a.O., S. 83.

wegen der Notwendigkeit der Enwicklung, bzw. Interpretation des Unionsrechts. Daraus folgt die Forderung, dass die Auswahl der Richter „demokratisch", so zum Beispiel durch Parlamentsausschüsse stattfinden sollte. Man muss - nach einer anderen „Legitimationsergänzung" – mit fachlichen Vorschriften bzw. Standards die Legitimationskette verstärken (z.B.: Amtshaftung, die Publizität des gerichtlichen Verfahrens, bzw. der gerichtlichen Beschlüsse). Das Kontrollmodell basiert ebenfalls auf der derivativen Partizipation, sowie auf der Rückkopplung des Volkswillens, aber weicht inhaltlich von der Auffassung des Legitimationsmodelles ab. Der Verfasser dieses Modelles, Axel Tschentscher betont die fachlichen und auch persönlichen Faktoren. Der entscheidende Punkt in diesem Modell ist die unabhängige Position des Richters von anderen Instirurionen abzusichern. In Tschentschers Auffassung ist die richrerliche Rechtsschöpfung, bzw. die Anwendung des Richterrechts in einer demokratischen Ordnung daher nicht problematisch, weil die Legislative ein „praktisches" Revisionsrecht hat: Falls das Parlament anders beschließt, kann es eine von der richterlichen Entscheidung abweichende Rechtsnorm schaffen – legt Baltes das theoretische System von Tschentscher dar.[58]

C. *Legitimationsvielschichtigkeit*

Die Konzeption der sog. Ergebnislegitimation unterscheidet sich im Wesentlichen von der Legitimationsrückkopplung durch die „Output-Seite" des demokratischen Entscheidungsprozesses, d. h. auf der inhatlich-qualitativen Beschaffenheit der gegebenen richterliche Entscheidung. Baltes legt die Konzeptionen von zwei Theoretikern Fritz Scharpf und Anne Peters dar. Scharpf nähert sich statt der Auffassung „government of citizens" mit dem Denkmodell „government of governments" grundsätzlich anders an die demokratische Ordnung der EU an. Daraus folgt, dass die Relation „EU vs. europäische Bürger" legitimatorisch weniger wichtig als die „EU vs. Mitgliedstaaten" ist. Die identischen Interessen geben den gemeinsamen Nenner auf der europäischen Ebene gegenüber dem mitgliedstaatlichen Rahmen in dem die „kollektive Identität" eine zentrale Rolle im gesunden Funktionieren der demokratischen Ordnung spielt. Die europäischen Entscheidungen sollen diesen „identischen"-„gemeinschaftlichen" Interessen, d. h. dem europäischen Gemeinwohl dienen. Das ist der Leitfaden der Ergebnislegitimation. Man braucht zu den „guten Ergebnissen" gute Leistung, zur guten Leistung Sachverständnis und daraus ergibt sich, dass die „Demokratisierung" der Richterauswahl – zumindest aufgrund des Prinzips der Volkssouverenität – keine Priorität hat. Nach der Darstellung von Baltes auch Peters meint, dass die Rechtfertigung der Richterselektion eben nicht in ihrem demokratischen Auswahlsprozess steht, vielmehr in der Rücksichtnahme des Sachverstandes und der Unbefangenheit des Richters. Peters nimmt die

[58] a.a.O., S. 86. ff.

demokratische Legitimation der Beschlüsse des EuGH nach einer output-inhaltlichen Untersuchung wahr, falls die richterlichen Entscheidungen – im Einklang mit den EU-Gründungsverträgen – die demokratischen Werte effektiv, „nach ihrem Inhalt" berücksichtigen und verteidigen.[59]

Baltes sieht die demokratischen Ressourcen der EU und des EuGH in einer Legitimationsvielschichtigkeit. „So kann ein dynamisches, zeit- und sachgemäßes Legitimationskonzept im Sinne einer komplexen Legitimationsbündelung erzeugt werden – insbesondere unter Berücksichtigung des Spannungsverhältnisses von demokrarischer Legitimation und Unabhängigkeit der Judikative." – schreibt Baltes.[60] Die Gründungsverträge bedeuten den ersten und wichtigsten Legitimationsfaktor, da ihr Zustandekommen auf die mitgliedstaatlichen Parlamente zurückzuführen ist. Die Verträge sichern zugleich den Rahmen der Gesetzesgebundenheit ab, weil auch die grundsätzlichen Werte der Union in ihnen gefestigt wurden und als eine Art Leitfaden dienen. Ein weirerer wichriger Faktor ist die sich auf die Richterwahl richtende dichorome – mitgliedstaatliche und unionsstufige – Verfahrensordnung.[61] Allerdings sollten – nach Baltes – die sich auf die Richterernennung beziehenden Rechtsnormen sowohl auf der mitgliedstaatlichen, als auch auf Unionsebene verfeinert werden.[62] Das sich auf die richterliche Tätigkeit konzentrierende Kontrollsystem ist bedeursam. Demnach sollen die Richter „die Wahrung des Rechts"[63] gewährleisten, das umfangreich aufgefasst werden soll, nicht bloß im Bezug auf das Primärrecht und Sekundärrecht, sondern auch auf die unionsrechtlichen Grundprinzipien. Der schwierigste Punkt ist die rechtsentwickelnde Tätigkeit des EuGH, die aber aufgrund des Art. 19. EUV ein konkreter Auftrag bedeutet, meint Baltes. Aus diesem Grund ist die Legitimation der Rechtsentwicklung, die sich auf die zwangsläufig vorkommende Lückenfüllung richtet, nicht bestreitbar, höchstens in ihrem Ausmaß beschränkt. In dieser Hinsicht liegen zwei wichtige demokratische Grenzen vor: Einerseits muss der EuGH im Laufe seiner rechtsentwickelnden Tätigkeit die Rechtsordnung der EU und der Mitgliedstaaten berücksichtigen. Andererseits hat die legislative Gewalt der Union die Möglichkeit durch die Gesetzgebung die Entscheidungen des EuGH zu revidieren.[64] Baltes hält für die demokratische Legitimation auch solche Institutionen, wie Kollegialität, Unbefangenheit, Unabhängigkeit, sowie die Öffentlichkeit für wesentlich.[65] Baltes teilt die Output-Legitimation in zwei Punkte ein. Der erste Punkt beschäftigt sich mit jenen Statusvorschriften und Verfahrensregelungen, die versuchen das Ergebnis sozusagen vorträglich („ex-ante") abzusichern und garantieren daher den Sachverstand und die unabhängige Position des Richters. Der zweite Punkt evaluiert das

[59] a.a.O., S.108-117.
[60] a.a.O., S 212.
[61] EUV Art. 19. und AEUV Art. 253., 254.
[62] a.a.O. S. 209.
[63] EUV Art. 19. (1). Bem.: Engl. Ueb. "Observed" – deutsch: "Wahrung"
[64] a.a.O. S. 196. ff.
[65] EUGH-Satzung, Art. 18., 31., 37., usw.

Legitimationspotenzial der Institutionen sowie die Transparenz, die Amtshaftung, bzw. die unmittelbare Klage[66] usw., die für das Ergebnis nachträglich („ex-post") nach der Entscheidung bürgen.[67] „Im Ergebnis begründen im Rahmen eines dynamischen, komplexen Demokratieverständnisses unterschiedliche Faktoren durch eine kooperative Legitimationsbündelung bereits eine nicht zu unterschätzende Legitimationsbasis für den Europäischen Gerichtshof und das Gericht."– stellt Baltes zusammenfassend fest.[68]

Fazit

Wie man das auch basierend auf dem oben dargestellten wahrnehmen kann, können/müssen wir den Demokrarie"index" der europäischen Organisationsstrukrur nunmehr auf mehreren Ebenen analysieren und – zu einem authentischen, angemessenen Ergebnis – die Problematik der WTO-Stuktur und der sog. „Juristokratie" bzw. „Weltkonstitutionalisierung" (siehe oben bei Ehs), das Dilemma des Parlamentarismus (siehe oben bei Veil) und auch der Mitgliedstaaten (siehe oben z. B. bei den Ultra-Vires Handeln), etc. zusammen betrachten und prüfen. Es beansprucht noch weitere Prüfschritte. Daraus ergibt sich, dass wir uns auf die folgenden Feststellungen beschränken müssen:

Ein wichtiger Punkt ist, dass bedeutende Theoretiker das unverzichtbare Element der Demokratie im Parlamentarismus wahrnehmen. Das Fehlen eines tatsächlich funktionierenden Parlamentes kann auf der Ebene der EU festgestellt werden, weil wichtige gesellschaftliche und politische Bedingungen dazu nicht oder nur mangelhaft vorhanden sind. Es ist zu betonen, dass der Mangel an Parlamentarismus – unter anderem – daher problematisch ist, weil die europapolitischen richtunggebenden Entscheidungen nicht vom Volk, bzw. nicht von den europäischen Bürgern bestimmt werden können. Wie im zweiten Teil dargestellt wurde, hat der EuGH – nach z.B. Michel - seit den Sechzigern diese quasi („ersatz-, oder not-„) gesetz-, und richtunggebende Rolle des Parlamentes teilweise übergenommen. Baltes weist – siehe den dritten Teil der Untersuchung – auf die besondere Bedeutung der institutionellen Unabhängigkeit des EuGHs hin, allerdings unterscheiden sich seine Legitimationskonzepte grundsätzlich von den „traditionellen" nationalstaatlichen Demokratievorstellungen, d. h. von der auf der Volkssouveränität basierenden parlamentarischen Demokratie. Falls die Befugnisse des EuGH weiterhin so weitreichend bleiben, kann man schwierig das institutionelle Gefüge der EU nicht als juristokratische Machtstruktur definieren. In diesem Bezug scheint Hans Kelsen's Stellungnahme über die Notwendigkeit der Einheit der staatlichen Gewalten aus der Hinsicht der Demokratie vorausschauend und bemerkenswert zu sein. Das Erfordernis der richterlichen Unabhängigkeit und das sehr große Kompetenzpotenzial ohne wirklich funktionierende

[66] AEUV Art. 263. (4)
[67] a.a.O. S. 204. ff.
[68] Baltes a.a.O., S. 214.

parlamentarische Gegenkontrolle bedeutet zusammen auf der Ebene eines sich noch immer entwickelnden Staatenverbundes eine bedeutsame Machtkonzentration in der Hand des EuGH. Also, was unsere Grundfrage angeht, d. h. ob die europäischen Bürger wirklich einen demokratischen, effektiven Einfluss auf die Entscheidungen der EU ausüben können, kann man nicht eindeutig mit „ja" oder „nein" beantworten. Münch und auch Baltes schreiben über eine „zeitgemäße" Demokratievorstellung, die die Gesellschaft pluralistisch und individualistisch betrachtet. Die sog. „Output"-, oder Ergebnislegitimationsmodelle können sich zwar als sehr wichtige Bestandteile eines demokratischen Gefüges des EuGH bzw. der EU erweisen, allerdings ersetzen sie nicht die demokratische Funktion des zur Zivillgesellschaft gehörenden (siehe oben bei Habermas) Parlamentes. Darüber hinaus liegt auch ein weiteres Problem mit der Ergebnislegitimation vor: Wie schon im ersten Kapitel dargestellt wurde, bedeutet die sog. Elitebildung immer eine ernsthafte Gefahr für die Demokratie. Sofern die Einzelnen als „Volk" ihren Willen durch das Parlament nicht validieren vermögen und so auch Schumpeter's Wettbewerbsmodell über die „Herrschaft der Politiker" marginalisiert wird, wird das Risiko der Herausbildung von Elitegruppierungen noch beachtlicher. Eine Demokratie muss den Rahmen des politischen Kampfes („Wettbewerbes") der Mehrheits- und Minderheitsansichten immer gewährleisten, ferner das eine Minderheitsmeinung zu einer Mehrheitsmeinung werden kann. Daraus folgt, dass man unbedingt prüfen muss, wie die Effizienz des Parlamentarismus auch auf der Ebene der EU aussieht, wie die europapolitischen Auseinandersetzungen für die mitgliedstaatlichen Bürger wirksamer verdeutlicht werden können und – vor allem – wie die Kompetenzverteilung zwischen dem EP und dem EuGH noch effektiver zugunsten der Prinzipien des Parlamentarismus ausgestaltet werden kann.

Abkürzungsverzeichnis

Abs.	Absatz
Alt.	Alternative
Art.	Artikel
Aufl.	Auflage
A.a.O.	am angegebenen Ort
Bd.	Band
BVerfG	Bundesverfassungsgerichr
bzw.	beziehungsweise
d. h.	d. h.
EU	Europäische Union
EuGH	Europäischer Gerichtshof
ff.	folgende
gem.	gemäß
Hrsg.	Herausgeber
halbs.	Halbsarz
i.S.	im Sinne
i.V.	in Verbindung
Nr.	Nummer
Rn.	Randnummer
S.	Seite
sog.	sogenannt
vgl.	vergleiche
z.B.	zum Beispiel
zit.	zitiert

PREVENTIVE PRIVACY PROTECTION FOR VICTIMS OF INFRACTION IN THE CONTEXT OF THE DIRECTIVE 2012/29/EU

HEPOVA, Adéla[69]

Introduction

On 10 June 2011, the Council of the European Union adopted on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings (Budapest plan). Herein the Commission has presented on 18 May 2011 a proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime. In 2012, the EU established the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (hereinafter referred to as the Directive).

The essence of the Directive is that the needs of victims must be addressed in an individual manner, based on an individual assessment, and using a dedicated and participatory approach regarding provision of information, support, protection and procedural rights.[70] In my opinion, in order to meet the long-term goals and objectives of the Directive, it is necessary to look at the victim of crime in a broader sense, i.e. to grant at least certain rights to victims of infraction. After all, the Budapest Plan itself talks about victims in general. An important argument are cases where the public authorities cannot determine with certainty from the outset whether the conduct fulfils the characteristics of a criminal offence, or even if the conduct itself will be classified as an infraction, it will not be a partial attack of a criminal offence.

This article then addresses the sub-issue of the preventive protection of the privacy of victims of infraction under Article 21(1) of the Directive. The main research question of this article is whether the legal regulation of preventive privacy protection for victims of infractions in the Czech Republic stands up in the light of the Directive.

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[70] BAHR, B. - MELUM, J. (2017). *EU's 'Victims' Directive' – a legal act for a cultural change?* in *International Journal for Court Administration, Vol. 9 2107.* p. 17. https://Doi:10.18352/ijca.246

As sub questions, it then aims to answer:

How the victim of an infraction is defined

How the privacy of a infraction victim is protected

How the privacy of a crime victim is protected

Are privacy protections for victims of infractions and privacy protections for victims of crime symmetrical?

Does protection comply with EU law?

Definition of victim of an infraction

European Union law does not use the term victim of an infraction. Article 2(1) of the Directive only defines a victim of a crime as a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence.

The Czech legal system does not work with the concept of a victim of an infraction at all, too. We can use the definition contained in Act No. 45/2013 Coll. Victims of Crime Act (hereinafter referred to as the "VCA"), on Victims of Crime, according to which: "A victim is a natural person who has been or should have been harmed, damaged or injured by a criminal offence or at whose expense the offender has been or should have been enriched by the criminal offence". Thus, we substitute the term crime for the term infraction in the sentence construction at issue. As regards the related concepts of personal injury, damage or non-pecuniary damage, these are defined in the Civil Code or the Criminal Code.[71] The definition contained in the VCA therefore corresponds to the definition in the Directive.

Act No. 250/2016 Coll. on Liability for Infractions and Proceedings thereon (hereinafter referred to as the „LIP") uses different terms and designations for victims of infraction depending on the stage of the offence proceedings and the procedural position of the victim. Before the commencement of the infraction proceedings, the victim may be referred to as the whistleblower, the person affected by the conduct of the suspected offender and the person directly affected by the commission of the infraction.

[71] GŘIVNA, T.- ŠÁMAL, P.-VÁLKOVÁ, H.: *„A kol: Oběti trestných činů. Komentář. 2. vydání,"* C. H. Beck, 2020, pp. 18-31

A victim of an infraction, in the procedural capacity of a whistleblower, is a natural person who has reported an infraction to the Police or an administrative authority. The whistleblower is not without more a party to the subsequent infraction proceedings. However, the whistleblower has the right to be notified by the police authority pursuant to Section 74(4) of the LIP or by the administrative authority pursuant to § 42 of Act No. 500/2004 Coll., the Administrative Code (hereinafter referred to as the „AC"), within 30 days, but only if the whistleblower so requests.[72] After the commencement of the infraction proceedings, the whistleblower usually acquires the procedural status of a witness.

A victim of an infraction, in person affected by the conduct of the suspected offender, is a natural person who could have, but necessarily did not have to, report the infraction and who has suffered damage or non-pecuniary harm as a result of the commission of the infraction. A person affected by the commission of an infraction has the potential to become a party to the proceedings - an injured party, or to acquire the status of a witness. According to § 76(3) and (5) of the LIP, the person affected by the infraction has the right to be notified if the case is adjourned.

The injured party is a party to the proceedings in the part of the proceedings that concerns his claim for compensation for damages or for unjust enrichment.

In order to become an injured party, the administrative authority shall without delay inform the person to whom the damage was caused by the commission of the offence or at whose expense the accused was enriched by the commission of the offence, if known to the administrative authority, of the possibility of making a claim for compensation or a claim for unjust enrichment. At the same time, the administrative authority must notify the person of the hearing. The reason for this notification is that the law associates the oral hearing with the deadline by which the claim for compensation for damage caused by the offence or the claim for the release of unjust enrichment obtained by the offence may be asserted. Since the potential victim is not a party to the proceedings before bringing his claim.[73]

[72]KUČEROVÁ, H.-HORZINKOVÁ, E.: *Zákon o odpovědnosti za přestupky a řízení o nich a zákon o některých přestupcích s komentářem a judikaturou.* Leges, 2019, p. 425
[73]JEMELKA, L., VETEŠNÍK P.: *„Zákon o odpovědnosti za přestupky a řízení o nich. Zákon o některých přestupcích. Komentář. 2. vydání"* C. H. Beck, 2020, pp. 542-550

The person directly affected by the commission of the infraction, unlike the injured party, is not a party to the proceedings, but has a hybrid status, where the person directly affected by the commission of the infraction is the subject of the proceedings to which he or she consents to the initiation or continuation thereof.[74]

According to the Explanatory Memorandum to the LIP, a person directly affected by the commission of an infraction is a person whose rights or legitimate interests have been directly affected by an act or omission that fulfils the facts of the infraction.

A person directly affected by the commission of an infraction is in fact a natural person who has been granted special procedural rights on the basis of the fact that an infraction should have been committed against him or her, for which a special law provides that the consent of the person directly affected by the commission of the infraction is required to initiate proceedings. The obligation to give consent is set out for each infraction.

The infractions for which consent is required are primarily enshrined in Act No. 251/2016 Coll., the Act on Certain Infractions (hereinafter referred to as the ACI), where consent is given by a close person or, in the case of the infraction of defamation, by the person who has been defamed. According to Section 22(1) of Act No. 89/2012 Coll. the Civil Code, a close person is a relative in the direct line of descent, a sibling and a spouse or a partner under another law regulating registered partnerships (hereinafter referred to as "partner"); other persons in a family or similar relationship shall be deemed to be close to each other if the harm suffered by one of them would reasonably be perceived by the other as harm to himself or herself. Persons who are married or permanently living together shall also be deemed to be close.

An exception is § 79 (5) LIP, where if a person under 18 years of age has been affected by the commission of an infraction or if the infraction was the reason for the expulsion from the common dwelling, the administrative authority shall initiate proceedings or continue proceedings already initiated without the consent of the person directly affected by the commission of the infraction.

The administrative authority should identify the person or persons directly affected by the infraction as part of its procedure and actions carried out prior to the initiation of proceedings. The

[74] FRUMAROVÁ, K. „*Osoba přímo postižená spácháním přestupku – subjekt, nikoliv však účastník přestupkového řízení*“ in Právní rozhledy Vol. 8 2018. p. 275

administrative authority must inform the person concerned of his or her right to consent to the initiation of the offence proceedings and, although the law does not expressly provide for it, should also inform him or her of the consequences of refusing to give consent and of the possibility and consequences of withdrawing it. At the same time as the instruction, the administrative authority must also set a time limit for the person to give consent. This period may not be less than 30 days. Its maximum length is no longer stipulated by law, however, it is necessary in this context to respect in particular the principle of speed of proceedings, as well as the impact of an excessively long time limit in relation to the running of limitation periods and thus the possible extinction of liability for the offence.[75]

Pursuant to Section 71 of the LIP, a person directly affected by the commission of an infraction also has the right to be notified of the initiation of the proceedings, the right to propose evidence and make other proposals throughout the proceedings, the right to information about the proceedings, the right to express his or her opinion in the proceedings, the right to inspect the file, the right to participate in the oral hearing and be present at all acts in the proceedings, the right to comment on the decision before the decision is issued, and the right to be served with the decision."

