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LIMITS OF LEGAL TRANSPLANTS

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Abstract. Often, legal ideas are transplanted between legal systems. This can be seen not only in colonial contexts, as is evidenced by the almost global relevance of ideas that originated in English Common Law, but was also visible in particular during the last centuries when Japan and China imported rules from German criminal and private law, respectively, into their domestic legal systems. One of the best known – and most unusual – features of German private law, concerning the transfer of ownership and the abstraction and separation principles, was in turn also the result of a legal transplantation, albeit a rather imperfect one. Using literature research methods, this text aims to show that transplanting legal norms between societies, while often practical, can at times lead to confusing and unintended, results – in particular when the context in which the norm was created is not fully understood.

Keywords: legal transplants, German law, Roman law, civil law.

Introduction

Law is meant to serve the needs of society. This means that, ideally, it is made by those who speak for the members of this particular society and who have the best possible knowledge of the problems that the law is meant to address and the solutions to these problems. While this might be the ideal, historically the practice of law-making in the Arctic, especially in colonial contexts, has been different, with a lack of connections between those making laws and those governed by them. In the contemporary Arctic, at least in Northern Europe, it is in addition not uncommon that inspiration for legislation is sought from other European countries. This is especially the case where domestic legislation is concerned, which is based on the implementation of legal standards imposed by the European Union. In practice, this means that during the drafting period of new laws or regulations existing rules which address similar or identical concerns in other countries are adopted. While this approach is of course practical, especially if the same legal basis in EU law is concerned, it is, however, not without its pitfalls. Often, legal concepts are transplanted from one legal system to another. This is particularly relevant for legal systems which undergo a significant transition. The effect of such legal transplants, however, can be a disconnect between the legal culture which permeates a legal system and the specific transplanted norm. While some legal systems have successfully integrated transplanted concepts, others have been less successful.

It is the aim of this text to show that, in extreme cases, the transplantation of legal concepts not only across legal cultures but also across significant time differentials can be disruptive. For this purpose, legislation and academic writings, primarily from Germany, will be analysed. This text highlights one such case, in which a norm was transplanted without much regard for its context. While it is primarily intended as an anecdote, this might serve as an example for other settings concerning the limitations of legal transplantations between systems and societies. The example introduced to the readers has already been documented (Wesel, 2006) – indeed, it is often perceived

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as one of the first real hurdles in private law for first year law students in Germany, as the specific legal principle in question seems counterintuitive.

The issue in question is at the core of the issues private law systems around the world have to deal with: the transfer of ownership and the abstraction and separation principles (Sadowski, 2014, p. 240). The transitional country in question was Germany at the end of the 19th century, which, shortly after its unification in 1871, required the creation of a nation-wide set of private law norms, which would eventually lead to the adoption of the Civil Code (*Bürgerliches Gesetzbuch*). The norm in question was one of Roman law, and its introduction into the German legal system led to a legal situation which is hardly understood by citizens in Germany and has confused generations of law students: under contemporary German law, a sales contract is entirely legally distinct from the transfer of ownership of the object of the sales contract. The transfer of ownership requires a separate agreement between the parties as well as, normally, the physical transfer of the sold item (p. 240).

1. The origins of law

In an ideal scenario, law is a product of society, with the members of the society having a say in the creation of legal norms. Often, however, legal problems are not specific to a particular society, but are commonly found. This is particularly the case in the realm of private law. It is therefore not surprising that legal solutions which have been found to be effective in other legal systems are adopted elsewhere. Today, this approach can be reconciled with democratic principles. In particular, legal systems which undergo transitional situations can benefit from the adoption of time-tested legal norms. Such a 'transplantation' of norms from one legal system to another requires expertise in both systems concerned. It will be shown in this text that even with a fairly high level of knowledge about the 'donor' system, the risk of mistakes remains relevant. Using what is today a core concept of German private law as an example, it will be shown that the effects of mistakes in the transplantation process can be long-lasting and far-reaching. It will also be shown that there is a practical relevance for comparative law as an academic discipline.

1.1. Where does law come from?

Law does not develop in a vacuum. Instead, it is the result of a number of (social) factors, be they representative of the people (as in an idealized democracy) or dependent on only one (undemocratic and unchecked) law-maker (as in a dictatorship). In any case, law usually reflects the society from which it emanates and to which it applies. At times, though, it has been useful not to invent legal concepts from scratch but to fill existing gaps in the laws of a society by implanting legal norms or concepts found in other legal systems. Such implants are not unusual and often it is possible to integrate foreign norms into an existing legal system.

One example of this approach can be seen in the continued relevance of Roman law in German private law (Lobingier, 1916; Zimmermann, 2016). While originally general rules (*Gemeines Recht, gemein* here having the meaning of *gemeinsam* (joint) or *allgemein* (general, common), which was frequently referred to as the *ius commune*, which translates as *common law*, but not to be confused with the Common Law applied across the Channel), often influenced by Germanic law, applied across the Holy Roman Empire of the Germanic nation (Wesel, 2006, p. 366 et seq.), Roman law was extensively studied by legal academics in Germany in the 17th to 19th centuries (p. 370) and eventually played a key role in the creation of the German Civil Code, the *Bürgerliches Gesetzbuch* (BGB), which entered into force on 1 January 1900 and was newly promulgated in 2002.

In this text it will be shown that the implantation of Roman law into German law in the 19th century continues to have effects today, but also that it was the result of an attempt by a tiny elite to preserve outdated ideas of society, including the oppression of large parts of the working population. Together with legal norms, Germany also implanted outdated ideas about the human person into its legal system. In one instance, as will be shown, a key feature of contemporary German law, which sets it apart from other legal systems, is based on a simple misunderstanding of a Roman law concept by a single German aristocrat who remains venerated as one of the nation's greatest legal scholars of all time.

1.2. The German legal family

Like French or Italian law, but in contrast to English law, German law is civil law. Comparatists from the global north categorize legal systems in "seven legal families: the French, German, Scandinavian, English, Russia, Islamic and Hindu" (Zweigert & Kötz, 1998, p. 64) families of legal systems. This approach obviously ignores large parts of the world and the contribution of non-dominant societies, including the laws of colonized indigenous peoples. For the purposes of this text, it may suffice that German law is perceived as a distinct legal family within the realm of civil law. This distinction is based on "substance" (p. 64). The idea behind the term *family* seems to be that it can be used to describe connections between different legal systems: "We are told that, as with languages in comparative linguistics, legal systems are to be put into families on the basis of similarities and relationship, but it is never made really clear which common qualities are the crucial ones. It is often obvious enough that one system is a parent system (like the Common Law of England), but we need more help with the difficult question whether a system is affiliated to one parent or to another, especially as legal systems have been known to adopt new parents" (p. 65). This also applies to German law, which today is influenced primarily by EU law, but where Roman law is far more than just a memory.

There are distinctions between Romanic and Germanic law, but both legal families are closer to each other than either is to the Common Law of England (Zweigert & Kötz, 1998, p. 132).

2. Roman law in German law

Today, the Roman history of military power and war has no practical relevance in Germany. Roman law, on the other hand, has had a significant influence on the development of German private law. To understand this influence, it is necessary to look at the historical development of this relationship.

2.1. The Germans and Rome

Two millennia ago, large parts of what is today Germany were part of the Roman Empire. Cities such as Cologne (*Colonia Claudia Ara Agrippinensium*), Mainz (*Mogontiacum*), Frankfurt-Heddernheim (*Nida*), Xanten (*Colonia Ulpia Traiana*), Speyer (*Noviomagus*), or Trier (*Augusta Treverorum*) were founded by the Romans. Buildings like the Porta Nigra in Trier, the Roman Theatre in Mainz, and the remnants of the Limes, Rome's border wall, can still be seen today, while other buildings, such as the Saalburg Fortress near Frankfurt and the Amphitheatre in Xanten, have been reconstructed. This tangible cultural heritage of the Roman Empire, however, is only the first indication of a much broader association. Over centuries, close economic and social ties developed between the German population and the Roman Empire. Indeed, many German tribes became part of the Empire, and there was frequent trade across the border. On the other hand, it is pertinent to ask whether armed conflict with the Roman Empire makes up an important aspect of German history, which remains relevant to this day. An example of this can be found in the wide general interest in the search for the exact location of the Battle of the Teutoburg Forest in 9 AD, when a small group of Germans, led by Arminius (who, incidentally, was also a Roman citizen and formally served in the Roman army), defeated a superior Roman force under Varus, the former governor of the provinces of Africa and Syria, who had gained notoriety for the massacres committed against the resistance movement in Judea. The other key event in the relationship between Germany and the Roman Empire was the conquest of Rome by Odoaker in 476. This marked the downfall of the Western Roman Empire.

These were mainly military events, but the downfall of the Roman Empire allowed for an opening which was filled *pro forma* when the Frankish ruler Charlemagne made himself Emperor of the Romans (Holy Roman Emperor) on Christmas Day 800. The empire Charlemagne ruled, however, was very different from the Roman Empire at the height of its might. After the dissolution of the Frankish Empire in 836, the Holy Roman Empire of the German Nation essentially claimed to have stepped into the place of the Western Roman Empire. The Holy Roman Empire was dissolved in 1806 after being conquered by Napoleon. After the Liberation Wars of 1813, which ended the French occupation, Germany did not exist as one nation but as many. National unity was eventually achieved in 1871, when the German Empire was founded after another war against France.

2.2. Germany's common law

From a legal perspective, however, despite the practical importance of the Latin language, little changed for the people who lived in the Holy Roman Empire. The law of the land was what was referred to as the *ius commune*, though there were some particular (regional) laws and customs. Roman law was only rediscovered later. For the most part, Europe encountered Roman law in the Middle Ages; Germany only did so in the mid-15th century (Zweigert & Kötz, 1998, p. 133). Unlike for France of England, for Germany the rediscovery of Roman law "meant not only a widespread acceptance of legal institutions and concepts of Roman law but also a much more extensive scientific systematization of legal thought than occurred elsewhere" (p. 133). This has been explained by the absence of strong central political and legal institutions – a consequence of the federal nature of Germany, which has been a country of tribes for thousands of years. Personal identity is often highly local and regional, rather than national. Together with Germany's 20th century history, this might explain why many Germans were open to the transfer of power to Brussels based on the concept of subsidiarity. It also meant that for centuries Germans were used to relatively local approaches to law and justice. Economically, this also meant many borders between dozens of states and statelets, which made trade difficult and expensive. Eventually, it became clear that some rules are best applied nationwide or at least over a larger area.

From the 15th to the 19th century, jurists worked with Roman law in many different contexts (Zweigert & Kötz, 1998): "Jurists trained in Roman law [first in Italy, later in Germany] were first employed in ecclesiastical institutions, the principalities, and the boroughs, but by the end of the fifteenth century they had increasingly taken the practice of law from the untrained practitioners and had themselves moved into judicial positions. […] In the course of the sixteenth and seventeenth century these lawyers […] created the 'usus modernus pandectorum' out of the Roman law which had been received and the indigenous legal ideas which continued in force everywhere. Admittedly no unified German common private law was developed [and] it was only in a few large jurisdictions that any synthesis of the Roman and native laws was achieved", for example in Saxony, Württemberg, or the Baltic States (p. 135). These collections were created by jurists in a way similar to the work of the American Law Institute's Restatements. Eventually, this led to some attempts at codification, most prominently in the form of the Preussisches Allgemeines Landrecht (ALR) of 1794. The ALR was an attempt at a holistic form of positive regulation, including rules on public, private, and criminal law – an attempt at codifying the existing common law (U.S. readers might want to try to imagine putting all of the American Law Institute's *Restatements* into a single Act). This was made possible in part by the Enlightenment, which "gave the lawyer a standpoint from which he could see his way through the *usus modernus pandectarum* with its variety of historically conditioned detail, purge it of obsolete legal institutions, and put it in a new systematic order", which lead to "the idea of codification, the idea that the diverse and unmanageable traditional law could be replaced by comprehensive legislation" (p. 135), as in the case of the aforementioned ALR and Bavaria's *Codex Maximilianeus Bavaricus Civilis* (1756) (p. 137).

2.3. The very, very, very long 19th century

As we will see, the late 19th century is still very much alive in German law today. From a German perspective, the 19th century was marked by the violent end of the old (800–1806) empire, the French occupation, the liberation of 1813, albeit without national unity, the failed attempt at democracy of 1848, and the emergence as a modern nation state in 1871. It is in this context, especially in the second half of the 19th century, that the interest, or infatuation, of German legal scholars with Rome reached its zenith in the run up to the creation of a nationwide civil code, which was to be one of the measures which were meant to push Germany into modernity.

In the 19th century, this positivist attitude gave way to Savigny's historical school, which "saw law as a historically determined product of civilization, having its roots deep in the spirit of the people and maturing there in long processes. Like language, poetry, and religion, law [was understood as] the product not of the formative reason of a particular legislator, but an organic growth" (Zweigert & Kötz, 1998, p. 138 et seq.). This concept dates back to an academic feud between Savigny and Thibaut, out of which Savigny emerged receiving more support. Rather than making law, Savigny's idea was that the law was already there and had to be found (p. 139). However, the next step was counterintuitive: "since for *Savigny* all law was the product of history, he and his followers concentrated on the historical development of law. In this, *Savigny* realized that the *Germanic* sources

of law had played a great part, and consequently he insisted on the study of Germanic law in Germany. But he and his followers turned exclusively to *Roman* law, not in the form it had taken in the Middle Ages or in the *usus modernus pandectarum* but in the form of *ancient* Roman law as it appeared in the Corpus Iuris" (p. 139[2]). The practice of the historical school, therefore, conflicted with its principle of taking into account all aspects of legal history (Zweigert & Kötz, 1998). It remained unclear how the German national spirit should, in the 19th century, have led to the emergence of law as it had been codified by Justinian in the 6th century (Wesel, 2006, p. 455).

