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PRODUCTION OF BIOBANK DATA FOR THE NEEDS OF CIVIL AND CRIMINAL PROCEEDINGS: JURISPRUDENCE FROM THE EU STATES

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Abstract. The purposes of retaining biological material may be diverse. Biorepositories, which are containers of biological materials, are referred to as *biobanks* in English-language scholarship or *biotheques* in French. There is no uniform agreement in legal and medical scholarship as to the scope of biological material to be maintained in order for an institution to be called a "biobank", or the actual aim of such maintenance. At present, special techniques are already able to determine the identity of the individual whose biological material is retained; thus, in case such data is identifiable using various techniques, they should be considered as personal data in accordance with the recent judgment of the Latvian Senate, No. SKA-166/2020. Such an inference is quite apparent, but this issue requires the resolution of the situation whereby biobank data could legitimately be produced for the necessity of administering justice, and whether this would be possible in principle. The court practice of the Nordic States already holds that a court may allow the production of biobank records, but this heavily depends upon the circumstances of the case: such situations may arise in civil litigation relating to paternity claims or to the right to know one's origin, and prosecution offices may opt to request biobank data for investigating suspicious deaths. In some other instances, biobanks, cryobanks, and medical institutions governing biobanks may be sued for illegitimate collection and maintenance of biological samples without the notification of the party involved – which are known in the United States of America, as well as one outstanding case in Iceland. The current situation concerning litigation relating to legitimate biobank data disclosure is evolving, and the legislation relating to it is either frequently absent, or lacks clarification. In this paper, the author calls for the clarification of legitimate instances where biobank data could be disclosed for the needs of court proceedings upon the examples of Latvian law, and highlights the current jurisprudential developments in respect to litigation against biobanks and the institutions governing them in respect to an alleged privacy violation.

Keywords: biobanks, biorepositories, medical confidentiality, civil procedure, criminal procedure, paternity claims, right to know one's origination, biobank secrecy, missing person search.

Introduction

Biobanks are referred to as institutions maintaining various biological samples for diverse needs (Stewart, Liprowth, Aparicio, Fleming, 2014, pp. 26–29).[2] Despite the fact that the concept of a biobank is not new in itself (i.e. some scholars mention that collections of biological materials, including human ones, are well known in history BBMRI, 2013, pp. 10–18), a peculiar name for a collection of biological samples in English language emerged only in 1996 (Coppola et al., 2019, pp. 173–178), whereas in France, the term *biothèque* is used as a synonym for the word *biobanque* (Chabannon et al., 2006, pp. 27–29), while the latter was used two decades ago in empirical legal research in terms of data protection for such medical institutions (Laurent & Armesto, 2010). However, the French courts use neither of the aforesaid terms to refer to biobanks in administrative disputes involving them, which are connected to a revocation of the biobanks' license to conduct biomedical research,

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[2] Note that the purposes of biobank operations are diverse. The Supreme Court of Norway in its 2013 judgment designated them as follows: "Based on their application purpose, the biobanks are divided into three main categories: diagnostic biobanks, treatment biobanks and research biobanks. Diagnostic biobanks contain material obtained in connection with the examination and / or treatment of a specific patient. Treatment biobanks are collections of biological material that are to be used for the treatment of a specific patient or a specified group of patients. Research biobanks are collections of biological material used for research, whether the material is collected directly for research purposes or is transferred from diagnostic biobanks or treatment biobanks" (Judgment Norges Høyesterett, 2013, para. 31).

usually referring to them by the actual name of the institution, not mentioning them by an overarching name (see, for instance: Judgment Cour administrative d'appel de Paris, 2012; Judgment Cour administrative d'appel de Paris, 2017; Judgment Cour administrative d'appel de Versailles, 2019).

The topicality of the issue of legitimate biobank data disclosure in civil and penal proceedings is high. As we may notice from the passages *infra*, paternity disputes may involve a request for DNA data, stored at a biobank (i.e. Norway, Netherlands), and it is not uncommon that these DNA data are the only sufficient evidence to prove one's paternity; and thus, the court, under the circumstances of the case, may decide that the interest in disclosure (i.e. to protect minor's and family rights) may be higher than the one to protect the confidentiality of information stored in biobanks (Judgment Norges Høyesterett, 2013, para. 28–75). To date, there has been very little discussion relating to the liability of biobanks in general, and some works have been dedicated to the issue of separate legal cases, for instance, the Judgment of the Icelandic Supreme Court of 2003 (Gertz, 2004), or the relatively recent US judgment of Kanuszevski (Judgment *Kanuszewski v. Michigan Department of Health and Human Services*, 2019, p. 396; Hart, 2020). There are several publications where the authors tend to believe that biobank data should not be used for any forensic investigations, or for any court proceedings in general (Keis, 2016, p. 22; Hallinan, 2021, p. 100). This was, however, mentioned in the context of Estonian biobanks, but there are no particular differences in issues of medical confidentiality in Estonia, or elsewhere in Europe, that may be in parity with the necessity of disclosure in paternity proceedings. Such views have already been expressed before by different authors (i.e., Otlowski, Nikol, & Stranger, 2010, pp. 163, 212), but a valid reason for an enhanced regime of confidentiality (i.e. between biobank data and hospital data) has never been mentioned. There is nothing new in the fact that courts order the hospital to produce records upon the plea of a patient, or occasionally, for criminal proceedings. Indeed, many decades ago, when a civil law court faced a rare case relating to a plaintiff's request to hand over hospital records for the necessity of an action for damages, it could deny such request on the basis, *inter alia*, of the concerns that some facts relating to the patient's health should be withheld in order not to traumatize him, notwithstanding real legal reasons, i.e. that hospital records are private documents and may not be used for a private claim (Judgment Oberster Gerichsthof, 1936, pp. 536–538). This approach looks somewhat old-fashioned, a point already acknowledged by the same court in Austria (Judgment Oberster Gerichtshof, 1984). There is no particular reason for which biobank data are bound to be disclosed under the same circumstances that hospital records may be. Strict confidentiality and paternalistic medicine are no longer in trend – what is more, it was not uncommon for doctors or hospital officials to ignore the maxim of non-disclosure a century ago, when the matter related to publishing books, articles, or other scientific findings about people with orphan diseases (or merely referring to patients making them identifiable).[3] Moreover, when courts assess whether to grant an order for disclosure of biobank records, they carefully assess the conflicting interests and conflicting legal provisions (if applicable), and we may not claim that everything is done for the needs of justice *per se*, and that a potential disclosure of biobank records for a limited purpose would somehow amount to an abuse of procedure. As the reader may see below, the courts (i.e. in Norway, where quite a lot of judgments relating to biobank data disclosure for the needs of civil and criminal proceedings were handed down) analyze not only the general provisions of the Criminal or Civil Procedure Acts, which relate to the production of evidence, necessary for trial, but also a number of other laws, which may put restrictions on such production – as the biobank laws in Norway do (Judgment Norges Høyesterett, 2013, para. 28–75; Judgment A (advokat Elias Christensen) mot B., 2018, para. 10–33). At the same time, there are no valid reasons for banning the production of such records at all – this could harm the administration of justice. To a certain extent, we may suppose that in terms of paternity proceedings, the biobank data will be produced without the consent, or awareness of the patient. At the same time, the courts have held that in such cases, consent is not necessitated – at least in the example of Norway (Judgment Norges Høyesterett, 2013, para. 60).

In terms of awareness, the existing jurisprudence shows that in paternity claims, the father may be either unavailable, or unwilling, to participate in the proceedings (Judgment Norges Høyesterett, 2013, facts). If we assume that the court is reluctant to order to produce the biobank data, then the case falls apart. Over a century ago, in 1851, the Scottish Court of Session held in *Whyte v. Smith* that medical confidentiality, obviously existing in the tissue of common law, is not absolute: "…The obligation [of secrecy] may not be absolute. It may and must

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[3] For instance, such cases could be found in early French and Luxembourgish jurisprudence: Judgment *B… . c. X… .*, 1888; Judgment *Consul c. Pitres* (originally C… c. P…), 1893, pp. 177–178; Judgment *Consul c. Pitres*, 1895, pp. 82–84; Judgment *Min. Publ. c. Dr. G.*, 1893, pp. 20–25.

yield to the demands of justice, if disclosure is demanded in a competent Court" (Scottish Court of Session, *Whyte v. Smith*; Judgment *AB v. CD*, 1851, p. 180; Session Cases Vol. 24, pp. 78–79). There is no evidence that this aged postulate has ever changed in civil law, or at common law; apparently, the rules regulating the production of facts containing medical secrecy, or testifying in court with respect to such facts, may be different. However, in many jurisdictions, the communications containing medical secrecy are not absolutely privileged; and nothing suggests biobank data are somehow different.

The aims of the article are:

- To discuss the main civil law doctrines (which may also be dubbed in common law doctrines), upon which the operation of biobanks exists. This includes the patient's autonomy (informed consent, medical experiments and research), right to privacy and medical confidentiality; proprietary rights in body parts or other biological materials, as well as the patient-physician relationships, based upon a contract;
- To review the recent judgment of the Senate of Latvia (Judgment *A pret. Veselības ministrija*, 2020), relating to the expungement of data preserved in a forensic medical center, technically a biobank;
- To observe the recent Nordic (Norwegian and Swedish) jurisprudence with regard to the disclosure of biobank records for the needs of court proceedings which include paternity claims, diverse criminal investigations and search for missing persons;
- To unfold the "myths" relating to the impossibility of producing biobank records and biological materials for the needs of justice.

The methodology applied in the article changes upon the context, but in general, it applies the following methods, namely: 1) the comparative legal research, since many different jurisdictions are discussed by the author; 2) the historical-legal method and the doctrinal approach: to observe legal doctrines which are applied to biobanks and the issues relating to them, which involves a historical investigation of the issue in old legislation and case law; 3) the hermeneutic (descriptive) approach, which is used for commenting upon the most relevant legal cases, where the courts dealt with the issues of biobank data production for the necessity of civil and criminal proceedings.