Finally, in the case of victims of infraction, the LIP deals with the notion of persons appearing in offence proceedings, which is contained in Section 72a of the LIP and was introduced by the amendment to the LIP No. 417/2021 Coll (hereinafter referred to as the Amendment). However, this concept will be elaborated on later.

Personally, I believe the most effective strategy in protecting victims is not to distinguish between victims of infractions and victims of crime. In practice, it is not uncommon to find situations in which a file is forwarded by an administrative authority to law enforcement authorities. The referral may occur because the offence is part of a criminal offence. The offence itself may then be assessed as a criminal offence on balance. The offence in question may also be decriminalized. It may also be common in the EU area for conduct to be classified as an infraction in one Member State and as a criminal offence in another. There may therefore be significant differences in the level of protection afforded to victims depending on the country in which the offence occurs.

[75] FRUMAROVÁ, K. *ibid,* p. 275

An apt example seems to me to be Case C-484/16: Resolution of the European Court of Justice (hereinafter referred to as the ECJ) (Ninth Chamber) of 13 December 2016. Criminal proceedings against Antonio Semeraro. Although the Court did not have jurisdiction to answer the question posed, the case raises the issue of the distinction between victims of crime and victims of infractions. A reference for a preliminary ruling was made concerning the interpretation of Article 2(1)(a) of the Directive. That provision defines the concept of victim of a crime.

Mr. Antio Semeraro alleged that the football match damaged the honor and dignity of Mr. Laterz. At the time the offence was committed, defamation was a criminal offence, but during the course of the criminal proceedings the provision containing the offence in question was repealed and the offence was still classified as an infraction. In the opinion of the Conciliation Judge, the action taken by the legislature was inappropriate and illogical. The repeal of the provision also disadvantaged the victim of the offence, who could not properly claim compensation. In the opinion of the Conciliation Judge, the Directive and Article 83 Treaty on the Functioning of the European Union have been infringed.

Although the Court ruled the question inadmissible, it identified a fundamental problem in its reasoning. There is no provision in the Directive concerning the definition of criminal offences or the obligation for Member States to define certain acts as criminal offences in their national legislation, except in cases and directives based on Article 83 Treaty on the Functioning of the European Union. Thus, it cannot but be stated that the position of victims is more than precarious, and a minor legislative change may deny the victim his or her rights because the victim will lose the right to them.

Based on the naming of the institute alone, it cannot be said that the victim will cope with experience better or worse. In fact, the victim's perception and experience of harm is individual. Regardless of whether it is a crime or infraction, the victim is traumatized.[76]

In this context, I refer to the interpretation of Article 6 of the European Convention on Human Rights (hereinafter referred to as the Convention), Right to a fair trial and the interpretation of the concept of criminal offence. The case law of the European Court of Human Rights shows that it would be unfair and discriminatory if the application of the guarantees of a fair trial guaranteed by

[76] DIANIŠKA, G:. „*Kriminológia. 2.*“ Vydání. Aleš Čeněk, 2022, p. 12

Article 6 of Convention depended only on an imprecise definition of this concept established by the laws of the Member States. The European Court of Human Rights in case Engel et. al. vs. the Netherlands identified three basic Engel criteria for determining whether a proceeding would fall under Article 6 of Convention.[77]

It is worth reflecting on the question of whether a similar approach should be taken to victims. Thus, if it is confirmed that the case falls under the Engel criteria and the accused has rights under Article 6 of Convention, the victim shall have the rights of a victim of a crime under the Directive.

Indeed, the Budapest Plan also states in its preamble (5): „In the light of the considerable progress made pursuant to the Roadmap for strengthening procedural rights of the suspected or accused persons in criminal proceedings, the Council considers that a similar approach should be adopted in the field of the protection of the victims of crime. “

3. Scope of protection of the privacy of persons appearing in proceedings

According to § 72a LIP:

The administrative authority shall exclude from inspection of the file information on the place of permanent residence or domicile, delivery address, place of employment, profession or business of persons appearing in proceedings on an infraction at their request, if the protection of their privacy or security so requires. The administrative authority shall decide on the request referred to in the first sentence by way of a resolution.

The data referred to in paragraph 1 shall be excluded from inspection of the file if access to such data has been restricted in a previous criminal proceeding concerning the same act, if this fact is known to the administrative authority. A record shall be made in the file of the exclusion from consultation of the file.

I personally find the legislation in question problematic. Below I will try to identify the major shortcomings of the provision in question.

[77] ŠKUREK, M.: *„Evropské správní parvo trestní a postihování přestupků v ČR“* Leges, 2015, p. 56

The first sentence of the first paragraph of the provision in question tells us what data, if any, will be excluded from inspection the file. I do not see a fundamental problem here. However, it is also necessary to interpret the newly introduced term 'persons appearing in the proceedings'. According to the explanatory memorandum to amendment, these are the persons directly affected by the infraction, the injured, a witness, a legal representative, a guardian, or an agent. I believe that there is also nothing to prevent the accused from being included in the list in question on the grounds that he may be subject to retaliation by another co-accused if he cooperates with the administrative authority in the proceedings.

However, I see the most significant problem as the fact that the content of the text and the explanatory memorandum imply that protection will be provided to victims only after the proceedings have been initiated. According to the explanatory memorandum to amendment, the provision in question: 'ensures the protection of the privacy and security of persons appearing in the proceedings on the infraction. This will also fulfil Task No. 14 contained in the Update of the Action Plan for the Prevention of Domestic and Gender-Based Violence for 2015-2018, approved by Government Resolution No. 622 of 4 September 2017 ("Legislate on the protection of personal data, privacy and the procedural status of vulnerable victims in infraction proceedings."). Both in the text of the law and in the explanatory memorandum, the legislator works with the term "proceedings"

On the one hand, of course, the legislator's reasoning in this respect can be understood, since the accused (i.e. the potential aggressor) only acquires the right to inspect the file material without further delay upon delivery of the notice of initiation of the infraction proceedings, i.e. according to Section 38(1) AC, only when he becomes a party to the proceedings. On the other hand, it should be noted that under certain conditions, it is possible to inspect the case file already before the commencement of the infraction proceedings, pursuant to Section 38(2) of the AC, by alleging and proving a compelling legal interest.

For example, a person who could use the information in the file in another proceeding will have a legal interest. As stated by the Supreme Administrative Court in its judgment of 23 January 2014, No 1 Afs 87/2013-73, the legal interest may also arise, depending on the circumstances, from the fact that the applicant is considering filing a civil action for damages and the administrative file contains information that may be relevant for the filing of the civil action and the formulation of its grounds.

Similarly, in its judgment of 11 August 2015, no. 6 As 43/2015-67, the Supreme Administrative Court stated that if there is a relevant connection between the administrative proceedings and the findings made therein on the one hand and the ongoing litigation on the other, not only the plaintiff but also the defendant usually has a legal interest in accessing the administrative file in order to develop and adapt its own procedural strategy in the court proceedings.

In the judgment of 17 April 2014, No. 62 Af 18/2013-112, 3286/2015 Collection of the Supreme Administrative Court, the Regional Court in Brno stated that "for the assessment of the existence (proof) of a legal interest in access to the file pursuant to Section 38(2)... it is not only the applicant's activity in the administrative proceedings (even if he was not a party to them) but also the 'position' of the applicant in relation to the issues addressed in the administrative proceedings". A person who is yet to become a party to the proceedings must also be regarded as another person with a right to inspect the file, provided that the proceedings are actually initiated. Such a person will typically be the suspected infraction.[78]

It should also be stressed that in practice there are also situations in which the actual initiation of proceedings does not even take place because an offence does not constitute an infraction due to lack of age or insanity, and the victims do not receive protection of their personal data at all.

4. Provision of data of victims of crime

As mentioned above, the rights of victims of crime, including the issue of providing data of victims of crime, are regulated in the Czech Republic by the Act on Victims of Crime.

According to § 16 VCA "If the victim, his/her proxy, legal representative, guardian or trustee so requests, data on the residence and delivery address of the victim, proxy, legal representative, guardian or trustee, data on their place of employment or profession or business, and on their personal, family and property circumstances shall be kept so that only law enforcement authorities, police officers and officials of the Probation and Mediation Service active in the case may become

[78] POTĚŠIL, L.-HEJČ, D.-RIGEL, F.-MAREK, D.: *„Správní řád. Komentář. 2. vydání“* C. H. Beck, 2020, p. 236-247

acquainted with them. Where this is necessary to achieve the purpose of the criminal proceedings or for the proper exercise of the right of defense of the person against whom the criminal proceedings are being conducted, the necessary information shall be disclosed by the competent police officer or criminal proceedings authority; a record shall be made in the file of the disclosure and the reasons for it."

The provision in question informs us that only an exhaustively defined circle of authorized persons, namely the victim of a crime, his/her proxy, legal representative, guardian and confidant, may claim statutory protection in connection with the provision of selected personal data.[79] Similarly, the list of data that can be excluded from inspection of the file is closed by law. Data on residence, delivery address, place of employment, profession or business, personal, family and property circumstances are protected.[80]

According to the provision in question, the protection of the personal data collected can be effectively invoked whenever the law does not expressly provide for a mandatory form of request. Thus, the request may be made in writing or orally (e.g. in a report drawn up on a criminal proceeding in which the beneficiary is involved).[81]

It is very important that the victim of a crime is granted privacy protection from the beginning, i.e. from the moment the criminal report of the commission of a crime submitted to the Police. This follows both from the § 16 VCA, which does not provide for a specific moment from which authorized persons could request anonymization of data, and from §2 (2) VCA, where a victim is understood as a natural person who has been or should have been harmed, harmed or harmed by a criminal offence, or at whose expense the perpetrator has enriched or should have enriched himself, i.e. the status of a victim of a criminal offence de facto arises from the commission of the criminal offence itself.

According to § 2(1) of the VCA, "An act otherwise punishable shall also be deemed to be a criminal offence for the purposes of this Act" According to the Explanatory Memorandum, the broader concept of a criminal offence where an act which otherwise exhibits the elements of a criminal offence is not a criminal offence because of the lack of age or insanity of the person acting. does

[79] JELÍNEK, J. *„Zákon o obětech trestných činů: komentář s judikaturou"* Leges, 2014, p. 104
[80] GŘIVNA, T.-ŠÁMAL, P.-VÁLKOVÁ, H. ET AL: *„Oběti trestných činů. Komentář. 2. vydání"* C. H. Beck 2020, p. 114
[81] JELÍNEK, J.: *„Zákon o obětech trestných činů: komentář s judikaturou"* Leges, 2014, p. 105

not lessen the impact on the victim of the offence. The victim experiences harm on the same level as if it were a criminal offence".[82] This approach, then, is straightforward as the entire provision is primarily conceived as a prevention against secondary victimization of the victim, whereby threats or intimidation of the victim by the accused can be prevented in this way.

Secondary victimization is a process or situation, when or where victims may be exposed to unpleasant behaviors, actions, and events during criminal proceedings which may create negative feelings and deepen their harm, the secondary victimization.[83]

Secondary victimization was defined in the legal context of the Czech Republic in the year 2013, under VCA, which defined secondary harm – secondary victimization – and sets basic principles for the authorities involved in the relationships towards the victims. In relation to victims, all law enforcement authorities have to be more sensitized in the future. The phenomena of secondary victimization includes defamation of the victim, blaming or transferring guilt to the victim, failure to respect the victim's privacy, damaging the victim's reputation, and harm downplay.[84]

It should be noted that this procedure contributes to the fulfilment of the purpose of criminal proceedings or the victim of the crime often plays a key role in the conviction of the perpetrator in criminal proceedings.[85] After all, the intention to provide victims of crime with the widest possible range of services can already be seen in the Directive itself, according to its preamble (22): „The moment when a complaint is made should, for the purposes of this Directive, be considered as falling within the context of the criminal proceedings. This should also include situations where authorities initiate criminal proceedings ex officio as a result of a criminal offence suffered by a victim."

[82] JELÍNEK, ibid p. 27
[83] MALACKA, M.: *Victims of crime and harmonization of the legal regulation of their rights in the EU and the Czech Republic* in *International and Comparative Law Review*, Vol. 20, 2020, p 132. https://DOI:10.2478/iclr-2020-0021
[84] MALACKA, ibid, p. 148.
[85] JELÍNEK: ibid, p. 104

5. The apparent disproportion between the protection of the privacy of the victim of an infraction and the victim of a crime, the case of the accused Mr L.

Already in an initial comparison of the protection of a victim of an infraction and a victim of a crime, one can see abysmal differences, as the so-called person involved in the proceedings is granted much narrower protection than the victim of a crime. I will demonstrate this disproportion with a practical example.

The substantive and locally competent administrative authority received the file material of the Police of the Czech Republic, which was forwarded in accordance with the LIP. The content of the case file was the suspicion against Mr L. that he had committed an infraction against civil coexistence - other gross conduct by driving a group of young women as a taxi driver in the morning hours, when he started to show his genitals to the passengers after they got out of the vehicle. One of the women then reported the suspect's actions to the Police Authority, and at her request her information was anonymized in accordance with § 16 VCA. It should be noted that in the case of suspicion of committing an infraction of other gross conduct, the Police Authority is not obliged to make the necessary investigations to identify the person suspected of committing the infraction and to secure the evidence necessary for later evidence before the administrative authority.[86] On the basis of the above procedure, the administrative authority is then generally obliged to examine the notification and obtain the necessary explanations. The administrative authority subsequently summoned the suspect, the young woman in the capacity of the informant, and ascertained the identity of the other women to provide explanations. The accused was not contactable in the matter. The following will outline how the status of the whistleblower as a victim of the offence was transformed.

1) By the mere referral of the file to the administrative authority, the whistleblower has already lost the existing preventive protection of privacy.

2) The suspect could have requested access to the file during the explanation before the proceedings were initiated and, if he had fulfilled the condition of an overriding legitimate interest, the

[86] § 73 and § 74 LIP

administrative authority would have been obliged to allow him access to the file, including the whistleblower's separately held data.

3) After the initiation of the proceedings, the accused could inspect the file without further delay, where this right arises from the moment of service of the notice of initiation of the proceedings. Thus, the whistleblower is not primarily aware of this moment of the emergence of her right to request the anonymization of data and, in the case of an active accused, the anonymization of data becomes irrelevant.

Certainly, we could encounter the opinion that according to § 72a(2) of the LIP, in combination with (22) of the Preamble of Directive, the data were excluded from access to the file because access to the data was restricted in the previous criminal proceedings and only an entry should have been made in the file. I cannot agree with this approach (although I believe it would be more equitable). In the case of the initiation of criminal proceedings within the meaning of the LIP, as a law firmly linked to criminal law and the procedural rules contained in Act No 141/1961 Coll. on Criminal Procedure Criminal Procedure Code, the act of initiating criminal proceedings is deemed to be the drawing up of a record pursuant to Article 158(3) of the Criminal Procedure Code of the initiation of criminal proceedings to clarify and verify the facts reasonably suggesting that a criminal offence has been committed (cf. Supreme Administrative Court No 6 As 56/2004). As the Supreme Administrative Court further stated, "It is the drawing up of the record of the commencement of criminal proceedings that separates the completely informal stage, which is not even a criminal proceeding under the Criminal Procedure Code, from the preparatory proceedings[87] (Vetešník, 2020, 259-274). The opposite approach, i.e. the application of the extended concept of criminal proceedings under the Directive, would mean exceeding the statutory competences of the administrative authority. There is no legal framework in the Czech legal order which would allow the administrative authority to take such an approach. Unlike criminal law enforcement authorities, which are directly empowered to take this approach under the VCA. In doing so, state (public) authority can only be exercised "in the cases and within the limits set by law and in the manner

[87] JEMELKA, L.-VETEŠNÍK P.: *„Zákon o odpovědnosti za přestupky a řízení o nich. Zákon o některých přestupcích. Komentář. 2. vydání“* C. H. Beck, 2020, pp. 259-274

provided by law". The yardstick here is therefore 'the law', whether ordinary or constitutional.[88] If the authority in question steps outside these limits, it is acting ultra vires.[89]

Unfortunately, however, the above list does not end with the shortcomings of the legal regulation of the protection of the privacy of victims of infraction. On further examination, we are bound to notice several curious situations that may arise.

The provisions of § 72a LIP state that "The administrative authority shall decide on the request pursuant to the first sentence by a resolution", while at the same time remaining silent on the possibility of objecting to the resolution, or on the disclosure of certain data to the accused ex post after anonymization. Therefore, there is no choice but to follow the general procedural rules of the Administrative Procedure Code, namely § 76 and § 72 of the Administrative Code, according to which the resolution is notified to the party and the party to whom the resolution was notified has the right to appeal.

It also follows from the regulation in question, § 94(3) of the AC, that "only the resolution on the adjournment of the case (§ 43) and the resolution on the discontinuance of proceedings (§ 66) may be reviewed separately in the review proceedings. The other resolutions may be reviewed only together with the decision in the case or with another decision preceding it and only if it may be relevant for the compliance of the decision in the case or another decision with the law or for the compensation of damages'.

This legal reality tells us that an resolution excluding a portion of the information from inspection of the file will always be served on the accused and, if applicable, on the injured party if the participation of the injured party is established before the resolution is issued. The person directly affected by the commission of the infraction and the witness will not be served with the resolution. The victim in the capacity of a witness will not even have immediate access to information on how the administrative authority has decided on the exclusion of data, given his limited rights. It is not a problem, then, if the administration authority decides in favor of the victim, but it certainly comes into play in a situation where the administrative authority refuses to exclude the data by its resolution.

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[88] SLÁDEČEK, V.-MIKULE- V.SUCHÁNEK, R.-SYLLOVÁ, J.: „*Ústava České republiky. Komentář. 2. vydání*“ C. H. Beck, 2016 p. 32
[89] SLÁDEČEK, V.-MIKULE- V.SUCHÁNEK, R.-SYLLOVÁ, J.: *ibid*, p. 43

As it follows from the above, the victim has no right to appeal and, given the fact that the resolution neither postpones nor suspends the proceedings, an independent review of the resolution on the basis of the victim's initiative is not possible. The victim's only theoretical possibility is that the administrative authority will apply under the Freedom of Information Act, find out the reasons for the refusal, and then apply again, since the resolution did not create an obstacle to the case being adjudicated. However, given the preventive nature of the measures, this construction is completely wrong. Moreover, the accused may, in the meantime, become acquainted with the contents of the file without difficulty, particularly if he is informed of the victim's efforts to exclude the data from inspection by means of a resolution sent by post.

Unfortunately, the shortcomings of the provision in question do not end with the list so far. I believe that a difficulty may arise with regard to the definitive way of excluding data from inspection. Although the accused, unlike some persons involved in the proceedings, has the right to lodge an appeal against the resolution to exclude part of the data from inspection of the file, the situation provided for in § 16 VCA may arise without much difficulty and some of the excluded data may need to be made available to the accused in order to achieve the purpose of the proceedings or to exercise his right to defense. It is common for the accused to hire a lawyer during the proceedings. If the defense counsel subsequently requests disclosure of information already excluded, although for the purpose of proper defense, this information will nevertheless no longer be disclosed. There is no legal cause on which the information could be disclosed.

6. Preventive Privacy Protection for Victims of Infraction in the Context of EU Law, The case of accused M, accused C and Mrs. C.

Given the fact that the Czech Republic is a member of the European Union, it is necessary to assess national legislation in the light of these obligations. It is necessary to ask whether the national legislation on the protection of the privacy of victims of infraction can stand not only on its own, but also in the context of the legislation of this Community and whether together they form a meaningful and functional whole. To my great regret, however, I must rather predict, on the basis of the preceding chapters, that the national legislation will not hold up, which may also have a significant impact on the protection of victims of infraction in the EU area as a whole.

I will again demonstrate my reasoning with a practical case, this time with a cross-border element. Mrs C was the wife of accused C when that marriage was in a long-standing breakdown. Both were citizens of the Slovak Republic. Mrs C subsequently met the accused M, who was a citizen of the Czech Republic, at a poultry show. Mrs C then finally decided, in view of the abusive behavior of her former husband, to apply for a divorce and subsequently moved to the Czech Republic to join the accused M. She reported her husband's abusive behavior to the police authorities in the Slovak Republic before she left. The accused C subsequently sought out Mrs C in the Czech Republic, where he harassed her and there was also a mutual assault between the accused C and the accused M.