In a sense, the historical school was almost religious in its approach to Roman law. In idealizing ancient Roman law, the proponents of this school ignored that the law of antiquity was also the product of a specific society. "Instead they thought that the Corpus Iuris placed at their disposal a store of legal institutions of eternal validity which could be put to direct use as valid law, if only they were set in the right order" (Zweigert & Kötz, 1998, p. 140). The task of the historical school, which eventually led to the emergence of the pandectist school, therefore was the "schematizing, ordering, and integrating of the concepts of Roman law" (p. 140). The pandectists therefore worked with a finite set of rules, and "one only had to apply logical or 'scientific' methods in order to reach the solution of any legal problem" (p. 140). While this dream is still alive for some lawyers when it comes to the use of artificial intelligence (AI) for the solution of standardized legal problems, and new technologies like AI and blockchain can lead to the automatization of large parts of the legal services industry, the pandectist school failed to understand the social reality of law. In essence, the proponents of this approach transplanted and imposed a set of rules which had been created in a different time and place and by a very different society on 19th century Germany. Today, the effects of this approach can still be felt in Germany through the influence that their work had on the creation of the BGB in the late 19th century.

The pandectists "did not bother to seek out the real forces in legal life, and they did not ask what ethical, practical, or social justification for their principles there might be; consequently much of what they wrote is hairsplitting pedantry and legal spillikins. This has admittedly been recognized for some time, yet these methods of conceptual jurisprudence are still at work behind the scenes in Germany" (Zweigert & Kötz, 1998, p. 141).

As Zweigert and Kötz note, this heritage remains with German lawyers to this day. Legal education, even though it has become more practice-oriented in recent years, is still rather disconnected from the real needs of the members of society. Indeed, criticizing the outdated (but often high-quality) German legal education has been a key concern for many generations of German lawyers. The quality of the law itself, on the other hand, is discussed in terms of legal policy, but usually only with regard to more modern laws; the fundamental principles usually remain untouched.

One way in which Savigny dramatically misunderstood Roman law still reverberates today: German private law is famous for the separation between the *Verpflichtungsgeschäft* and the *Verfügungsgeschäft* – the creation of an obligation and its fulfilment are separate from each other. In the most basic constellation, the direct sale of a good with immediate payment, this means that the transfer of ownership of the sold item is independent of the validity of the sales contract. This *Abstraktionsprinzip* is based on an incorrect reading, by Savigny, of a 2nd century text by Gaius: Gaius had mentioned in an aside that the transfer of ownership did not require anything in addition to the transfer of possession and the intention of the original owner that the ownership is to be transferred. While Gaius had presumed the existence of a cause for the transfer of ownership, for example a sales contract, Savigny understood the remark to mean that no *Grundgeschäft* were necessary at all (Wesel, 2006, p. 159). To this day, Savigny's invention (which he thought to be a restatement of Roman law) is codified in § 929 BGB and continues to confuse regular citizens, first year law students, and foreign business partners of Germans. The law as it is now does not reflect Roman law, nor the old German common law, and is only the result of a misunderstanding on the part of Savigny, who apparently aimed at preserving the old order (p. 455) – which had effectively already ended in 1806. As a result, the law applicable in the 21st century is based on a 19th century misunderstanding of a 2nd century side-remark. The origin of this misunderstanding lies in an attempt to preserve a legal-political order which has been doomed to end since the late 18th century – specifically since the French revolution. While hardly anybody but lawyers would notice if this particular rule were changed in favour of a rule which better reflects the reality of millions of sales contracts regarding movable goods which are concluded and fulfilled every day, the

[2] Italics added with regard to the name *Savigny* (in the text by Zweigert and Kötz, the name of *Savigny*, like other personal names, is written in small caps), all other italics as in the original.

strongest justification for the continued existence of Germany's exotic position is the conservatism of lawyers: by now, this unnatural separation has existed for longer than anybody alive can remember. There have been several generations of lawyers for which § 929 BGB is like a law of nature. This static approach, however, might be seen as an inherent function of the conservatism of lawyers, but it does not need to be this way, as modern codes from other countries show. Instead, 21st century lawyers in Germany continue to have to work with norms based on ideas from antiquity because of the dominance exerted by and the veneration afforded to a small 19th century elite – the pandectists.

The pandectists did not look to the future, but at the past, yet their influence during the late 19th century means that the BGB still reflects their views in both system and substance: "In language, method, structure, and concepts the BGB is the child of the deep, exact, and abstract learning of the German Pandectist School with all the advantages and disadvantages which that entails" (Zweigert & Kötz, 1998, p. 144). This includes the structure of the BGB as well as the legal institutions contained in the Civil Code (p. 146). When trying to find its bearings, the young empire which was founded in 1871 looked to Rome. This also means that the BGB is a relatively static code. While German Civil Code still works, despite being a static product of the 19th century, this is due to the inclusion of general clauses such as the good faith rule of § 242 BGB, which have been used by the courts extensively to deal with the reality of life (p. 150). In other words, it is up to the courts to ensure that the law fits to the reality of the society which it is meant to serve.

The BGB does not have the average citizen in mind, instead "for the BGB the typical citizen is not the small artisan or the factory worker but rather the moneyed entrepreneur, the landed proprietor, and the official, people who can be expected to have business experience and sound judgment, capable of succeeding in a bourgeois society with freedom of contract, freedom of establishment, and freedom of competition, and able to take steps to protect themselves from harm" (Zweigert & Kötz, 1998, p. 144).

But this approach also meant that in the 19th century, law came of age as a science (Dreier, 1981; Hilgendorf, 2008). Since then, law has become the object of many, very diverse, theoretical approaches (Buckel et al., 2006). Especially research in legal theory has often been intertwined with legal philosophy, and was frequently understood to serve legal policy goals (Hilgendorf, 2008, p. 113 et seq.). Today, however, it is often not clear which, if any, goal many of the theories created in academic legal discourse serve – beyond fulfilling the need for legal creativity. The special nature of jurisprudence as a science and the problem of the falsifiability of legal norms leads to a way to answer questions which is different from that utilized in the natural sciences: a legal theory can only be false if it is incompatible with the norms in question (Dreier, 1981). At first sight, this approach may seem rather positivistic in nature because it presupposes the existence of norms which are knowable and sufficiently clear in order to serve as a yardstick against which theories can be measured. It should be noted, though, that unwritten law can also be clear enough to be applied within a society (e.g., the customary laws of indigenous communities). Hence, legal theories can at least be disproven by others, and the method of analysis can be replicated by researchers elsewhere, which is a key element of scientific research. That said, the 'scientification' of law in Germany appears to have been supported immensely by the systematic approach favoured by German law-makers in the late 19th century. This period saw the creation of landmark codes such as the *Strafgesetzbuch*, which was promulgated on 15 May 1871 and again after a major reform in 1998, the *Gerichtsverfassungsgesetz* (promulgated first in 1877 and again in 1975), the *Zivilprozessordnung* (promulgated in 1877 and again in 2005), the *Strafprozessordnung* (also promulgated in 1877 and again in 1987), and of course the aforementioned BGB (2002), which was promulgated on 18 August 1896 and entered into force on 1 January 1900.

Public law, on the other hand, remains fairly unstructured, which is also due to the widespread competences of the federal states (*Länder*) instead of the federation (*Bund*) in this regard. This in turn follows from the general competence of the states to enact legislation as defined in the *Grundgesetz* (literally: Basic Law), the post-World War II constitution of the Federal Republic of Germany (Grundgesetz, 1949, Article 70, Paragraph 1), and the limited exceptions allowing for federal legislation (Articles 73–74). Despite many changes, the organization and style of these 19th century codes continue to dominate the way German lawyers tend to think about law.

3. Critique

Late 19th century law-making, based on the views of legal scholars, has effects which can still be felt today. For more than a century, during the Empire, the Weimar Republic, Nazi rule, the occupation after World War II and in West-Germany after 1949, as well as in reunified Germany since 1990, courts have worked to correct these mistakes and have continued to develop the law further. While later corrections have also been made by the legislature, the lasting impact of the work of the legal scholars of the 19th century, who were often disconnected from the reality of the everyday lives of the overwhelming majority of people, continue to limit the legal system in Germany.

In reality, "except for a tiny minority of the idle rich, or the leisure class, […] work has been the defining condition of humanity throughout most of its history" (Chang, 2014, p. 347). Compared to the daily reality of the majority of the population, the drafters of Germany's Civil Code seem to have had a richer class of legal actors in mind. This is highlighted, for example, in the fact that for large parts of his life, Max Weber, who wrote his *Habilitation* thesis on "*Die römische Agrargeschichte in ihrer Bedeutung für das Staats- und Privatrecht*" (Ferguson, 2011, p. 259), lived based on his family's inheritance rather than his own work – but praised an ethic focused on hard work (p. 262).

The implantation of Roman law into the German legal system was not merely a scientific project. Instead, it was a political-social project orchestrated by members of the dominant class with the aim of preventing change and development during the time between the failed attempt at democracy in 1848 and the formation of the German nation state in 1871 – i.e., when Germany did not exist as one state but consisted of many, often tiny, states, governed by unelected rulers who already felt the desire for change in large parts of the German population, almost a century after the French revolution. Bringing ancient, static law into the German legal system was a move backwards, and the moral dimension usually underpinning legal developments (Alexy, 2008, p. 23) was largely absent in the work of 19th century Roman law experts, which foreshadowed the coming dominance of positivism and which would eventually contribute to the darkest years of German legal history, when law was a tool in the service of systematic injustice on an unprecedented scale.

While many modern legal problems cannot be answered with old law, many basic problems of private law were already covered by Roman law. Other aspects of contemporary German law which are fundamental, such as the unconditional respect for human dignity (Alexy, 2008, p. 23) required by Article 1 paragraph 1 of the *Grundgesetz*, are not found in Roman law. The idea of the human being held by the drafters of the BGB was rather disconnected from the reality experienced by most people in everyday life. The concepts of *Privatautonomie* and *Vertragsfreiheit* presuppose the existence of a near-perfect egalitarian society, which did not exist back when the BGB was a draft – and which does not exist today. At first sight this might be contrasted with the rather paternalistic view held by many EU institutions, which has led to far-reaching consumer protection rules, but the comparison would not do justice to the fact that the BGB was created by the elite of the time. They did so by relying not merely on the commonly applied norms found in different parts of Germany during the 19th century, some of which had already been codified regionally, but by important outdated legal concepts, at times even without understanding them properly. In so far, the implantation of Roman law into the German legal system was primarily a political endeavour of representatives of a kind of past area and, decades before the end of the Empire in 1918, a retreating battle of Germany's *ancien régime*, wrapped in the language and style of scientific discourse.

Without disputing the importance of legal expertise, this should be seen as a warning that legal expertise is not sufficient for those who create legislation or apply the law. Instead, it is necessary for lawyers to be critical of the texts they are working with. In some ways, law as a science is closer to theology and the interpretation of sacred texts than to other social sciences. The text-based approach to law appears to be inevitable in larger, more anonymous societies due to the fact that written text is the best way available for making norms known to a wider audience whilst also ensuring legal certainty.

As importantly, a multi-disciplinary academic outlook should be combined with practical life and work experience outside the legal field. It remains possible to become a judge without having ever studied any subject but law at the university level, and without any work experience outside the *Referendariat*. Especially given the large

number of law graduates leaving universities today, and in light of the different ways of work of future lawyers thanks to developments such as artificial intelligence, a more holistic approach to legal education is called for. Legal implants are not *per se* negative – indeed, they can often help solve problems in an effective manner, especially in smaller jurisdictions which might have less opportunity to deal with specific cases than a larger legal unit. In the long run, the effective creation and application of legal standards requires lawyers to be more than lawyers. Given the already long duration of legal training, the demand for a broader education increases the risk that not everybody will be able to afford it, which in turn would benefit those future lawyers who are already coming from a solid financial background. It might be a better alternative to require a number of years of work experience in non-legal areas, regardless of when or how they were obtained – e.g., by working part-time while studying (which many students already do anyway). The three months of internships currently required of law students by German law (Deutsches Richtergesetz, 1972, Section 5a, Paragraph 3, sentence 2) do not fulfil this function. As it is right now, there is a disconnect between legal education in universities and the practice of law which would be unacceptable in other academic disciplines.

Conclusions

The disconnect between legal practice and legal studies at universities is reflected both in the legislative choices of the past and in the limitations of the current system. This problem has been discussed by lawyers in Germany for generations, but reform is notoriously slow. Indeed, like in the case of the transplant of a misunderstood legal rule from the Roman era, law-makers are often not cognisant of alternatives. This might be especially true for lawyers who are trained in a particular legal system, which is then perceived as the normal system of making and applying law, although alternatives do exist. If one compares, for example, the way in which legal norms are written in the Nordic countries – accessible for the reader, providing clear answers to everyday legal questions – with the approach still found in Germany, where legal disputes quickly necessitate professional legal advice and representation due to the arcane nature of many norms, the potential for improvement becomes obvious.

Legal transplants can play a role in improving the law, but they are not without risk. The distinction between a sale and the transfer of ownership and the multitude of legal relations inherent in such dealings appears to be counterintuitive because it was never meant to be that way – the law as it remains is not the result of an organic response to a specific regulatory need. This is the risk inherent in the transplantation of norms between legal systems – although often that approach can facilitate lawmaking processes.