1. Biobanks and the legal doctrine

1.1. In international law

Another complicated question is the correlation of biobank data production to the European Convention of Human Rights (Art. 8) and the Oviedo Convention. To date, the European Court of Human Rights has not discussed the violations occurring in biobanks, or the legitimacy of biobank data procurement for the needs of justice. But the legitimacy of medical data production has already been observed in *Z v. Finland* (1997), where the plaintiff's medical records were seized by police authorities, and her doctors were obliged to testify concerning her state of health, as such information was necessary for criminal proceedings against the plaintiff's husband, who was accused in knowingly contracting unspecified women with HIV (and both plaintiff, and her husband were HIV-positive). The European Court recognized that the seizure of her medical records and the obligation of the doctors to testify did not violate her right to privacy, and had a legitimate aim, but the violation occurred in the publication of the judgment report with identifying information, later disseminated in the press (Judgment *Z v. Finland*, 1997, para. 9–18).

Thus, the principle announced by the Scottish Court of Session in *Whyte v. Smith* still works: the disclosure of information containing medical secrecy before a court is very different to the voluntary disclosure of such communications elsewhere (Scottish Court of Session, *Whyte v. Smith*, A. Dunlop's Session Reports Vol. XIV, pp. 178–180; Session Cases Vol. 24, pp. 78–79). It should be the same in the case of biobanks: the judgments, where such data are used, are usually anonymized (especially in civil law jurisdictions), and the persons whose medical information is used remain confident of their anonymity. As mentioned before, it is very common for an alleged father not to participate in paternity proceedings, or the biobank data may be the only reliable evidence – not only in paternity proceedings, but also in the search of missing persons. However, it is apparent that the courts in different jurisdictions may have diverse positions in this respect. But it does not seem that either the European Convention of Human Rights, or the Oviedo and its additional protocols, are the instruments that preclude the production of biobank data. At some point, the cases relating to the production of biobank data may reach the

European Court of Human Rights. The position of this court, which is the court of last resort within the scope of the ECHR signatories, will be crucial to the future of this aspect. At the same time, analysis of the court reports from Norway or Sweden proves that the courts consider the national legislation (which, in fact, may be in conflict relating to the production of such data as evidence) in resolving such issues, but not international instruments. Moreover, the Oviedo Convention does not inhibit the production of medical records: Art. 10 of the said instrument does not provide for an absolute confidentiality of medical records as such.[4] Biobanks are not explicitly mentioned in Oviedo, but could fall under the scope of Additional Protocol relating to biomedical research (CETS-195), in case we are discussing entirely research oriented biobanks. Indeed, Art. 25 of this Additional Protocol provides for the ensuring of research participant confidentiality.[5] In fact, as the Supreme Court of Norway held, there may be a variety of purposes for which biobanks operate, and according to this ruling, the scope of their operation lies far beyond research (Judgment Norges Høyesterett, 2013, para. 31). At the same time, the basic rule on confidentiality within biobank maintenance or research on humans is not disputed, but neither the Convention, nor its Protocols, declare a ban on the production of such records or data for court proceedings.

The provision of Art. 2 of the Oviedo Convention, declaring that “The interests and welfare of the human being shall prevail over the sole interest of society or science” is potentially a legal norm, which may impact upon the assessment of the parity of confidentiality and public interest in civil and criminal proceedings in some civil law or common law jurisdictions in the future. However, it is very superficial to deduce that the production of biobank or hospital records is impermissible on this basis. Firstly, the said norm is declarative in its wording, and the basis for restraining the production of such evidence, as biobank data, should be firm. Secondly, there is no uniform interpretation of this norm to date (Helgesson & Eriksson, 2006). Thirdly, the explanation of legal norms is put upon the courts, and the interpretation of such provision by a German court is not binding for a French court, though it may be considered in theory. Had the European Court of Human Rights interpreted the given norm in a very strict sense (i.e. concerning the production of biobank data), it would facilitate application by national courts.

1.2. Patient autonomy and biomedical research

There is very little legal precedent in respect to the issues for the historical predecessors of biobanks, such as collections of human organs in medical universities, or exhibitions of biological specimen organized by research institutions, museums, or private parties (i.e. doctors). Some authors suggest that the legal doctrine surrounding biobanks should be treated from the point of view of property law and the law of gifts (Stewart et al., 2014, pp. 27–32), where it could be sound to assume that the legal aspects covering the legitimacy of experiments on human beings is also applicable to a certain extent. The legal scholars investigating the legal issues of legitimate medical experiments in the 1960s and onward have found that Anglo-American law has very little to offer in this respect (Waddams, 1967, p. 28-etc), however French and Belgian precedents, as well as some others, may come to the rescue. Consent of the patient is essential for any experimental or potentially hazardous procedures – this was clearly established by the civil law courts over a century ago. In the case of *Dr. Albrecht* (1856), the Obergericht and the Oberappellationsgericht [court of appeals and the court of cassation in the free Prussian cities respectively – A.L.] of the town of Lübeck held that a physician was guilty of negligence for not informing a wet nurse of a baby sick with syphilis, and therefore she and her entire family contracted the disease (Oberappellationsgericht zu Lübeck, *Joachim Bracker v. Dr. Albrecht*, 1856, pp. 176–190). In 1859, the Correctional Court of Lyon condemned two doctors for conducting an experiment by treating a child suffering from ringworm with an injection of syphilis. The procedure was an entire medical experiment used for drafting a scientific article, and apparently, no consent from the boy’s parents was given or sought (Judgment *Min. publ. c. Guyenot et Gailleton*, 1859, pp. 87–88). This case was later designated as “The Case of the Antiquaille Hospital”, becoming a classic for the vaults of informed consent (Lytvynenko, 2021d). The later Belgian case of *Dechamps* also involved an allegedly unconsented osteotomy, which had never been conducted on minors of the age of plaintiff’s son, a point which could also be considered experimental to a certain extent (Judgment *Demarche c. Dechamps / Dechamps c. Demarche*, 1889–1890; *Dechamps c. Demarche*, 1891, p. 281; Belgique Judiciaire Vol. 1891, p. 699, etc.). Finally, there is the case of *Chavonin* (1935–1937), where the relatives of a man plunged into an unauthorized

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[4] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, *European Treaty Series*, No. 164, p. 3.

[5] Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, *Council of Europe Treaty Series*, No. 195, p. 8.

medical experiment with radiography (the man died later owing to the negative consequences upon his health), litigated against all the parties involved. The Paris court established that such acts are illegitimate without the person's free and informed consent ("*consentement libre et éclaire*"), affirming that the experiment had not a curative, but a solely scientific aim (Civil court of Seine [Paris]; Judgment *Chavonin c. Thorande Labs etc.*, 1936, p. 9; 1937, pp. 340–341 etc.).

French and Belgian courts have distinguished between experimental methods of treatment, as such, which may be beneficial for the patient and are conducted for healing purposes, and experimental treatment, which is provided for the means of conducting research – in the latter case, the treatment methods were usually published in magazines, scientific journals or were presented in special exhibitions (i.e., in the shape of photographs).[6] Unauthorized medical experiments are subject to criminal liability in Belgian law: in 1983, the Correctional Court of Charleroi found physicians liable for unauthorized brain biopsies conducted for the sole aim of biomedical research and observation on the basis of assault/battery (Charleroi Criminal Court, 1983, Rev. Reg. Droit 1983, pp. 248–253). As evident in the passage above, the French and Belgian legal doctrine and case law established the main principles of patient's autonomy in respect to medical experiments, and the quintessence of this is applicable in respect to biobanks which are dealing with biomedical research. In fact, unconsented experimental acts were frequent in Europe in the 19th and the 20th centuries Though few legal precedents have survived, they occur in, for example, the historical archives within the court decision catalogues, or are encountered in legal scholarship, and the Nuremberg trial No. 1 (1947) has seemingly impacted legal scholarship on this also (Ducruet, 2008, pp. 6–24; Judgment Tribunal militaire américain de Nuremberg, 1946, pp. 845–863). We may notice this problem while examining the earlier legal scholarship in regard to, for instance, unconsented surgery, which was a popular topic in American and Canadian legal scholarship of the early and mid-20th century. For instance, Vincent MacDonald (1933), a Canadian lawyer commenting on an early authority on informed consent in Canada, *Marshall v. Curry* (1933, pp. 260–276),[7] mentioned that very little authority in respect to the expression of the patient's will existed in Anglo-American law (MacDonald, 1933). Whether it was medical paternalism, or the authority of the doctors' profession that precluded people from litigating against doctors and/or hospitals, or the unwillingness of the citizens to go to courts suing for medical malpractice, we will probably never know (Lytvynenko, 2020). Seemingly, the situation was identical with that of human organ and other biological specimen retention, maintained in private collections, medical institutions, and museums. For instance, in *Dobson & Ors. v. North Tyneside Health Authority & Anor* (1996), where the deceased patient's brain was extracted during the post-mortem, the case authorities, except from *Doodeward* (see below), used as a legal analogy, were outdated and did not consider cases regarding medical malpractice; the court, however, found that since there are no property rights in a dead body, the brain could not be returned (Judgment *Dobson & Ors v. North Tyneside Health Authority & Anor*, 1996, pp. 600–602).

1.3. Property rights in body parts and right to know one's origin

Another aspect of the operation of modern biobanks, much like their historical predecessors, is apparently the maintenance of biological specimens, raising the issue of property rights in them. At common law, a dead body could not be property in a general sense (Anonymous, 1929, p. 105; Skegg, 1975, pp. 412–421); the only thing it could be kept in custody for was burial, dictated seemingly by Christian tradition, notwithstanding sanitary norms (Davies & Galloway, 2008, pp. 148–151). In Canadian law, however, the courts recognized a limited property right on a dead body, but only in the sense of its preparation to a decent burial (Judgment *Miner v. Canadian Pacific Railway*, 1911, p. 415). At the same time, there was no dispute relating to the use of a body or body parts for needs differing from the necessity of burials. However, an Australian case of *Doodeward v. Spence* (1907–1908) has cast some light upon the legal status of a biological object, kept in custody for purposes other than burial. This was an action for detinue (and conversion on appeal to the New South Wales Supreme Court), against

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[6] See the following:
– in doctrine such view was supported by a number of French historic and contemporary scholars (Tart, 1894, pp. 1070–1072; Demogue, 1932, pp. 186–187; Hennau-Hublet, 1986, pp. 591–597; Jasson, 1990, p. 52);
– in jurisprudence: Judgment *Min. publ. c. Guyenot et Gailleton*, 1859, pp. 87–88; Judgment *R. c. P.*, 1913, pp. 73–74; Judgment *Consorts Chavonin c. K.*, 1935, pp. 390–392 (see in particular the reasoning of the trial court).