The summary of the case:

In the Slovak Republic, there is no preventive protection of victims of infraction, and even the Slovak legal system does not contain preventive protection of the privacy of the victim of a crime.

It is possible to inspect the file material in Slovakia according to Act No. 372/1990 Coll. on infractions, hence according to Act No. 71/1967 Coll. Act on Administrative Proceedings, under de facto the same conditions as in the Czech Republic, including inspection of the file prior to the initiation of proceedings.

In view of the fact that Mrs. C and Accused C were in divorce proceedings, Accused C had the opportunity to inspect the pre-trial file when he argued and proved the reasonableness of his claim. Accused C submitted that the information in the file was necessary for him to attend the divorce proceedings. Based on the information provided in the file in Slovakia, accused C sought out Mrs C in the Czech Republic.

Also in this case, as in the previous example, it is true that preventive privacy protection in the Czech Republic was not granted to the victim from the moment the case was reported, but only when the proceedings were initiated.

Ms C has the procedural status of a person directly affected by the commission of an infraction, specifically pursuant to § 7(1)(c)(4) ACI, where she has consented to the initiation of proceedings.

If Mrs C had requested anonymization of her data, she would not have been notified of the resolution. She could have found out the result by inspecting the file. However, Mrs C would be deuied the right to challenge the resolution.

The first problem that the above example highlights is the fact that some countries have not yet properly implemented the Directive. The Commission's report to the European Parliament and the Council on the implementation of the Directive of 11 May 2020 shows that Member States had until 16 November 2015 to transpose the requirements of the Directive into national law. In January 2016, the Commission launched infringement proceedings against 16 Member States that had not notified their implementing measures by that date.[90] As of the date of publication of this Report, most of the Member States have not completely transposed the Victims' Rights Directive. Infringement proceedings for these countries are on-going.[91] As regards the implementation of Article 21, several Member States have not implemented this provision at all and less than half have only partially implemented it.

It is indeed a problem to ensure the protection of any legal asset in the EU area if some countries do not provide this protection at all or very casually. However, it should be remembered that victim protection already existed before the Directive.

In this vein, the Directorate-General for Justice issued a guideline in 2013 to facilitate the effective and timely implementation of the Directive bound by its provisions. In line with the DG Justice guidance, the general principles of EU law (e.g. equality and non-discrimination) and the provisions of the CPR must be fully respected. Existing case law of the European Court of Human Rights, which contains various references to victims' rights, is also binding, in particular as regards access to justice and respect for due process requirements.[92]

[90]Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Romania, Slovenia and Slovakia

[91] The Commission has 21 on-going infringement proceedings for incomplete transposition of the Victims' Rights Directive against Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Sweden.

[92] BANACH-GUTIERREZ, J.B.: Crime victims' rights in the European area of justice and Polish legislation. Nowa Kodyfikacja Prawa Karnego, 2019, 52. p. 14
https://Doi:10.19195/2084-5065.52.2

Looking then at the other circumstances of the example, in my view it can be concluded that Mrs C (the person directly affected by the infraction) may have been deprived of her right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union. Specifically, I am referring to the right to an effective remedy, which corresponds to Article 13 of Convention. Indeed, the right to a fair trial is itself guaranteed by the Directive in paragraph (66).

This problem, in my judgment, lies in the fact that even if Mrs. C had decided to make an application to anonymize her data in the file, she would not have had the right of appeal or application to activate the supervisory remedy in the event of a refusal resolution. It is also more than striking that although the resolution rules on the victim's right to preventive privacy, the victim is uot eveu notified of the resolution. I believe that in the current wordiug of the legislation under § 72a of the LIP, this protectiou of the privacy of the victim of an infraction canuot be considered realistic, let alone effective.

I am also of the opinion that such an approach of the legislator is in direct contradiction with the case law of the European Court of Human Rights hereinafter referred to as the ECHR). In a 2011 judgment, the ECHR emphasized that "the object aud purpose of the Convention [for the Protection of Human Rights and Fundamental Freedoms, ECHR] as an instrument for the protection of iudividual humau beings requires that its provisions be interpreted aud applied so as to make its safeguards practical and effective .[93] In its jurisprudence, the ECHR has also stated that the victim's right to access to justice must not only be theoretical, but also effective.[94] It is also debatable whether the State in this case has complied with its positive obligation under Article 8 of the Couvention to take measures to eusure respect for private life in relations between individuals.[95]

The other problem I see is the potential curtailment of the rights of the accused. It is likely that the excluded iuformation and its disclosure will be uecessary for the accused to exercise his right of defense under Article 6(3)(b) of the Convention. If the accused or his attorney were not allowed to see specific informatiou, the rights of the defense might be impaired.[96]

[93] ECHR Case of Al-Skeini and other v. The United Kingdom (Application no. 55721/07)
[94] ECHR Case of El-Masri v. The former Yugoslav Republic of Macedomia (Application no. 39630/09)
[95] ECHR Case of Đorđević v. Croatia (Application no. 41526/10)
[96] ECHR Case of Öcalan v. Turkey (Application no. 46221/99)

A significant violation of the accused's procedural rights may also have a direct impact on the victim. Even if the accused were the perpetrator of the offence, the proceedings would suffer from such irreparable defects that a decision of guilt on the merits would not stand.

As a result, the victim's right to a thorough and effective investigation that could lead to the identification and punishment of those responsible could not be fulfilled.[97]

While the main purpose of the Convention system is to provide individual assistance, it is essential to stress that its mission is also to adjudicate public policy issues of common concern, thereby raising general standards of human rights protection and expanding human rights jurisprudence throughout the Convention community.[98] Given that the Court provides the final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will assess whether the national authorities have taken sufficient account of the principles emerging from its judgments on similar issues, even where they concern other States.[99] It can therefore be concluded that failure to respect the clear fundamental statements of case-law may be considered a violation of the parties' obligations under Article 1 of the Convention, irrespective of the State against which the relevant judgment was directed.[100]

7. Conclusion

More than 10 years have passed since the adoption of the Directive and therefore we can assess, at least in the short term, whether its introduction was successful and whether it has had a positive impact on the legal order of the Czech Republic and the EU as a whole. It can certainly be stated that the legislator in the Czech Republic has primarily focused on victims of crime, as the proclamation in the Directive itself suggests. As far as the rights of victims of infraction are concerned, the legislator has rather failed on this point. In my opinion, this article shows that the legislator started to partially address the rights of victims of infractions only after a long time after the introduction of the Directive, and not yet in a very successful way. The legislator did not define

[97] ECHR Case of Gäfgen v. Germany (Application no. 22978/05)

[98] ECHR Case Bayatyan v. Armenia (Application no. 23459/03)

[99] ECHR Case of Opuz v. Turkey (Application no. 33401/02)

[100] ARNARDÓTTIR, O. M.: *Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights* in *The European Journal of International Law*, Vol. 28 2017. p. 825. https://Doi:10.1093/ejil/chx045

the concept of a victim of an infraction, since in the case of preventive privacy protection it does not grant protection to all victims, but only to those who have a procedural status in the proceedings initiated. Also, in the legal system of the Czech Republic, there is a significant gap between the protection of victims of criminal offences and victims of infraction offences, without any reflection of the possibility that the procedural status of a victim of an infraction offence may be only temporary and, from a substantive point of view, a person may be a victim of a criminal offence. I believe that it is precisely this myopia that leads to a breach of the obligations arising from the Directive for the Czech Republic. On the basis of a more thorough analysis, it must then be concluded that the legal regulation of victims of infraction not only does not stand up to the Directive but also to the recent case law of the ECHR. In my opinion, it would be appropriate for the protection of victims of infraction to adopt at least the position that victims of infraction should be regarded as victims of crime or at least be given adequate protection. However, it would of course be best if this issue were addressed at least marginally in a decision of the ECHR or the ECJ. Given the rather marginal interest in infractions as opposed to crimes, this seems less likely in my view. However, this case law, as a unifying element, would then cover protection throughout the EU area, despite the lax approach of some Member States to transposing and implementing the Directive into their national legislation. However, we shall see what the future practice will bring.

MEASURE OF CULTURAL LANDMARK CONSERVATION- BINDING OPINIONS AND WRITTEN STATEMENT OF THE NATIONAL HERITAGE INSTITUTE

HORÁKOVÁ, Monika[101]

Introduction

The Czech Republic is a state that tries to preserve its cultural and historical identity by legally regulating the protection of its cultural heritage primarily through the legal regulation of the care of cultural landmarks. The basis for the protection of landmarks is its definition in the Constitutional order of the Czech Republic and in the Act on State Landmark Conservation. The aim is to ensure the effective and transparent protection of the heritage fund, especially through the institute of renewal of cultural landmarks. The renewal of cultural landmarks is enshrined in Section 14 of Act No. 20/1987 Coll., on State Landmark Conservation, as amended, hereinafter referred to as the "Act on State Landmark Conservation". The concept of renewal is understood as a legislative abbreviation for activities such as maintenance, repair, reconstruction of a cultural landmarks, or it may be its restoration, other modification or intervention in its environment, while with the exception of restoration none of these activities is legally defined.[102] The state, through the state landmark conservation bodies and the National Heritage Institute, assesses plans to carry out these activities from the perspective of the principles of conservation and uses a legal instrument - a binding opinion to regulate these activities. In order for this binding opinion to be issued by the relevant state conservation authorities, an opinion of the National Heritage Institute must be requested.

Binding opinion of the landmark conservation body

Binding opinions are issued by the state landmark conservation bodies, they are basis for the decision of the competent administrative authority or are themselves an administrative decision.[103] The state landmark conservation bodies, i.e. the municipal office of a municipality with extended powers, and regional authorities, will express their opinion on whether the submitted intention of the owner of the cultural

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[102] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *„Zákon o státní památkové péči. Praktický komentář"* Praha, Wolters Kluwer ČR, 2019, p. 129.

[103] VARHANÍK, J.-MALÝ, S.: *„Zákon o státní památkové péči: komentář. 1. edition"* Praha: Wolters Kluwer ČR, 2011, p. 79-83. More also thesis MRÁZKOVÉ, Magdalény *„Vyjádření odborné organizace státní památkové péče v procesu vydávání závazných stanovisek při obnově kulturní památky"*

landmark to carry out its restoration is permissible and set the conditions for its implementation. When issuing them, they are guided by the opinion of the professional organisation involved in the state landmark conservation - the National Heritage Institute as the guarantor of the expertise of the state administration in the field of state landmark conservation. At the same time, it is possible and permissible for them to deviate from the content of the National Heritage Institute's statement when issuing binding opinions, provided that the legal conditions are met. The opinion of the National Heritage Institute is a prerequisite for issuing a binding opinion under both Section 149 and Section 67 of the Code of Administrative Procedure.[104]

The new text of the Act on Spatial Planning and Building Code (Building Act), hereinafter referred to as the "Building Act", in the sense of integration of permitting processes and efforts to speed up administrative proceedings, as well as the adoption of Act No. 283/2021 Coll., the Building Act, which takes full effect from 1 July 2024, play a crucial role.[105]

The basic provision in relation to the legal regulation of the issuance of binding opinions by the landmark conservation bodies is the aforementioned Section 14 of the Act on State Landmark Conservation. If the owner of a cultural landmark intends to carry out the renewal of a cultural landmark pursuant to Section 14(1) of the Act on State Landmark Conservation or the owner of a property that is not a cultural landmark but is located in a conservation area intends to carry out works pursuant to Section 14(2) of the Act on State Landmark Conservation, it is obliged to request a binding opinion from the municipal office of a municipality with extended powers or the regional authority if it is a national cultural landmark It is essential that the binding opinions are of a preventive nature, because the assessment of the suitability of the restoration plan, both in terms of the proposed scope and the suitability of the proposed works, takes place in advance.[106]

[104] § 32 odst. 2 písm. f) Act on State Landmark Conservation

[105] According to A. n. 183/2006 Sb., Act on Spatial Planning and Building Code (Building Act), especially A. n. 403/2020 Sb., so called Linear Act. The state landmark conservation bodies are authorised to issue binding opinions pursuant to Section 149 of the Code of Administrative Procedure on the plan to renewal a cultural landmark or a national cultural landmark or a property located in a landmark reservation or a landmark zone that is not itself a cultural landmark or a national cultural landmark In addition, plans for the renewal of properties located within the protection zones of an immovable cultural landmark , immovable national cultural landmark, landmark area and landmark zone will also be assessed, in order to protect the environment and, in particular, the property concerned.

[106] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid,* p. 144. They state that *"practice has tended towards a rather loose interpretation of precautionary effect, whereby the fulfilment of the condition 'in advance' is understood broadly, including cases where the application is made in the course of the execution of the works or where the works are already carried out in the course of the relevant procedure".*

Binding opinion issued pursuant to Section 149 of the Code of Administrative Procedure

The binding opinion makes the decision in the administrative procedure conditional. Pursuant to Section 149(1) of Act No. 500/2004 Coll., Code of Administrative Procedure, as amended, hereinafter referred to as the "Administrative Procedure Code", it is an act performed by an administrative authority on the basis of the law in administrative proceedings (main proceedings), it is not an independent decision in administrative proceedings and its content is binding for the operative part of the decision of the administrative body.[107] In this case, it is necessary to relate the above-mentioned Section 14(1) and (2) of the Act on State Landmark Conservation to the provisions of Section 44a(3) of the Act on State Landmark Conservation , which regulates the mutual relationship between the Act on State Landmark Conservation and the Building Act when issuing binding opinions.[108] A binding opinion is issued if the building authority is competent to decide on the matter under the Building Act, cumulatively - it must be a building or other intervention regulated by the Building Act.[109] It is not only about the administrative procedure itself, but also about other procedures where the decision-making power of the building authority is established, such as the notification regime for the implementation of buildings or the issuance of planning consent. The procedure where a public law contract is concluded is also specific. The builder states in the draft contract that he undertakes to comply with the conditions laid down in the binding opinions of the authorities concerned pursuant to Section 78a(2) or 116(3) of the Building Act.

Pursuant to Section 149(2) of the Code of Administrative Procedure, which defines the content of a binding opinion, a binding opinion consists of a binding part and a statement of reasons.[110] Binding opinions issued in this way cannot be challenged on appeal. They may be reviewed on appeal only in the context of an appeal

[107] Compare SLÁDEČEK, V. *„Obecné správní právo. 4., aktualizované vydání"* Praha, Wolters Kluwer ČR, 2019, p. 186. Compare FRUMAROVÁ, K., GRYGAR, T., POUPEROVÁ, O., ŠKUREK, M.: *„Správní právo procesní. 1. vydání"* Praha: C. H. BECK, 2021, p. 460. It points out that there is no distinction in the Code of Administrative Procedure with the opinion issued under Article 67 of the Code of Administrative Procedure. In order to make the distinction, it is necessary to apply the rules laid down in the special laws governing the various parts of the public administration, taking into account the essential criterion of the finality of the decision, i. e. whether the binding opinion issued is the basis for a decision of another administrative body or whether it is a binding opinion in the form of a final decision. Read more PRŮCHA, P. *„Správní řád s poznámkami a judikaturou. 4. aktualizované a doplněné vydání"* Praha, Leges, 2019, p. 435. Compare also Judgment of the Supreme Administrative Court of 10. 5. 2017, č. j. As 163/2016-27. Next ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 529.

[108] Compare § 105 a § 106 Act on Spatial Planning and Building Code (Building Act), and, of course, to apply the provisions of Section 136 of the Code of Administrative Procedure, which regulates the authorities concerned.

[109] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 526-527.

[110] The substantive requirements were first derived from case law, as there was no relevant statutory regulation. Compare also Judgment of the Supreme Administrative Court of 22. 10. 2009, čj. 9 As 21/2009-150, Read more PRŮCHA: ibid p. 436, and § 149 odst. 2 Code of Administrative Procedure. In the binding part, the authority concerned "*shall state the solution to the question which is the subject of the binding opinion, the provision of the law which authorises its issue and other provisions of the legislation on which the content of the binding part is based. It shall state in the statement of reasons the grounds on which the content of the binding part of the binding opinion is based, the grounds on which it is based and the considerations which have guided its assessment and interpretation of the legislation on which the content of the binding part is based.*"

against a final, i.e. conditional, decision.[111] Similarly, judicial review of the content of binding opinions in accordance with Article 36(2) of the Charter of Fundamental Rights and Freedoms is possible only by way of judicial review of the final administrative decision pursuant to Article 75(2) of the Code of Civil Procedure.[112] However, binding opinions issued in this way can be reviewed in a review procedure and, on the basis of the illegality found, the superior administrative authority of the authority that issued the binding opinion may cancel or amend the opinion. Both the party to the proceedings and the administrative authority are entitled to lodge a complaint if, in the course of its official activities, it finds that another administrative body has issued an unlawful binding opinion.[113]

Fundamental changes to the legislation were brought about by the aforementioned amendment to the Liner Act.[114] This amendment also amended the Code of Administrative Procedure and the Building Act. In particular, it introduced into the Code of Administrative Procedure a time limit for issuing a binding opinion. Under the provisions of Section 149(4) of the Code of Administrative Procedure, the administrative body competent to issue a binding opinion is obliged to issue it 'without undue delay, no later than 30 days from the date on which it was requested to issue a binding opinion'. If an on-site inspection must be ordered or if the case is particularly complex, up to 30 days may be added to this time limit.[115] If the application for a binding opinion does not have the prescribed formalities or suffers from other defects, the administrative authority shall invite the applicant to eliminate the defects and shall provide him with a reasonable period of time for doing so and, in particular, shall fulfil its duty to instruct the applicant on the consequences of failure to eliminate the defects in the application. The time limit for issuing a binding opinion shall not run while the application is being remedied. The new period shall start to run from the date on which the defects in the application are remedied. If the applicant nevertheless fails to remedy the defects in the application which prevent the issuing of a binding opinion, the administrative authority shall inform the applicant that a binding opinion cannot be issued.

In this context, the amendment to the Building Act concerns the provisions of Section 4(9).If the binding opinion of the concerned authority is not issued within the time limit for its issuance (even if the time limit

[111] Judgement of the Extended Chamber of the Supreme Administrative Court of 23. 8. 2011, čj. 2 As 75/2009-113, in which the Extended Chamber of the Supreme Administrative Court expressed the opinion that binding opinions issued pursuant to Section 149 of the Code of Administrative Procedure are not decisions within the meaning of within the meaning of Section 67 of the Administrative Procedure Code or Section 65 of the Code of Civil Procedure, as they do not in themselves create, modify or abrogate or bind rights or obligations. More on the complicated evolution of case law PRŮCHA: 2019, p. 437.

[112] More PRŮCHA ibid, p. 438

[113] Cf. § 94 et seq. - review proceedings and § 156(2) of the Code of Administrative Procedure, which is not applicable in this case. Section 149(8) of the Code of Administrative Procedure, which was amended by the amendment to the Liner Act, applies.

[114] Act No. 403/2020 Coll., amending Act No. 416/2009 Coll., on accelerating the construction of transport, water and energy infrastructure and electronic communications infrastructure, as amended (hereinafter referred to as the "Line Act").

[115] POTĚSIL, Lukáš *„a kol. Správní řád. 2. vydání.“* Praha,Nakladatelství C. H. Beck, 2020, p. 735. More Explanatory Memorandum to Act No. 403/2020 Coll. amending the Linear Act, p. 55.

has been extended and the concerned authority has issued a resolution to that effect, which it has noted in the file and informed the applicant), it is deemed to be consensual and without conditions. The amendment therefore introduced the institution of a fictitious consent opinion.[116] The main reason was to eliminate unjustified delays in the proceedings. At the same time, however, pursuant to Section 4(10) of the Building Act, if the prerequisites for issuing a fictitious consent opinion without conditions were not met, the superior administrative authority may cancel the fictitious opinion by issuing a new binding opinion and thereby cancel the previous fictitious opinion. The new opinion may be issued within six months of the legal validity of the decision which was conditional on the binding opinion.[117]

Binding opinion issued pursuant to Section 67 of the Code of Administrative Procedure

According to Section 44a(3) of the Act on State Landmark Conservation a binding opinion is a decision in an administrative proceeding if it is issued by a state landmark conservation body in a matter that the building authority is not competent to decide on under the Building Act. In the sense of the following exhaustive list: the implementation of building modifications pursuant to Section 79(2) of the Building Act, where no decision on the location of the building or planning consent is required, similarly changes in the use of the territory pursuant to Section 80(3) of the Building Act and buildings, landscaping, equipment and maintenance works not requiring a building permit or notification pursuant to Section 103 of the Building Act. a.[118]

In the light of the amendment to the Lines Act described above concerning the time limits for issuing a binding opinion, it should be noted that according to the provisions of Section 71(1) of the Code of Administrative Procedure, the administrative body is obliged to issue a decision without undue delay. If it is not possible to issue a decision in this way, the administrative authority is obliged to issue a decision within 30 days of the initiation of the proceedings, plus up to 30 days if it is necessary to order an oral hearing or a local inquiry, to summon, to conduct a hearing or to serve a public notice on persons who are demonstrably unable to be served or if the case is particularly complex. In addition, the time required for the execution of a request for an inquiry, the preparation of an expert report or the service of a document abroad shall be added.[119] Failure to comply with the time limit for issuing a binding opinion constitutes maladministration and measures against inaction may be applied. Likewise, unlike binding opinions issued under Section 149

[116] Section 4(9) of the Building Act, as amended by Act No. 403/2020 Coll., the Linear Act. More Explanatory memorandum to Act No 403/2020 Coll. amending the Linear Act, p. 6.