For the time being, though, the gap between legal practice and legal science, in particular teaching at German universities, remains too great. In the last decades, there have been many laudable attempts by German legal academicians to overcome this hurdle,[3] but as long as law students are required to know a multitude of legal theories which are completely irrelevant for the practical application of the law in the courtroom just to pass a single exam, this will take time. Centuries of history will not be overcome easily. However, any attempt to bridge this gap between legal practice and legal education should be welcomed because it would help students to better prepare for their future professions. Law does not only exist in books, but is a consequence of the lived reality of societies. By taking this into account, legal academia can help future and legal practitioners to do their job even better. The heritage of the transplantation of Roman law into German private law in the late 19th century is a constant reminder of this gap and of the limitations of law as a scientific discipline.

Of course, it is important to learn from other legal systems, and the contribution of comparative law scholars for the development of law, in particular in remote, sparsely populated countries and post-colonial settings, is not to be underestimated. But the transplantation of legal concepts, even when not undertaken with a colonial mindset, contains inherent risks. It is therefore essential for all who are involved in decision-making processes, and in particular in processes which lead to the creation of new legal norms, to be aware of the needs of the people of the target society and those challenges they face which can actually be solved through regulation. As such, it is essential for lawmakers to interact with local communities. The dissemination of scientific knowledge across all scientific disciplines, including law and governance, can play an important role in facilitating the work of policy-

[3] For example, the Refugee Law Clinic and the *Studies in Applied International Law* approach at the author's *alma mater*, Justus-Liebig-University in Giessen, Germany.

makers and legislators. Most of all, they will need a willingness to learn and compassion for the people for whom they work.

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THE SOVIET CRACKDOWN ON LITHUANIAN PARTISAN MOVEMENTS (1946–1956) – A GENOCIDE?
BACKGROUND DELIBERATIONS ON THE ECHR JUDGMENT IN *DRĖLINGAS V. LITHUANIA*

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Abstract. The present contribution deals with the question of whether the sufferings inflicted upon the Lithuanian population during the Soviet anti-insurgency and Sovietization campaigns of the 1940s and 1950s amounted to genocide under international law. Proceeding from the factual findings of the ECHR's much-noticed judgments in the cases of *Vasiliauskas v. Lithuania* (2015) and *Drėlingas v. Lithuania* (2019), it is argued that these historical incidents – although constituting a borderline case – did not pass the legal threshold of genocide, neither in terms of "physical genocide" nor under the contested concept of "social" or "cultural genocide". As regards physical genocide, it cannot be sufficiently ascertained that the targeted fraction of the protected group of ethnic Lithuanians reached the numeric threshold of a substantial "part" of the group under the definition of genocide. In view of social/cultural genocide, this article purports that Soviet policy-makers might indeed have acted with the intent to culturally destroy a sufficient part of the group, but lacked the required genocidal motive.

Keywords: genocide, partisan movement, Vasiliauskas v. Lithuania case, Drėlingas v. Lithuania (2019) case.

Introduction

The venture undertaken by international criminal law to capture systemic mass-crimes that "shock the conscience of humanity" (preamble to the ICC Statute) in bald legal terms turns out to be a dispiriting task at times. Already in his opening statement at the Nuremburg Trial against Major War Criminals, chief prosecutor Robert H. Jackson drew attention to a key feature of the newly evolving field of international criminal law, denoting it as "one of the most significant tributes that Power has ever paid to Reason" (*Trial of the Major War Criminals*, 1947, S. 99). Indeed, international criminal law as it stands may well be conceived of as an epitome of *compromise* between power and reason, sovereignty and world-conscience, *realpolitik* and justice. For this reason alone, high hopes and aspirations that international criminal law can in all instances serve as an accurate measuring-device of massive wrongs are doomed to disappointment. Such disappointment is particularly hurtful when traumatic collective experiences of suppression have sunk into the defining narratives of an ethnic or national community and compose an important aspect of its self-perception and identity. In such cases, the wish that the endured suffering be acknowledged before not only the "Tribunal of World-History" (Schiller, 1987, p. 133) but also the Tribunals of World-*Law* is all too understandable, and declining such recognition may even – albeit erroneously – be perceived as an act of secondary victimization. Arguably, the Soviet Union's suppressive campaign against Lithuanian armed and unarmed resistance depicts such a case that was not adequately mirrored by the international criminal law provisions applicable at that time. Accordingly, the ECHR's much noticed *Drėlingas* judgment, along with its earlier, no less notable *Vasiliauskas* judgment, hold all the markings of enflaming passion and dividing minds, which is evidenced not only by a number of dissenting opinions in both cases, but even more so by the fact that the ECHR's majority opinion seems to have shifted from a stance of reservation (in *Vasiliauskas*) towards a stance of affirmation (in *Drėlingas*) in regard to labeling these historic events as "genocide".

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Leaving aside the peculiarities of both cases, the legal considerations hereinafter shall focus on the broader question of whether the severe Soviet measures taken against parts of the Lithuanian population – partisan group members and others – amounted to genocide if assessed in accordance with the developmental state of international criminal law at that time. Before this core issue can be addressed, however, it seems necessary to adduce the following disclaiming remarks. First, for the purposes of the present text, only the time period between UN General Assembly Resolution 96 (I) of 11 December 1946 (UN-Doc. A/RES/96) and the execution of Adolfas Ramanauskas ("Vanagas") in 1957 shall be taken into account, as the first date marks the first definite expression of an international consensus on the punishability of genocide as a crime under international law, while the second date marks a final decapitalizing blow to the residual structures of the already shattered Lithuanian resistance movement. Second, the scope of genocide under *customary* international law in said time period shall be deemed as being congruent with the scope of genocide as set out by the UN Genocide Convention of 1948 (UN-Doc. A/RES/260(III)), as the latter can be assumed to reflect the universally shared *opinio iuris* of those days. Third, in construing the crime, particular emphasis shall be given to the *trauvaux préparatoires* of the Genocide Convention. For lack of any state practice in applying the freshly coined crime in the early 1950s, let alone relevant international jurisprudence, such a focus seems warranted despite the merely subsidiary role afforded to the preparatory work of international treaties by international legal theory at that time and, subsequently, by Art. 32 of the Vienna Convention on the Law of Treaties (1969). Fourth, the information and translations provided in *Vasilauskas* and *Drėlingas* shall be employed as the only sources in regard to the historical events. Last – and in view of the aforementioned qualifications – it is advised that the observations at hand be regarded as preliminary in nature and only as seeking to add to the debate on potential misinterpretations of the crime of genocide on the part of the courts involved, including the ECHR.

1. Protected group

One major issue of the *Drėlingas* and *Vasiliauskas* cases was to delineate a group under the protection of genocide, as defined in international criminal law at the material time, that was targeted by the stark Sovietization policy and counter-insurgency measures carried out in Lithuania. In particular, dispute revolved around the critical question of whether the members of the Lithuanian insurgency movement which would merge into the LLKS (*Lietuvos laisvės kovos sajūdis*) in 1949 – the all-partisan organization whose goal it was to lead "the nation's political and military struggle for freedom" from Soviet rule (LLKS-Declaration of 16 February 1949, cited at Judgment of *Drėlingas v. Lithuania*, 2019, para. 8) – enjoyed protection as a stand-alone "political group" or, at best, as a mere part of the much larger ethnic or national Lithuanian group (para. 74). Forming a good starting point for the ensuing observations, these questions shall be addressed first.

While the definition of genocide to this day remains controversial in many respects, it is comparably safe to hold that "political groups" never fell under the crime's protective scope, *inter alia*, for the following reasons. Firstly, strong indications suggest that the enumeration of groups (national, ethnic, racial, and religious) was meant to be exhaustive. This can be inferred not only from the norm's wording and the progressive narrowing of the article's protective scope during the drafting process, but in particular by the fact that an early draft-version included an opening clause ("or other groups"), which was then deleted (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 9, p. 60). Secondly, and even more plainly, discussions held by the UN General Assembly's Sixth Committee – which was in charge of the Genocide Convention's final draft – suggest that political groups were quite purposefully excluded from the crime's protection (Schabas, 2009, p. 153 et seq.). The debate was sparked when the Haitian delegate submitted that, in combination with a requirement of genocidal motive, excluding political groups "would open up a loophole in the provision's scope of protection, since governments would always be able to allege that the extermination of any group had been dictated by political considerations, such as the necessity of quelling an insurrection or maintaining public order" (Tams, Berster & Schiffbauer, 2014, Art. II, para. 9; UN Doc. A/C.6/SR.75, 113). The majority of committee-members, however, did not subscribe to this objection. On the contrary, numerous delegates feared that the protection of political groups would jeopardize the Convention's ratification by a large number of states, especially those with a strong desire to remain free to suppress internal political disturbances (Tams, Berster & Schiffbauer, 2014, Art. II, para. 9; UN Doc. A/C.6/SR.65, 66, 69, 74, 21, 31, 58, 99. Similarly: UN Doc. E/794, p. 13-4). On the grounds of these and other considerations (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 9), a move to exclude political groups was ultimately adopted by a clear 22 to 6 votes, with 12 delegates abstaining. This episode illustrates that a dominant motive for deleting political groups from the Convention's protective scope was to grant states free rein in combating insurrections

and political uprisings of all sorts. The Haitian delegate's warning remark even begs the conclusion that the Sixth Committee's decision was taken in full consideration of the risk that states might use counter-insurgency measures as a pretext for the destruction of national, ethnic, racial, or religious groups. It would thus run directly counter the Convention-makers' explicit intentions to count political associations (and partisan organizations such as the LLKS in particular) among the protected groups under the Genocide Convention. Against this backdrop, the accuracy of the ECHR's finding that (at least) at the time in question, international law did not include "political groups" in the definition of genocide (Judgment of *Vasiliauskas v. Lithuania*, 2015, para. 178; Judgment of *Drėlingas v. Lithuania*, 2019, para. 49) can hardly be called into doubt.

The ensuing question then is whether the Lithuanian resistance movement constituted, if not a protected group in its own right, at least a fraction of a larger group under the protection of the crime of genocide. As it is quite obvious that most of the population of Lithuania at the time qualified both as an ethnic and as a national group, there is no need to dwell at length on this – a few remarks will suffice. *Ethnicity*, to begin with, may be defined as the entirety of cultural, historical, customary, linguistic, and religious peculiarities (the cumulative presence of *all* of these criteria certainly not being required), and the whole way of life and mode of thought which sets a group apart from its neighbors, creates common bonds between its members, and bestows a proper identity (Tams, Berster, & Schiffbauer, 2014, Art II, paras 49 et seq.). The Lithuanian Supreme Court gave a largely identical definition: "[A]n ethnic group is a community of persons with a common origin, language, culture, and self-identity" (Judgment of *Drėlingas v. Lithuania*, 2019, para. 50). Lithuanians, connected by manifold linguistic (*lietuvių kalba*) and cultural properties of all sorts and sharing awareness of a common history and destiny, evidently constituted an ethnic group. The ordinary meaning of *nationality*, on the other hand, is less easy to pinpoint, and so in defining the term *national group* under the Genocide Convention, at least three different approaches have been brought forward (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 48). First, in a formal and rather restrictive manner, *national group* could be confined to all citizens of a given state (Judgment *Prosecutor v. Akayesu*, 1998, paras 512 et seq.). Second, the term could be construed in accordance with existing covenants and rules on the protection of "national minorities", which would include expatriate groups (Kreß, 2018, mn. 40; Pritchard, 2001, p. 31). Third, the term could be extended even further to also encompass any plurality of persons entitled to found a new state by virtue of the right of self-determination (Lisson, 2008, p. 1491 et seq.). As the last two interpretations more or less overlap with the definition of *ethnic group*, in order to allow for clear distinctions it seems preferable to follow the first approach. This narrow understanding is further buttressed by the underlying discussions within the Sixth Committee: the Swedish delegation had particularly pushed for the incorporation of ethnic groups, reasoning that if the term *national group* meant a group enjoying civic rights in a given state, groups linked to a state which had ceased to exist or to one that was in the process of formation would be left unprotected (UN Doc. A/C.6/SR.73, 97; Tams, Berster, & Schiffbauer, 2014, Art. II, para. 48). According to the restrictive view, the existence of a standalone national group of Lithuanians during the relevant time period is quite doubtful, as a national group could at best have existed on the grounds of citizenship of the Lithuanian Soviet Socialist Republic, which, at least formally, remained a separate member-state within the Soviet Union. Citizenship of the Soviet Union, however, was universal by design, and did not acknowledge special affiliations to any one of the member-states. For these reasons, in the following, focus shall be placed only on the group of ethnic Lithuanians, who clearly qualified as a protected entity under genocide as defined in international criminal law at the time in question.

2. Intent to destroy

Besides the existence of a protected group, the crime of genocide notoriously requires special intent (*dolus specialis*) on the part of the perpetrators "to destroy a protected group, in whole or in part". According to the prevailing restrictive understanding, the notion to "destroy" only denotes the *physical* (or biological) annihilation of the respective group, but does not extend to forms of social destruction – that is, the dissolution of the group as a social entity by eliminating the cultural ligatures between its members. Readily picking up on this restrictive approach, the courts in *Vasiliauskas* and *Drėlingas* gave no deeper consideration to the question of whether parts or even the entirety of the ethnic group of Lithuanians might have (also) been targeted for social destruction. Only the Lithuanian Supreme Court slightly touched on the topic, stating that "[t]he participants in the resistance to occupation (…) had an essential impact on the *survival of the Lithuanian nation*, and [were] highly important for the protection and defence of Lithuanian *national identity, culture and national self-awareness*" (Judgment of *Drėlingas v. Lithuania*, 2019, para. 53, emphasis added). However, to all appearances, they likewise failed to

assess this finding's potential implications in terms of "social genocide." According to the present view, the courts missed an opportunity here. Aside from "physical genocide," they could and should have given deeper consideration to the merits of the concept of social genocide (i.e., "cultural genocide") as well, which might be more adequate for capturing the specific wrongs committed in Lithuania from 1946–1957. Therefore, Soviet policies in Lithuania shall be assessed in terms of both physical and social genocide hereinafter.