[7] Operation performed to cure hernia upon a crippled mariner; the surgeon removed his testicle to cure the hernia, and the testicle was a grossly diseased, thus causing damage to plaintiff's health, had it remained. The action was dismissed, and the court found the doctor's acts to be justified.

a police sub-inspector, who halted the plaintiff's "exhibit" – the body of a two-headed child born and died in the late 1860s, preserved in a bottle (jar) and kept by the plaintiff as a curiosity - which, in the view of the police sub-inspector, violated public decency.[8] The lower court did not uphold plaintiff's appeal, finding the "exhibit" a *corpse*, and hence not being the subject of property, but the High Court of Australia found that such a "Kunstkamera" could be a subject of property (especially if he had applied sufficient skill to maintain it in a good condition), and there may be cases when a corpse is legitimately kept for a reason, other than burial, finding for the plaintiff (Judgment *Doodeward v. Spence*, 1908, pp. 106–108). The said case became a valuable precedent in terms of property rights in human organs, or other biological materials, such as semen samples, most recently in the case of *Re Cresswell* (2018) in Australia (Judgment *Re Cresswell*, 2018, see in particular at para. 96-ff (regarding Doodeward as authority); also Judgment *AB & Ors v. Leeds Teaching Hospital NHS Trust,* 2004, para. 132–160), which was appraised by the Supreme Court of Queensland and received its renewed fame in modern legal scholarship (Judgment *Re Cresswell*, 2018, para. 96; Falconer, 2019, pp. 3–5). Attention to the maintenance of biological samples (i.e. like gametes and spermatozoa), which are also preserved in biobank-like institutions, is, in fact, very timely. For instance, in France, a woman, conceived by the donation of gametes, attempted to determine the identity of her biological "forbearer" (i.e., the donor) but did not prevail in action owing to the law on donor anonymity, as ruled by the Council of State (Judgment Conseil d'État, 2015); similar claims were also rejected by administrative courts of lower instances in the 2010s also (Judgment Tribunal administratif de Montreuil, 2012; Judgment Cour Administrative d'Appel de Versailles, 2013; Conseil d'État, 2015).[9] In a similar case from the Netherlands, a woman strived to discover the identity of her biological father, whose DNA data was allegedly kept at the Erasmus Medical Center after he had participated in a medical-scientific study relating to epilepsy. She instituted paternity proceedings before the District Court of Amsterdam for a judicial determination of parentage. Seeking additional evidence, she applied for a court order at Rotterdam District Court, requesting the Center to hand over the biological materials, which would be likely to be transferred to an institution specialized in kinship investigations (upon the Center's choice) in order to establish his paternity. The alleged father had signed a consent form in which he willed to treat his medical data confidentially. The plaintiff claimed that there was no other direct means to establish paternity; despite the fact that she possessed a number of unspecified written documents (though it could not be assumed that the court would accept them as sufficient evidence in paternity proceedings), as well as witness testimony from the immediate family of the alleged father. The court ruled not to grant the order for producing the DNA samples: firstly, in the opinion of the judge, the privacy considerations invoked by the Erasmus Medical Center (defendant in the case) were weighted higher, and next, it was not clear at the time of the hearing whether the existing evidence in the paternity proceedings brought before the court of Amsterdam was sufficient to establish the deceased man's paternity in relation the plaintiff (Judgment Rechtbank Rotterdam, 2019, Section 3–4). At this point, the court of Rotterdam considered the patient's privacy rights and the biobank's duty of maintaining the information relating to biological samples in confidence, which ran counter to the plaintiff's desire to establish the deceased man's paternity. It should be noted that *not* in all proceedings relating to the production of biobank records did the courts thoroughly consider the potential impact on the "patient" (that is, the person, whose biological samples were once collected and are requested to be produced for the needs of certain court proceedings).

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[8] According to the facts represented in the court reports (i.e. the one of the New South Wales Supreme Court, and the one of the High Court of Australia (citation in the footnote below), the baby with two heads was born in New Zealand in ~1868, never lived independently, and the body was taken away by the medical attendant of his mother. When he died in 1870, the jar with the body was sold on an auction, and was bought by plaintiff's father. The question is: could the mother of the two-headed child sue the doctor for taking the corpse, i.e. as a trover? The New South Wales Supreme Court clearly recognized that it *was* a corpse (Judgment *Doodeward v. Spence,* 1907, pp. 104–107), and no objection from the Australia High Court's judgment found that it *wasn't* a corpse; instead, the court found that there could be legitimate aims for maintaining a corpse other than for burial (which is crucial at the moment), admitting the plaintiff's skills for preserving it in a good condition, judgment *Doodeward v. Spence*, 1908, pp. 106–108. The situation with the possession of the unusual corpse, taken from the mother of the baby. was quite unique, especially for the law of New Zealand as it was in the 1860s.

[9] Also note two similar judgments with the same claim: Judgment Tribunal administratif de Paris, 2013; Judgment Cour administrative d'appel de Paris, 2016 (both rejected). The latter claim was somewhat unusual in the scope and amount of data requested: two plaintiffs desired not only to have the information regarding the gamete donor communicated to them but also the photograph of the donor. Despite claims to disclose sensitive data for the means of discovering one's origins (and the plaintiff's purpose for disclosure is not always evident), the plea to obtain the donor's photograph was somewhat unusual.

1.4. Medical confidentiality, maintenance of medical records, the right to privacy and biomedical research

The third already-existing legal doctrine upon which the biobanks are founded is medical confidentiality. As the European Court of Human Rights mentioned in *S. & Marper v. United Kingdom* (2009), biological samples (in this case, plaintiffs litigated with law enforcement agencies to expunge fingerprints, cellular samples and DNA profiles, both were suspects and both were not convicted), which are available to be identified by specific techniques, should be considered as personal data – not necessarily that they should be written records[10] (Judgment *S. & Marper v. United Kingdom,* 2008, para. 74–75). The Latvian Supreme Court (Senate) in its judgment No. SKA-166/2020 adopted the same position (Judgment *A pret. Veselības ministrija*, 2020, para. 11–15). Since such medical information, coded or not, may be identifiable by machines, there may be no doubt that the rules of privacy should be applicable to the case of the maintenance of biological specimen by biobanks. A paper on personality rights in "Biobanking and genetic research with human tissue" raised the following interrogation: could the general right to privacy with its old routes be applicable in such context (Beier, 2011, p. 52)? There are no obvious obstacles to saying it could. It apparently depends on what is implied under the right of privacy. French law drew this right from a multitude of different legal doctrines of the 18th–20th centuries – from various personality rights (i.e. right in a name and likeness) and defamation of rights in artistic and literary property, also notwithstanding professional secrecy.[11] In terms of historic legal precedents, the French-originating right to privacy involved general personality rights, such as right to one's name and likeness, as well to insult and to honor, which could be found in the 19th and early 20th century precedents, which are even more historic than their common law counterparts.[12] It is quite natural that human rights expand owing to technological advances, and the right to privacy is hereby not an exception; therefore, it is sound to respond affirmatively to the question raised hereinabove.

Advancements in the issues of confidentiality, like the privacy of donors, have also contributed much to the issues of secrecy in terms of maintaining biobank samples. Blood banks are also biobanks by their nature, as firstly, one cannot argue that blood samples are biological samples (and are valuable for access by the patient himself, Judgment *Māris D. pret BO VAS „Paula Stradiņa klīniskā universitātes slimnīca" un BO VAS „Iekšlietu ministrijas poliklīnika"*, 2008, pp. 2–3; 7–10), and secondly, the maintenance of such samples is undisputable. Occasionally, a blood bank cannot avoid being plunged into litigation – whether it's supervisory board would desire that or not. For instance, American jurisprudence of the 1980s and 1990s shows that the blood banks and associate healthcare bodies were repeatedly sued for negligence in screening procedures, when a citizen to whom blood was transfused had subsequently contracted HIV/AIDS, which led to the deterioration of his health and subsequent death; plaintiffs requested records relating to the blood donor, or requested the donor to be produced in order to question him concerning the aforesaid screening procedures. In most of the cases, they allowed a discovery, also issuing a protective order anonymizing the donor's identity in further proceedings (see., for instance, the following American cases: Judgment *Rasmussen v. South Florida Blood Service*, 1987; Judgment *Otto Boutte v. Blood Systems*, 1989, pp. 123–126; Judgment *Stenger v. Lehigh Valley Hospital Center*, 1992). Norwegian jurisprudence would allow production of biobank data for reasons such as searching a missing person,

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[10] "As regards DNA profiles themselves, the Court notes that they contain a more limited amount of personal information extracted from cellular samples in a coded form... [...] The Court observes, nonetheless, that the profiles contain substantial amounts of unique personal data. While the information contained in the profiles may be considered objective and irrefutable in the sense submitted by the Government, their processing through automated means allows the authorities to go well beyond neutral identification... [...]" (Judgment *S. & Marper v. United Kingdom*, 2008, para. 74–75).

[11] The comparative issues of right to privacy while comparing civil law and common law were few, though prominent in selected English-language scholarship (Weeks, 1963, pp. 495–502; Wagner, 1971, p. 45-etc). The material consulted here also included occasional commentaries on separate privacy cases from France and Belgium, though I have devoted a paper on the development of German right to privacy in the sphere of personality rights, professional secrecy, and breach of good morals in Prussian and German case law of the 19th and 20th centuries, which included the analysis of unique cases collected from historical jurisdictions, like the Kingdom of Bavaria and the Free City of Lübeck (Lytvynenko, 2021c).