[117] Section 4(10) of the Building Act.

[118] More ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p 36. This also includes cases of project documentation in the form of a conceptual plan or preliminary study. The state landmark body issues a binding opinion in the form of a decision.

[119] Section 71 of the Code of Administrative Procedure.

of the Code of Administrative Procedure, they may be challenged on appeal and their judicial protection is ensured.[120]

Statement of the National Heritage Institute

Statements as part of binding opinions (forms of action of administrative bodies) are of significant importance in the implementation of the renewal of cultural landmarks.[121] Binding opinions, which are issued by the state landmark conservation bodies, are an basis for the decision of the competent administrative body or are themselves an administrative decision.[122] However, the state landmark conservation bodies are guided in their issuance by the opinion of the expert organization of state landmark protection - the National Heritage Institute as the guarantor of the expertise of the state administration in the field of protection of cultural landmarks. At the same time, it is possible and permissible for them to deviate from the content of the National Heritage Institute's statement when issuing binding opinions, provided that the legal conditions are met. The opinion of the National Heritage Institute is a necessary condition for the issuance of a binding opinion under both Section 149 and Section 67 of the Code of Administrative Procedure.[123]

The competent administrative body shall request a statement after it has received the request for a binding opinion. The National Heritage Institute shall evaluate the plan for the renewal of the cultural landmark and issue a statement within 20 days; in particularly complex cases, the time limit may be extended by up to a further 30 days; the extension of the time limit shall be decided by the administrative body, which must also extend the time limit for issuing a binding opinion. The maximum time limit for issuing a statement may be 50 days.[124] If the time limit expires in vain, the binding opinion may be issued without the opinion of the National Heritage Institute. The statement is evidence and the administrative body applies the principle of free evaluation of evidence.[125]

The basic provision in relation to the legal regulation of the issuance of statements by the National Heritage Institute is the aforementioned Section 14(1) and (2) of the Act on State Landmark Conservation. The state landmark protection body, whether it is a municipal office of a municipality with extended powers, and regional authority[126] before issuing a binding opinion, it shall request a written statement from the National

[120] Compare PRŮCHA ibid, p. 435

[121] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 128.

[122] VARHANÍK-MALÝ ibid, p. 79-83.

[123] § Section 32(2)(f) of the Act on State Landmark Conservation.

[124] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 157.

[125] If the administrative authority does not follow the opinion of the National Heritage Institute, it is obliged to justify this in the justification of the binding opinion. More ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 158.

[126] If it is a cultural landmark or national cultural landmark or a property located in a landmark reservation or landmark zone that is not itself a cultural landmark or national cultural landmark.

Heritage Institute, which is a professional organisation of the state landmark protection. The National Heritage Institute shall submit its opinion to the State landmark protection body within twenty days of the date on which it received the request for its issuance. This time limit is not per se fixed. It is part of the thirty-day period within which a binding opinion must be issued by the State landmark body. In particularly difficult cases, the time limit may be extended. The competent administrative body to issue the binding opinion may do so, but is not obliged to do so, of course, with the proviso that the time limit for issuing the binding opinion is also extended. The maximum time limit is therefore 50 days.

If the extended time limit is not met and the statement is not made and the state landmark body is not delivered in the sense of handing over a copy of the written version, the authority may issue a binding opinion even without the missing statement of the National Heritage Institute. In any event, from the point of view of the professional protection of cultural heritage, about the desired state. In addition, in order to be able to issue an opinion, it is necessary to verify that all the other procedural requirements are met, namely the establishment of the facts of the case and the existence of a proper statement of reasons o.[127]

However, a situation may arise that the statement of the National Heritage Institute is prepared and delivered to the state heritage protection body after the expiry of the extended deadline. In this case, the administrative body will also take into account such a late statement, but only if it has not yet issued its binding opinion.[128] It does so primarily to ensure the expertise of the assessment of the case.

Similarly, the institution of fiction may be pointed out, which would seem to be possible in this context. The question remains, however, whether it is appropriate. It is assumed that the content of the statement is a highly professional assessment of the applicant's intention from the point of view of conservation. Nor does the provision of section 14(6) Act on State Landmark Conservation correspond to the possibility of its normal absence, nor is the administrative discretion of the National Heritage Institute assumed here.

Statement of the National Heritage Institute as evidence

The opinion of a professional organization of the state conservation has the nature of evidence.[129] The administrative authority issuing the binding opinion is not bound by the conclusions of the expert body of the state conservation authority. It evaluates it as evidence.[130] It follows that it may depart from the

[127] imilarly, we can look at the situation where an opinion is issued in a timely manner but is disadvantageous to the applicant. It is clear from the content of the statement that the applicant's intention is found to be inadmissible. In such a case, it is necessary to deal with these conclusions both in the opinion and then in the decision of the administrative body.

[128] I.e. he did not provide a written copy of the binding opinion. Section 71(2)(a) of the Code of Administrative Procedure. Compare ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 157. It is a similarity.

[129] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 158. Furthermore, Opinion of the Ministry of Culture, Department of Heritage Protection of 10 October 1997, No 10904/97, available at: www.mkcr.cz. (cited:30/09/2023)

[130] Compare § Section 50(4) of the Administrative Procedure Code, in the sense of the principle of free evaluation of evidence, as well as the judgment of the Municipal Court in Prague of 31. 5. 2018, č. j. 5 A 187/2014-82. Furthermore, in the sense of the

conclusions contained therein. However, in that case, it is under an obligation to duly justify the divergent assessment in the statement of reasons for the binding opinion issued, in terms of the grounds, conclusions and considerations which guided its assessment.[131]

The contents of the statement of the professional organisation of the state conservation must always be fulfilled. In particular, it must always be clear whether the applicant's project under examination is considered admissible or inadmissible, and the conclusion of the examination must always be clearly and comprehensively justified.[132] In addition, the statement must include a description of the proposed works (the source is a copy of the application and project documentation provided by the state conservation authority), a description of the values of the protected object and an assessment of the impact of the proposed works on those protected values.[133] In addition to the above, the expert organization must draw on relevant literature, other sources such as archival materials, its own research, photo documentation, etc. It must respect national and supranational methodological guidelines.[134] The justification must be sound and detailed, not only if it proposes conditions of implementation for the project under consideration.[135] In the binding opinion, this reasoning may then be used verbatim, or the administrative authority may use at least part of the reasoning of the statement, in this case with appropriate justification, or in the case of a different opinion and failure to accept the conclusions with appropriate justification. Here, too, as already mentioned in the text above, care must be taken to ensure that differences in the concept of monument protection do not arise and that the double-track nature of protection represented by the views of the National Heritage Institute and the state landmark conservation body does not result.[136] The National Heritage Institute therefore introduces, through its statements, the conditions of the so-called established decision-making practice, subsequently implemented by the state landmark conservation bodies. In this context, it is thus necessary to emphasise the fulfilment of one of the basic principles of the activities of the administrative bodies, namely the principle of legitimate expectation and the derived principle of non-surprise. However,

Judgment of the Supreme Administrative Court of 2 August 2012, No 5 Azs 2/2012-49 on the assessment of the evidence individually and in their mutual context.

[131] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 159. This is a procedure of the conservation authority that is in accordance with the law, but it should be rather unique so as not to create specific differences between the performance of conservation by the National Heritage Institute and the state landmark bodies.

[132] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 158. Compare Judgment of the Regional Court in Ústí nad Labem of 20 June 2006, No 59 Ca 59/2005-32, available at www.nssoud.cz.

[133] VARHANÍK-MALÝ ibid, p. 91, compare Judgment of the Municipal Court in Prague of 24 October 2019, No. 5 A 57/2016-38, available at: www.mkcr.cz. (cited:30/09/2023)

[134] VARHANÍK-MALÝ ibid, p. 91. Cf. Judgment of the Regional Court in České Budějovice of 26 October 2016, No. 50 A 2/2016-38, available at: www.mkcr.cz. (cited:30/09/2023)

[135] Compare Judgment of the Supreme Administrative Court of 21 January 2010, No. As 36/2009-162, available at: www.mkcr.cz. (cited:30/09/2023)

[136] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p. 159. Cf. Judgment of the High Court in Prague of 5 A 67/96-29, and Judgment of the High Court in Prague of 25 February 1997 No. 6 A 139/1994, available at: www.mkcr.cz. (cited:30/09/2023)

it should also be emphasised that similar treatment to that in previous comparable cases can be invoked only if that previous action by the administrative body was in accordance with the law. It is therefore not possible to claim that the administrative body has complied with a previous unlawful practice, even if it has not been challenged or brought into conformity with the law. According to the second sentence of Article 2(4) Code of Administrative Procedure, the administrative authority is to ensure that no unjustified differences arise in its decision-making. At the same time, however, it is possible to modify the principle of legitimate expectations by applying the principle of the protection of the public interest.[137]

At the same time, it should be taken into account that the National Heritage Institute has no decision-making power. This is given by law to the state landmark conservation body, which decides in administrative proceedings and may issue an administrative act.[138] According to its statute, the National Heritage Institute is a professional organisation of the state heritage protection.[139] As such, it has no legal means of defending itself in cases where the state conservation authority does not respect the issued statement as to the admissibility of the assessed plans. In the case of a binding opinion, which is a decision in itself or the basis for an administrative decision of another administrative body, such as a building authority, the National Heritage Office is not a party to the proceedings and therefore cannot appeal. The only option would be to initiate a review procedure.[140]

Definition of the institute of the statement of the National Heritage Institute in the proposed new legal regulation by the Act on the Protection of the Heritage Fund and on the amendment of Act No. 20/1987 Coll., on State Heritage Care

In 2019, the Ministry of Culture prepared a draft law on the protection of the monument fund and on the amendment of Act No. 20/1987 Coll., on state landmark conservation, and the institute of expression was retained in it, in accordance with the existing legislation.[141]

Title IV. Marked as "Assessment of work on a cultural monument, in a conservation area and in a conservation area", the statement was enshrined in § 44. In terms of the procedure of the conservation body, the latter was obliged, upon receipt of an application for the assessment of work on a cultural landmark, an

[137] More Judgment of the Supreme Administrative Court of 12 May 2016, no. 5 As 155/2015-35, available at www.nssoud.cz. See also Opinion of the Ministry of Culture, Monument Inspectorate of 24 March 2011, no. 17082/2011 PI, available at: www.mkcr.cz. (cited:30/09/2023)

[138] ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p 159. See also the judgment of the High Court in Prague of 25 February 1997, Case No. 6 A 139/94-17.

[139] Cf. Statute of the National Heritage Institute of 25 June 2020, ref. MK S 5513/2020 OPP, available at available at: www.mkcr.cz. (cited:30/09/2023) Cf. also the Implementing Decree No. 66/1986 Coll., to the Act on State Landmark Conservation.

[140] § 94 of the Code of Administrative Procedure and more ZÍDEK, M.-TUPÝ, M.-KLUSOŇ, J.: *ibid*, p 158.

[141] available at: www.mkcr.cz. (cited:30/09/2023)

application for the assessment of the renewal of a cultural landmark or an application for the assessment of work in a conservation area and conservation zone, to inform the conservation authority of the intended work. In order to strengthen the legal certainty of the applicant, it was proposed that the state landmark conservation body should immediately send a written communication to the conservation authority stating that it would not comment 'unless there are facts justifying a different conclusion in factually identical or similar cases compared to those dealt with previously'."[142] This would directly introduce the fiction of a positive opinion of the National Heritage Institute, but supported by a written communication of the relevant opinion. It is also possible that no opinion at all could be given, in which case these would be so-called 'minor cases'. The appellant has thus solved the problem of the current legislation in that, although it is a recurring routine, it is quite burdensome for the landmark conservation body in that a written opinion must always be drawn up. The appellant has thus fully invoked the principle of legitimate expectation and the principle of non-surprise in the procedure and decision-making of the administrative body, as discussed above in the text, as well as the potential problems of the institution of fiction. However, it is a prerequisite for the implementation of this procedure that the landmark conservation body has complete documentation for the assessment, either in the form of a detailed description by the landmark conservation body or in the form of a copy of the application.[143] In other cases, it was suggested that the conservation authority could deliver its statement within twenty days of receiving the information from the conservation authority. The latter cannot issue its assessment of the application until it has received the relevant statement or the statutory period of 20 days has expired. If the representation is received by the conservation body after the time limit has expired, it shall not be taken into account.[144]

Conclusion

The lack of modern legal regulation of the protection of cultural heritage and especially cultural landmarks is a problem of the Czech legal system. The Constitution of the Czech Republic already refers in its Preamble to the need to protect cultural heritage. Article 34(2) of the Charter of Fundamental Rights and Freedoms establishes a certain degree of protection of cultural heritage and ensures access to it, while Article 35(3) directly sets limits to the protection of cultural heritage. The State protects cultural monuments and oversees their protection, which is in the public interest. The Czech Republic is bound by a number of international

[142] Draft Act on the Protection of the Monument Fund and on Amendments to No. 20/1987 Coll., on Act on State Landmark Conservation, § 44(2), first sentence, p. 22. ibidem

[143] It is for the purpose of drafting the statement that the National Heritage Institut must have the right to inspect the file, make extracts or make a copy of the file or a part of it, more Explanatory Report to the Draft Act on the Protection of the Monument Fund and on the Amendment to Act No. 20/1987 Coll., on State Landmark Conservation., p. 51. available at: www.mkcr.cz. (cited:30/09/2023)

[144] Draft Act on the Protection of the Monument Fund and on the Amendment of Act No. 20/1987 Coll., on State Landmark Conservation., p. 51. available at: www.mkcr.cz. (cited:30/09/2023)

treaties, such as the Convention Concerning the Protection of the World Cultural and Natural Heritage, which established the World Heritage List and the World Heritage Fund.[3] The basic law is Act No. 20/1987 Coll., on State Landmark Conservation. Conservation, which is the only legal regulation of care for cultural landmark . Eforts can be traced to modernise this law and, above all, to adopt a new, modern law that would comprehensively regulate monument care and respond to changes in the concept of protection of cultural monuments. The most recent proposal was the government's draft law on the Heritage Fund, which was rejected by the Chamber of Deputies in its third reading in 2017. The Ministry of Culture prepared a draft law on the protection of the monument fund and on the amendment of Act No. 20/1987 Coll., on State Landmark Conservation, which was submitted for comments in 2019 and unfortunately no further action was taken. Fundamental changes to the legislation were brought about by the amendment of the Building Act and the Linear Act, with my focus on the change of the legal regulation of the institute of binding opinions and statements, which is essential for the implementation of the restoration of cultural monuments and their preservation under the current, rather outdated legislation.

PUBLICATION OF HIGH-VALUE DATASETS UNDER THE ACT NO. 106/1999 COLL., ON FREE ACCESS TO INFORMATION ("THE INFORMATION ACT")

ŠKUREK, Martin[145]

Introduction

At the end of last year it was reported in the media that the European Commission had released a list of high-value datasets. High-value datasets can be defined as documents the re-use of which is associated with important benefits for society, the environment and the economy.[146] The issue of high-value datasets is thus very topical an important, and the author of the present article is therefore interested in finding out how this legal institute is enshrined in the legal system of the Czech Republic, as one of the EU Member States. The instrument of this enshrinement shall be Amendment no. 241/2022 Coll. which, with effect from January 1st 2023, supplemented and changed certain provisions of the Act no. 106/1999 Coll., on free access to information (hereinafter referred to as "the Information Act").

With regard to its content, the present article deals with the part of the Amendment no. 241/2022 Coll. which, with effect from 1 January 2023, supplemented the legal regulation of the Information Act with a provision (the new Section 5b) on the publication of high-value datasets. The new Section 5b of the Information Act states that the so-called obliged entity must publish as open data, in a machine-readable and open format under standard conditions of use in particular through an application programming interface, the information (i.e. high-value datasets) listed in a directly applicable regulation of the European Union issued under Article 14(1) of the Directive (EU) 2019/1024 of the European Parliament and of the Council on open data and the re-use of public sector information (hereinafter referred to as "the Directive (EU) no. 2019/1024").[147]

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[146] Point 66 of the preamble to the Directive (EU) no. 2019/1024.
[147] On some of the problems associated with the adoption of the Directive (EU) no. 2019/1024, see Vuckovic, R., Kanceljak, I. & Juric, M. (2021). Is It Time for New Data Governance? *2021 44th International Convention on Information, Communication and Electronic Technology, MIPRO 2021 – Proceedings*, pp. 1483–1489. DOI: 10.23919/MIPRO52101.2021.9597161.

Terms linked to the concept of high-value datasets

It follows from Section 5b of the Information Act that the concept of a high-value datasets is linked to other terms, namely the terms of obliged entity, open data, machine-readable format, open format and application programming interface. Obliged entities which are obliged to provide information related to their competence according to Section 2 of the Information Act are state authorities, local self-government units and their bodies and public institutions. Obliged entities are also those entities entrusted by law with decision-making power on rhe righrs, legally protected interests or obligations of natural or legal persons in the field of public administration, only to the extent of their decision-making activities. According to the Information Act, professional self-governing chambers publish only information relating to the exercise of public administration entrusted to them by law. Furthermore, the obliged entity is a public company which for the purposes of Section 2a of the Information Act means a legal entity which (a) carries out a relevant activity under the Act no. 134/2016 Coll., Public Procurement Act; acts as a public service provider under Article 2 of the Regulation (EC) no. 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road and on repealing the Council Regulations (EEC) nos. 1191/69 and 1107/70; acts as an air carrier which performs public service obligations under Article 16 of the Regulation (EC) no. 1008/2008 of the European Parliament and of the Council on common rules for the operation of air services in the Community; or acts as the owner of a ship which discharges a public service obligation under Article 4 of the Council Regulation (EEC) no. 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage); and (b) in which the obliged entity may exercise, directly or indirectly, a dominant influence by virtue of its ownership interest in the legal person or the rules governing it. The condition of dominant influence shall be deemed to be fulfilled if the obliged entity directly or indirectly (a) holds a majority of the subscribed share capital of the public company, (b) holds a majority of the voting rights attaching to the shareholding in the public company; or (c) may appoint more than half of the members of the administrative, management or supervisory body of the public company.[148]

For the purposes of the Information Act, open data means information published in a manner allowing remote access in an open and machine-readable format, the manner and purpose of subsequent use of which is not restricted by the obliged entity publishing it and which is registered in the National Catalogue of Open Data (hereinafter referred to as the "NCOD"). In other words, open data is a highly effective way of publishing public sector information. In particular, open data must be: accessible as data files in a machine-

[148] Section 2 and 2a of the Act no. 106/1999 Coll., on free access to information.

readable and open format with complete and up-to-date database content or aggregated statistics; accompanied by non-restrictive terms of use; registered in the NCOD by obliged entities as direct links to data files; accompanied by documentation; available for download without technical barriers (registration, access restrictions, CAPTCHA, etc.); prepared with the aim of the easiest possible machine processing by programmers, etc. and with contact details for the curator for feedback (bugs, extension requests, etc.). If a dataset does not meet one of the conditions, it is not open data. On the other hand, the following are not open data: a search form for end users, a web page with additional information, a public GIS map interface, a web service making available the individual records that make up a dataset with a limitation on the number of accesses, a dataset in PDF format, a dataset in XLS format for printing or a dataset in pseudo-CSV format (e.g. a separator other than a comma). Open data does not only refer to traceability data but to all areas of public administration.[149]

As regards the registration of open data by obliged entities in the NCOD, it is a public administration information system accessible by remote access and used to register information published as open data and other information published by remote access, in particular by an interface for programming applications and by information on products and services that use open data and other information. The information contained in the NCOD shall be provided in a way that allows remote access as open data. The NCOD is managed by the Digital and Information Agency (hereinafter referred to as the "the DIA"). The DIA is the Czech central administrative authority for electronic identification, trust services and public administration information systems. It was established on January 1st 2023 and took over full competence from April 1st 2023. It is to take over the administration of the basic registers, the administration of Czech POINTs (Czech POINT is a Czech state project under which municipal offices with extended competence, regional offices, notaries and other legal entities, e.g. establishments of the Czech Post and local offices of the Chamber of Commerce of the Czech Republic with the appropriate authorization, can issue extracts from the Land Register, from the Criminal Register or from the Trade Register) and the Citizen's Web Portal from the Ministry of the Interior. The DIA was established by the Amendment no. 471/2022 Coll. to the Act no. 12/2020 Coll., The Digital Service Right Act.[150]