2.1. Intent to physically destroy a group, in part?

Pursuant to the understanding proposed here, the special "intent to destroy" is composed of both a volitional and a cognitive element (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 104). While the exact requirements of the volitional element are controversial in respect of mid- and low-level perpetrators (for the dispute between the "purpose-based-approach" and the "knowledge-based approach", see Tams, Berster, & Schiffbauer, 2014, Art. II, mns 117 et seq.), a relative consensus exists that on the part of the leading figures and string-pullers behind a genocidal campaign, the destruction of the group (in whole or in part) needs to be the perpetrators' *goal*, *objective*, or *purpose* (Judgment of *Prosecutor v. Krstić*, 2004, para. 32; Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 188). According to an equally widespread view, this does not necessarily require the destruction to be the perpetrators' *final* goal, but is also fulfilled when – from the perpetrators' perspective – the group's (partial) destruction constitutes an indispensable intermediary step within a causal chain leading to the final goal (Kim, 2016, p. 72 et seq. ("on the straight line of your purpose")). Mere awareness that the (partial) destruction of a group could or would occur as a *side-effect* in pursuit of a different end, however, would fall short of the threshold for genocidal intent.

In contrast to the volitional element of genocidal intent, its cognitive component is rarely addressed in academic writing and jurisprudence. Nevertheless, the necessity of such an element within "genocidal intent" already flows from the logical consideration that only a "genocidal maniac" would act in pursuit of a destructive goal which they think is impossible to attain, or to the realization of which they feel incapable of contributing (for a more elaborate explanation, see Tams Berster & Schiffbauer, 2014, Art. II mns 106 et seq.). While the sheer existence of a cognitive element within the "intent to destroy" is therefore quite evident, pinpointing the extent of likelihood the offender must assume in regard to the intended destruction remains tricky, and even more so in assessing which cognitive degree might have been required in the 1950s. In that respect, indirect guidance can be gleaned from Article 30 of the ICC Statute, which reflects the respective position within international criminal customary law as it stood at the time of the Rome Conference on the Establishment of the ICC (1998) and presumably stands today. For lack of other distinct sources, it seems warranted to assume that the legal state of the 1950s did not considerably differ from this consensus expressed in Art. 30 of the ICC Statute. Pursuant to this provision, unless otherwise provided, the cognitive component ("knowledge") is an indispensable part of the perpetrators' *mens rea* (Article 30 para. 1 ICC-Statute), "knowledge" being defined as the awareness that a consequence *will occur in the ordinary course of events* (Article 30 para. 3 ICC-Statute, emphasis added).

On the basis of these requirements of genocidal intent, the question remains as to whether Soviet officials acted with the intent to physically destroy the Lithuanian ethnicity. Starting with the aspect of volition, at the outset it would seem as a given that Soviet policy-makers did not intend to physically annihilate the ethnic group in its entirety. Lithuanian Courts – unchallenged by the ECHR – were, however, satisfied that such an objective existed in regard to the members of the LLKS and associated persons. Along these lines, for instance, the Trial Court of the *Drėlingas* case held that it was "one of the core goals of that repressive structure (…) to finally physically eliminate the members of the organized Lithuanian national resistance to the Soviet occupation – Lithuanian partisans, their contacts and supporters" (Cited at Judgment of *Drėlingas v. Lithuania*, 2019, para. 37). Arguably, however, while this assessment seems quite convincing in principle, it needs to be specified in order to reflect the Soviet policy-makers' genuine intentions, which most likely did not consist in the intent to kill all partisans and supporters *under all circumstances*. First, it should be taken into account that even somewhat prominent LLKS-supporters or members were not automatically put to death but, at times, were "dealt with" in different forms. For instance, as mentioned in the *Drėlingas* judgment, Vanaga's wife, Birutė Mažeikaitė (code name "Vanda"), was sentenced to eight years' imprisonment and deported to Soviet gulags in Siberia. Moreover, the wording of the KGB reports of 15 and 18 October 1956, which the courts invoked in support of their view that leading Soviet officials indeed sought to physically annihilate the resistance groups, is rather ambivalent. The last report con-

cluded that "having arrested the last leader of the Lithuanian nationalist underground R. [Ramanauskas ("Vanagas")] the *liquidation* of the former heads of the Lithuanian bourgeois nationalist banditry formations was totally completed" (Judgment of *Drėlingas v. Lithuania*, 2019, para. 28, emphasis added). It should be noted that *liquidation* is a broad term that does not forcibly denote the physical destruction (i.e. the killing) of all partisan group members, but may also be understood as total neutralization, incapacitation, and dissolution of said formations. In light of the historical circumstances, the latter interpretation seems to be more fitting, since Vanagas and Vanda were still alive at the time of the report, so that the announced "total completion" of the projected "liquidation" of the targeted groups could hardly be meant to denote their total physical destruction. Down the line, therefore, it would seem more accurate to describe the Soviet agenda in Lithuania as total neutralization of the Lithuanian "bourgeois nationalist" resistance by all necessary means, including the killing of opponents *whenever it might seem purposive or useful to do so*. Yet this concretization of the perpetrators' intentions does not compromise the finding that the perpetrators met the volitional requirement of genocidal intent. Notably, the fact that at the time the destructive policy was forged it was still unclear just how many opponents would actually have to be killed in order to reach the projected goal does not preclude the willingness to kill *all* members and supporters of the LLKS, as the destructive decision itself was unconditional, while only its degree of realization was subjected to circumstances still unknown when the policy was made.

The cognitive component of genocidal intent, however, causes trouble in the present case. As outlined above, this element requires the awareness of a substantial likelihood that a group's partial destruction will occur as the result of the perpetrators' plot. Yet at the beginning and throughout the Soviet anti-resistance campaign, there could not be any certainty as to how many killings in total would have to be committed in order to reach the projected goal to fully neutralize the Lithuanian resistance movement. While it is likely that the Soviet leaders developed some estimates about the potential number of opponents to be killed, then, it should be very difficult to ascertain the number of killings that (from their perspective) would have had to be reckoned with not as a mere possibility, but as a *substantially likely* consequence of their anti-resistance policy. Unless there exist any Soviet reports or memoranda that could shed light on this question (the *Vasiliauskas* and *Drėlingas* judgments make no mention of such documents), the actual death toll provides the only tolerably reliable clue as to what Soviet officials might have projected as a likely consequence of their policy. According to the Lithuanian Supreme Court, roughly 20,000 Lithuanian partisans and their supporters were killed during the resistance (cited at Judgment of *Drėlingas v. Lithuania*, 2019, para. 52), so this number should be taken as an estimator for the scope of the cognitive element, and as a consequence, of the special intent to physically destroy a group (in part).

Thus, on the basis of the foregoing considerations, Soviet policy-makers indeed acted with the "intent to destroy", physically, a fraction of the Lithuanian ethnic group. This fraction numbering no more than around 20,000, however, undercuts the numeric threshold of a sufficient "part" of the group under the definition of genocide, as shall be addressed below.

2.2. Intent to socially destroy a group?

Arguably, extending the notion of "intent to destroy" to certain forms of social or cultural destruction is much more in line with the wording, spirit, and objectives of the Genocide Convention.

Firstly, when the Genocide Convention was forged, the chief objective of criminalizing genocide was to protect the right to exist of such human groups as may be regarded as "the spiritual resources of mankind" (Lemkin, n.d.; similarly Lemkin, 1947, p. 147), and whose disappearing would hence result "in great losses to humanity in the form of cultural and other contributions" (UN General Assembly, UN Doc. A/96(I)). Quite clearly, the Genocide Convention's fundamental concern to uphold the cultural, spiritual, and genetic multiplicity of mankind is no less imperiled by the social dissolution of a group than by the physical destruction of the group's members (Kreß, 2006, p. 486). The *effet utile* principle of treaty interpretation hence strongly militates in favor of an extensive notion of the term "destruction" – an argument, incidentally, which was already raised during the drafting process (UN Doc. A/C.6/SR.83, 195 et seq.; 205). Secondly, reducing "destruction" to forms of physical annihilation fails to explain why genocide can be committed by acts that leave the physical integrity of the group-members unharmed, such as causing serious mental harm to members of the group (under Art. II (b)) or transferring children from one group to another (under Art. II (e) of the Genocide Convention). It only remains to assume, therefore, that the inclusion of serious mental harm serves to cover detrimental effects on a group's social texture as well as

its national, ethnic, and religious peculiarities. Lastly – and contrary to a common presumption – the drafting process of the Genocide Convention does not suggest otherwise. Proponents of the restrictive approach essentially argue that the drafters originally envisaged two types of genocide, physical (or biological) and social, but abandoned the latter concept later-on, thereby limiting the scope of the Convention to the physical (or biological) destruction of a group (Judgment of Application of the Convention, 2015, para. 136). However, a careful analysis of the historical material suggests otherwise. Indeed, at the last stage of the drafting process in the Sixth Committee, criticism emerged against draft Art. III, which specified a set of acts through which social genocide could be committed. Specifically, the Committee found fault with these provisions for lacking terminological clarity (UN Doc. A/C.6/SR.83, p. 197) and for not amounting to the normative gravity of the acts of "physical genocide" (p. 197), and concluded by deleting draft Art. III in total. Yet this deletion of the specific acts of social genocide should not be mistaken as a clear vote for abandoning the concept of social genocide in its entirety. On the contrary, a number of delegates who criticized the acts under Article III (or did not object to their deletion during the vote, respectively), spoke in favor of the concept of social genocide in principle (pp. 193–204) as well as highlighting its practical importance for a group's persistence (pp. 193, 195, 199). It follows that the Committee's vote may well be regarded as a specific move against the inclusion of draft Article III, but not necessarily as reflecting a negative stance towards the idea of social genocide *per se*.

The aforementioned considerations (among others, see: Berster, 2015, p. 1 et seq.) would have opened up an avenue to argue that the specific intent requirement extended to forms of social or cultural destruction all along. It would thus not appear *a priori* excluded that the practice of forcible Sovietization of Lithuania involved a *genocidal* intent to (socially) destroy the ethnic or national group of Lithuanians in whole or in part. Extending the special intent requirement to social destruction is not to say, however, that the (intended) subjugation and Sovietization policy in Lithuania would automatically turn genocidal in character, as – at least from the present viewpoint – only the intention of particularly *grave* infringements upon a group's social texture should be deemed to exceed the threshold for genocide. The need for such reservation follows from the fact that causing detriment to a group's cultural integrity is much tougher to assess than physical destruction, which invariably constitutes a massive wrong. For instance, cultural interference may range from comparably harmless measures of acculturation, such as compulsory school attendance for all children of minority groups, to utterly vile acts such as the targeted killing of all dignitaries of a particular religion. This illustrates that extending "destruction" to all forms of social destruction whatsoever would run into a notional blur that would be at odds with even modest aspirations of legal certainty. However, according to the present view, these issues of vagueness can easily be resolved by means of interpretation. In order to qualify as an intent to *socially* destroy a group in whole or in part, the perpetrator's intentions should have to meet two requirements cumulatively.

The first requirement can be gleaned from an analytical comparison between physical and social destruction: physical (and biological) destruction targets the "physis" of the group's members; social destruction targets the non-physical bonds and links between those members. In order to depict a comparable wrong, the required intensity of social destruction must be constructed as an analogy to physical destruction. Thus, since a group's *physical* (or biological) destruction requires nothing short of the killing (or birth-prevention) of group-members, an analogous notion of *social* destruction would require the near *total* dissolution of the specifically national, ethnic, racial, or religious ties between the group members. At any rate, the perpetrators' destructive goal must be of such a kind that, if accomplished, the (former) group would be incapacitated as a "spiritual resource of mankind," and whose disintegration would hence spell a "great loss to humanity in the form of cultural and other contributions."

The second restriction is required to adhere to the Sixth Committee's decision to eliminate all *acts* of social genocide as provided by draft Article III while (according to the present understanding) not abandoning the concept of social genocide as such. Against this backdrop, only such (projected) campaigns of social destruction as are composed of acts according to Article II (a)-(e) of the Genocide Convention should be rated as genocidal. By tying the vague term of social or cultural destruction to the clean-cut and exhaustive list of genocidal acts under Article II (a)-(e) of the Genocide Convention, the abovementioned concerns that extending the intent to destroy to forms of social destruction would undermine legal certainty can be dissolved.

Having shed some light on the presumptive contours of social/cultural genocide, we can now proceed to the focal question of whether the occurrences in Lithuania met the aforementioned two requirements.