[12] For instance, here are a few outstanding cases from France and Belgium: Judgment *Dumas c. Liebert* 1867, pp. 41–42; Judgment Société Liébig's extract of *Meat Company et héritiers Liebig c. Houlekiet et Ànderson*, 1884; Judgment *Peltzer c. Castan*, 1888, pp. 19–21; Judgment *Doyen c. Parnaland et Societe Generale des Phonographes et Cinematographiques*, 1905, pp. 389–390; Judgment *T c. Du Laar*, 1905, p. 391. At this point, no discussion of similar German precedents of the given time era will be made. See the recent paper (Lytvynenko, 2021c) about the Hart–Fuller Debate and the origination of German right to privacy in this model is dedicated.

presumably deceased, upon a plea from the police authorities *in case of the explicit consent of the person concerned*[13] (Judgment Oslo tingrett, 2020 [trial court decision]; Judgment Borgarting lagmannsrett, 2021 [appellate court confirming the trial court decision]; Judgment Norges Høyesterett, 2021 [the Supreme Court reverses the decision for biological samples production because of no consent of the semen donor, which could not be legitimate upon presumption in the sense of the Norwegian Biobank Act]), as well as in paternity claims, where the state interest in protecting minors, or an adult individual's interest in seeking his origins would prevail over the individual interest in maintaining confidentiality (Judgment A (advokat Elias Christensen) mot B., 2018, para. 10–33). In paternity claims, consent of the "patient", whose DNA samples are requested, is not necessary according to Norwegian legislation, nor is such necessity established in case-law (Judgment Agder lagmannsrett, 2012; Judgment Norges Høyesterett, 2013 [grounds]).

Biobanks may maintain medical records as an object of their research, but not biological samples, which are not available for identification without specialized techniques. Legal scholarship tends to believe that biobanks may be also treated as medical databanks, in case they are research biobanks (Kaye et al., 2016, pp. 97–98). One of the most well-known legal cases involving this problem was the judgment of the Supreme Court of Iceland in the case of *Ragnhildur Guðmundsdóttir gegn íslenska ríkinu* (in English: *Ragnhildur Guðmundsdóttir v. The Icelandic State*), adjudicated in 2003. In 1998, a special law founding a centralized database of medical records was adopted, allowing a private company deCODE Genetics to benefit from such medical data for exercising it in genetic research activities. Icelandic citizens needed to lodge special notifications to the state bodies to prevent the transmission of the medical records into the database (Arnason, 2010, pp. 300–303), and such applications were not always granted in a gracious manner. The following case started because of these exact reasons. The plaintiff, a woman, brought an action before the first-instance court of Reykjavik, demanding to annul an administrative decision declining her request to prevent the transfer of the medical records belonging to her deceased father to the said database. When the case came to the Supreme Court, it ruled for the plaintiff, having admitted that the said law does not sufficiently safeguard her privacy rights, and that the plaintiff's legal interest in preventing the transfer of her deceased father's medical data to the said database is conceivable (Judgment *Ragnhildur Guðmundsdóttir gegn íslenska ríkinu*, 2003, Section II, IV). It has to be highlighted that the consent of the data subject was already presumed for such transmission, which has nothing to do with the contemporary principles of biobank functioning in respect to medical records or biological samples – all of them (especially in Scandinavian law) are based upon the principle of informed consent of the data subject (Hoeyer, 2010, pp. 280–281).

Biobanks have an apparent duty to maintain confidentiality of medical records and other data, which may be deduced from biological samples. In some jurisdictions, this duty of confidentiality is even underlined by legal neologisms, designating a name for the confidentiality of biobanks. For instance, in France, the biobanking secrecy was named *secret biobancaire*, merging the term *secret bancaire* (*banking secrecy* in French) and *biobanque* (*biobank* in French).[14] The authors of the book alleged that the provisions of the German Criminal Code, Art. 203 (the book was written about Germany and interpreted into French) should be amended in relation to biobanks, as they found that a multitude of biobank staff would be confidants of sensitive medical records (Conseil d'éthique allemand, 2010, pp. 32–33). It is not clear for what reason the obligation of professional secrecy should not be applicable to all personnel involved in work with medical records. The obligation of professional secrecy (currently – Art. 203 of the Criminal Code, previously, Art. 300 upon the 1851 and 1871 Prussian Penal Law[15]) is general and absolute, apart from any legitimate exceptions; not only are hospital doctors subject to professional secrecy, but other hospital staff are too, for instance, nurses (Judgment Bundesgerichtshof, 1985,

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[13] At the same time, courts are not eager to order disclosure of biobank data of a deceased person, especially for the need of criminal proceedings: Judgment Norges Høyesterett, 2020, para. 16–40; see also comments on this judgment in the following conference paper (Lytvynenko, 2021b).

[14] Such terminology was used for biobanking secrecy in legal literature relating to biobank operation and all surrounding issues (Conseil d'éthique allemand, 2010, pp. 31–41). It is also notable that there is an identical neologism in German legal scholarship, which is designated as *Biobankgeheimnis*, also merging *biobank* and *Geheimnis* (*secret* in English). For instance, such neologism is used in the doctoral dissertation of N. Koch regarding the legal aspects of biobank functioning and the protection of personality rights in respect to their operation (Koch, 2013, pp. 208–217).

[15] See the interpretation of the Art. 300 of the Prussian Penal Code by the German Supreme Court in its judgment Reichsgericht, 1885, pp. 61–64.

para. 7–11, 13–14). Upon the established principle, it is inconceivable for what reasons the provisions of professional secrecy should not be applied to a hospital staff member other than a physician. In 1993, the Brussels labor court rejected the appeal of a medical researcher, whose contract was terminated after he had conducted a video recording of the conduct of the in-patients, made without their prior consent or knowledge (Judgment Cour du Travail de Bruxelles, 1993, pp. 296–301). The liability of the plaintiff in respect to his research work (i.e. the university ethics committee found the plaintiff had made unauthorized acts) was rather disciplinary; the court report did not disclose whether the said in-patients sued the plaintiff afterwards, or whether they knew that he conducted such recordings. But the gist is the same – researchers possess various types of liability, and apparently will be liable for unauthorized acts within their research, as well as disclosure of data they are operating with. Over a century ago, the French Court of Cassation established a principle upon which a plenipotentiary person or official, acquainted with facts that constitute a medical secret, being not a doctor by profession, is liable for the illegitimate disclosure of such communications (i.e. the facts concerning a citizen with a dangerous or contagious disease), and bears the same responsibility in respect to revealing such facts illegally as the doctor, thus becoming a confidant of confidential communications, and henceforth is liable under the penal law, i.e. Art. 378 of the French Penal Code, active in 1810–1994 (Judgment *Procureur General c. Dijon*, 1897, pp. 25–28). There is no sound distinction between the biobank employee's duty of confidentiality and the examples cited in German, French, and Belgian cases. The principle is well founded: once a person connected with a profession requiring a duty to maintain professional secrecy becomes a confidant of such communications, no matter what his position is, that person is hereby bound to professional secrecy. Therefore, the general provisions of professional secrecy are applicable, and no special provisions in terms of biobank confidentiality are strictly necessary. The case law of Norway deals with the issue of legitimacy of subpoenaing biobank records for various reasons, and such records are not, generally speaking, inadmissible from the point of civil procedure or criminal procedure law, however the legislative policy provides for a limited disclosure of such data, especially in criminal proceedings (Judgment Norges Høyesterett, 2021, see grounds for the decision).

1.5. Contractual relationships between patients and hospitals

The nature of patient–physician relationships received a thorough review in the civil law and common law courts over a century ago, when the courts attempted to determine the liability of physicians for the imprudence they committed. The "good-old" case law originating from England shows that it was not uncommon for patients to formulate contracts between them and their attending physicians – the English legacy includes a number of disputes relating to the remuneration of bills for treatment of some person, originating from an express contract (Judgment *Dent v. Bennett*, 1839, pp. 269, 271–272, 274–276).[16] At the same time, in early English cases on medical malpractice, the aggrieved parties based their claim on tort (i.e. negligence) and not on contract (Judgment *Pippin and Wife v. Sheppard*, 1822, pp. 405–406, 408–410; Judgment *Gladwell v. Steggall*, 1839, pp. 733, 734–735, 736–737); since the tort of negligence defined itself as an independent tort in early 19th century case law, one of those early actions against a physician was based on an "action on the case" (Judgment *Seare v. Prentice*, 1807, pp. 376–377; East, 1807, pp. 348–351), one of the earliest English common-law remedies, originating from the medieval period (Silver, 1992, pp. 1196–1199, 1205–1206). In earlier Scottish jurisprudence, the Court of Sessions held in *Edgar v. Lamont* (1914), that the liability *ex contractu* may sometimes be hardly distinguishable from liability *ex delicto*, but in cases where negligence has been committed, that does not mean it is unrecoverable unless there is no express contract between the patient and physician (Judgment *Edgar v. Lamont*, 1914, pp. 208–210). The earlier French court practice also displayed that contracts for treatment between patients and physicians or hospitals was known in the 19th and early 20th centuries (Judgment *Beltzer c. Hospices de la ville d'Auxonne*, 1906, pp. 17–18). Since the late 1940s, the contractual form of legal relationships between patients and physicians was anchored in French and Belgian law (Judgment *Epx De Busschere c. Docteur X.*, 1946), and legal scholarship accepted this position (Del Carril, 1966). It also has to be noted that such a form of legal relationship between patients and physicians (or hospitals) was known in the early-to-mid 20th century case law of Central and Eastern Europe, including such states as Czechoslovakia (Judgment *Nejvyšší soud Československé republiky*, 1936, pp. 444–447), or Estonia (Judgment Riigikontrolli vanema kontrolöri, 1923, pp. 91–92). In 1936 the Supreme Court of Austria, deciding a dispute relating to access of the plaintiff's medical records from a sanatorium, where she was treated with "poisonous" pills, and later desired to sue either the doctor who prescribed the medicines or the

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[16] Note that the English courts have recognized that the relationships between patients and physicians possess confidence (Judgment *Billage v. Southee*, 1852, pp. 532, 539–541).