For the purposes of the Information Act, a machine-readable format means a format of a data file with a structure that allows software to easily find, recognise and extract specific information from that data file, including individual data and their internal structure. In other words, a machine-readable format is one that

[149] Section 3a of the Act no. 106/1999 Coll., on free access to information and The Government of the Czech Republic. Co jsou otevřená data? Open data portal. Available at: https:/opendata.gov.cz/informace:start. (cited: 30/08/2023)
[150] Section 4c of the Act no. 106/1999 Coll., on free access to information and details of the DIA in the explanatory memorandum of Amendment no. 471/2022 Coll.

can be read by a computer program. Usually, if a public administration worker scans text in image format (JPEG), the information seeker has no problem reading the text, but a machine cannot. The obliged entity must therefore choose between machine-readable formats. The most suitable machine-readable formats are considered to be RDF, Odata, XML, CSV. On the other hand, PDF, DOC or DOCX are not suitable formats.[151]

Furthermore, for the purposes of the Information Act, an open format means a format of a data file that is not dependent on specific rechnical and software equipmenr and is made available to the public without any restriction that would prevent the use of the information contained in the data file. In other words, an open format is one that is accessible (readable) by the requester of the information using common computer software without legal restrictions on use. Thus, an open format can be understood as a format without legal restrictions on use which aims to guarantee long-term access to data without current or future uncertainty about legal rights or technical specifications. In practice, obliged entities provide information in open formats such as TXT, PDF, RTF, RDF, XML, HTML/XHTML, JPEG or CSV. Thus, as can be seen from the above, not every open format is machine-readable, see e.g. PDF format. Obliged entities must therefore consider carefully which format they choose in a given case.[152]

Finally, for the purposes of the Information Act, an application programming interface (hereinafter referred to as "API") means a set of functions and processes that enable the creation of applications that access the functions or data of an operating system, database, application or other electronic service. In other words, API is an interface that is used to communicate between two programs/applications. Through it, they can exchange open data and extend their functionality more easily, for example, with open data that is prepared by someone else. Open data can be freely processed and presented in a web or mobile application via API. API is sometimes thought of as contracts with terms between two parties: if one party sends a remote request with a certain structure, the other party's software will respond. Within the framework of APIs of digital services of the state, APIs of data boxes or APIs of the value-added tax register have been established in the Czech Republic.[153]

[151] Section 3a of the Act no. 106/1999 Coll., on free access to information and BUDIL, P.: *„Novela "Infozákona" – malá revoluce ve zpracování informací?"* Právní prostor, 2015, available at: https://www.pravniprostor.cz/clanky/spravni-pravo/novela-infozakona-mala-revoluce-ve-zpracovani-informaci. (cited: 30/08/2023)

[152] Ibidem.

[153] Section 3a of the Act No. 106/1999 Coll., on free access to information and the Ministry of the Interior of the Czech Republic. *Popis API.* Open data of the Ministry of the Interior of the Czech Republic. Available at: https://opendata.mvcr.cz/popis-api. (cited: 30/08/2023)

The concept of high-value data

As already indicated, unlike the terms defined above, the Information Act does not explicitly define the concept of high-value datasets, but only refers to the Directive (EU) no. 2019/1024. Point 66 of the preamble to the Directive (EU) no. 2019/1024 states that in order to provide for conditions supporting the re-use of documents which is associated with important socioeconomic benefits having a particular high value for the economy and society, a list of thematic categories of high-value datasets should be set out in an Annex to this Directive. By way of illustration, and without prejudice to the implementing acts identifying the high-value datasets to which the specific requirements set out in this Directive should apply, taking into account the Commission guidelines on recommended standard licences, datasets and charging for the reuse of documents, the thematic categories could, inter alia, cover postcodes, national and local maps (geospatial), energy consumption and satellite images (earth observation and environment), in situ (the original position) data from instruments and weather forecasts (meteorological), demographic and economic indicators (statistics), business registers and registration identifiers (companies and company ownership), road signs and inland waterways (mobility).[154]

Under Article 13(1) of the Directive (EU) no. 2019/1024, in order to provide for conditions to support the re-use of high-value datasets, a list of thematic categories of such datasets is set out in Annex I to this Directive. Under Annex I the list of thematic categories of high-value datasets is as follows: 1. Geospatial, 2. Earth observation and environment, 3. Meteorological, 4. Statistics, 5. Companies and company ownership, 6. Mobility. Article 13(2) then stipulates that the Commission is empowered to adopt delegated acts in accordance with Article 15 in order to amend Annex I by adding new thematic categories of high-value datasets in order to reflect technological and market developments.[155]

Article 14(1) stipulates that the Commission shall adopt implementing acts laying down a list of specific high-value datasets belonging to the categories set out in Annex I and held by public sector bodies and public undertakings among the documents to which this Directive applies. Such specific high-value datasets shall be: (a) available free of charge, subject to Article 14(3), 14(4) and 14(5); (b) machine readable; (c) provided via APIs; and (d) provided as a bulk download, where relevant. Those implementing acts may specify the arrangements for the publication and re-use of high-value datasets. Such arrangements shall be compatible with open standard licences. The arrangements may include terms applicable to re-use, formats of data and metadata and technical arrangements for dissemination. Investments made by the Member States in open

[154] Point 66 of the preamble to the Directive (EU) no. 2019/1024.

[155] Article 13 of the Directive (EU) no. 2019/1024.

data approaches, such as investments into the development and roll-out of certain standards, shall be taken into account and balanced against the potential benefits from inclusion in the list. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 16(2).[156]

Under Article 14(2), the identification of specific high-value datasets pursuant to Article 14(1) shall be based on the assessment of their potential to: (a) generate significant socioeconomic or environmental benefits and innovative services; (b) benefit a high number of users, in particular SMEs; (c) assist in generating revenues; and (d) be combined with other datasets. For the purpose of identifying such specific high-value datasets, the Commission shall carry out appropriate consultations, including at expert level, conduct an impact assessment and ensure complementarity with existing legal acts, such as Directive (EU) no. 2010/40/EU on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport, with respect to the re-use of documents. With regard to high-value datasets held by public undertakings, the impact assessment shall give special consideration to the role of public undertakings in a competitive economic environment.[157]

Article 14(3) states that by way of derogation from point (a) of the second subparagraph of Article 14(1), the implementing acts referred to in Article 14(1) shall provide that the availability of high-value datasets free of charge is not to apply to specific high-value datasets held by public undertakings where that would lead to a distortion of competition in the relevant markets. Under Article 14(4), the requirement to make high-value datasets available free of charge pursuant to point (a) of the second subparagraph of Article 14(1) shall not apply to libraries, including university libraries, museums and archives. And Article 14(5) finally states that where making high-value datasets available free of charge by public sector bodies that are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks would lead to a substantial impact on the budget of the bodies involved, Member States may exempt those bodies from the requirement to make those high-value datasets available free of charge for a period of no more than two years following the entry into force of the relevant implementing act adopted in accordance with Article 14(1).[158]

Following on from the Directive (EU) no. 2019/1024, the Commission had adopted an implementing act focused on high-value datasets on December 21st 2022 (hereinafter referred to as "the Implementing Regulation"), thus the Implementing Regulation laying down a list of specific high-value datasets and the arrangements for their publication and re-use. Since defining the specific value of datasets was not a trivial

[156] Article 14 of the Directive (EU) no. 2019/1024.
[157] Article 14 of the Directive (EU) no. 2019/1024.
[158] Article 14 of the Directive (EU) no. 2019/1024.

task, an impact assessment study (Impact Assessment study on the list of High Value Datasets to be made available by the Member States under the Open Data Directive) was prepared for the Commission, detailing the list of high-value datasets that were to be made available.[159] The starting point of the study was a map of all relevant EU legislation, presenting the datasets that were already available from all EU Member States. Interviews with stakeholders then took place to develop a preliminary wish list of datasets considered to be of the highest value from an economic and social reuse perspective. Moreover, the Commission provided the inception impact assessment (Open data – availability of public datasets), aiming to inform citizens and relevant stakeholders about its plans and open up to feedback. The document stressed the importance of high-value datasets and the need to have harmonisation rules to improve the availability of public data and its reuse.[160] As a result of this process, a limited and well-defined group of datasets were identified. These aim to provide maximum value to their users and shall be able to be used free of any technical, legal or financial barrier. These datasets are listed in the Implementing Regulation and are in accordance with the Directive (EU) no. 2019/1024 grouped in a list of six high-value datasets thematic categories: geospatial, earth observation and environment, meteorological, statistics, companies and company ownership and mobility.[161]

In the above context, it should be added that the first guidelines concerning public sector information in the EU were produced in 1989, and since then several policy documents, studies and further legislation had followed. More specifically, public sector information was regulated by the first directive in 2003 (the Directive no. 2003/98/EC of the European Parliament and of the Council on the re-use of public sector information), by the directive in 2007 (the Directive no. 2007/2/EC of the European Parliament and of the Council establishing an Infrastructure for Spatial Information in the European Community, so called INSPIRE),[162] by the directive in 2013 (the Directive no. 2013/37/EU of the European Parliament and of the Council amending the Directive no. 2003/98/EC on the re-use of public sector information), by the general data protection regulation in 2016 (the Regulation (EU) no. 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing the Directive no. 95/46/EC /General Data Protection

[159] The European Commission. *Impact Assessment study on the list of High Value Datasets*. The official portal for European data. Available at: https://data.europa.eu/en/publications/datastories/high-value-datasets-overview-through-visualisation. (cited: 30/08/2023)

[160] The European Commission. *Open data – availability of public datasets*. The official portal for European data. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12111-Open-data-availability-of-public-datasets_en. (cited: 30/08/2023)

[161] The Implementing Regulation to the Directive (EU) no. 2019/1024.

[162] For lessons learned during the implementation of the INSPIRE, see for example KOTSEV, A.-PEETERS, O.-SMITS, P.-GROTHE, M.: *Building bridges: experiences and lessons learned from the implementation of INSPIRE and e-reporting of air quality data in Europe* in *Earth Science Informatics*, Vol.2 2015.pp, 353 – 365. DOI: 10.1007/s12145-014-0160-8.

Regulation/) and finally by the latest directive in 2019 (the Directive (EU) no. 2019/1024). The public sector information directives were instrumental in harmonising the public sector information available to the public, increasing transparency and introducing a set of measures (such as the use of machine-readable formats or central repositories) to facilitate the discovery and reuse of information produced by the public administration. This means that the Implementing Regulation establishing high-value datasets is the culmination of a process developed over many years.

Specifically, its Article 1 states that the Implementing Regulation establishes the list of high-value datasets belonging to the thematic categories set out in Annex I to the Directive (EU) no. 2019/1024 and held by public sector bodies among the existing documents to which this Directive applies. The Implementing Regulation also lays down the arrangements for publishing and reusing high-value datasets, in particular the applicable conditions for re-use and the minimum requirements for disseminating data via API.[163]

Article 3 of the Implementing Regulation stipulates that public sector bodies holding high-value datasets listed in its Annex shall ensure that the datasets described or referenced in its Annex are made available in machine-readable formats via APIs corresponding to the reasonable needs of re-users. Where indicated in the Annex to the Implementing Regulation, the datasets shall also be made available as a bulk download. Those public sector bodies referred to in Article 3(1) of the Implementing Regulation shall set out and publish the terms of use of the API and the quality of service criteria on its performance, capacity and availability. The terms of use shall be available in a human-readable and machine-readable format. Both the terms of use and the quality of service criteria shall be compatible with the arrangements for the re-use of high-value datasets laid down in accordance with Article 4 of the Implementing Regulation. API terms of use shall be accompanied by API documentation in the European Union or internationally recognised open, human-readable and machine-readable format. Public sector bodies referred to in Article 3(1) of the Implementing Regulation shall designate a point of contact for questions and issues related to the API with a view to ensure the availability and maintenance of the API and ultimately the smooth and effective publication of the high-value datasets. Public sector bodies holding high-value datasets listed in the Annex to the Implementing Regulation shall ensure that the datasets are denoted as high-value datasets in their metadata description.[164]

Article 4 of the Implementing Regulation states that an exemption granted by a Member State in accordance with Article 14(5) of the Directive (EU) no. 2019/1024 shall be published online, in the same way as the list of public sector bodies referred to in Article 6(3) of the Directive (EU) no. 2019/1024. To facilitate the

[163] Article 1 of the Implementing Regulation to the Directive (EU) no. 2019/1024.

[164] Article 3 of the Implementing Regulation to the Directive (EU) no. 2019/1024.

availability of datasets for re-use covering longer periods of time, the obligations imposed under the Implementing Regulation shall also apply to existing machine-readable high-value datasets created before the date of application of the Implementing Regulation. High-value datasets shall be made available for re-use under the conditions of the Creative Commons Public Domain Dedication (CC0) or, alternatively, the Creative Commons BY 4.0 licence or any equivalent or less restrictive open licence, as set out in the Annex to the Implementing Regulation, allowing for unrestricted re-use. The Creative Commons BY 4.0 licence is a type of the Creative Commons license. This is a non-copy left free license that is good for art and entertainment works, and educational works. It is compatible with all versions of the GNU, i.e. General Public License. A requirement of attribution, giving the credit to the licensor, can additionally be required by the licensor. High-value datasets shall be made available in accordance with the arrangements for the publication and re-use as set out in the Annex to the Implementing Regulation.[165]

Article 5 of the Implementing Regulation finally states that by 2 years after entry into force of this Implementing Regulation Member States shall provide the European Commission with a report on the measures they have carried out to implement the Implementing Regulation. Where appropriate, the information in the report can be provided through references to relevant metadata. The report shall contain the following information: a) a list of specific datasets at Member State level (and, where relevant, subnational level) corresponding to the description of each high-value dataset in the Annex to Implementing Regulation and with online reference to metadata that follow existing standards, such as a single register or open data catalogue; b) persistent link to the licensing conditions applicable to the re-use of high-value datasets listed in the Annex to Implementing Regulation, per dataset referred to in point a); c) persistent link to the APIs ensuring access to the high-value datasets listed in the Annex to Implementing Regulation, per dataset referred to in point a); d) where available, guidance documents issued by the Member State on publishing and reusing their high-value datasets; e) where available, the existence of data protection impact assessments carried out in accordance with Article 35 of the Regulation (EU) no. 2016/679; f) the number of public sector bodies exempted in accordance with Article 14(5) of the Directive (EU) no. 2019/1024.[166] According to the Implementing Regulation, the list of high-value datasets is as follows:

1. Geospatial – The geospatial thematic category includes datasets, within the scope of the INSPIRE data themes titled Administrative units, Geographical names, Addresses, Buildings and Cadastral parcels, as defined in Annex I to the Directive no. 2007/2/EC as well as data themes titled Reference parcels and Agricultural parcels as defined in the Regulation (EU) no. 1306/2013 of the European Parliament and of

[165] Article 4 of the Implementing Regulation to the Directive (EU) no. 2019/1024.
[166] Article 5 of the Implementing Regulation to the Directive (EU) no. 2019/1024.

the Council on the financing, management and monitoring of the common agricultural policy and in the Regulation (EU) no. 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and the related delegated and implementing acts, setting out their granularity and geographical coverage and listing some or all of the key attributes.

2. Earth observation and environment – The earth observation and environmental thematic category includes earth observation, including space-based or remotely-sensed data, as well as ground-based or in situ (the original position) data, environmental and climate datasets, within the scope of the INSPIRE data themes, as defined in Annexes I-III to the Directive no. 2007/2/EC and datasets produced or generated in the context of the relevant legal acts. The most up-to-date datasets as well as historical datasets available at all generalisation levels up to the level of scale 1:5000 covering the entire country when combined are included. Furthermore, the earth observation and environmental thematic category includes all Environmental information, as defined in Article 2 of the Directive no. 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC, and the environmental information listed in Article 7 of the Directive no. 2003/4/EC titled Dissemination of environmental information.

3. Meteorological – The meteorological thematic category includes datasets on observations data measured by weather stations, validated observations (climate data), weather alerts, radar data and numerical weather prediction model data with the granularity and the relevant key attributes.

4. Statistics – The statistics thematic category includes statistical datasets related to reporting obligations as defined in the relevant legal acts, i.e. Industrial production, Industrial producer price index breakdowns by activity, Volume of sales by activity, EU International trade in goods statistics – exports and imports breakdowns simultaneously by partner, product and flow, Tourism flows in Europe, Harmonised Indices of consumer prices, National accounts – GDP main aggregates, National accounts – key indicators on corporations, National accounts – key indicators on households, Government expenditure and revenue, Consolidated government gross debt, Environmental accounts and statistics, Population, Fertility, Mortality, Current healthcare expenditure, Poverty, Inequality, Employment, Unemployment, Potential labour force. In order to identify in a complete manner the relevant legal references in the relevant legal acts, for some of the datasets it is necessary to refer to concepts from a number of provisions and Annexes. Time series shall begin no later than at the date of application of the relevant respective legal act.

5. Companies and company ownership – The companies and company ownership thematic category includes datasets containing basic company information and company documents and accounts at

individual company level and with the relevant key attributes, i.e. Name of the company, Company status, Registration date, Registered office address, Legal form, Registration number, Member State where the company is registered and Activity/activities that are the object of the company, such as the NACE (Nomenclature statistique des Activites economiques dans la Communaute Europeenne) code.

6. Mobility – The mobility thematic category includes datasets, within the scope of the INSPIRE directive data theme titled Transport networks, as set out in Annex I to the Directive no. 2007/2/EC, at all generalisarion levels available up to a scale of 1:5000, covering the entire country when combined, including as key attributes national identification code, geographical position as well as links with cross-border networks, where available. For those Member States to which the Directive no. 2005/44/EC applies, this category also includes the relevant datasets, i.e. a) Static data – Fairway characteristics, Long-time obstructions in the fairway and reliability, Rates of waterway infrastructure charges, Other physical limitations on waterways, Regular lock and bridge operating times, Location and characteristics of ports and transhipment sites, List of navigation aids and traffic signs, Navigation rules and recommendations; b) Dynamic data – Water depths contours in the navigation channel, Temporary obstructions in the fairway, Present and future water levels at gauges, State of the rivers, canals, locks and bridges, Restrictions caused by flood and ice, Short term changes of lock and bridge operating times, Short term changes of aids to navigation; c) Inland electronic and navigational charts – Waterway axis with kilometres indication, Links to the external xml-files with operation times of restricting structures, Location of ports and transhipment sites, Reference data for water level gauges relevant to navigation, Bank of waterway at mean water level, Shoreline construction, Contours of locks and dams, Boundaries of the fairway/navigation channel, Isolated dangers in the fairway/navigation channel under and above water, Official aids-to-navigation, for example buoys, beacons, lights, notice marks. The datasets are understood as described in the Directive no. 2005/44/EC.[167]

Evaluation of the reflection of the legal institute of high-value datasets in the legal system and reality of the Czech Republic

Regarding the reflection of the involvement of the legal institute of high-value datasets in the Czech Republic it is necessary to distinguish between de facto and de jure situation while the European Commission stipulated that EU Member States must make a list of high-value datasets available free-of-charge by June 2024.[168] The de facto situation in each EU Member State is the subject of the Open Data Maturity Report.

[167] Annex of the Implementing Regulation to the Directive (EU) no. 2019/1024.