2.2.1. Intent to socially destroy the ethnic group of Lithuanians, in whole

As a first step, one may consider whether the ethnic group of Lithuanians was targeted for social destruction *in their entirety*. Already in regard to the first of the here-proposed requirements, however, it is particularly difficult to fathom whether Soviet policies actually sought to liquidate the Lithuanian ethnic group to a point where it would dissolve into one large Soviet society and lose its ability to contribute to the cultural multitude of mankind. Ponderous voices in academic writing have taken this view, such as that of James E. Mace (1988, p. 119) who held that, at least "[i]n the Stalin period, the Soviet State did not hesitate to attempt the complete destruction of [national and religious] identities and those who bore them, if they were perceived to be hindrances to the state's complete integration and subordination of all forces in society to Stalin's goals". To the same effect, Lauri Mälksoo (2001, p. 784) observed that "[t]he Baltic national groups were ordered to be transformed into something else, for a part of the 'Soviet people', and Stalin's condition for individuals' and groups' right to existence was their willingness to obey to such forced transformation of identity". On the other hand, it should not be ignored that even the sternest Stalinist Sovietization regime left a number of key elements of the Lithuanian ethnicity largely inviolate, such as a common language and literature (irrespective of the increasing role of Russian as a *lingua franca*) and a communal spirit flowing from the awareness of a common history. The sole fact that even decades after the Lithuanian opposition movement was brutally stamped out, the surviving sentiment of ethnic or national unity proved unabated and strong enough to lead to national independence in 1990, may also indicate that the Sovietization policy allowed for maintaining certain ethnic or national properties, albeit on a reduced scale. Moreover, at least extrinsically, the Sovietization campaign in the Baltics and elsewhere features differences in comparison to "typical" forms of social genocide: while the latter consist in the forced acculturation, dissolution, and seamless integration of a (minority) group into an *already existing* ethnic group, the former strived for the creation of an entirely new way of life as an interim step towards the utopia of a classless society. Finally, devout Marxists among those who headed the Sovietization campaign in Lithuania likely believed that the destruction of the bourgeois portions within Lithuanian culture was in essence not a matter of individual will, but of historical necessity, pre-determined by the laws of historical materialism and therefore principally outside of the realm of purposeful human behavior (see, e.g., Marx, 1982, p. 92: "Even when a society has begun to track down the natural laws [!] of its movement (…) it can neither leap over the natural phases of its development nor remove them by decree. But it can shorten and lessen the birth-pangs"). However, is it notionally even possible to build "intent" towards the realization of something when one is firmly convinced of its historical inevitability? These considerations alone indicate that it would go beyond the scope of this contribution (and far beyond the author's historical expertise) to venture an assessment as to whether Soviet policies met the first requirement of the (projected) social destruction of a protected group. Ultimately, however, this question can be left open, as the second here-proposed requirement of social genocide – the intent to destroy a group's social texture *by means of acts according to Art. II* of the Genocide Convention – was obviously *not* fulfilled in regard to the whole group of ethnic Lithuanians, the majority of whom were not targeted for these specific forms of maltreatment.

2.2.2. Intent to socially destroy the ethnic or national group of Lithuanians, in part

It cannot be ruled out, however, that both criteria of "social genocide" were met in regard to a considerable *portion* of ethnic Lithuanians, namely those who were specifically deemed to pose a (potential) source of bourgeois persistence or resistance against the imposed Sovietization policies, and were hence subjected to especially harsh treatment. This fraction comprises not only the members and affiliates of the LLKS, but also extends to the large number of deportees with no apparent connection to Lithuanian insurgency units. The kaleidoscope of measures taken against this fraction of the Lithuanian population is very diverse, ranging from deracinating people from their traditional environment by means of deportation or measures of prolonged incarceration in prisons or gulags to the torture or killing of intellectuals, political or military leaders, and other alleged representatives of the Lithuanian bourgeoisie. Behind all of this, however, one consistent purpose may be made out: the goal to root out the ideologically "unreliable" part of the Lithuanian population (see: Judgment of *Vasiliauskas v. Lithuania*, 2015, para. 59, citing the Constitutional Court of Lithuania: "(…) Lithuanians as an 'unreliable' nation (…)") by disconnecting the targeted persons from the rest of the population and from each other, and hence eroding their social ties to the point of being fully incapacitated from interfering with the project of building a new society under Soviet auspices. Furthermore, said measures to reach this goal invariably qualify as acts under Art. II (a)-(e) of the Genocide Convention. This also holds true in regard to the deportations, which do not in themselves constitute a genocidal act, but were – at least in the case of Lithuania – accompanied and enabled by a multitude of acts

under Art. II, in particular conduct according to lit. (a)-(c). Even on the basis of the here-proposed restrictive understanding of social genocide, then, it would not seem far-fetched to hold that the Sovietization campaign in Lithuania did indeed involve genocidal intent in regard to a sizable fraction of the protected ethnic group of Lithuanians.

3. The relevant part of the group

According to the foregoing reflections, Soviet officials acted (a) with the intent to *physically* destroy around 20,000 LLKS members and supporters and (b) with the intent to *socially* destroy a larger number of ethnic Lithuanians. So it remains to determine whether these respective fractions constituted sufficient "parts" of the group under the definition of the Genocide Convention. As to the precise meaning of the "part" element, only vague suggestions can be gleaned from the Convention and its genesis. In light of the Convention's chief protective purpose, however, only such fractions whose destruction would considerably enfeeble or endanger the group as a whole and thus imperil the group's capacity as a "spiritual resource" of mankind should be deemed to qualify (for more information, see: Tams, Berster, & Schiffbauer, 2014, Art. II, paras 132 et seq.). This basic consideration has found its expression in the common finding that "the part must be a *substantial* part of the group" (Judgment of *Prosecutor v. Krstić*, 2004, para. 12 (emphasis added); Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 198; Decision in *Prosecutor v. Al Bashir*, 2009, para. 146; Kreß, 2006, p. 490), and was also corroborated by the Lithuanian Constitutional Court, who demanded that the targeted fraction represent "a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation" (Judgment of *Drėlingas v. Lithuania*, 2019, para. 59). Since the 1990s, international jurisprudence and scholarly writing have further elucidated that the criterion of "substantiality" or "significance" of the targeted part "can theoretically arise from three different aspects, namely (a) the sheer numeric size of the targeted portion, (b) specific properties or skills of the targeted members which are pertinent for the group's physical or social survival, and (c) a number of circumstantial aspects like the strategic importance of the group members' area of settlement" (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 133) or a specifically symbolic or "emblematic" role afforded to these group members by the other group members. To the present view, it is sound and legitimate to draw upon these aspects – though being formulated decades after the fact – as an interpretative aid in the present case, as they constitute a mere concretization of the *telos*-based substantiality requirement, and were therefore early on implied in the "part" element of the crime's definition (for a different stance, see Judgment of *Vasiliauskas v. Lithuania*, 2015, para. 177, which is challenged in Judgment of *Drėlingas v. Lithuania*, 2019, Judge Motoc diss. op, para. 14). For the application of these criteria to a present case, the ICTY Appeals Chamber provided useful guidance, proposing that the numeric size be taken as "the necessary and important starting point", which should then be supplemented with said additional factors, the applicability and relative weight of which "will vary depending on the circumstances of a particular case" (Judgment of *Prosecutor v. Krstić*, 2004, paras 12, 14, confirmed by Judgment of *Prosecutor v. Karadžić*, 2013, para. 66; Tams, Berster, & Schiffbauer, 2014, Art. II, para. 133). In the case at hand, one would first have to find out if the number of targeted group members relative to the ethnic group's total size *prima facie* satisfied the numeric threshold of substantiality or, failing that, if the lack of magnitude was compensated for by qualitative properties or circumstantial aspects. Quite obviously, determining a numeric bottom-line below which group members are stripped from the Convention's protection and abandoned to their fate is a macabre and discomforting task, and it is not surprising that international courts have at times deemed remarkably small ratios to be sufficient (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 134). Most prominently, the Srebrenica massacre of 1995 was found to constitute genocide (by Judgment of *Prosecutor v. Krstić*, 2001, para. 599; Judgment of *Prosecutor v. Blagojević and Jokić*, 2005, paras 671 et seq.; and Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 297) although the targeted group of Bosnian Muslims in Srebrenica numbered around 40,000 and hence represented less than 3% of the Bosnian Muslim population (Judgment of *Prosecutor v. Krstić*, 2004, para. 15, fns 25 et seq.). In this case, however, the ICTY buttressed its finding by also adducing qualitative aspects, thereby (possibly) indicating that a mere 3% of the whole group would undercut the numeric threshold of substantiality unless counterbalanced by additional factors.

On the basis of this standard, the Soviet policy-makers' intent to physically destroy 20,000 members and associates of the LLKS was not directed at a sufficient "part" of the protected group, and hence did not constitute genocidal intent under international criminal law. According to the data provided by the Lithuanian Department of Statistics, the population of Lithuania numbered approximately 2.3 million in 1951. This brings the ratio of

those who were targeted for physical annihilation down to a mere 0.87% of the whole ethnic group, which definitely undercuts the numeric threshold. Trying to compensate for this small number by means of qualitative criteria would also not seem promising in this case. Even though there can be little doubt that the Lithuanian resistance played leading role as a source of hope for national independence and a cornerstone of ethnic identity (and in that sense constituted a "basis of the Lithuanian civil nation (*pilietinė tauta*)" – Lithuanian appellate court, cited at: Judgment of *Drėlingas v. Lithuania*, 2019, para. 43), history has sufficiently proven that the cultural strength and resilience of the Lithuanian ethnicity remained unbroken even after the resistance organized by the LLKS had been quashed.

In respect of the group members targeted for *social* destruction, things look different. According to the Lithuanian Constitutional Court (cited at Judgment of *Vasiliauskas v. Lithuania*, 2015, para. 62), during the relevant time period, 132,000 Lithuanian inhabitants were deported to the Soviet Union (of whom 35,000–37,000 lost their lives in gulags or prisons and 28,000 perished in "ordinary" exile), while 186,000 people were otherwise arrested and imprisoned.

Even factoring in potential double-counts and overlapping data, with an estimated population of 2.3 million in 1951, it seems safe to conclude that well over 10% (and possibly many more) of the ethnic group were targeted for social destruction. Further, considering that this intent had a special focus on leading figures and representatives of the Lithuanian bourgeoisie whose contributions to Lithuanian cultural and social life can be assumed as above-average, the attacked fraction clearly qualifies as a sufficient "part" of the Lithuanian ethnic group.

4. Genocidal motive

Finally, the crime of genocide requires the perpetrators to have acted on the grounds of a special genocidal motive. However, to all appearances the ECHR completely ignored this requirement, which is a major shortcoming of the *Drėlingas* judgment and all the less explicable as the motive element is well established in international jurisprudence and academia, and even finds an – admittedly vague – textual basis in the international definition of the crime ("group *as such*").

In order to establish if this element already pertained to the crime of genocide at the time in question, however, we must once again take a look into the drafting protocols. These reveal that throughout the shaping of the crime's definition, the role of motives was fraught with dispute. This discussion arose during the intermediate drafting stage at the "*Ad Hoc* Committee", when the Lebanese delegate remarked that an additional criterion would be required to reshape genocide as a particularly reprehensible destruction of human groups and exclude certain scenarios from the definition "in which the intentional destruction of a group appeared less reprehensible and inapt to shake the conscience of mankind, such as the destruction of a group which itself habitually committed the crime of genocide" (Tams, Berster, & Schiffbauer, 2014, Art. II, para. 26). To the delegate's mind, this criterion was to be best found in the underlying motive: "Included in the crime of genocide, therefore, would be all acts tending towards the destruction of a group on the grounds of hatred of something different or alien, be it race, religion, language, or political conception, and acts inspired by fanatism in whatever form" (UN Doc. E/AC.25/SR.2, pp. 3–4). A number of states warmed to this idea, opining that a motive element was essential to capture the intrinsic characteristics of genocide (UN Doc. A/C.6/SR.72, p. 84; UN Doc. A/C.6/SR.75, p. 119), and leaving it out would allow cases which should not constitute genocide to fall under the definition, such as the destruction of a group for motives of profit (UN Doc. A/C.6/SR.75, p. 118) or bombing raids against whole groups as a means of defensive warfare (p. 119). However, the proposition remained controversial. The United Kingdom, which led a group of states who opposed any reference to motive in the definition of the crime, argued that the limitative nature of motives was dangerous as it "allowed the guilty to exonerate themselves from the charge of genocide on the pretext that they had not been impelled by motives contained in the proposed list" (p. 120). Eventually, the issue was formally settled through the abovementioned compromise formula, whereby the term "intent to destroy a group" was supplemented by the addendum "as such". The exact meaning of this element, however, remained disputed among the drafters even after the text was adopted.

Despite this controversy at the drafting stage, it would nevertheless be inaccurate to conclude that the motive element was not from its inception incorporated in the crime's definition, since it did make it into the text of Art. II of the Genocide Convention, albeit in a rudimentary form. Simply turning a blind eye to the confining words

"as such" would hence mean interpreting the crime *in malam partem* and to the detriment of the accused, which would hardly be in line with the principle of *nullum crimen sine lege* or, respectively, the common-law-based rule of strict construction or interpretation that governed international criminal law from the beginning (albeit naturally on a reduced scale, see: Ambos, 2013, p. 88 et seq.) and is now prominently enshrined in Article 22 para. 2 of the ICC Statute. For the same reasons, failing to consider the term "as such" as a confining motive-requirement while assessing Drėlingas' conviction in terms of Art. 7 ECHR marks a serious flaw within the ECHR's judgment.