manufacturer of the pills, held that access to medical records does not derive from the contract between the patient and the physician (or hospital), but at the same time, the contractual form of legal relationships was undisputed (Judgment Oberster Gerichsthof, 1936, pp. 536–538). In 1982, the Federal Supreme Court of Germany held that access to the patient's medical records derives from a contract between the patient and physician, and generally recognized the existence of such a right (Judgment Bundesgerichtshof, 1982, para. 15). In fact, the nature of patient–physician relationships was discussed in the well-known judgment of the Reichsgericht in 1894, which was a criminal trial against a surgeon who conducted a bone resection operation upon a girl, in order to terminate a tubercular suppuration of the tarsal bones, against the will of the father (co-plaintiff); the operation was nevertheless conducted, was unsuccessful, and a foot amputation was conducted subsequently. The doctor was tried and acquitted, but the Supreme Court found him to be guilty of battery, remanding the case (the lower court, according to the subsequent notes, acquitted him). Discussing patient–physician relationships, the Reichsgericht said the following: "Whether you call it an order, a power of attorney, a service lease, work contract, or whatever else – in any case, it is the will of the patient, or his relatives and spiritual representatives, who, in general, call this doctor to take over the treatment of this patient…", and "Consequently, the doctor who deliberately commits a physical abuse for healing purposes, without being able to derive his right to do so from an existing contractual relationship, or the presumptive consent […] acts unjustifiably, i.e. unlawfully, and is subject to the norm of §223 [of the Penal Code] which prohibits such offenses" (Judgment Reichsgericht, 1894, pp. 375, 380–382).

These sentences may have been the very beginning of what we currently call "the right to autonomy", two decades before it was discussed in the case of *Schloendorrf v. Society of New York Hospital* (New York State Court of Appeals, 1914, New Y. Reports Vol. 211, pp. 125, 130). In early Swiss jurisprudence, the Federal Tribunal has explicitly stated that the relations of patient and physician are contractual in the case of *Dr. Dormann gegen Hochstrasser* (1891) (Judgment *Dr. Dormann gegen Hochstrasser*, 1892, pp. 336–342). Considering such historic case law, it may be that the relationships of patients and physicians should be treated as contractual ones, and that the rights and obligations of the parties, even if they are unwritten in special contractual provisions, still derive from the contract between the patient and the physician; in the 1980s, the German courts held that to gain a right to insight to medical records, no special provisions in the contract are necessary (Judgment Bundesgerichtshof, 1983, para. 12). In terms of the biobank data, biobanks are neither hospitals nor healthcare institutions, but rather repositories of biological materials. However, prior to handing over the biological samples to the biobank representatives, the patients usually sign documents, referred to as "consent forms" or something similar. In civil law, such a "consent form" is unlikely to be observed as a covenant (contract), but rather as an unnamed bilateral deed. Concerning actions related to the negligence of biobanks, for instance in Germany, these were actions for damages based on *negligence*, but not on breach of contract (Judgment Bundesgerichtshof, 1993, para. 7–15).

1.6. Inferences

As is evident from the first chapter of the paper, the functioning of biobank structures (or hospitals and other healthcare institutions, which are *de-facto* acting as biobanks for various reasons), is based upon a number of legal theories, which are well established in medical law: informed consent, property rights in biological samples and medical confidentiality. These doctrines have never been empirical, being a result of a century-fold precedent chain at both common law and civil law. These doctrines, within the currently existing jurisprudence, are applicable towards biobanks. At the same time, the issue of the legitimate disclosure of biobank data is very sensitive, requiring precise legislative and jurisprudential answers, which is well illustrated in the case law of the Nordic states. As to the legacy in international law relating to biobanks, there seems to be far more questions than answers. The Oviedo Convention, being the only binding international legal instrument, has not much to say on the subject of biobanks, apart from the protocol on biomedical research which may be attributed to research biobanks. It also cannot be deduced, according to the provisions of the Oviedo Convention, or the additional protocols, that biobank data may enjoy more legal protection than the usual hospital records do. In the absence of an appropriate interpretation, the national courts have to act either upon the principle of proportionality, defining whose interest is more important, or to act strictly upon the legislative norms, allowing or inhibiting such production, if such norms are adopted by the legislative bodies.

2. Latvian Senate's judgment No. SKA-166/2020 and inferences from it

In 2020, the Senate of Latvia handed down a judgment ruling on the principles of medical confidentiality, finding that the transfer of an in-patient's medical records to the state police (he was hospitalized after consuming drugs, and the doctors suspected he had committed a crime) was illegal and had no firm legislative basis (Judgment Senata Administratīvo lietu departamenta, 2020, para. 11–17). This was one of the first medical confidentiality-related judgments, adjudicated by the highest judiciary in Latvia, where the principles of patient's informed consent are already elaborated in the judgments No. SKC-216/2013 (involuntary psychiatric treatment, see (Judgment *G.D. pret Valsts sabiedrību ar ierobežotu atbildību „Strenču psihoneiroloģiskā slimnīca"*, 2013, para. 8.5)) as well as SKA-790/2020 (bowel resection, failure to comply with the duty to inform, (Judgment *A pret. Veselības ministrija, Latvijas Republikas Augstākās tiesas*, 2020, para. 12–14; Lytvynenko, 2021a)). This body of medical case law was augmented by judgment No. SKA-166/2020, which dealt with the plaintiff's right to expunge the blood samples belonging to his deceased father, kept in a forensic biobank years after his death. In the original, the judgment is named "*A pret. Veselības ministrija*", or "*A v. Ministry of Health*" in English. The cases are commonly referred to by the designation of the case number by the Latvian Senate's department, which is SKA-166/2020 for the case discussed below.

The facts of this case were as follows. A man, whose deceased father's blood samples were maintained in a forensic biobank, previously utilized for the needs of a criminal investigation, applied to the said biobank (named as "State Forensic Medical Examination Center") with a plea to expunge the biological specimen of his deceased father, which refused his request. He turned to the Ministry of Health, asking the same. However, the Ministry rejected his request, and he decided to resolve the dispute in a court order. The regional administrative court upheld his claim, instructing the forensic biobank to destroy the blood samples within one month. The court did not dispute that the blood samples were obtained legitimately in the course of criminal proceedings on basis of the decision of the prosecuting authority, and concluded that the human tissue samples are a source of biometric data, but are not biometric data *per se*. The court also emphasized that Art. 17 of the Forensic Experts Law does not apply to biological samples, but to results, records, inscriptions, and illustrative materials, etc., which were obtained in the course of the forensic examination. It was not disputed that Latvian Criminal Procedure Law provides for a re-examination in case of necessity in general, but there was a lack of legal basis for storing a tissue sample for more than two years after the closure of criminal proceedings. The appeal in cassation from the side of the defendant (the Ministry of Health) invoked that the lower court incorrectly found that blood samples are not personal data *for the means of* the Data Protection Law, and that before March 2016 (the case started in early 2015), the provisions of the Forensic Experts Law did not specify the time period of biological sample retention, and it believed that the plaintiff's rights were not infringed by the mere fact that the blood samples were collected in the course of criminal proceedings (Judgment *A pret. Veselības ministrija, Latvijas Republikas Augstākās tiesas,* 2020, para. 1–4).

Hence, the object of the dispute was whether the relatives of a deceased person have a legal right to request the destruction of their biological samples, which were obtained during a forensic examination. The administrative procedure law of the Latvian Republic provides for establishing whether the person's rights or other legal interests have been infringed in order to assess whether the plaintiff may prevail in action, and it is necessary to assess whether such rights arise from legal norms. The Senate turned to discuss the dispute in relation to Art. 96 of the Latvian Constitution, which protects the right to privacy. The Senate has noted that privacy is a very broad right, *inter alia*, encompassing the issues of DNA profiles, tissue samples and fingerprints; thus, tissue samples appear to be a part of the human body and they are covered by the concept of privacy, and so is the issue of their handling and storage. In the case at bar, we are not dealing with the personal right to privacy, as the blood samples belonged not to the plaintiff, but to his father, but rather a so-called "relational" right to privacy, as it was tentatively designated by American scholars of the 20th century, who were dealing with privacy violations in state courts.[17]

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[17] The so-called "relational" right to privacy was subject to academic discussion decades ago (Anonymous, 1953, p. 109; Kennedy, 1965, pp. 325–329; Anonymous, 1966, pp. 79–82). See also the case of *Bazemore v. Savannah Hospital* (1930) where the Supreme Court of the State of Georgia (USA), in a *per curiam* decision decided for the plaintiffs whose child, born in Savannah Hospital with a rare pathology of *ectopia cordis* (the heart of the infant was located outside the body). The baby died shortly thereafter, as there was no medical solution for such a severe congenital condition in 1927 when the baby was born. The hospital staff allowed a newspaper photographer to photograph the child's body and a newspaper later reported it.

The Senate ascertained the same: the right to privacy is a personal right and is non-transferrable in a classical meaning of the concept, and is not transferred to successors in title, but there may be exceptions. The maintenance and custody of a deceased person belongs to the sphere of human dignity, which is of great constitutional value for the Latvian State. The Court underlined that the obligation to treat the body of the deceased with respect is not only applicable to the body as a whole, but to the tissue samples as well, and such a right is not something intangible, but must have a practical outcome, and thus there must be a person who may exercise such right. Upon such a view, the Senate found it would be correct to give recognition to a subjective right to demand respect for the deceased person's body. The conjunction between personal and relational privacy, upon the view of the court, may also be ascertained by the fact that biological samples may reveal facts concerning congenital diseases or a predisposition to certain ailments (Judgment *A pret. Veselības ministrija, Latvijas Republikas Augstākās tiesas*, 2020, para. 5–11).