[168] For information on the situation in each EU Member State, see for example

This report was prepared as part of data.europa.eu project that is an initiative of the European Commission. Regarding the situation in the Czech Republic, the report states that one of the main tasks is to prepare an open data publication list (plan) with selected datasets with identified risks and benefits, along with a time framework for publication. The Czech Republic shall enable individual datasets, including those labelled as high-value datasets, to be directly linked to the list of reuse examples on the national Open Data Portal (which shall also be in open data format). For that reason, when reading the metadata for datasets that shall be labelled as high-value datasets, it shall be possible to see examples of their practical reuse. The national Open Data Portal is also important because metadata quality measurements, downloadable as CSV files, are displayed on it. Moreover, the metrics that are used to measure quality are included in the standard query language and protocol (SPARQL) endpoint of the portal and are part of the user interface for each individual metadata item in the portal. Furthermore, a dashboard to check metadata quality is available for the metadata publishers and users of the portal to better understand potential deficiencies. The Czech Republic also leverages other methods to grasp users' needs, such as surveys and uses the categories related to the type of service provided, like applications, web-services and others. In the Czech Republic several major projects are being implemented. For example the project "Map of educational failure/success" focuses on the links between the level of education and social issues, raising awareness on regional education inequalities that need to be addressed. The Czech Republic shall also run a project called "National Environmental Reporting Platform" focusing on available sources of environmental open data and analysing their impact on the social, political and legislative requirements caused by the climate and environmental changes. In connection with the above, the national open data team provides several means of support to the publication process. On the basis of the above mentioned facts, it can be concluded that in the Czech Republic at the de facto level fundamental processes are being implemented and some effective tools are being used to integrate the legal institute of high-value datasets, enshrined in the Directive (EU) no. 2019/1024, into social life.[169]

However, the de jure situation in the Czech Republic is much more complicated. The reason is the fact that the special part of the explanatory memorandum to Amendment no. 241/2022 basically states what is briefly set out in Section 5b of this Amendment.[170] Only the fragment in the special part of the explanatory memorandum of Amendment no. 241/2022 Coll. which states that Member States should publish the

DE JUANA-ESPINOSA, S.- LUJÁN-MORA, S.: *Open government data portals in the European Union: Considerations, development, and expectations* in: *Technological Forecasting and Social Change*, 2019 p.149, DOI: 10.1016/j.techfore.2019.119769;
DE JUANA-ESPINOSA, S. - LUJÁN-MORA, S. (2020). *Open government data portals in the European Union: A dataset from 2015 to 2017* in *Data in Brief, Vol.4. 2020.* pp. 105–156. DOI: https://doi.org/10.1016/j.dib.2020.105156; or
RIVZA, B.-RIVZA, P.: *Digitalization in the Baltic States. International Multidisciplinary Scientific GeoConference Surveying Geology and Mining Ecology Management*, SGEM 2020, pp. 135–144. DOI: 10.5593/sgem2020/2.1/s07.018.

[169] The European Commission: *The Open Data Maturity Report 2022. The official portal for European data.* Available at: https://data.europa.eu/en/news-events/news/open-data-maturity-report-2022-out. (cited: 30/08/2023)

[170] The explanatory memorandum of the Amendment no. 241/2022.

information from the datasets in such a way that, with the exceptions provided for in Article 14(3), (4) and (5) of the Directive (EU) no. 2019/1024, is freely available, machine-readable, accessible through an application programming interface and, where relevant, also available with the option to download the complete dataset, whilw he proposed Section 5b implements these requirements in line with the Information Act systém, is essential. A specific part of the explanatory memorandum to the Amendment no. 241/2022 Coll. thus speaks abour the implemenration of the Directive (EU) no. 2019/1024 in relation to the content of this Amendment. The concept of implementation of the EU directive is often confused with the concept of transposition of the EU directive. However, it should be noted that these are not identical concepts.[171] Transposition is merely the formal incorporation of the EU directive into the national legislation (transposition measure) of the Member State, whereas implementation of the EU directive is a broader process, as it involves both transposition and the phase following transposition, i.e. ensuring adequate application of the transposition measure and effective enforcement of the rights and obligations arising from the EU directive.[172]

Thus, if the new Section 5b of the Information Act states that the so-called obliged entity must publish as open data, in a machine-readable and open format under standard conditions of use, in particular through API, the information listed in a directly applicable regulation of the European Union issued under Article 14(1) of the Directive (EU) no. 2019/1024, it is certainly not possible to say that the new Section 5b of the Information Act is, regarding high-value datasets, an effective instrument for the implementation of this Directive. The new Section 5b of the Information Act, regarding high-value datasets, provides no instrument for effective enforcement of the rights arising therefrom. Regarding high-value datasets, the new Section 5b of the Information Act can therefore only be assessed as the result of a completely formal transposition of the Directive (EU) no. 2019/1024, or it is only a reference to Article 14(1) of this Directive. In view of this fact, it is possible to question the meaningfulness of the existence of the new Section 5b of the Information Act, which is constructed in this way. It is also questionable to what extent the new Section 5b of the Information Act fulfils Article 288 of the Treaty on the Functioning of the European Union. Article 288 of the Treaty on the Functioning of the European Union specifically states that a EU directive shall be binding,

[171] The Government of the Czech Republic. *Usnesení vlády České republiky ze dne 15. listopadu 1999 č. 1212 + P o Metodických pokynech pro zajišťování prací na sbližování právních předpisů České republiky s právem Evropských společenství.* Informační systém ODok Úřadu vlády České republiky. Available at: https://kormoran.odok.cz/usneseni/usneseni_webtest.nsf/0/B7724FA12D7EF030C12571B6006D7D54. (cited: 30/08/2023)

[172] For examples of timely and correct transposition of EU directives, see STAROŇOVÁ, K. & KIŠĎURKA, M.: *Transposition in new member states of the EU (Transpozícia v nových členských krajinách EÚ)* (2013) in *Sociologia (Slovakia) Vol. 1 2013*, pp. 48 – 70. and on the issue of transposition of the EU directives using Germany as an example, see further PAASCH, J.-STECKER, C.: *When Europe hits the subnational authorities: The transposition of EU directives in Germany between 1990 and 2018* in *Journal of Public Policy*, Vol. 4-2021. pp. 798–817. DOI: 10.1017/S0143814X20000276.

as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. As mentioned above, the new Section 5b of the Information Act apparently fails to establish the appropriate forms and methods. Overall, it can be summarized that the new Section 5b of the Information Act does not provide a sufficient platform for the obliged entities and these entities have to follow, basically in its entirety, only the relevant provisions of the Direcrive (EU) no. 2019/1024. For rhe aforementioned reasons, the new Section 5b of the Information Act cannot be considered as a functional national regulation for the publication of high-value datasets.

Conclusion

To conclude this article, it is unfortunately necessary to state that even the Directive (EU) no. 2019/1024 may not have a fully effective impact on the publication of high-value datasets in the Czech Republic. It is certainly positive that Article 14(1) and (2) of the Directive (EU) no. 2019/1024 sets out quite clearly the conditions for the publication of high-value datasets and the criteria for assessing their potential, but on the other hand, it is impossible to ignore the significant downsides of the legislation under this Directive. This downsides especially lie in the strong interdependence between Article 14 and Article 2 of the Directive (EU) no. 2019/1024. Article 2 of the Directive (EU) no. 2019/1024 contains the definitions of the essential terms used in its Article 14, to which the new Section 5b of the Information Act refers. The terms used in Article 14 of the Directive (EU) no. 2019/1024 can be divided into two groups, i.e. technical and institutional terms.

The technical terms including: standard licence, document, reuse, personal data, machine-readable format, open format and high-value data files, among others, appear to be unproblematic because their definitions under Article 2 of the Directive (EU) no. 2019/1024 correspond to the content of the legal order and to the realities of the Czech Republic. However, in relation to institutional terms including: public sector body, bodies governed by public law, public undertaking, university and others, a different conclusion must be drawn. These terms are defined in Article 2 of the Directive (EU) no. 2019/1024 in a way that does not fully correspond to the content of the legal order, to the case law of Czech administrative courts related to the legal order, to the concepts used in the theory of Czech administrative law and to the realities in the Czech Republic or the legal order of the Czech Republic does not even know these terms. As an example, the term university is defined in Article 2 of the Directive as any public sector body that provides post-secondary-school higher education leading to academic degrees (in the Czech Republic is referred to as tertiary education) and the term public sector body is defined in Article 2 of the Directive (EU) no. 2019/1024 as the State, regional or local authorities, body governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law (this term is not known in the Czech Republic). Body governed by public law is then defined as the body that has all of the following characteristics: (a) it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) it has legal personality; and (c) it is financed, for the most part by the State, regional or local authorities, or by other bodies governed by public law; or is a subject to managemenr supervision by those authorities or bodies; or has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law (this concept is marginally mentioned in particular by Section 71(3)(b) of the Act no. 235/2004 Coll., on Value–Added Tax, i.e. by a legal regulation in the field of financial law, not administrative law).

Another problem is that Article 14 of the Directive does not even hint at measures leading to the publication and re-use of high-value datasets (which must be compatible with open standard licences), but leaves this issue to subsequent implementing acts, especially to the Implementing Regulation, thus failing to give these measures the appropriate legal force. The effectiveness of the Directive is also undermined by its Article 14(5), which does not sufficiently explain the vague legal term "a substantial impact on the budget of the bodies involved" and it is not sufficiently explained why the requirement to make high-value data files available free of charge does not apply to libraries, including university libraries, museums and archives. The limits of the scope of the Directive (EU) no. 2019/1024 are therefore not entirely clear.

In order to make Section 5b of the Information Act a truly effective piece of legislation, the author de lege ferenda proposes the following. Unlike Article 14 of the Directive (EU) no. 2019/1024, the new Section 5b of the Information Act should at least, in principle, define measures leading to the publication and reuse of high-value datasets compatible with open standard licences. Thus, the new Section 5b of the Information Act would, regarding high-value datasets, establish at least some basis for the enforcement of the rights arising therefrom. Furthermore, the new Section 5b of the Information Act should define tools for assessing the potential of high-value datasets, and these tools should correspond to the realities of the Czech Republic. Furthermore, it is essential that the new Section 5b of the Information Act, for reasons of legal certainty, would sufficiently explain any possible exceptions to the requirement to publish high-value data files free of charge. Of course, the most important thing is that the legal regulation of the new Section 5b of the Information Act should be linked, as soon as possible, to an objectively high-quality unique information platform for publishing and searching of high-value datasets. The ideal would probably be to confirm the current trend, with the DIA being the administrator of this information platform, which is already responsible for the administration of the NCOD under Section 4c of the Information Act. The creation of such a platform in the Czech Republic is currently the subject of efforts by the relevant institutions, so we can only wait to see what the outcome of these efforts will be. The implementation of the de lege ferenda proposals of the author would also lead to the fulfilment of the meaning and purpose of Article 288 of the Treaty on the Functioning of the European Union.

KEY CONCEPTS ON INTELLECTUAL PROPERTY RIGHTS AND SUSTAINABLE DEVELOPMENT

KESERŰ, Barna Arnold[173]

"I have read about the museum of extinct species in Ann and Paul Ehrlich's book. Going through the halls those creatures can be seen, which have already disappeared from our planet because of expropriation their habitat as a result of human intervention. In the last room stands a mirror."

LÁNYI András

The importance of subject

The citation above highlights an age- and societal phenomenon, which needs to be addressed. It is examined by economists, engineers, natural scientists, doctors, lawyers and representatives of many other sciences. The processes which make the world a more and more dangerous place can be experienced day by day from firsthand. The nature of mankind is extremely ambivalent. From the one hand, it can create amazing artistic, technical, and human achievements, which make us truly a valuable and creative civilization. Just look at for example the wonders of ancient times, the creations of Leonardo da Vinci or the Higgs-boson and gravitational waves as the results of the millennia old scientific improvement of humanity. The human mind is designed to achieve amazing things. But from the other hand it is capable of limitless destruction, and not only of destruction of its environment, but of destruction itself. We can see and feel the harmful and destroying effects of some human activities. In the military conflicts of mankind crowd of people are perished physically. The situation isn't much better in peace either. The economy, as the largest civilizational structure maintained by the few, can toss so many people into poverty and make their living impossible as the wars do. Lethal or humane economy? Asks David C. Korten in the title of his book for a reason. Meanwhile our most valuable treasure, the Earth has suffered serious damages during the last (especially the 20th) centuries. The planet and the ecosystem means the basics of biological existence of mankind. Despite

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of the fact, that it is an extremely complex system and we know only a small fragment of it, we don't protect it enough. As a result of this negligence our living and lifeless environment decays more and more faster.

Initially these harmful processes have been recognized by a few enlightened thinker, later more researcher and finally the international community. The result of this intellectual momentum is the idea of sustainable development, which was integrated quite quickly into the public consciousness. Sustainable development has become a political buzzword and a scientific milestone as well. Many new area got into focus under the flag of sustainable development both in the national and international discourse, and in our everyday life. The UN climate change congress in Paris at the end of 2015 affirms that, because it was surrounded by unprecedented media interest. Besides, sustainable development has become a relevant scientific aspect, and every scientific branch tries to redefine itself in the spirit of sustainability and to serve sustainable development.

This paper aims to highlight the need of redefinition. The law has to reflect to the scientific and social changes experienced around us. Independently from the fact, that we comprehend law as a retrospective phenomenon which follows the societal changes, or as the engine of changes like the tool of societal engineering, we got the same result. The idea of sustainable development is around us, but we have a lot to do in order to reach it. So the law cannot ignore it either. Originating from the regulative function of the law I prefer the active and forward looking role. It is the duty and obligation of the law to serve the society, so it has to create the legal framework which is suitable to integrate the idea of sustainable development and its goals.

This can be done with many tools even within the system of law. There are more area and legal institution in the private law which have a connection to the sustainable development goals. Such an area is the intellectual property right. This connection is barely researched in the Hungarian literature, although it is one of the most current topics abroad among the intellectual property researchers.

The aim of the summarization of this connection is to determine that intellectual property rights how can facilitate sustainable development, or how can they pull it back. At the first glance the connection of these areas can be seemed surprising, but intellectual property rights deeply affect the pillars of sustainable development. This connection isn't artificial or superficial but really intense and fertile.

Sustainable development is such a notion which has huge amount of scientific literature, however there are still many unanswered questions and contradictions. If the basic notion is so controversial, it is absolutely necessary to introduce some conceptual cornerstone, because the questions about sustainable development determine the answers in the system of intellectual property rights.

According to the main message of this paper the law doesn't exist just for itself and it isn't self-serving. It has to serve some useful and forward-looking societal goals. That is why I avoid the causeless legal thinking and to examine this field from the ivory tower of law just for itself. Instead of that I think about law as a tool to achieve a chosen goal. This approach originates from Nicolai Hartmann who developed the theory of final determination.[174] According to this theory the chosen goal by the national legislators and the international community is the sustainable development, what goal inherently determines the suitable legal and non-legal tools for the reaching of that goal. So the choose of goal is also a choose of tool, and the duty of a lawyer is to find the best legal tools for the goal. The success of the choose of tool can be judged according to the effect of legal norms. Of course, this is a long process and not a blink of an eye, because the realization of the goal, or the absence of it provides a permanent feedback about the correct regulation of the chosen legal tools. This approach describes how I wish to present the complex relationships between IP and sustainable development.

During the review of the legal tools I present the existing intellectual property rights from one side, which can be evaluated by the current feedbacks, and from the other side those new types of IP rights, which are held to be necessary in order to reach sustainable development.

Conceptual thoughts about sustainable development

Sustainable development and within that environmentalism has very old roots, much older than international law would imply it, because in the ancient societies – mainly in religious ground – the respect and protection of plants and animals, or the prohibition of wasting water appeared.[175] Especially the Buddhist religion was quite progressive, because it didn't deemed the human as the landlord of Earth and living nature, but as their guardian. This way the primary duty of humanity is the preservation and protection, and not usage and overexploitation.[176]

The forestry of 17-18. century was the second big step in the formation of sustainable development, and the sustainability as a scientific term was born at this time. Inter alia Evelyn[177], Colbert[178] and

[174] SZIGETI Péter-TAKÁCS Péter: *A jogállamiság jogelmélete*, Napvilág Kiadó, Budapest, 2004. pp. 153-154.
[175] ATAPATTU, Sumudu: *Sustainable Development, Myth or Reality?: A Survey of Sustainable Development Under International Law and Sri Lankan Law*, in *The Georgetown International Environmental Law Review*, Vol. 14., Issue 2. 2001. p. 286.
[176] Magyarország v. Slovakia, Gabcikovo- Nagymaros case, Dissenting Opinion of Cristopher Weeremantry, International Court of Justice, Judgment of 25 September 1997, pp. 95-99.
[177] EVELYN, John: *Sylva, or a Discourse of Forest-trees, and the Propagation of Timber in His Majesty's Dominions*, Vol. I., 4th ed., Arthur Doubleday & Company Ltd., London, 1706. http://www.gutenberg.org/ebooks/20778. (cited: 18.11.2023.)
[178] SARGENT, Arthur John: *The Economic Policy of Colbert*, Longmans, Green and Co., New York-Bombay, 1899. p. 105. https://archive.org/stream/economicpolicyof00sargrich#page/104/mode/2up (cited: 18.11.2023.).

Carlowitz[179] have a huge contribution to the establishment of forward-looking and responsible way of thinking, what is an intrinsic element of sustainable development.[180] Their main message is that the short-term, utilitarian and profit-seeking point of view is unsustainable. This message is much more actual today, than any time in the history before.[181]

The three pillar model of sustainable development was already outlined in the 17-18. century, because of the above-mentioned authors made connections between the destruction of forests, the economic depression and the negative societal changes.

Sustainable development is hard to define properly. Development has many different meanings, and these could even compete each other, so it is quite important to determine what is sustainable development. It can be approached from structural,[182] evolutionary,[183] technical,[184] economical,[185] democratic[186] and legal[187] aspects. There were born more theories about that from the '60-s, which focused on the different aspects of the unsustainable development (Carson,[188] Hardin,[189] Meadows,[190] Schumacher,[191] Jackson[192]).

DEVÈZE, Michel: *La grande réformation des forêts royales sous Colbert, 1661-1680; une admirable réforme administrative*, École Nationale des Eaux et Forêts, Nancy, 1962. pp. 192-195. http://documents.irevues.inist.fr/bitstream/handle/2042/33607/AEF_1962_19_2_169.pdf?sequence=1. (cited: 2023.11.18.)

[179] SOMOGYI Zoltán: *Egy háromszáz éves könyv margójára*, in *Erdészeti Lapok*, 2013/5. szám, pp. 134-135., http://erdeszetilapok.oszk.hu/01781/pdf/EPA01192_erdeszeti_lapok_2013_05_134-137.pdf.

[180] WILDERER, Peter A.–SCHROEDER, Edward D.–KOPP, Horst (eds.): *Global Sustainability. The Impact of Local Cultures. A New Perspective for Science and Engineering, Economics and Politics*, 2005, Wiley-VCH Verlag GmbH & Co. KGaA, Weinheim, 6.

[181] VEHKAMÄKI, Seppo: *The Concept of Sustainability in Modern Times*, in JALKANEN, Anneli–NYGREN, Pekka (eds.): *Sustainable Use of Renewable Natural Resources: From Principles to Practices*, University of Helsinki, Department of Forest Ecology, Helsinki, 2005. pp.2-3., GROBER, ULRICH: *Deep roots – A conceptual history of 'sustainable development' (Nachhaltigkeit)*, Wissenschaftszentrum Berlin für Sozialforschung, Berlin, 2007. p.8.

[182] NÁRAY-SZABÓ Gábor: *Fenntartható a fejlődés?*, Akadémiai Kiadó, Budapest, 2006. p.9., TEILHARD DE CHARDIN, Pierre: *Az emberi jelenség*, 1968, http://www.tat-tokod.hu/tdc/books/Az_emberi_jelenseg.pdf. (cited: 18.11.2023.)

[183] DARWIN, Charles: *A fajok eredete. Természetes kiválasztás útján, avagy a létért való küzdelemben előnyhöz jutott fajták fennmaradása*, Typotex, Budapest, 2003. pp. 107-108, LORENZ, Konrad: *A civilizált emberiség nyolc halálos bűne*, Cartaphilus Kiadó, Budapest, 2001. pp. 11-12.

[184] SAGAN, Carl: *The Dragons of Eden. Speculations on the Evolution of Human Intelligence*, Ballantine Books, New York, 1986. pp. 14-16.,

LÁSZLÓ Ervin: *Káoszpont*, Kossuth Kiadó, Budapest, 2006. p. 81.,

A/RES/30/3384, *Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind*, Resolution adopted by the General Assembly, United Nations, 10 November 1975., http://www.un-documents.net/a30r3384.html. (cited: 18.11.2023.)

[185] SAMUELSON, Paul A.–NORDHAUS, William D.: *Közgazdaságtan*, Akadémiai Kiadó, Budapest, 2012. p. 453., FRIEDMAN, Benjamin Morton: *Jólét és erkölcsösség*, Napvilág Kiadó, Budapest, 2010. pp. 11-15.

[186] SEN, Amartya: *A fejlődés mint szabadság*, Európa Könyvkiadó, Budapest, 2003. pp. 10-35.

[187] A/RES/41/128, *Declaration on the Right to Development*, Resolution adopted by the General Assembly, United Nations, 4 December 1986, http://www.un.org/documents/ga/res/41/a41r128.html. (cited: 18.11.2023.)