In order to fathom whether Soviet policy-makers acted on the basis of a genocidal motive, recourse can be made to a formula used by modern-day international jurisprudence, whereby "[t]he victims of the crime must be targeted *because of* their membership in the protected group, although not necessarily solely because of such membership" (Judgment of *Prosecutor v. Blagojević and Jokić*, 2005, para. 669 (emphasis added); Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007, para. 187; Judgment of *Prosecutor v. Niyitegeka*, 2004, para. 53; Judgment of *Prosecutor v. Ntakirutimana* et al., 2004, paras 304, 363; Judgment *Prosecutor v. Akayesu*, 1998, para. 521; Judgment of *Prosecutor v. Krstić*, 2001), para. 561; Kreß, 2006, p. 499). On the basis of this definition and the present author's historical understanding, however, the completion of the motive element must be called into doubt. One chief reason for the Soviet attack on a large part of the Lithuanian ethnic group consisted in their actual or alleged stance of opposition against foreign rule and the denial of the right to self-determination. Yet to this extent, the motivation is a purely *political* one, and is not driven by any aspects pertaining to the *ethnic* categorization of the victims. Besides their wish to secure grip and sheer political power over Lithuania, however, Soviet officials also acted to stamp out the victims' "bourgeois" way of life, which was deemed incompatible with the doctrine of socialism. This political socialist agenda of forcibly replacing an "outmoded" social order with another undeniably implied a certain ethnic dimension as well, since the formerly practiced civilian lifestyle certainly formed an aspect of Lithuanian culture and, thereby, of the Lithuanian ethnicity. *Insofar*, it would seem warranted to hold that the destructive Soviet agenda was partly fueled by ethnic considerations as well. But should such a rather weak "*co*-motive" really be sufficient to conclude that the victims were attacked *because* they were ethnic Lithuanians? Preferably not. It should be taken into account that the lifestyle habits of the bourgeoisie are or were no specific property of the Lithuanian ethnicity but of a multitude of ethnic groups since the beginnings of the bourgeois age. These structures are hence best conceived of as providing a social frame or points of crystallization for the standalone properties and idiosyncrasies of a specific ethnicity. They do not constitute a central or fundamental criterion of ethnicity, as opposed to aspects like common language, literature, art, shared narratives, and the consciousness of a common historical destiny. These latter *defining* aspects of Lithuanian ethnicity, however, supplied neither motive nor cause for the Soviet policy of suppression. Wherever Soviet officials sensed or suspected "bourgeois" opposition similar to the one in Lithuania, they combated it with the same recklessness, as is evidenced, *inter alia*, by the examples of Latvia and Estonia. Therefore, in due respect of the wording of Art. II of the Genocide Convention and in order to uphold the confining function of the motive element, attacks on an ethnic group should not qualify as genocidal if they are motivated by aspects that do not pertain to the group's defining properties (the controversial question as to whether a group's defining properties should be judged from the perspective of the perpetrators, the victims, or an objective bystander is irrelevant in this case, and can hence be left open). In conclusion, the motivation behind the oppressive campaign in Lithuania was not genocidal in character.

Conclusions

The foregoing brief analysis hence prompts the sobering conclusion that the occurrences in Lithuania from 1948 to 1957, albeit constituting a borderline case, ultimately defy categorization as genocide under Art. II of the Genocide Convention. This finding should however not be mistaken as diminishing or even trivializing the tremendous suffering of the Lithuanian people under Soviet rule. Conversely, the case of Lithuania may serve as a prominent example of the well-known fact that the complicated definition of genocide, forged in the incipient stage of international criminal law, holds considerable lacunae and should not be (mis-)conceived of as a reliable measuring tool for the magnitude of mass-crimes and historic wrongs. One lesson to be drawn from the cases of *Vasiliauskas* and *Drėlingas* is the cognizance of an unabated need to strengthen, concretize, and further develop the legal instruments of international criminal law in order to close potential loopholes. This being said, the rather "technical" approach of legal interpretation taken in this contribution may nevertheless find itself exposed to doubts in terms of *summum ius summa iniuria*. To the same effect, Judge Kūris raised his admonitory remarks against the majority judgment in *Vasiliauskas*, whereby "[c]ourts in their ivory towers deal with the law, but not

only that. More importantly, they are dealing with human justice" (Judgment of *Vasiliauskas v. Lithuania*, 2015, diss. op. Judge Kūris, para. 8). On the other hand, at least in this author's firm belief, it is only *through* the law that our path towards human justice remains a promising one – despite setbacks along the way.

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FREEDOM OF MOVEMENT OR A HOLIDAY IN ZANZIBAR: THE RIGHT TO LEAVE AND RETURN TO THE HOMELAND

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Abstract. The Charter of Fundamental Rights and Freedoms, as a key part of the constitutional system of the Czech Republic, was adopted thirty years ago. This happened in a fundamentally different society. Over the past thirty years, Czech society has undergone significant changes. From a society of scarcity, it has become a much richer society as a whole, accustomed to a high standard of consumption and possessing higher expectations. Czech society has also changed in the sense that it has gone from being a collectivist society to one based on strong individualism. This can be well illustrated by the example of Article 14 of the Charter of Fundamental Rights and Freedoms, which guarantees freedom of movement and, among other things, the freedom to travel beyond the borders of the state and to return to its territory. At the time of the creation of the Charter of Fundamental Rights and Freedoms, in 1990–1991, this right was perceived primarily as the right to leave the territory of the state and return without the need for the consent of the ruling regime, i.e., regardless of the political attitude of the state towards the individual and vice versa. Naturally, this right also included an element of possible economic emigration. During the COVID-19 pandemic, it became apparent that freedom of movement was perceived, not by the whole of society but by a not-insignificant part of it, as an unrestricted right, including the right to go on holiday and to return, regardless of the health consequences. This is one of the proofs of a change in Czech society's view not only of itself but also of the content of the Charter of Fundamental Rights and Freedoms.

Keywords: freedom of movement; Charter of Fundamental Rights and Freedoms; limitability.

Introduction

This year's annual conference held on the Constitution Day was dedicated to the rule of law and current challenges and problems in its implementation in practice. This is an extremely topical subject for two reasons. The first reason is obvious. The fight against it entails many measures that also imply interference with the rule of law, in addition to interference with the fundamental rights and freedoms of the individual. The second reason is linked to this first reason, but goes beyond it, even though it apparently concerns only the countries of Central and Eastern Europe. It lies in the fact that this year marks three decades since the restoration of democracy, human rights, and the rule of law in this region. Thirty years is a long time to be able to observe the transformation of society. The societies of the countries of Central and Eastern Europe have changed considerably over that period (Klima, 2005, p. 5).[2] As this is a slow change, it is not the subject of significant or everyday discussions (Filip, 2010, p. 315; Kudrna, 2021, p. 57),[3] although such assessments have begun to appear in the public space in the last few years (Suchanek & Jiraskova, 2009, p. 7).

Importantly, the transformation of society's view of itself also has an impact on society's view of its basic constitutional documents and the principles on which they are based – and which they are supposed to guarantee

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[2] Let us compare the impact of this long period with the observation of Prof. Karel Klíma from the Faculty of Law in Pilsen, who points to a significant social shift already during the year and a half that separated the preparation of the Charter of Fundamental Rights and Freedoms and the Constitution of the Czech Republic.
[3] Prof. Jan Filip from Masaryk University in Brno, and judge of the Czech Constitutional Court, specifically mentions the traditional lack of interest in the anniversary of the Charter of Fundamental Rights and Freedoms.

and ensure (Paine, 1999, p. 9).[4] As society and its needs change, so too does its view of what codified texts mean (Pavliček, 2011, p. 464).

As far as the rule of law is concerned – but also other fundamental rights and freedoms – this is the result of liberal political and social thinking in our legal space over recent decades. The purpose of fundamental rights and the rule of law is to guarantee individual freedom to the extent that this is at most possible without compromising the functioning of society (Barber, 2018, pp. 2–6; Garlicki, 2000, p. 32; Winczorek, 2000, p. 110; Holländer, 2009, pp. 262, 265).

However, these rights and freedoms, including the rule of law, are perceived differently by a society that has just liberated itself from totalitarianism and is beginning its journey towards individualism and prosperity, and differently again by a society that is already individualistic and prosperous. In the first case, the rule of law is a promise and a goal of this journey; in the second case it is a demand and an expectation. In the first case, society is still essentially restrained; in the second case, its members often actively seek further ways to expand the space of their individual freedom and to break free from social constraints. In both cases, the same legal document and the same legal principles are applied, but in different conditions.

The aforementioned global COVID-19 pandemic marks a return to previous decades in a societal sense. The space for individualism and its expansion has been reduced, because the fight against COVID-19 means fighting to protect public health, which also entails limiting the rights and freedoms of individuals (Barber, 2018, pp. 6–9).[5] This pandemic has shown just how much our societies have changed, and how individualized they are. It has also shown how, in the fight against the COVID-19 pandemic, some solutions which would not have surprised anyone thirty years ago – but which, in today's society, are perceived by a significant proportion as undemocratic, even totalitarian – are being returned to.

This paper attempts to show this fundamental shift through some concrete examples from the Czech Republic.

1. Historical context

The Charter of Fundamental Rights and Freedoms (hereinafter "the Charter") was adopted by the Czechoslovak Federal Assembly on 9 January 1991, and entered into force on 8 February of the same year. The reasons, objectives, and motivation for the adoption of the Charter are well captured in its preamble. The preamble was essentially mirrored by the speakers who addressed the 11th Joint Session of the two Houses of the Federal Assembly at which the Charter was adopted (Stenographic record, 1991). The adoption of the Charter was to be one of the steps towards fulfilling the demands of November 1989. This was manifested, among other things, by the efforts to approve a new catalogue of human rights symbolically on the first anniversary of 17 November 1989 (Pavliček et al., 1995, p. 14).

In relation to the demands of the civic initiatives of the autumn of 1989, the Charter was therefore primarily intended to create the basis for an enforceable legal framework for the truly free status (Pavliček, 2011, p. 463) of every person in Czechoslovakia (Pavliček et al., 1995, p. 13; Filip, 2010, p. 315). It was also intended to confirm a return to the values and ideals with which Czechoslovakia was founded (Pavliček et al., 1995, p. 15), and which a significant part of society aspired to or at least longed for in some form, even in the non-free times – i.e., democracy, self-governing principles, and civil society. However, the Charter also had an impact on international politics and Czechoslovakia's position in the international community. Demonstrations in November and December 1989 included the demand for "Back to Europe" (Filip, 2010, p. 316) – i.e., to join the family of states that were committed to respecting the rights and freedoms of the individual as the basis for the functioning of society and the state. In order to uphold these values, these states gave up part of their sovereignty and submitted to the authority of international organizations, among which the Council of Europe (Copenhagen criteria, 1993,

[4] Let us recall the words of Thomas Paine: "Every age and generation must be as free to act for itself, in all cases, as the ages and generation which preceded it. The vanity and presumptions of governing beyond the grave is the most ridiculous and insolent of all tyrannies".
[5] See the term *positive constitutionalism* mentioned by prof. N. W. Barber.

Art. 1(2))[6] stands out. For Czechoslovakia, this also meant adopting the standards of this organization and harmonizing the Czechoslovak legal system with the European Convention for the Protection of Fundamental Rights and Freedoms (hereinafter "the Convention") (Filip, 2010, p. 315). The adoption of a Charter compatible with the Convention was therefore also of national political significance.[7] This, however, significantly exceeded the State level of interest, because with regard to the direct enforceability of the Convention by the individual, it was of positive significance for every person in Czechoslovakia and for the guarantees of their rights and freedoms.

Like all things, the Charter reflects the time and circumstances of its creation and is the product of contemporary social processes (Pavliček, 2011, p. 464). It expresses the needs and expectations of contemporary society and is intended to address its problems (Pavliček et al., 1995, p. 14; Filip, 2010, p. 317). The thirty years that have elapsed since the adoption of the Charter are a long time not only in the life of an individual, but also in the life of society today. These thirty years were a period of great social, economic, technological, and political change. In the course of thirty years, generational change has reliably taken place. The society that gave itself the Charter no longer exists. It is therefore inevitable that the needs of contemporary society and the view of the Charter must also differ from those associated with the time of its creation.

The Charter was adopted as a legal document taking into account the experience of two totalitarian regimes – especially the communist regime, naturally (Filip, 2010, p. 317). Many of its provisions are still interpreted in this light (Decision of the Constitutional Court, 2006).[8] This is natural and it is right, because the Charter was created in response to the communist totalitarian regime. However, the developments of the past thirty years have brought new problems. Certainly, the Charter can also provide an answer to these, but it requires a fresh look at its provisions, a discussion of their interpretation, and the finding of a new social consensus.

In the author's view, the questions thus opened up touch on virtually all the provisions of the Charter. This text touches on just a few issues to highlight the difference in social circumstances between thirty years ago and today. In particular, these are the issues of freedom of movement, the right to leave the territory of the Czech Republic, and the right to return. In all these cases, we can clearly see the differences between the social conditions of 1991 and those of 2021.

2. From the right to leave the homeland and possibly return to it to the right to holiday in Zanzibar without restrictions?

As far as freedom of movement is concerned, its origins as a universal right are linked to the Enlightenment and the end of feudalism. This occurred at different times in different countries in Europe, but for the area of Western and Central Europe this was in the 18th century. Freedom of movement means, above all, the liberation of the rural population from its attachment to the land and the local authorities. It is also inextricably linked to the freedom to settle, in principle, anywhere in the territory of the state, and is so treated by Article 14(1) of the Charter, where the two freedoms are linked.

The freedom of movement and residence, or, where appropriate, establishment, has always taken two forms. One element has been the free movement of people within the state, the other has usually been cross-border movement. It is worth remembering that, until the 1857 publication of Imperial Decree No. 31/1857 of the Reich Code, Austria made the movement of its own inhabitants within its territory conditional on the possession of a valid

[6] If membership of the Council of Europe was most important in terms of achieving high standards of human rights protection, human rights guarantees were also important in terms of Czechoslovakia's other political aspirations, namely its prospective entry into the European Economic Community. The EEC declared the issue of respect for human rights in the form of the so-called "Copenhagen criteria" as one of the basic conditions for membership.