The defendant ascertained that the maintenance of biological samples is necessary before the criminal proceedings are terminated, and before the decision of closing the criminal case is received, the biological samples, as all other recorded data, are kept for ten years according to Section 17 (12) of the Forensic Experts Law. The Senate had examined the provisions of the said law, including its draft, and deduced that the blood samples are to be considered as research objects (from which data may be extracted by special techniques, obviously). The Senate held that neither the jurisprudence, nor the academic literature, could clearly define whether the blood samples should actually be considered as personal data (that is, all the provisions of the Personal Data Protection Law would apply to their maintenance and other activities regarding them), but the pre-existing blood samples should not be regarded as such, as blood samples do not meet the definition of personal data, as it is impossible to identify to whom they belong without special technologies. However, tissue samples as research objects may provide a sufficient amount of private information – not only about the person itself, but his/her relatives as well, and techniques that enable the extraction of such information do exist. The Senate held that it would be disproportionate to say that documented records would grant a greater level of protection than for biological samples – that is, "…a source of such information that can already provide very specific and unique information about a person". On this basis, the Senate held that biological samples should be considered as "personal data" in the broadest sense of the term, especially taking into consideration the stipulation that they were definitely collected for data processing. The Senate deduced that the biological samples are personal data, and therefore, the principles of privacy and data protection should be taken into account while dealing with the justification of storage of such data. The restriction of the right to privacy, held the Senate, is in accordance with the Satversme (the Constitution of Latvia), where it is established by the law, has a legitimate aim, and is proportionate; and when the proportionality issues are observed, it is necessary to determine whether the general principles of data protection have been observed. It was undisputed that the personal data of the plaintiff's father were collected in a legal way (i.e. in the sense of the Criminal Procedure Law). However, neither the Criminal Procedure Law, nor the Law on Forensic Experts, provided for the procedure of storing the tissue samples, nor for the procedure of their destruction, nor for the terms after the completion of the medical examination. The Constitutional Court of Latvia in Judgment No. 2015-14-0103 emphasized that, in order for the data processing to in order to be in conformity with the Satversme, the regulatory provisions must have sufficient legal remedies, and their sufficiency depends, *inter alia*, on whether it has been determined for how long the personal data is stored, and used [for legitimate activity], and when it must be destroyed (Judgment Court of Satversme, 2016, para. 23.3). The Latvian Senate applied an analogy for maintaining material evidence and documents: upon Art. 329 (1) of the Criminal Procedure Law, they must be kept either until the court judgment regarding the criminal case enters into force (and the term for appeal thus expires), or after the criminal investigation is terminated. The Senate held that applying the analogy, the legal basis of maintaining tissue samples expires upon the same terms. Consequently, after the legal basis is lost, the tissue samples must be destroyed. In terms of overall data protection

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The parents of the child did not consent to such exposure, and sued the hospital, the photographer, and the newspaper (*Savannah Press*), prevailing in action. Among a wide variety of privacy actions, which became very common in the 20th century US common law, there were few cases associated with exposing rare medical conditions, see. e.g. Judgment *Douglas v. Stokes* (1912) which was an action against a photographer, who was asked to make twelve photographs of the dead bodies of Siamese twins, delivering them to the father, but the photographer made more photographs and filed one to the US Copyright Office, which was apparently done against the will and consent of the parents, who brought an action (defendant's appeal to the Court of Appeals of the State of Kentucky was dismissed). The case authorities used by the courts in those cases were mainly common-law ones, for instance, see the English case of *Pollard v. Photographic Co.* (1888); Keener's Selection of Equity Cases (1895, pp. 76–95).

principles, the data are to be maintained as long as there is a reason for it. The Senate also emphasized that the storage of personal data is not justified only if there is a theoretical possibility of it being useful once in the future for an unspecified reason. So, the Senate held that in case the terminal proceedings are terminated, and there is no indication they are going to be continued or reopened in the near future, there is no reason to maintain such personal data. The criminal case was terminated in June 2015, so the Senate found that the reason for further maintenance of such data was long lost. Thus, the Senate ruled to leave the lower court's judgment unchanged, dismissing the appeal in cassation (Judgment *A pret. Veselības ministrija, Latvijas Republikas Augstākās tiesas*, 2020, para. 12–17 & operative part).

At the present time, there is no special law on biobanks or on biobank data privacy in Latvia, despite the apparent existence of biobanks there; the only close law, which may relate to biobanks, is the Human Genome Research Act, adopted in 2002 (*Latvijas Vēstnesis*, 99, 03.07.2002). Biobanks are not only research-oriented institutions, and research biobanks are also not confined only to genomic research, but general provisions, i.e. issues of data protection (Art. 9, see also Art. 18 relating to destruction on tissue samples – in the case above, this was obviously not a research biobank, but a forensic one), or the rights of the gene donors (Section II, Art. 10–12), are basically the same in typical biobank laws covering the main principles of biobank functioning. To date, there appears to be no Latvian case where a genomic research biobank was brought to court for an alleged violation of Personal Data Protection Law, or a violation of the rights of the donors, but we may witness such cases in the near future. Since Art. 9 of the Human Genome Research Act (2002) stipulates that the provisions of the Personal Data Protection Law are applicable to the issues of genomic research, it seems to be a sound solution for all the biobanks as well. The Senate's solution of utilizing an analogy for destruction of tissue samples, which were collected by a forensic medical center with all material evidence preserved for criminal proceedings, also seems logical. At the same time, it is not possible to expect that the tissue samples will be always destroyed as soon as the criminal proceedings are terminated, or when the respective court judgment enters into force. Thus, we may expect that plaintiffs will have to make a request in an administrative order (i.e. by requesting the destruction from the ministry of health); if such measures were ineffective, then nothing would prevent resolution in a court order.

3. The experience of Nordic states in relation to legitimate biobank data disclosure

Otlowski, Nikol, and Stranger (2010) addressed their virtual concern towards the production of biobank data for the needs of justice, suggesting that such production should be performed in accordance with the law (pp. 163, 212). The production of biobank data is something which would not be radically different from a blood bank, as a blood bank is technically a biobank too (Judgment *Stenger v. Lehigh Valley Hospital Center*, 1992, pp. 800–804). Biobanks are under the jurisdiction of the courts in the same way hospitals are; and the law has not changed for years in respect to the liability of medical practitioners and hospitals; in older times, it was established by statute (for instance, Art. 3 of the Medical Ordinance of 1818 in the free city of Lübeck, see the annotation an texts of the court decisions of all three instances in the matter of *Dr. Albrecht* (Judgment *Carl Joachim Christian Bracker, Klager, gegen Dr. Juris Albrecht*, 1856), or interpreted by courts in a way that doctors and hospitals were liable for their professional misconduct, if proved (Judgment *Trib. civ. de Ypres*, 1843, p. 552). It appears that the situation has not changed over the course of the centuries. A biobank, as any other legal entity, may be sued for negligence in maintaining biological samples (Judgment Bundesgerichtshof, 1993, para. 7–15). The law in respect to access to medical records, as a part of hospital documentation, has gradually changed during the 20th century: for instance, if in 1936 the Supreme Court of Austria held that medical records are a private document and cannot be produced by a subpoena *duces tecum* in a private claim (Judgment Oberster Gerichsthof, 1936, pp. 536–539), and in 1984, the same court allowed the production of the plaintiff's deceased relative's hospital records, then obviously, the "times change", and so do the concepts of patients right to autonomy (Supreme Court of Austria, Case No. 1 Ob 550/84, 1984). Thus, biobanks are under the same jurisdiction of courts as the hospitals or any other medical institutions are, and there is no reason to see for what aim the court should not order a biobank to produce biological samples, necessary for court proceedings, in both civil and criminal cases. Such boundaries, however, could be established in case law, as is the case in Norway, where Art. 15 of the Biobank Act does not explicitly specify in which cases biobank data may be legitimately requested to be handed in to the court as evidence (e.g. for paternity proceedings), and circumstances under which they may be are decided by courts in each situation separately. Based upon the existing case law, biobank data may be ordered for disclosure in paternity claims, but the use of such records in criminal proceedings is very limited, or not permitted, and the same applies to requests from police authorities to investigate on biological samples in cases of missing persons.

The 2013 and 2018 judgments of the Norwegian Supreme Court cast a light on the legitimacy of disclosing biobank data containing biological samples in paternity claims. The 2013 case was an inheritance dispute. A 67 year-old man died in September 2011, and the son, born 1982, registered as the heir. The man's surviving spouse (as recorded by the appellate court judgment), contested their relationship. The son and his mother filed a summons to the district court against the probate regarding the determination of paternity. The deceased man was cremated, and the son did not wish to submit any biological material for DNA analysis. However, some biological material belonging to the deceased man was still maintained at a biobank at the Oslo University Hospital at a pathology department. The hospital agreed to hand over the necessary biological material upon receiving a court order, but the other party claimed this was illegal, as the condition for releasing biobank data was not met (Art. 11; 13; 15 of the Biobank Act), meaning, in short, that the consent of the deceased person had not been obtained. The district court of Larvik found that the order for disclosure should be made, as Art. 24 (2) of the Barneloven (Children's Act in Norwegian – A.L.) would allow for a demand of the disclosure of biobank data in paternity cases, even despite the contradiction to the provisions of the Biobank Act, as stated above. The decision was appealed, but the appellate court rejected the complaint, finding that Art. 24 (2) of the Barneloven provided sufficient basis for disclosure, and neither the Biobank Act, nor the existing case law, provided any necessity for the consent of the person concerned in such cases. The probate estate and surviving spouse (designated as parties upon the materials of the cassational complaint and the court report of the Supreme Court) again impugned the judgment, demanding the annulment of the judgments of the lower courts, and claiming that the histological material of the deceased man's (referred in the Supreme Court's report as "A.") shall not be handed over for using it as evidence in paternity proceedings. The son and his mother asserted that the lower court judgments were correct. The Supreme Court weighted the aforementioned provisions of the Biobank Act and the Children's Act, finding that the latter must prevail in a paternity claim (in fact, the dispute was not a paternity claim initially, but an inheritance dispute – A.L.). Among the aforesaid legal provisions, the Court analyzed the provisions of the Medical Practitioners Act of 1980 and norms relating to the obligation of confidentiality (Art. 37). The comment of 1979–1980 to the act (seemingly, it was written before the law was adopted), provided that doctors could disclose information regarding a deceased individual, when legitimate reasons exist for him to do so (Judgment Norges Høyesterett, 2013, para. 40).[18] Analyzing the provisions of Art. 15 of the Biobank Act and the comments to the law (i.e. preparatory work), the Supreme Court found that there was no indication that the consent of the individual concerned is necessary in the scope of paternity claims. Had even such a rule existed, the Court held that a number of special considerations in favor of disclosure of such data in paternity proceedings would nevertheless prevail (Judgment Norges Høyesterett, 2013, para. 60).[19] The court admitted that such dispute raises quite a lot of controversy in terms of the prevalence of one act over the other, and decided to reject the appeal (Judgment Norges Høyesterett, 2013, para. 28–75). This judgment became a very valuable precedent in terms of the disclosure of biobank data in paternity claims, but Norwegian jurisprudence has much to offer in other instances, too.