[188] CARSON, Rachel: *Silent Spring*, 1962, Fawcett Publications, Greenwich, p. 17., https://ia600704.us.archive.org/10/items/fp_Silent_Spring-Rachel_Carson-1962/Silent_Spring-Rachel_Carson-1962.pdf. (cited: 18.11.2023.)

[189] HARDIN, Garrett: Tragedy of the Commons, in *Science*, New Series, Vol. 162., No. 3859. 1968. pp. 1243-1248.

[190] MEADOWS, Donella H. et al.: *A növekedés határai*, Kossuth Kiadó, Budapest, 1973. p. 84.

[191] SCHUMACHER, Ernst F.: *A kicsi szép*, 1991, Közgazdasági és Jogi Könyvkiadó, Budapest, p. 11.

[192] JACKSON, Tim: *Prosperity without Growth. Economics for a Finite Planet*, Sterling, London, 2009. p. 187., http://www.ipu.org/splz-e/unga13/prosperity.pdf. (cited: 18.11.2023.)

Sustainable development was defined by the World Commission on Environment and Development (commonly Brundtland Commission) in 1987 in its famous report entitled Our Common Future: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[193] The mainstream concept of sustainable development relies on this definition today as well, the big world conferences didn't changed it in merit.

This definition brings up serious problems, if we don't examine the pillars purely in themselves, but in their interdependency. The deepest critics arise against the economic pillar. I deem those theories wrong, which identify sustainable development with economic growth, or make the economic growth the center of sustainable development (e.g. the EU2020 strategy explicitly favors economic growth). The growth-centered development policy wants to reach a sustainable growing society, which is able to turn the environmental and societal situation. However this is a paradox, and such a model of sustainable development is structurally wrong.

The actual welfare steals the opportunities of next generation. A growth-centered development doesn't allow to step upon the path which is between the ecological limits, and the pure growth doesn't make the life better.[194] A lot of studies and reports proves that the current level of consumption and production is far beyond the biocapacity of Earth. The only acceptable way of sustainable development is the respect of environmental limits. It provides the biological basis of human existence, so without a livable environment we can't talk about sustainability and humanity either. The Sustainable Development Goals (adopted in 2015) shows a significant move towards environmentalism contrary to the Millennium Development Goals.

The economy – just like the law – can't be self-serving and can't exist just for itself. There isn't any self-value, if an economy is small or big, product and consumes more or less. The only valuable factor is its impact on the quality of human life. The Stiglitz report, the theory of degrowth,[195] the well-being economy[196] and the theories introducing more alternate indicators highlights, that economic growth and GDP tells us nothing about the qualiry of life, moreover the macroeconomic growth can disguise the individual poverty. Consequently the economy should play a subordinate role.

[193] *Report of the World Commission on Environment and Development: Our Common Future*, p. 41., http://www.un-documents.net/our-common-future.pdf. (cited: 18.11.2023.)

[194] STIGLITZ, Joseph c.–SEN, Amartya–FITOUSSI, Jean-Paul: *Report by the Commission on the Measurement of Economic Performance and Social Progress*, 2009, 12., http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf. (cited: 18.11.2023.)

[195] LATOUCHE, Serge: Degrowth, in *Journal of Cleaner Production*, Vol. 18., Issue 6., 2010. pp. 519-522.

[196] SEAFORD, Charles: *Well-being: Human Well-being and Priorities for Economic Policy-makers*, New Economics Foundation, London, 2010. p. 5.

In order to achieve considerable changes in environmental protection, first of all societal change of mind set and societal self-limitation is needed. But to do so, we have to eradicate poverty, repel diseases and improve education, otherwise there is no hope for the expansion of global environmental mindset.

In my opinion the ideal paragon of sustainable development can be described as the spiral and forward movement of dynamic interaction of the three pillars. Instead of that the experience shows that the pillars are divergent, they don't move in the same direction, but they are getting farther from each other.

Key elements about the general connection of sustainable development and intellectual property rights

In order to make property and intellectual property suitable for incentive and protection of creativity and knowledge, it is necessary to properly build up the system of checks and balances on national, regional and international level as well. Otherwise they can conserve the material status quo and hold back progression. In the latter case they degrade to the tools of noxious growth-oriented development.

IP rights are more often mentioned together with human rights, what refers to the interpretation of development by Amartya Sen.[197] For the connection of these fields there are two main theories. According to the first, despite of the common economical and societal roots, the two field get more and more far from each other, and they are actually in a conflict. According to the second theory, the two field complete each other, because their final aim is the same. Therefore the IP rights are integrated into the system of human rights, they are a part of it.[198]

Ideally the two field should cooperate in order to reach sustainable development. However we can see exactly the opposite, there is competition between them. There is a need for paradigm-shift in order to make human rights and IP rights complementary fields instead of competing opponents. This means creating balance among right holders, users and the society regarding to sustainable development.

World Intellectual Property Organization (hereinafter referred as WIPO) and World Trade Organization (hereinafter referred as WTO) as the two most important international organizations of IP are suitable by their importance and role to be a forum, where IP rights and sustainable development can bring together. The WIPO Convention doesn't refer explicitly to tasks concerning sustainability, but the activities of WIPO in broader context shows a quite different picture. The establishment of WIPO was supported by

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[197] SEN: *cit.*, pp. 10-22.

[198] GROSHEIDE, Willem: *General Introduction*, in GROSHEIDE, Willem (ed.): *Intellectual Property and Human Rights. A Paradox*, Edward Elgar, Cheltenham-Northampton, 2010. p. 5.

the fact, that the developing countries have seen their biggest opportunities in technology transfer, and the developed countries have deemed very beneficial to create an organization, which sole purpose is to spread the concept of IP worldwide and to improve the national legislation.[199]

The WIPO pays special attention since its establishment to the interests of developing countries and the serious responsibility of developed countries for the global development. This is in line with the role of WIPO as UN specialized agency, and it complies with the UN-WIPO Agreement adopted in 1974. According to the Agreement, the main objective of WIPO is to "promote creative intellectual activity and to facilitate the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development". As an UN specialized agency, WIPO has to take into account the UN Sustainable Development Goals and to serve them.[200]

When the WTO appeared and the TRIPS entered into force the international regime of IP rights has changed significantly and the political and legal relations have transformed. The Article 66.2. of TRIPS creates a close relationship between IP rights and technology transfer, what can be justified by many reasons. IP rights can be both incentives and barriers of technology transfer, therefore it is important to maintain a legal regulation what supports technology transfer in order to prevail the interests of developing and developed countries with the adequate checks and balances.

There are two different approaches about the relationship of IP rights and technology transfer. According to the supporters of strong IP regime the high level of protection facilitates the technology transfer through the requirements of disclosure and publication. According to the supporters of weak legal protection the IP rights hinder the international technology transfer, because the quasi-monopolistic IP rights allow to the right holders to keep the prices high and to prevent the economic actors of developing countries to access to these technologies.[201]

Since 2000 the so-called TRIPS-Plus agreements have become more popular, which are such bilateral or multilateral free trade agreements, what contain more rigorous IP rules than the TRIPS. The intensifying legal monopolies can slow down the long-term innovation processes and suppress technology transfer, what is against the purpose of TRIPS.[202]

[199] MUSUNGU, Sisule F.–DUTFIELD, Graham: *Multilateral agreements and a TRIPS- plus world: The World Intellectual Property Organisation (WIPO)*, Quaker United Nations Office – Quaker International Affairs Programme, Geneva – Ottawa, 2003. p. 18.
[200] Ibid. p. 18.
[201] NGUYEN, Tu Thanh: *Competition Law, Technology Transfer and the TRIPS Agreement. Implications for Developing Countries*, 2010, Edward Elgar, Cheltenham – Northampton, p. 25.
[202] KUANPOTH, Jakkrit: TRIPS- Plus Rules under Free Trade Agreements, in HEATH, Christopher –SANDERS, Anselm Kamperman (eds.): *Intellectual Property and Free Trade Agreements*, Hart Publishing, Oxford, 2007. p. 28.

2007 was a milestone in the world of IP and in the activity of WIPO, when the Development Agenda was adopted. Briefly the Agenda is the intellectual property action plan for sustainable development. The Agenda defines 45 recommendations in 6 cluster, in which there are principles what affects the international community fundamentally. The implementation of these is essential for sustainable development.[203]

The Development Agenda isn't perfect, because there are overlaps among the recommendations, they aren't always in a logical order, the classification into clusters isn't everywhere consistent and the level of abstraction of recommendations varies on a very wide range. Despite of these facts the Agenda is one of the most important document in the world of IP, because it can renew fundamentally the IP system in the light of sustainability.

Conceptual thoughts related to the connection of classical IP forms and sustainable development

Public domain is an important issue in the case of every IP form, because the exclusion of subject matter of protection and the intellectual creations from protection have a huge impact on the relationship of IP and development. A core question is where are the limits of individual power and how big is the scope of freely used intellectual creations for the members of society. 16th and 20th recommendations of the Development Agenda prescribe the thorough examination of public domain and its positive effects, and they urge legislation to widening the limits of public domain and to create a robust public domain.

Other tool of making balance are the limits and exceptions, and many of them have close interaction with the pillars of sustainable development. They have to be defined broadly on international level, because the economic, societal and environmental circumstances of developing countries are different, so their interests demand different solutions. This way every country must tailor its own IP regime.

Copyright can support the goals of sustainable development through the dissemination of knowledge. The access to knowledge determines the intellectual productivity and creativity of humans because we can quickly and effectively create something new if we build upon the existing knowledge. Therefore, it is crucial, that the rules of copyright what kind of opportunities allow to access information in the field of education and scientific researches.

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[203] SANDERS, Anselm Kamperman: *The Development Agenda for Intellectual Property*, in HEATH, Christopher–SANDERS, Anselm Kamperman (eds.): *Intellectual Property and Free Trade Agreements*, Hart Publishing, Oxford, 2007. p. 21.,
DE BEER, Jeremy: *Defining WIPO's Development Agenda*, in DE BEER, Jeremy (ed.): *Implementing WIPO's Development Agenda*, , Centre for International Governance Innovation – International Development Research Centre, Ottawa, 2009. pp. 9-11.,
MUÑOZ TELLEZ, Viviana – MUSUNGU, Sisule F.: *A2K at WIPO: The Development Agenda and the Debate on the Proposed Broadcasting Treaty*, in KRIKORIAN, Gaëlle – KAPCZYNSKI, Amy (eds.): *Access to Knowledge in the Age of Intellectual Property*, Zone Books, New York, 2010. p. 186.

The Appendix adopted in 1971 in Paris at the revision of Berne Convention was an important station in the development of copyright limitations and exceptions for education and scientific research. The aim of the Appendix is to provide flexibilities to developing countries regarding their economic, social and cultural needs, which can limit the exclusive rights of the copyright right holders. The Appendix tries to widen the cases of free use with the introduction of compulsory licenses for education and research, in the name of respect of the role of education and research in development. The Appendix provides flexibilities in the context of two economic rights for the developing countries. It allows in a very complex way to translate and reproduce works without the consent of their author in the favor of education and research. Despite of the right goals of the Appendix, it hasn't become a widely used tool of developing countries. Because of the bureaucratic attribute the system of compulsory licensing is dysfunctional and works barely.[204]

Patent law has an important role in each pillar of sustainable development, because as an extremely valuable competitive tool it can contribute to the economic development, in the context of pharmaceutical or food industry it may achieve essential social goals, and through the green innovation (environment-friendly energy-efficient technologies) it can facilitate the environmental endeavors. Besides these, through the disclosure requirement the patent documents provide access to the newest knowledge.

In the last decades biotechnology has become one of the most important field of patent-intensive industries, what has brought serious legal questions about the limit between patentable subject matter and public domain and other ethical issues.[205] The recently closed Myriad case in the USA highlights that the biotechnological inventions as patentable subject matters are still in the center of serious debates. The Supreme Court said that only the artificial DNA segments are patentable, which are significantly different from the DNA in nature, so the living nature can't be patented limitless.[206]

Public health is a core element of sustainable development, but unfortunately the Development Agenda doesn't contain any recommendation in this field. Despite of that WHO, WIPO and WTO pay special attention to the connection of IP rights and public health. The continuous extension of transitional period of TRIPS clearly reflects the public health situation in the developing countries. With complex system of transitional period according to the current state the developing countries have the opportunity to

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204 RICKETSON, Sam–GINSBURG, Jane C.: *International Copyright and Neighbouring Rights. The Berne Convention and Beyond,* Oxford University Press, Oxford, 2006. pp.129-130., VON LEWINSKI, SILKE: *International Copyright Law and Policy,* Oxford University Press, Oxford, 2008. pp. 73-74.,
SILVA, Alberto J. Cerda: Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright, in *PIJIP Research Paper,* No. 2012/08, American University Washington College of Law, Washington, D.C., p. 8.
205 PETZNÉ STIFTER Mária: A biotechnológiai tárgyú találmányok szabadalmazhatóságának kérdései Magyarországon és az Amerikai Egyesült Államokban, in *Iparjogvédelmi Szemle, a Szabadalmi Közlöny és Védjegyértesítő melléklete,* 1992. augusztus, 49.
206 DOMOKOS Klarissza: Gének szabadalmazhatósága, in *Iparjogvédelmi és Szerzői Jogi Szemle,* 2013/5. szám, pp. 25-26.

maintain such a patent system until 1. January, 2033, which doesn't fit to the TRIPS and serve their public health interests.[207]

Because of the opportunity of deviation from TRIPS in some countries the stricter TIRPS-Plus rules prevail, in other countries the standards of TRIPS are in force, and in many developing countries the TRIPS-Minus regime can be observed during the transitional period.

It is an important patent law question whether the patented inventions can be used in researches. The requirement of disclosure provides the access to knowledge as a general societal interest. The use of patented inventions however requires special limitations and exceptions for research, but this solution accepted only in a narrow scope in most countries. The Bolar case in the USA has had a pioneer role, which led to a legislation what has permitted the researches of bioequivalence for the drug approval process. This have become a sample in many countries.[208]

The preferential procedure for green inventions is a more and more examined question. Its legal aspects are more administrative rather than substantive civil law issues. In order to browse in these inventions, it is necessary to establish a classification system which allows to separate green technologies. On international level there are already new solutions: the international patent classification was amended with a Green Inventory, and the Cooperative Patent Classification launched by the European Patent Office and the USPTO gives an own section for these technologies. The other way of supporting green inventions is to grant patents faster. In order to do that, since 2009 more countries adopted preferential procedural rules for green inventions which can significantly shorten the patent procedure.[209]

Trademark protection has slighter impact on sustainable development than other IP forms. Primary it is important as a boost for economy and competition and this way can serve indirectly the other pillars of

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[207] MUSUNGU, Sisule F.–OH, Cecilia: *The Use of Flexibilities in TRIPS by Developing Countries: Can They Promote Access to Medicines?*, Commission on Intellectual Property Rights, Innovation and Public Health, Geneva, 2005.

[208] JUNEAU, Todd L.–MACALPINE, Jill K.: *Protecting Patents From The Beginning: The Importance of Information Disclosure Statements During Patent Prosecution*, in *Journal of the Patent and Trademark Office Society*, Vol. 82., Issue 8., 2000. pp. 580-581.,
Manual of Patent Examining Procedure, , United States Patent and Trademark Office, Alexandria, 2015. (cited: 18/11/2023), http://www.uspto.gov/web/offices/pac/mpep/s2165.html.
SCP/20/4, *Exceptions and Limitations to Patent Rights: Experimental Use and/or Scientific Research*, 2013, Standing Committee on the Law of Patents, WIPO, Geneva, p. 6., (cited: 18/11/2023), http://www.wipo.int/edocs/mdocs/patent_policy/en/scp_20/scp_20_4.pdf.
Roche Products Inc. v. Bolar Pharmaceutical Co. Inc., 733 F.2d 858 (Fed. Cir. 1984), U.S. Court of Appeals for the Federal Circuit, (cited: 18/11/2023), http://law.justia.com/cases/federal/appellate-courts/F2/733/858/459501/..

[209] BAJI Gál Árpád: *Zöld szabadalmak gyorsított megadása program a Szellemi Tulajdon Nemzeti Hivatalánál*, Budapest, SZTNH, disseration, 2015. p. 5., DECHEZLEPRETRE, Antoine: *Fast-tracking Green Patent Applications. An Empirical Analysis*, International Centre for Trade and Sustainable Development, Geneva, 2013. p. 3.

development. The "green certification marks" could be very useful in order to identify those products which were made from environment-friendly materials.

The definition of trademark is the most important question from the view of trademark public domain. In the EU it is a quite current issue because the new trademark directive gave up the requirement of graphical representation (moving towards the liberal TRIPS definition of trademark), and this way there is wider opportunity to get protection.[210] The other aspect of public domain are the grounds of refusal. From the view of sustainable development, it is important to prevent the acquisition of cultural heritage. In my opinion to grant trademark protection as an individual intellectual property right on a century or millennia old cultural symbol can't be allowed, because it decreases the cultural self-determination of the affected society.[211]

Geographical indications are important factors in sustainable development through the preservation of local values, culture and lifestyle. This fact was well represented at the Geneva revision of Lisbon Agreement in 2015. The system of geographical indications is important for the developing countries, and the consensual agreement in Geneva could be realized only through the balanced respect of the interests of developing and developed countries.[212] The regulation of geographical indications is interesting, because it differs from the other IP forms, it has a special characteristic, and its structure could be adequate for the new types of IP forms, which are forming in order to serve sustainable development.

Remarks related to the potential new forms of IP

Diversity is one of the most important elements of sustainable development. This comes from the structural theory, because a diverse system can adapt best to the environmental changes. From this aspect diversity is the key to survival. Therefore, the complexity and diversity of a system shall be protected. One of the endpoints of diversity is biological diversity, and the other endpoint is cultural diversity. The protection of biodiversity is related to the protection of genetic resources, and the protection of cultural diversiry connects

[210] *Study on the Overall Functioning of the European Trade Mark System,* Max Planck Institute for Intellectual Property and Competition Law, Munich, 2011. (cited: 18/11/2023), http://ec.europa.eu/internal_market/indprop/docs/tm/20110308_allensbach-study_en.pdf.

[211] WIPO/STrad/INF/5 *Grounds for Refusal of all Types of Marks*, 2010, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, WIPO, Geneva, (cited: 18/11/2023), http://www.wipo.int/export/sites/www/sct/en/meetings/pdf/wipo_strad_inf_5.pdf.

[212] CURCHOD, François: *The Revision of the Lisbon System*, presentation, Worldwide Symposium on Geographical Indications, Budapest, pp. 20-22. October 2015.,
WIPO-SZTNH, DE TULLIO, Elio: *From Lisbon to Geneva: The Outcome of the Lisbon System Revision,* presentation, Worldwide Symposium on Geographical Indications, Budapest, pp. 20-22. October 2015, WIPO-SZTNH.

to the protection of traditional cultural expressions. Between them stands – partially linked, partially separated – the protection of traditional knowledge.

The protection of genetic resources, traditional knowledge and traditional cultural expressions indicate such new directions within the IP rights, which declared aim is to facilitate the different aspects of sustainable development. These are such new, forming legal institutes, which aren't part of the universal system of IP yet, and maybe they never will be. In this process the WIPO tries to be a pioneer, but the end of its work is far away. The classic forms of IP can protect these fields only partially, this way the effective protection requires sui generis solutions.

The WIPO drafts on the protection of traditional cultural expressions[213] and traditional knowledge[214] are very similar, they regulate their subject parallel, along the lines of classical IP forms. However the draft treaty of genetic resources is quite different, it embodies the defensive protection.[215] It means, that instead of providing exclusive rights, it creates grounds of refusal for other IP forms.

The right holders, or with the new terminology, the beneficiaries of these rights are the indigenous people and local communities. This solution is unfamiliar in the individual system of IP and requires the acceptance of legal capacity of communities.

Each new form is built upon the system of equitable access and benefit-sharing. This gives the economic side of these protections, what can serve the further development of the affected indigenous people and local communities. However, this could be a danger, because the technical and infrastructural development can the communities tear apart from their original and natural environment, where the protected values were born.

For the effective protection complex searchable databases are essential, because in the absence of them it is barely possible to prevent granting IP rights for others about these values without consent. In order to establish databases, proper database protection system would be a good incentive. This can be done through the classical copyright protection and sui generis database protection, like the EU did. Unfortunately, the issue of international harmonization of database protection isn't in the agenda of WIPO.[216]

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[213] WIPO/GRTKF/IC/40, *The Protection of Traditional Cultural Expressions: Draft Articles - REV,* 2019, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO, Geneva, (cited: 18/11/2023), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/facilitators_text_on_tces.pdf

[214] WIPO/GRTKF/IC/40, *The Protection of Traditional Knowledge: Draft Articles*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, 2019. (cited: 18/11/2023), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/facilitators_text_on_tk.pdf.