[7] This is also clear from the opening address of the President of the Federal Assembly, Alexander Dubček, at the aforementioned joint meeting of the two Houses of the Federal Assembly.

[8] In it, the Constitutional Court explicitly argues the "historical conditionality" of the constitutional prohibition on forcing a citizen to leave their homeland, as set out in Article 14(4) of the Charter. According to the Constitutional Court, this provision refers to the practice of the communist regime, which forced some of its opponents to emigrate. Now, in a democratic state, this prohibition cannot be applied to extradition under the EAW, and a euroconformist interpretation must be preferred and the limitations of the cited prohibition overcome by way of interpretation.

passport. In 1859, Austria acceded to the Dresden Convention of 22 October 1850, which established the free movement of citizens of the German States within its territory. Thus, the movement of persons between Germany and Austria was possible without restriction by border controls. Imperial Decree No. 116/1865 of the Reich Ordinance abolished all passport controls at the Reich borders. After the Austro-Hungarian settlement, Hungary enacted its own legislation and Austrian citizens were considered foreigners in the eyes of the law. That passport control between the two parts of the monarchy was not carried out in practice was another matter (Rychlik, 2007).

A fundamental change in the regulation of freedom of movement and residence was brought about by the First World War, after which there was essentially no restoration of the liberal conditions that prevailed in most of Europe before its outbreak. Of course, the period of Nazi and Communist totalitarianism is crucial for the consideration of freedom of movement and residence in the territory of the present-day Czech Republic. However, even in pre-war Czechoslovakia, conditions were not comparable to the period before the First World War. This was naturally due to the pan-European situation. As far as the so-called Third Czechoslovak Republic was concerned, the legal situation in 1945–1948 was not fundamentally different from the later communist situation (Rychlik, 2007, pp. 26–33). The experience of the communist regime's policies was of course decisive for the drafting of the Charter, and this is doubly true for freedom of movement. Indeed, this was repeatedly emphasized in the speeches preceding the final stage of discussion and approval (Stenographic record, 1991).

It is clear from all circumstances, whether unspoken or explicitly mentioned, that the Charter was primarily intended to guarantee every citizen the right to leave the country for political reasons and, regardless of political reasons, the right of return, which can also be described as the right to the homeland. These intentions are also consistent with the Fourth Additional Protocol to the Convention, in particular Article 2 para. 2 and 3, and Article 3 para. 2.

Neither the Charter nor its drafters ever conceived of this right as absolute. Similarly, the 4th Additional Protocol to the Convention is not conceived as an absolute, without the possibility of regulating or even preventing the movement of even its own citizens.

Moreover, there is no need to argue historically; the construction of the Charter itself is clear. The freedoms guaranteed by Article 14 par. 1 and 2 are clearly those freedoms which, for a number of reasons, paragraph 3 of the same Article allows for the restriction of (Klima, 2005, p. 709). It permits the restriction of the freedom of movement and residence by law where this is necessary for the security of the state, the maintenance of public order, the protection of health, or the protection of the rights and freedoms of others. In designated areas, such fundamental rights and freedoms of people may even be subordinated to the interests of nature.[9]

Let us add that the legal restrictions envisaged by the Charter do indeed exist in current law, ranging from the obligation to travel to many countries only with a passport and to return with it, to the possibility for the state to withdraw travel documents in justified cases, to the prohibition of travel, whether for pandemic reasons or for reasons of increased state threat – for example, in times of national emergency or a state of war.

Where proof of a personal document is not required when crossing national borders, as is the case within the Schengen area, the legislation, namely the so-called Schengen Borders Code (Regulation (EU) 2016/399, 2016), allows restrictions to be temporarily imposed for compelling reasons, and thus naturally the restriction of freedom of movement. However, it must be stressed that identity checks at the national border do imply a restriction of freedom of movement, but not its prevention. This matter is dealt with by the Treaty on the Functioning of the European Union, which allows, in Article 45 para. 3, for the restriction of this one of the fundamental freedoms of the European Union for, inter alia, reasons of health protection. Thus, while border checks or other

[9] This aspect is noteworthy because, on the one hand, it is an abandonment of a rather anthropocentric conception of the Charter, and, unlike other grounds, no one has ever, in principle, made a major political or legal case against restricting freedom of movement and residence on environmental grounds, comparable to the debate on whether it is possible to restrict holiday travel to a country heavily burdened by an ongoing pandemic. In other words, no one has ever argued for a person's right to stay overnight without regulation in a designated protected area, even if the person in question has not caused any damage to the area. Respectively, restrictions and possible sanctions are generally accepted by society without embarrassment. However, the right to go on holiday without restrictions, even in a risk area, is fought for, even if the return is to increase the risk to other people.

accompanying checks are merely a procedural restriction and cannot, without a substantive reason, lead to a prohibition of entry and a restriction on freedom of movement and residence, the actual restriction is due to substantive reasons. Thus, the European Union also envisages the possibility that Member States may restrict freedom of movement and residence in relation to their territory for exhaustive reasons.

Although Article 14 par. 4 of the Charter does not explicitly speak of the limitability of a citizen's right to return to the Czech Republic, at least the first sentence of this provision is not absolute and unlimited (Klima, 2005, p. 710; Pavliček et al., 1995, pp. 142–143)[10] – Article 4 of the Charter can be applied to it. This is what happens in practice, since entry into the territory of the state is in some cases conditional on proof of a travel document, typically a passport. This requirement has also never been challenged as to its constitutionality.

More interesting is the question of the provisions of the second sentence of Article 14 para. 4 of the Charter. Its wording rather gives the impression of an unlimited nature. However, we know that this is not the case. This view was refuted by the Constitutional Court in its ruling in the case of the so-called Euro-warrant, file no. Pl. ÚS 66/04. The reasoning used by the Constitutional Court can be disputed. The preference for a teleological interpretation and the neglect of a grammatical interpretation is problematic. The author considers the argumentation to be particularly double-edged, when the Constitutional Court emphasized that the provision in question was expressly created as a reaction to the practice of the communist regime and was not intended to be applied, for example, to the extradition of Czech citizens abroad for the purposes of criminal proceedings.

In this case, we can observe a visible shift in the view of the Charter and its role in relation to the citizen – from extensive protection towards its reduction. What is interesting, however, is the justification for the reduction in the protection of the rights of the citizen. This is not the interest of the citizen concerned, but is a higher state interest, where the aim is to contribute to the Czech Republic being a good member of the European Union.

However, the key point in relation to freedom of movement is that the freedoms guaranteed by Article 14 of the Charter have never been seen as unlimited, either by their framers or by the Constitutional Court.

All the more surprising was the statement by the President of the Constitutional Court, P. Rychetský, who, in an interview with Czech Television on 29 November 2020, described the government's action, which restricted the cross-border movement of people during the fight against the COVID-19 pandemic, as "absolutely unconstitutional". Specifically, he said:

> At one point (the government) closed the borders and no one was allowed to leave the Czech Republic. So that is absolutely unconstitutional. The government can close the borders in that crisis situation, but for the return or for the entry into the country. But we have in the constitution, for reasons that only older people remember, for that totalitarian regime, we have an explicit provision that no one can be prevented from leaving this country (Rychetský, 2020, 25:50–26:25).

This statement is clearly erroneous in light of the text of Article 14 of the Charter. There is no point in discussing it further, as it provoked a number of reactions, all of which pointed to the fact that in May 2020 the Constitutional Court refused to address this very issue (Hasenkopf, 2020; Malecky, 2020).[11] This was under the leadership of P. Rychetský, not only as President of the Constitutional Court, but also as Judge-Rapporteur (Resolution of the Constitutional Court, 2020). This stance is noteworthy because it fits into a broader current of opinion, where from the beginning of the introduction of restrictions on travel abroad, criticism has been voiced that such a procedure is unconstitutional because freedom of movement is (or should be) unlimited. Given the social authority of the President of the Constitutional Court, the interview undoubtedly strengthened and legitimized this current of opinion in Czech society.

[10] Moreover, Professor Karel Klíma draws attention to the substance of Article 12(4) of the International Covenant on Civil and Political Rights, which prohibits the "arbitrary" denial of a citizen's entry into the territory of their own state.
[11] See, e.g., the commentary by lawyer P. Hasenkopf, or a commentary by journalist Robert Malecky, a long-time specialist in law and justice issues.

Even if this was only one of the currents of opinion, other opinion groups were in favor of much more drastic restrictions on cross-border movement, and, in the author's opinion, they deserve attention as they show a shift in the thinking of a not-insignificant section of society. Whereas at the time of the adoption of the Charter freedom of movement was strongly political in nature, i.e., emigration or return to the homeland was to be prevented for political reasons, over the past thirty years this reason has essentially receded into the background, and Article 14 of the Charter is given a much wider meaning by a significant section of society – it is intended to provide protection against any restriction by the state. Thus, the right to leave the country for political reasons has become the right to go on holiday at anytime and anywhere, even to Zanzibar, which was at one moment a proverbial place in the Czech Republic.[12]

Conclusions

It is hardly surprising to see such a shift in thinking. As mentioned at the outset, today's society is fundamentally different from the one that gave itself the Charter thirty years ago.[13] This is a society that is generally affluent, civically confident, accustomed to a much higher standard of living, and which feels what society took for granted thirty years ago as a difficult-to-carry limitation.

The Charter itself has not changed in the past thirty years. Society's view of itself and of what is acceptable and unacceptable has changed fundamentally. It has done so in an essentially unobtrusive manner, without wider social discussion. It was only the case of the so-called 'euro-warrant', mentioned by experts, that sparked this debate. However, this discussion did not, for natural reasons, reach a significant part of society. This was only proved by the COVID-19 pandemic, which affected everyone without exception and has already caused a society-wide debate. The conclusions so far are of a rather practical nature. In practical terms, the restrictiveness of the freedoms guaranteed by Article 14 of the Charter has so far held out.

If the opposite view should prevail, then the discussion should be more thorough. The possibility of preventing the departure of, for example, persons with final convictions and perhaps even criminal prosecutions, would probably stand up to a deeper and more intensive discussion. The question is, however, how the discussion would proceed, for example, on the provisions of Section 24 of Act No. 585/2004 Coll. on Conscription and Enlistment (the Conscription Act), as amended. In the case of a citizen subject to conscription, this provision makes their travel abroad during a state of national emergency or a state of war conditional on the state's consent. Although this matter is now rather hypothetical, it can be assumed that at a time of heightened national emergency, the social debate on the subject would undoubtedly be stormy – leaving aside the fact that it is somewhat belated.

Changes in the way the state views itself, society, and the individual, what its role should be, and what capabilities it should have also play a role. The state, which is made up of people, is of course subject to the same changes as society as a whole. If the issues of implementing conscription have been mentioned, it is worth mentioning that the state has completely lost the ability to use this obligation quickly and to replenish the armed forces if necessary.[14] Another example of an absolute change in the state's view of its role in relation to society is the abolition of the possibility of the blanket removal of legally held weapons from their owners if necessary in a state of national emergency and in a state of war. It is worth noting, in this case, that these were not demands from below but were an initiative of the Ministry of the Interior itself.

[12] This happened at the turn of 2020 and 2021, when Zanzibar, unlike other holiday destinations, was not included in any pandemic travel restrictions, and interest in holidays there skyrocketed. When travel between districts within the Czech Republic was banned in March 2021, travel to Prague airport was a holiday, so Czechs could not visit their relatives in the next district, but, paradoxically, they could travel to and from Zanzibar with virtually no restrictions.

[13] Indeed, we can see the same at the level of the European Union. At the beginning of the 1990s, one of the fundamental pillars of European integration, freedom of movement, was only a freedom for workers, and for a limited period of time. In 2021, it is the right of anyone to move and settle anywhere in the European Union, essentially without restriction. However, this shift in thinking has also caused problems within the European Union.

[14] It is beyond the scope of this paper to describe the reasons for this, except to mention that there is a whole complex of causes. Starting with the virtual non-existence of army reserves, through the state's ignorance of potential conscripts and their capabilities, to the legally and administratively complex system of conscription.

Although the Charter is an extremely rigid document in terms of direct normative changes, it is subject to even fewer visible changes due to the way society changes and perceives itself, and, thus, what it expects from the Charter. Article 14 is a testament to this, and offers good inspiration for possible future considerations. These considerations should also leave room for so-called positive constitutionalism, which also considers the social interest and the knowledge that every individual is part of society and that their rights can hardly, if at all, be realized outside society (Barber, 2018, pp. 6–9).

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PRIVACY PROTECTION IN THE DIGITAL AGE: A CRIMINAL LAW PERSPECTIVE

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Abstract. Privacy as a fundamental right faces considerable challenges as people's activities have moved into cyberspace. The development of technology has had an impact on a various areas related to personal privacy. This article discusses changes to the concept of privacy in the digital age, presents approaches to privacy issues in the law of the European Union (EU) and United States (US) today, and reveals the aspects of privacy protection in criminal law based on the relevant Lithuanian case law and Ukrainian law. This analysis showed that legal regulation and practice must be adapted to the changed situation. The use of technology has created new ways of committing serious privacy violations; therefore, criminal law must be ready to properly respond to the changing nature of crimes against personal privacy in the digital age.

Keywords: privacy, inviolability of privacy, digital age, principle of equivalent treatment, EU privacy approach, US privacy approach, Lithuanian privacy approach, Ukrainian privacy approach.

Introduction

The coming of the digital age brought new challenges and perspectives; it influenced all aspects of people's lives, including in the most general sense and in specific modes of action. The features of the digital age can be identified as the following: (1) a significant part of all activities takes place in cyberspace or has an online component; (2) digital tools are extremely common in both public and private life; (3) data has become key to any economic, social, or political activity; (4) the amount of data is large and the speed of its spread is incredibly high; (5) the development of societies is uneven, and this is exacerbated by the digital divide; and (6) the power of business structures is growing, including their ability to modify the behaviour of users of digital tools.