The next Supreme Court's judgment was a more trivial dispute, namely a claim for determining paternity with the issue of the legitimacy of disclosing biobank data of a potential biological father in paternity proceedings. In 2016, an infant was born to the plaintiff, and the plaintiff was married to a man named B., registered as the child's father. In 2017, the plaintiff brought an action to the district court in order to deny the paternity of Mr. B., and asked the court to issue an order to obtain records from a police DNA register, which was collected in connection with an earlier criminal conviction. Mr. B. no longer stayed with plaintiff, and by that time had already moved from Norway (thus, it was practically impossible either to obtain his consent, or for him to be present at paternity proceedings). The district court and the court of appeals rejected plaintiff's claim, so the plaintiff filed an appeal in cassation, claiming that the acting Norwegian legislation (i.e. the Children's Act, the Police Register Act and

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[18] Translation by the author: "After a person's death, a doctor may disclose confidential information about him when there are compelling reasons to do so. The assessment takes into account the nature of the information in question, the presumed will of the deceased and the interests of the relatives and society".

[19] "…it would be to be expected that the special considerations that apply – especially the child's fundamental interest in having a legal determination of who his father is – would have been drawn out and weighed against the considerations behind the consent rule…". At this point, it is obvious that the word "child" does not strictly mean "a minor", but any person who is a biological child of the person, whose biological samples are necessary to define paternity: in this case, the son was 28–29 years old at the moment of his father's death and was 30–31 (the birth date was referred as "0-0-1982") at the time of the Supreme Court's judgment.

other laws), and the principles adopted in case law would allow the disclosure of DNA data kept in the register for the needs of paternity proceedings. The provisions of two named laws collided: the former would allow the production of biobank data kept in a DNA register if the presumed father is deceased, or unavailable, while the provisions of the latter provided that the information kept in police registers, may be used only for the needs of criminal justice. The Supreme Court assessed the provisions of each law, and found that the provisions of the Children's Act must be given priority in this case. By a vote of 2–1, the Supreme Court judged to annul the decisions of the lower courts (Judgment A (advocate Elias Christensen) mot B., 2018, para. 10–33).

The Supreme Court's 2020 and 2021 judgments give a substantial background to the issue of disclosure of biobank data for the needs of criminal investigation. In the first case, the prosecuting authorities attempted to obtain the biological samples of an infant to determine the cause of his death, and in the second, upon which the decision was handed down on 1 July 2021, the police authorities strived to obtain the biological samples of a missing person, which were also maintained in a biobank. Both judgments are examined below.

An infant, 15 months old, deceased in November 2013 under suspicious circumstances, and both parents were put on charge. However, the forensic experts were unable to define the cause of the infant's death, and the criminal case was thereby temporarily suspended. The biological material from the infant's body was collected twice: the first was for the needs of the prosecution, and the second was procured for the needs of a research project named "Transformation and redistribution of chemical substances (alcohol, narcotics, drugs) in the body after death", which was conducted at the Norwegian University of Sciences and Technology, and the biological samples were hereafter maintained at the research biobank of the said university. As per the case facts, the body of the infant was cremated, thus making an exhumation of the body impossible, had it been necessary (Judgment Norges Høyesterett, 2020, para. 3–6). The biological samples, which were stored on behalf of the police and the prosecution at St. Olav's Hospital, were later destroyed in January 2017. In 2019, the criminal case was reopened, and the surviving father (the mother was already deceased by the time of the reopening of the case) was put on charges. By 2019, the remaining biological samples of the deceased child were kept in the university's research biobank, and the police filed a request to obtain the necessary biological material so as to proceed with the criminal case, pointing out that the given biological samples could assist the determination of the cause of the infant's demise, and thus could help with proceeding the criminal case. The university refused, and so the prosecution authority decided to file an action to the district court to obtain them. The district court rejected the claim on basis of Article 27 of the Medical and Health Research Act (2008), and the prosecution body impugned the judgment at the court of appeals, which held that Art. 27 of the aforesaid law could only give rise to request such data in very exceptional cases, where (literally) major societal interests are at stake (though, in fact, the abovesaid provision did not clarify, for instance, what type of civil or criminal cases would constitute these interests), and dismissed the appeal. The prosecution body filed an appeal in cassation to the Supreme Court, and the Court discussed the correct interpretation of Art. 203–204 (1), and 210 (1) of the Criminal Procedure Code, dealing with obtaining evidence, which is required for procuring a criminal case, and it held that ordering to obtain any biological samples is admissible in principle. Art. 27 of the Medical and Health Research Act of 2008, said the Supreme Court, did not generally allow to disclose medical data for prosecuting purposes. However, the last provision of Art. 27 of the abovesaid law provided for additional regulations that may be adopted to legitimize such disclosure with considerable interests (be it public or private), but no such regulations were ever developed and adopted by the legislator. Next, the Court mentioned its view relating to the application of Art. 15 of the Biobank Act, that possessed a similar norm, and reckoned up its earlier practice, when the same Court held that biological samples obtained in the course of the person's treatment, should not be handed over to the law enforcement agencies for the necessity of investigation, and emphasized that substantial privacy considerations are related to the medical data stored in biobanks. The given approach, used by the Court, makes it hardly possible to obtain such biological samples for the needs of procuring a criminal case. The Court did not deny that there may be some situations when the request for biological samples may be satisfied, but still chose to reject the prosecution body's appeal. The Court admitted that the case arises controversial legal issues. Indeed, on one hand, the case had very specific circumstances (the death of a child), and the Constitution and Criminal Procedure Act was designed to investigate sudden and unexpected demises, and it may seem adequate in relation to the legal security of the child. On the other hand, the Court gives substantial weight to the wording of the law, when it is promulgated as an "absolute rule", wherein all exceptions are clearly indicated (in this case, they were not). Next, such revelations, with an absence of precise indications in Art. 27 of the Health Research Act of 2008, would undermine the general confidence in all medical research and the biobanks themselves, found the Court.

Therefore, the Court rejected the appeal of the prosecution office (Judgment Norges Høyesterett, 2020, para. 10–33).

The most recent Norwegian case (as of 2021) concerned the legitimacy of use of a person's semen samples kept in a biobank for the needs of searching for a missing person (including abroad), upon which, despite the reversal of the judgments where the lower courts upheld it is admissible in the view of the Treatment Biobank Act, Art. 15, the Supreme Court acknowledged that a request for such data was admissible in case the person's consent existed. The facts of this case were as follows. Person A. was missing since January 2010. Before disappearing, he handed over semen samples before undergoing treatment which could cause sterility, having agreed for long-term storage of the semen samples for assistive reproduction with a future spouse or partner in a stable cohabitation. The circumstances under which he disappeared led the police to open a criminal investigation; it was suspected that person A. could have been killed, but his body was never found. The police obtained his mother's DNA profile, and asked the European states and the USA to use the said samples to conduct a search in their registers of unidentified bodies, and some of the states responded that such a search is permissible under the law only in case they transfer the DNA sample of the missing person. The police decided to seize the semen sample from Oslo University Hospital, and Person A.'s mother agreed, but the hospital opposed it, claiming that they cannot hand over the said samples without the donor's consent pursuant to Art. 15 of the law mentioned above (i.e. Treatment Biobank Act). The police applied to the Oslo District Court for an order to disclose the necessary biological samples, and the court upheld the claim, stating that the Art. 15 of the Treatment Biobank Act has to be interpreted restrictively, and the lack of consent was not an obstacle for disclosing the biological material in such a case. In a *per curiam* decision, the Borgarting Court of Appeal had dismissed the appeal of the hospital, which filed an appeal in cassation to the Supreme Court, which found it would be sound to uphold the appeal.

The position of the parties was, in brief, as follows:

1) Claimant (the prosecuting authority was designated as claimant): the Borgarting court of appeal did not commit any procedural errors, and Art. 203, 204 and 210 are sufficient authority for ordering a biobank to disclose the necessary biological samples, and the proportionality principle (pursuant to Art. 170 of the Code of Criminal Procedure) is met. The provisions of Art. 15 of the Treatment Biobank Law provide for presumed consent, and thus the consent requirement is also met; the patient's rights law (originally – the Patient and User Rights Act, Art. 4–6 (2) and 11) support this view. The prosecution authority admitted that the law was silent in regard to presumed consent in such cases; it could not be held that a presumed consent is generally excluded.
2) Defendant (the Oslo University Hospital): the Treatment Biobank Act, Art. 15, sets up an absolute rule of the donor's voluntary and informed consent, which does not allow any exceptions. The appellate court, upon the view of defendant, made several procedural errors, and claimed that the principle of proportionality was not fulfilled (Art. 170 of the Criminal Procedure Law) (Judgment Norges Høyesterett, 2021, para. 13–20, 2–12 [facts]).