[215] WIPO/GRTKF/IC/40, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, 2019 (cited: 18/11/2023), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_6.pdf

[216] VON LEWINSKI: *cit.*, pp. 549-551.

The draft treaties breach the principle of territoriality because of the specialties of beneficiaries and the subject matter of these protections, and because of the new philosophy of these IP forms. Indigenous people and local communities in geographical sense don't fit necessarily to the borders of states, and their genetic resources, traditional knowledge and cultural expressions aren't connected solely to one country, so their effective protection requires cross-border cooperation. Besides that, sustainable development is a global phenomenon, and these IP forms – serving sustainable development – need to be regulated on global level.

Conclusion

The polarization of interests is crucial within sustainable development. We can talk about bipolarized system, where the interests of developed and developing countries collide, or about tripolar system, where the interest of transitional economies appear as well. This can be split further according to the opposition of east and west. The variety of interests appears in the sustainable development as a whole, and in narrower sense in the subsystem of IP rights.

This polarization visibly (think about TRIPS, TRIPS-Plus and TRIPS-Minus) begins to stretch out the traditional framework of IP rights, and because of the spread of sustainable development the current legal constructions seem even narrower. This necessarily induce changes in every level of the legal system.

The expanding borders of IP system are reflected well by the draft treaties of new IP forms. Though we can't tell that these would become the part of IP system (maybe they won't) but clearly indicate that sustainable development requires new solutions. From private law aspect it is a hard question to figure out, how could these new forms be integrated into the current dogmatics. However, the system isn't unified currently either, because there are serious differences between the Roman-German and Anglo-Saxon legal systems, and the adoption of new IP forms cause both of them tough moments. The legal capacity of communities, the breach of territoriality and the benefit-sharing would be quite strange elements, but we have to remember, the IP law was always on of the most adaptive and progressive field of law, so the pure novelty or weirdness can't be an obstacle.

As a final remark, we can say that IP law could be a useful tool for facilitating sustainable development. It has so strong incentive power what is essential to development. There is a lot of connection points, where the IP rights have influence on the pillars of sustainable development. Therefore, I can't accept the nihilist approach of public domain, which sees the key to sustainability in the elimination of IP rights.[217] However I feel necessary to generally limit them. IP rights as tools for sustainable development aren't good or bad in

[217] BOBROVSZKY: *cit.*, p. 17.

themselves, everything depends on how we use them. The economic centric national and international legislation degrades IP to a tool for individual economic power, regardless from societal and environmental aspects. The examined elements are just small parts of a complex system, but they have crucial role in order to create balance.

Law and IP law as a subsystem are suitable tool to help humanity to step onto a sustainable path. But it isn't enough alone. It is an important tool and frame but can't realize all of the goals. We need serious societal changes, new way of thinking, new human values, which aren't primarily legal issues, but the law has to be a partner for these. We can't see the future, so we don't know whether these initiatives will be successful or not. However, the experiences justify pessimism.

THE POLITICAL PROTECTION OF TRANSDANUBIAN PROTESTANTISM IN THE LIGHT OF MIKLÓS BETHLEN'S PAMPHLETS (1671-1681)

ALBERT András[218]

Introduction

After the Habsburg Empire's victory over the Turks on 1st. August 1664 at Szentgotthárd, Leopold I. tied the Vasvár peace. They didn't expel the Turks from Hungary, they began to build the system of absolutist domination. The Hungarian statesmen were discontent with the policy of the Habsburg court so they began to organize. At the meeting in Murány (Muráò) 23rh. October, 1666 they reflected on the idea that Hungary should be under the protectorate of the Sultan. The Porta would guarantee free king election, internal and foreign politics. Vienna became aware of the conspiracy, but didn't interfere for many years. Leopold I. in 1671 swooped down on the conspirators by surprise. Péter Zrínyi, Ferenc Frangepán, and Ferenc Nádasdy were executed. The exiles escaped to Transylvania. Although initially the prosecution was politically motivated, the pretext of punishing the conspirators was particularly suitable to get even definitely with the Hungarian Protestants. The political persecution obtained religious essence.[219]

The conclusions of peace from 1606 in Vienna, 1621 in Linz and 1626 in Nikolsburg which contained the national laws about the Protestants' rights and their religious freedom, were considered null.[220] The Protestant historiography called this period beetween 1671-1681 „decade of mourning".[221] This name was given because of theaggressive action against the churches and their persecution.[222] The Habsburg court

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[218] ALBERT ANDRÁS church historian, Phd student. Széchenyi István University, Deák Ferenc Faculty of Law and Political Sciences.

[219] In front of emperor Leopold I. (1640-1705) and his court France of Cardinal Richelieu and Mazarin was an example followed. They have sought to build the absolute power. They wanted to achieve the national constitutional institutions, the National Assembly, the palatine dignity and the abolition of county government. The conspiracy served as the legal basis for against the coronation oath. The emperor-king tried to dismiss himself with the theory "playing the role of law" taken to comply with the Constitution, from the royal oath.

[220] BUCSAY, MIHÁLY: *A protestantizmus története Magyarországon 1521-1945*. Budapest, 1985. p. 116.

[221] The "mourning decade" word usage in the protestant interpretation was the most violent period of early modern hungarian history. The Magyar Nagy Lexikon wording: "*In the hungarian legal history by the special delegation of court of law in Bratislava in 1673 and 1674 in respect of high treason sentenced and sent to the galley in context of Protestant pastors fate appeared at the end of 17th century.*"

See Magyar Nagylexikon, VIII. Bp., Magyar Nagylexikon Kiadó, p. 1999

[222] See for details PÉTER, KATALIN: *A magyarországi protestáns prédikátorok és tanítók ellen indított per 1674-ben*, Budapest, 1983 in: *A Ráday Gyûjtemény Évkönyvei. 35.*, (ed.) BITSKEY, ISTVÁN: *De Ruyter admirális és a magyar irodalom: négyszáz éve született a magyar gályarabok szabadítója* Debreceni Szemle, 15.évf.2007, pp. 167-173, BITSKEY, ISTVÁN: Szellemi élet a koraújkorban. In: Magyar művelődéstörténet, (ed.) KÓSA, LÁSZLÓ, Budapest, 2001, p. 242. and BENCZÉDI, LÁSZLÓ: *A prédikátor perek történeti háttere. Theologiai Szemle*, 7-8. Vol 1975. pp. 199-205. and pp. 264-267.

considered this moment the most suitable to attack the Protestant churches. The main reason of the attacks against the Protestant churches was that the Wesselényi - conspiracy was initiated by the protestant churches and their pastors and teachers.

According to the re-formulated theory in 1670 the protestants lost the right to religious liberty guaranteed by their political movements. The Protestant religions, therefore operate illegally and they had to be banned.[223] Historian László Benczédi says: "to justify the large counter-attack he mainly blamed the Protestant priests because of the attack of the Hungarian rebels… or even the general staff of the Catholic Church considered that time the most suitable for returning to the ancient Catholic faith, the accomplishment of country with one faith."[224]

Count Miklós Bethlen and the transdanubian protestant pastors's, teachers's case

The embracing of the persecuted Hungarian protestants' case was favourably received in Michael Apafi I., Transylvanian prince's court. During the persecutions on 6th April, 1671 he wrote a letter to Rottal military governor in which he asked his support in the case of the slandered priests. Prince Michael Apafi I. and his councilors decided to notify the foreign protestant monarchs, princes and political elite circles about the Hungarian events and their religious background.[225]

Miklós Bethlen, the Transylvanian politician and his circle of intellectuals played a very important role in this. In the pamphlets sent to the kings and princes of western protestant countries the members of the mentioned circle were devoting all their efforts to inform the European public of persecuting religion in Hungarian Kingdom. In the pamphlets the authors revealed the Hungarian counter-reformation, emperor and king Leopold I. attacks and pointed out the great defensive struggle of protestant princes against them. The literature attributed wrongly these political pamphlets to Miklós Bethlen for a long time.

Literary historian József Jankovics, the excellent expert in Miklós Bethlen's life and work contradicted this fact in his researches.[226] But it is certain that Miklós Bethlen's influence can be felt concerning the

[223] NÉMETHY, SÁNDOR: *Delegatum Judicium Extraordinarium Posoniens anno 1674 története és jogászi kritikája,* in: *Theologiai Szemle* Vol6. 1980. pp. 331-334. 1981, pp. 162-163., 1981, pp. 219-224. 1981 pp. 295-300. 1982. pp. 99-105. 1983, pp. 234-244. 1983, pp. 276-286, 1984 pp. 97-102.
[224] BENCZÉDI, LÁSZLÓ: 1975, 9-10. sz. 266. p.
[225] POKOLY, JÓZSEF: *Az erdélyi református egyház története. II. kötet, (1605-1690),* Budapest, 1904. 266. p.
[226] The first pamphlet of Austeritas Austriaca (1671), the second Austriacae Austeritas continuatio, a third of the pamphlet Austriacae Austeritatis, eiusdemque Continuationis Confirmation was. The works were published pseudonym. The identity of the author of works literary scholar JANKOVICS, JÓZSEF revealed that BETHLEN, MIKLÓS is not the author. Bethlen himself did not know the author.
See JANKOVICS, JÓZSEF: Bethlen Miklós levelei. Budapest, 1987. I. köt. 38-43. p., R. VÁRKONYI, ÁGNES: *Erdélyi változások.* Budapest, 1984. 143. p.

background of the formation of the pamphlets. Around the formation of the pamphlets a small circle of intellectuals has to be seen. This literary and intellectually circle functioned under Miklós Bethlen's leadership. Among the members of this literary and intellectually circle were: Pósaházi János, Michael Szatmárnémethi, Peter Fajgel and Eszéki István.[227]

Count Miklós Bethlen, the Transylvanian politician embraced the case of persecuted protestant pastors and teachers through international diplomatic channels. On behalf of Mihály Apafi I., prince of Transylvania and his Councillors in letters he appealed to the kings of the Protestant western countries and university professors. He requested for their support in the case of the persecuted Hungarian Protestant pastors and teachers. He was assisted by Péter Kovásznai Transylvanian reformed bishop, Istvan Pataki professor from Kolozsvár and István Adami Transylvanian saxon lutheran bishop.[228] Miklós Bethlen in 1672 sent these well-drafted and edited letters with a German lutheran officer to Kővár. His plan was that the letters travelling through Poland should arrive in Berlin and Heidelberg. The sending out of some of these letters were impeded by councillor Teleki Mihály. The assumption is that political considerations led Teleki to confiscate the letters.

Some of the letters got into the hands of the archbishop György Szelepcsényi, which letters became important documents against those priests who were summon to appear before the court in Bratislava.[229] The prosecutor of the court of law established in 1674 in Bratislava convicted the protestant pastors and teachers on trumped-up charges.[230] According to the charge István Vittnyédi, Miklós Bethlen, Ambrus Ketzer corresponding to each other and the transdanubian protestant pastors.[231] According to the data found in minutes the defendants' letters were very strongly political coloured.[232] John Burius Krupina pastor has rejected the accusation that the ministers and above mentioned persons would have something to do with them. The lawyer appointed by the court of law in Bratislava, Heussler Ferdinand was also on the pastors and teachers' side. He firmly maintained and proved that the letters presented as evidence are false and have nothing to do with the defendants.

One of the documents against the convicted pastors was the "Vitnyédi letter". This letter was written by István Vittnyédi in Eperjes and addressed to Bethlen Miklós on 10th May, 1669.[233] There are many different

[227] Diarium theologicum… Kolozsvár, 1675. RMK I. 1359.
[228] POKOLY: ibid, 269. p.
[229] NAGY, GÉZA: A *református egyház története (1608-1715). Vol. I-II.*, Máriabesnyő–Gödöllő, 2008. p. 508.
[230] The protocol of 1674's galley prisoner sentencing can be found in Esztergom Primate Archives in . S. Varga Katalin (ed): „Vitetnek ítélőszékre… Az 1674-es gályarabper jegyzőkönyve" Bratislava, 2002, 344. p.
[231] See S. VARGA, KATALIN: ibid, 30. p.
[232] Op.cit. 30. p.
[233] The judges of the court of law in Bratislava showed up two letters. One of them was addressed to Miklós Bethlen, and the other one to Ketzer Ambrus. See RÁCZ, KÁROLY: *A pozsonyi vértörvényszék áldozatai 1674-ben*, Sárospatak, 1874. 239. p.

counter-arguments which prove that the letter is not authentic.[234] 1. Miklós Bethlen wasn't the captain of the Hajdúság and the Partium territory but of the szekler army. This was well known by István Vitnyédi. 2. Miklós Bethlen and transylvanians usually didn't have any contact with Ferenc Rákóczi II. 3. The letter sent to Bethlen, on 19th June, 1668[235]17 by Vitnyédi caused a serious disagreement between the two parties, so they never corresponded afterwards. This was confirmed by Miklós Bethlen himself. 4. Vitnyédi wasn't in Eperjes that time when the letter was written. 5. There are a few question related to the authenticity of the letter addressed to Bethlen: The original letter or a copy of it was discovered and which version was Bethlen holding in his hands? The answer can be find in Bethlen's letter to the galley slave - pastors: "But I never see God's face if I saw something like this! ..."[236] 6. Bethlen claimed that in 1669 Wittnyédi was no longer alive.[237] The false letter came to light had another important message concerning Miklós Bethlen's person. Miklós Bethlen was a very good politician with an outstanding personality. He had an extensive political connection to different countries. In Vienna and Bratislava he was kept in evidence and used in connection with charges. The case of the galley protestant pastors caused a great indignation in the whole Europe. Many people came to help them.

Politicians, diplomats, professors, wealthy people did everything they could to rescue the Hungarian protestant pastors.[238] Five years passed however, when finally the Protestant powers through diplomatic channels could do something in their favour. Miklós Bethlen in the letter „Epistola Nicolai Bethlen ad Ministros Exules ..."[239] written on 4th January, 1675 cleared himself from the accusations. He proved the innocence of the slandered, and convicted protestant pastors, teachers, and that the accusations against them were unfounded. He asked for the political support of the western protestant states in order to prevent the religion persecution what he finally achieved in the future. At the end of his letter he encouraged the galley prisoner pastors to persist and remain devoted to their faith.[240] The Apologia Ministrorum Evangelicorum Hungaricae (The Protection of the Hungarian Evangelical Pastors) pamphlet appeared two years later.[241]

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[234] See RÁCZ ibid,. 235. p. — Sárospataki Füzetek Vol. 557 1863, PAYR, SÁNDOR (ed): *Egyháztörténeti Emlékek. Forrásgyûjtemény a Dunántúli Ágostai Hitvallású Evangélikus Egyházkerület történetéhez. I. kötet*, Sopron, 1910. pp. 236-237.

[235] Sárospataki Füzetek 1868. évf. 921. p.

[236] See for details Bethlen Miklós levele az elítélt prédikátorokhoz. Jan. 4. 1675. MOL.

[237] See for details in *„Geschichte der evangelischen Kirche in Ungarn von Ungarn von Anfang der Reformation bis 1850"* Berlin. 1854. p. 225.

[238] PAYR, SÁNDOR: A *magyar protestáns gályarabok*, Budapest, 1928. p. 75., RÉVÉSZ, IMRE: *A gályarabok lelke*, Debrecen, 1936, p. 85. THURY, ETELE: *Gályarabjaink megszabadítása*, Protestáns Szemle, 1909.
THURY, ETELE: *A Dunántúli Református Egyházkerület története*, Pozsony, 1998. pp. 72-98.

[239] SZABÓ KÁROLY: *Régi magyar könyvtár I. (1531—1711. megjelent magyar nyomtatványok) — II (1473—1711. megjelent nem magyar nyelvű hazai nyomtatványok)*, Budapest, 1879-1885. p. 1313

[240] Miklós Bethlen's letter to the exiled protestant preachers Miklós Bethlen's letters (1699-1716) has collected, organized by newspaper, an introductory essay and commentary written by the József Jankovics.
JANKOVICS, JÓZSEF: *Régi Magyar Prózai Emlékek*, Budapest, 1987. pp. 1159-1180.

[241] Apologia Ministrorum Evangelicorum Hungaricae ad innocentiam suam Orbi Christiano declarandam, opposita Judicio Tribunalis Posoniensis, a quo Perduellionis crimine contra Regiam Majestatem iniquissime accusati et condemnati, non modo toto

In this pamphlet he defended the persecuted Hungarian protestant pastors and pointed to the causes of dissatisfactions in Hungary. He was arguing with János Lapsánszky, the Secretary of lawcourt in Pozsony, refusing the alleged relationship between the rebellion and the protestant pastors. Miklós Bethlen strongly argued that the persecution of the protestants in Hungary had religious reasons.[242]

The Epistola ad Ministros Exules letter appeared in print in Cluj as Appendix of this pamphlet. Miklós Bethlen with this dual work intended to inform the transylvanian and the foreign public. He managed to achieve this in the

future. A letter from Miklós Bethlen adressed to exiled preachers was printed in the Netherlands.[243] It is considered Miklós Bethlen's diplomatic success that almost at the same time Gerard van Hamel Brunigh (Bruininx) Dutch Ambassador of Netherlands in Viena and Bergt Gabrielson Oxenstierna Ambassador of Swedish Government presented a submission. In these presentations both of them support the defense of Protestantism in Hungary.[244]

The „Onschuld Vereenigde der Nederlander, vertoont aan den Rooms Keiser Leopoldus I. but Door der selver Resident de Hr. Hamel Bruininx. Door der selver Resident de Hamel Bruininx Hr. In den Jaare 1675. In den Jaar 1675th Tot Weene „memorandum submitted by the Hammel Gerard Bruninnx to the emperor contains the Dutch allies Estate's attitude towards the persecution in Hungary. The allies Estate considered the pastors and teachers innocent. They emphasized that in Hungary the case wasn't against the rebellion, but there was a religious persecution, which was considered damaging to the entirely Christian world.[245] These letters were precious documents of the international diplomatic intervention and political pressure on Habsburg Court in Vienna. The Latin and French letters came from Gerard van Brunigh Hammel, Dutch diplomat in Vienna.[246] These letters are good evidences of the Dutch diplomatic efforts that had been made to the Protestants in Hungary.[247] Miklós Bethlen's intellectual excellence provided him leading role in the political life of Transylvania, international politics, the Protestantism in Transylvania, education, culture as

Regno proscrptr sunt, sed exemplo a Pietate et Mansvetudine Christiana prorsus alieno, magnam partem ad Triremes Hispanicas damnati. Anno Patientiae Sanctorum. MDC. LXXVII. Ultrajecti, Ex Officina Guilielmi …Typograph. Ao: 1678. Leírása SZABÓ KÁROLY: *Régi magyar könyvtár I.* (1531—1711. megjelent magyar nyomtatványok) — II (1473—1711. megjelent nem magyar nyelvű hazai nyomtatványok). Bp. 1879-1885. II. 384.p.

[242] LUKINICH, IMRE: "A *bethleni Gróf Bethlen-család története,*" Budapest 1927, p. 389.

[243] SZABÓ KÁROLY: "*Régi magyar könyvtár I. (1531—1711. megjelent magyar nyomtatványok) — II (1473—1711. megjelent nem magyar nyelvű hazai nyomtatványok)*" Budapest 1879-1885. p. 1400., JANKOVICS JÓZSEF (ed.): "*Bethlen Miklós levelei*", Budapest, 1987. I. p. 89. II. pp. 1159-1180.

[244] Introductory essay written by László Makkai in: MAKKAI, LÁSZLÓ: "*A magyarországi gályarab prédikátorok emlékezete,*" Magyar Helikon, 1976. 20-23. p.

[245] RÁCZ, ibid, pp. 28-249.

[246] TÓTH, ENDRE: "*Hamel Bruininx a soproni országgyűlésen.*" ThSz. 1926. pp. 678-707.

[247] HHStA. Ungarische Akten, Miscellanae, Fasc. 427. 6566., 6768.

well as concerning the inflow of foreign intellectual capital. His vocation and mission was to resolv political, social, cultural and religious problems in Transylvania and the Hungarian Kingdom.

Completion

Miklós Bethlen undertook to resolve such a problem that time when the protestant pastors and teachers were persecuted. He was the promoter of resettlement in Alba Iulia of the expelled Reformed College in Sarospatak , protector of the persecuted protestants in Hungarian Kingdom. As he was a brilliant statesman he was worthy placed in the Transylvanian and Hungarian political, cultural and church history life in the 17-18th century. The message of his life-work is: you must build during difficult, turbulent times,too , stop the decline and awaken hope for people in hopeless situations. God, Christian Church and Hungarian State must be served with firm loyalty