The Supreme Court summarized that the dispute is whether it is admissible for the police authorities to order a biobank to hand over the biological samples of a man who is missing for ten years, so as to file requests abroad for the search of this person in the registers of unidentified bodies, had he died elsewhere abroad. Since the Court is essentially a court of cassational instance, its competence lies in determining whether the appellate court tried the case and interpreted the legislation in a correct manner (see Art. 388 of the Code of Criminal Procedure). The Supreme Court held that the most controversial point of the case is whether Art. 15 of the Treatment Biobank Act may allow disclosure upon a presumed consent. Despite the fact that trial and appellate courts held it would, the Supreme Court held that it would not. Judge Bergsjø, speaking for the Supreme Court, outlined that the privacy issues relating to biobanks are very sensitive, and that issues of disclosure are regulated by a blanket provision of the last paragraph of Art. 15 of the Treatment Biobank Act, which holds as follows: "The King may, in regulations, decide that the disclosure of human biological material to the prosecuting authority or court may very exceptionally take place, if very weighty private or public interests [exist to] do so lawfully". No such regulations were adopted by 1 July 2021 (the date of the judgment). Then, held the Court, the rule of consent still remains to be absolute. The Court reviewed the previous case law, involving different situations – from paternity cases to criminal investigations (the cases described above), and did not uphold the view of the claimant that the rule of presumed consent could apply, as it could apply within other laws in the sphere of medical law and healthcare – the Court found that no such conclusion could be drawn based on other laws, governing any other branch of healthcare services. The Court found that Art. 15 of the Treatment Biobank Act leaves no space for presumed consent, which must be “voluntary, express and informed”, adding that it may be up to the legislator to provide an addendum to the regulations for relaxation of the disclosure rules in respect to the treatment biobanks, but such regulations did not exist at the time, when the judgment was handed down. The Supreme Court decided for the defendant, ruling unanimously (5–0); the Oslo University Hospital won the case and was awarded the legal costs according to the Dispute Act, Art. 20 (2) (Judgment Norges Høyesterett, 2021, para. 22–35, 35–48, 49–50; see also the judgments of the trial court and the appellate court: Judgment Oslo tingrett, 2020 [trial court decision]; Judgment Borgarting lagmannsrett, 2021 [appellate court confirming the trial court decision]).

Swedish legal scholarship regards the production of biobank data as a coercive act in civil or criminal procedure, and thus it necessitates a strict conformity with the acting legislation, as well as providing a legitimate aim for doing so (Bergmann, 2021, pp. 27–32); and the District Court’s judgment in the case of *Allmän åklagare mot Karolinska Universitetssjukhuset Huddinge,* adjudicated by the Swedish Supreme Court in 2018 (*Attorney General v. Caroline University Hospital of Huddinge* in English) mentions that the production of biobank data in a criminal case would necessitate a serious crime to occur for the Court to decide to request it; the conclusions of the District Court judgment emphasized that the Swedish Biobank Act of 2002 takes precedence over other legislation (Judgment *Allmän åklagare mot Karolinska Universitetssjukhuset Huddinge*, 2018, p. 852 / Conclusions of the Falun District Court [extract]). Sweden is one of the few states to possess a broad law on professional secrecy, namely the 1980 Secrecy Act,[20] whereas many states have never enacted any special laws on secrecy, limiting such provisions to norms of the Penal Code (i.e. Italy, Germany, France). The judgment of the Swedish Supreme Court of 2018 somewhat reflects the policy towards a limited, or a completely absent, possibility of disclosure of biobank data in regard to criminal proceedings. The dispute in this case did not seriously vary from the ones in Norway. The public prosecutor’s office filed a request to the District Court to grant a search in Stockholm Medisinska Biobank, located in Caroline University Hospital in Huddinge (a district of Stockholm, Sweden) for the necessity of searching for tissue samples, which were submitted by a person who was a [civil] plaintiff in an ongoing preliminary investigation. The prosecutor’s position was that due to the investigation on an aggravated assault, access to parts of two tissue samples was needed; and these were stored in a biobank; and there was no other means to obtain them; and the purpose for obtaining them was to compare the viruses in these samples with the viruses from the analogous samples of the suspect; and the plaintiff had already consented towards the production of the said biological samples. The biobank and the Healthcare Inspectorate objected to the search. The Falun District Court found that the plaintiff’s case was already supported by many facts, and considered the position of the defendant biobank, whose counsel claimed that a criminal investigation is not the type of activity under which the biobank tissue samples may be used, in accordance with Art. 2 of the Biobank Law of 2002.[21] The new biobank law drafts (law drafts and comments to them seem to be considered as a credible source of Nordic law) also hinted that the biobank data should not be utilized for criminal investigations. The District Court of Falun concluded that the order should not be granted. It held that in order to grant such a search, a very serious crime should occur, and concluded that the civil plaintiff’s consent is not decisive, doubting that the crime happening in the plaintiff’s case was of such nature that it was a major crime that would make the court grant an appropriate order for such search. The prosecutor’s office filed an appeal, and the Svea Court of Appeal found that the search could be granted. The Appellate Court found that the prosecutor reported sufficiently concrete circumstances that the plaintiff’s tissue samples were of great importance for the ongoing preliminary investigation. Concerning the search, the Court of Appeal held the following: if there is a reason to assume that a crime which was committed would amount to an imprisonment to the accused (which in fact could include aggravated assault), then the search may be conducted for the objects, which may be seized. According to the house search rules, “the house search may only be decided if the reasons for the measure outweigh the intrusion or otherwise that the measure entails for the suspect or for some other opposing interest”. The Court found that the requirements for a special reason were met. The defendant impugned the judgment to the Supreme Court, claiming, *inter alia*, that the Biobank Act takes precedence over the Code of Judicial Procedure. The Swedish Supreme Court reviewed the legislation on biobank operation as well as the rules of the Code of Judicial Procedure with respect to the house searches, finding that the relationship between the Biobank Act and the Code of Judicial

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[20] Sekretesslag (1980:100).

[21] Lag (2002:297) om biobanker i hälso- och sjukvården m.m. [in English: The Act on Biobanks in Healthcare, etc.].

Procedure has never been touched explicitly by the legislator, but the Biobank Act had to be taken into consideration with respect to the principle of proportionality of interference relating to a house search. The draft laws did not contain any suggestions, but the Court concluded in the test on proportionality that biobanks are likely not to be used for criminal investigative purposes; while at some point, there truly may be instances when such could happen, the Supreme Court emphasized that the interested criminal investigation must be very strong. Thus, the Supreme Court overturned the Appellate Court's decision and rejected the claim for search (Judgment *Allmän åklagare mot Karolinska Universitetssjukhuset Huddinge*, 2018, p. 852, para. 22–36).

As we may deduce from Swedish and Norwegian court judgments, the courts are not very eager to allow production of biobank tissue samples for the needs of criminal proceedings, though Norwegian courts allow it for the needs of civil proceedings in limited occasions. There is no strict statutory prohibition for producing biobank tissue samples for the needs of criminal proceedings either in Norway or Sweden, but the courts usually claim that the reason for such production would have to be much more substantial than in the criminal cases at stake. Even a search for a missing man, presumably deceased by the time of the proceedings before the Norwegian Supreme Court in 2021, was not a valid reason for production of biobank data without his free and informed consent. However, Norwegian courts would allow the production in civil claims, such as paternity proceedings. Therefore, it may not be concluded, that biobank data are exempt from production for the necessity of administering justice.

Conclusions

The interaction of biobanks and the courts rarely becomes an object of scientific scholarship, despite worldwide jurisprudence showing that biobanks were not once sued for various malpractice cases (i.e. for mishandling of biological samples, or illegal collection and possession of them). One of such seldom-reviewed aspects is the production of biobank data for the necessity of civil and criminal proceedings. Despite the fact that such cases are still rare in the Continental legal system, the Nordic states already possess a decent body of relevant judge-made law, as the acting legislation usually does not provide an explicit answer concerning the production of biobank data for the needs of justice. Many biobanks oppose the production upon the request of the courts or the prosecution authorities, impugning the judgments to the higher courts with variable success. The courts also are occasionally reluctant to order the production of biobank data. In some instances, Norwegian courts had to deal with the clash of legal provisions of various laws, deciding which one takes prevalence over the others in a distinct legal case. In Latvian law, the problem of biobank data maintenance is reflected in the judgment No. SKA-166/2020 of the Latvian Senate, where the plaintiff litigated with the Ministry of Health in order to expunge the biological samples of his deceased father, which were kept in a forensic biobank long after the criminal investigation was already closed. At the same time, no lawsuits against Latvian biobanks (whatever their role and operation is) have been found in the court case databases, though such lawsuits may be a matter of time. In the author's view, there should be no legal obstacles for ordering a biobank to produce certain types of biological samples both in civil and criminal cases. As Norwegian jurisprudence shows, biobank samples may be legitimately produced for the needs of paternity proceedings. There is no fundamental difference between the production of biological samples from a biobank and the production of medical records from a hospital. Nobody encroaches upon the issues of confidentiality of the biological samples by asking for a court order to produce it for a peculiar trial. If we hold that biobank samples maintenance invokes very sensitive privacy issues, then surely it is the same for hospital records, and records from psychiatric facilities. The aims for what the biobank samples are required (i.e. paternity claims, search for missing persons, evidence for criminal cases) have nothing to do with the concerns which were expressed by the European Court of Human Rights in *S. & Marper v. United Kingdom* (2008): the tissue samples are not ordered to allow for, roughly speaking, spying on someone's genome, or conducting unauthorized research. Therefore, the concern for an additional privacy protection, beyond the one for ordinary medical records, seems to be overrated. What is more, even if we theorise that the tissue samples, once legitimately produced upon a court order, may be misused, a lawsuit would only happen had it disturbed the plaintiff – a similar situation already occurred in the Latvian Senate's judgment SKA-166/2020. Based upon the above inferences, biobank data, in whatever form, are types of medical records, that enable their identification (i.e. it should be regarded as personal data) according to special techniques, are subject to medical confidentiality, as any other medical records, and there should be no legal obstacle for producing them for the needs of administering justice, applying either the principle of proportionality in civil and criminal proceedings, or the already existing legislative provisions concerning medical records production. At present day, there is no uniform solution relating to the legitimate production of biobank records, and thus, National Courts usually reach decisions on a case-by-case basis, as a legal case may possess peculiar circumstances which should be assessed by the court properly, and which may change the outcome of the case. Since the European Court of Human Rights has not dealt with the issues of biobank data production to date, National Court judgments are currently the only source for a legal solution to this problem.

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