These factors defined crucial changes in attitudes towards human rights and privacy, in particular from a legal perspective. Such changes were not instantaneous, but nor were they imperceptible. From the moment when the development of digital technologies began to gain momentum and penetrate into all spheres of society, serious concerns have been expressed about threats to privacy from such technologies (DeCew, 1997), maintaining privacy in cyberspace (Schwartz, 1999), and dramatic changes in law as such (Hildebrandt, 2015). There are also many concerns about the consequences of the digital age that were not earlier regarded as threats, namely: the indirect impact of digital technologies on democratic societies and the subtle undermining of democratic foundations (Nunziato, 2009; Diamond, 2010; Etling et al., 2010; Liveriero, 2019); changes in the ways and speed we receive information and, accordingly, the perception of media messages by society (Ekstrand, 2015); the disproportionate impact on people and communities that business structures which own digital tools have (Shadmy, 2019); and the impact of the long-lasting digital footprint on human rights and privacy (Rosen, 2012; Ambrose, 2013; Razmetaeva, 2020). The scientific literature also raises questions about the importance of the principle of equivalence in criminal law (Fedosiuk & Marcinauskaitė, 2013), and reveals various privacy concerns in light of developing technologies (Scott-Hayward et al., 2015; Dorraji & Barcys, 2014). At the same time, it

appears that the challenges to privacy posed by the very nature of the digital era are still underestimated, as well as their implications for law, especially for such important and simultaneously conservative areas as criminal law.

This article attempts to address the challenges to privacy that have emerged in the digital age, bearing in mind their impact on criminal law from the points of view of different paradigmatic approaches. For this purpose, a comparative analysis of the EU and US approaches to protecting privacy, its relationship with freedom of expression, and reasonable expectations in the area of privacy in connection with digitalisation is carried out. Conceptual changes in privacy *per se* and their role in defining changes in law, including criminal law, are explored. This article also reveals the significance of the principle of equivalent treatment applied in ensuring the proper interpretation and application of the criminal codes. This principle becomes relevant when actions transgressing the inviolability of privacy are committed in cyberspace. Analysis of case law is used to show the peculiarities of the use of technology and changes in privacy violations, which justify the need for a broad interpretation of private life that applies such concepts to cyberspace.

This paper also turns to the legal answers offered by developed and developing democracies in the area of privacy protection, as exemplified by Lithuania and Ukraine, which rely primarily on a European approach to the interpretation of privacy. The choice of these approaches for comparison is explained by the following reasons: (1) the approaches of the EU and the United States are the most authoritative both from the point of view of influential actors, including the authority of the relevant judicial institutions, and from the point of view of responding legally to the challenges of the development of digital tools; (2) the approaches of Lithuania and Ukraine are taken as those that, in terms of values and regulations, are applied in democratic countries, and at the same time both are based on EU standards; and (3) the comparison of the approaches of Lithuania and Ukraine reflects the different degrees of their compliance with EU standards, and the different strength of democratic institutions and the rule of law in these countries.

The methodology used in this study is interdisciplinary, combining philosophical and practical approaches starting from the anthropocentric idea of human rights and allowing for the justification of the need to take into account changes in privacy so that individuals can maintain control over their lives. The interpretation of different approaches to privacy in this paper is based on an analysis of the case law of the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), the Supreme Court of the United States, the practice of the Constitutional Court of the Republic of Lithuania, and the decisions of Lithuanian courts in criminal matters.

1. Changes to the concept of privacy in the digital age

1.1. The essence of these changes

Privacy is one of the broadest fundamental rights, and at the same time a concept that has a significant impact on the lives of individuals and societies in the digital age. The interactions of all subjects of law, which are often mediated today by new communications and digital technologies, include an element of privacy protection, especially in the areas of data protection and online confidentiality. It seems that there have been some changes in the understanding and protection of privacy in the digital age,[1] which are reflected in the following:

(1) Privacy is acquiring the features of a collective phenomenon, where private information can be not only what individuals disclose about themselves, but also what others disclose about them. For example, tagging photos on social media gives basic control over group photo settings to those who upload them. Of course, the person being identified has some tools to stop unwanted data leaks, but these tools may be ineffective or belatedly applied. In addition, public expectations regarding private lives have changed. For instance, such expectations could include the need to have at least one social network account filled with some information. On the one hand, this is a matter of free will, but on the other hand it is a matter of social pressure. Today, we are forced to interact more than ever, even if we do not want to, and to rely on others that control part of our privacy – even if we are not personally acquainted with these others and do not pass on or disclose private information directly to them. Attempts to

[1] Part of this concept was presented at the Data and Ethics: Second Transatlantic Conference, University of Vienna (AUT), Saint Anselm College (USA), University of St. Andrews (UK), Nov 22–23, 2019, Stift Klosterneuburg, Austria. The authors are very grateful to the conference participants for their valuable comments and remarks.

overcome the impact of such interactions include a gradation of privacy, involving recourse to the idea of group privacy. For example, Mariarosaria Taddeo (2020) calls for the need to protect this type of privacy "in the age of big data and artificial intelligence, where data collection is often finalised to identify categories, groups, of individuals rather than to single out a specific person" (p. 173). At the same time, the division of privacy into individual, group, and perhaps the privacy of communities or even societies requires a cautious approach, because it possible to lose the very essence of privacy.

(2) The long-lasting digital footprint is having an increasingly noticeable impact on privacy. A person may forget what private information they have disclosed in the past, or may change their identity, but a lot of information about them is stored for years and can be easily found. In the absence of effective legal (and technical) means of erasing such a trace, reliance remains largely on the fact that individuals will learn to be aware of the consequences of the information about themselves that they leave in the form of data. At the same time, the level of monitoring of the actions of individuals in the digital environment and monitoring by technical means is growing steadily in today's world.

(3) The focus of communication is shifting from people to devices, and private information is increasingly being stored and disseminated through devices. For a long time, privacy was seen in the context of interaction with other people, but today people are increasingly sharing information in contexts other than with live interlocutors. Smartphones are becoming a digital extension of individuals, which may not allow users to properly assess the limits of confidentiality. What people still consider a private conversation is no longer private when it comes to devices. At the same time, these devices, which we unconditionally trust as our digital continuation, constantly interact with each other. The Internet of Things (IoT), defined as "a system of interconnected computing devices with unique identifiers (UIDs) [that] can perform data communications without any human involvement" (Liu et al., 2021, p. 1331), as well as communication between gadgets – when your refrigerator can exchange data with your fitness bracelet, for example – further exacerbate the problem. For example, some researches have shown that with the advent of the IoT, the possibility of using big data as a source of official statistics is increasingly being considered, creating additional ethical and statistical problems (Tam & Kimb, 2018). The accumulation of big data through networks and devices can lead to actual deanonymisation, as confidential user data can be obtained statistically (Vivitsou & Saadatmand, 2016). Therefore, the invasion of privacy becomes possible without the use of personal data due to the connection of different pieces of data and their processing.

(4) A significant part of life, including private life, is moving to the online space. What is rightly called "the massive expansion of the online world" is taking place, and, accordingly, "privacy issues in cyberspace have become a primary concern" (Lee et al., 2020, p. 49). Not everyone chooses to engage online completely voluntarily and knowingly. For example, the COVID-19 pandemic has forced many to turn to Internet interactions. At the same time, the number of people who cannot imagine life without cyberspace, as well as the intensity of the online activity of businesses, organisations, and governments, is steadily growing. The Internet has become such a commonplace and everyday occurrence that it is becoming increasingly difficult to separate online and offline life. Therefore, the question of "How can people feel protected against the threats posed by the Internet when they go online?" (Gosztonyi, 2020, p. 135) is becoming more and more principal.

(5) There is an increasing amount of trust being placed in artificial agents such as AI, as well as in corporations, including the trust of private information to them. First, the digital age gave rise to what Mireille Hildebrandt terms "an artificial world, 'peopled' by myriad of artificial agents" (Hildebrandt, 2015, IX). Invisible algorithms increasingly determine important decisions, including those related to privacy. Meanwhile, the consequences of how defining they are – and, at the same time, their lack of responsibility – have yet to be realised. Second, there is a disproportionate increase in the trust placed in corporations, which are conventionally considered representatives of the private sector of society. In particular, a recent study showed that students displayed a surprising amount of trust in Facebook and Google (Crocco et al., 2020). This is a very disturbing trend, especially as companies "can now access years of past records and link a great variety of data sources, sometimes innocuous on their own but not in the aggregate, to inform an increasingly broad range of decisions" (Williams et al., 2018, p. 79).

It is advisable to consider such changes if we want to apply a consistent concept of privacy in the digital world. In particular, legislation and judicial practice should be based on the fact that it is privacy today that allows

individuals to maintain control over some part of their lives; therefore, balancing rights and legitimate interests must also take into account the shifted yet high importance of privacy. Conservative privacy doctrines cannot provide adequate and effective legal protection any longer, as they lag significantly behind the development of digital tools. At the same time, some of the changes discussed above have already had a significant impact on law in general, defining, among other things, changes in case law, including criminal law.

1.2. Understanding private *and* public

In the digital age, the features of which were mentioned above, the understanding of terms such as *private and public person*, *private and public sphere*, and *private and public interest* should be revised. In particular, the scope of the right to privacy significantly depends on who is the subject of this right – the head of state or its ordinary citizen. However, in today's world, we need to change our attitude to new opinion leaders – digital influencers and popular bloggers, for instance, who often have a more significant influence on us than officials or opposition politicians. Privacy protection regimes depend on the definition of a public person, so – bearing in mind that citizens have the right to know a little more about people making important decisions or shaping our political lives – we should offer an expanded understanding of who we are referring to as a public person.

One could argue that Instagram bloggers, for example, should not be subject to such close attention, because they only entertain an audience, even if it amounts to hundreds of thousands of followers. However, as the well-known case of Princess Caroline of Monaco showed, entertainment also plays a role in the formation of opinions and has a great influence. Further, although the ECtHR has established that the distinction drawn between figures of contemporary society "par excellence" and "relatively" public figures has to be clear, and that protection should be higher in a "secluded place" (*Von Hannover v. Germany*, 2004), in the digital age there are no places truly isolated from any impact, and there is no anonymity that cannot be discovered. In addition, bloggers can express an influential opinion on pressing public issues, call for civil protests, and successfully and irresponsibly advertise someone or something. Therefore, the opportunity to know more about them or to conduct studies that touch on the data of such bloggers can be justified by considerations of public interest.

Given the penetration of digital tools in all spheres of life and the accumulation of overlapping data, one can observe a tendency to establish a complex balance of public and private in online and offline spaces. For instance, we might look to the controversial case *Lopez Ribalda and Others v. Spain* (2018) and consider the issue of the legality of the secret video surveillance of supermarket employees by the manager, who had reasonable suspicions of theft. The court's position contains, among other things, arguments about the different degrees of publicity of the spaces in which the cameras were located, and the expectations of employees regarding the protection of their privacy. In particular, the expectation of the protection of privacy could be very high in places which are private by nature, such as toilets, but it is manifestly lower in places that are visible or accessible to colleagues or to the general public. It should be said that, despite the fact that the ECtHR applies clear criteria of proportionality and generally relies on a dynamic doctrine, in the aforementioned case the three judges came out with a dissenting opinion in which they disagreed about the absence of a violation of privacy. There is no consensus in such cases, even at the EU level, and this is greatly complicated when it turns to the application of law in cyberspace, several jurisdictions, or transnational corporations.

The understanding of private and public may vary in different legal systems. At the same time, regulatory jurisdictions are becoming increasingly interdependent, so a single court decision may affect several states. Another point to consider is the attempt by many governments to apply extraterritorial jurisdiction to issues related to information exchanges, which include threats to privacy. Therefore, potential privacy decisions must be based on specific approaches, among which the approaches used in EU and US law deserve special attention. Being applicable in different jurisdictions, these approaches represent the results of legal thinking and legal practice, which, in turn, influence the decisions made about privacy today.

2. The approaches of EU and US law to privacy issues today

2.1. Differences in approaches to privacy

It appears that the three key differences in the approaches (or legal doctrines) of the EU and the US regarding privacy are as follows:

(1) Miscellaneous balancing of privacy with other rights and interests. Privacy is not an absolute fundamental right, so it needs to be balanced with other human rights as well as legitimate interests. The most frequent conflict situations arise when it comes to the relationship between privacy and freedom of expression. In this regard, the US approach seems to be more protective of free speech, as it is one of the central values of American democracy. In particular, in a complex case regarding the media's publication of a rape victim's name, the US Supreme Court highlighted the sensitivity and importance of the interests represented in the clashes between the First Amendment to the US Constitution and privacy rights, but still ruled that the newspaper was protected by freedom of expression if it "lawfully obtains truthful information about a matter of public significance" (*Florida Star v. B.J.F.*, 1989). Jeffrey Rosen (2012) draws attention to that difference in approaches when he writes about the right to be forgotten and the corresponding privacy issues, emphasising that "Europeans and Americans have diametrically opposed approaches to the problem" (p. 88).

Another type of common conflict is illustrated by the clash of privacy with security interests. As it is fairly noted, "security schemes can contribute to the prevention of privacy infringement. However, preventive security may infringe upon personal privacy" (Lee et al., 2020, p. 51). Here we come to the second significant difference, which is likely due to both the American anti-terrorism legislation, which gives rather broad powers to government agencies, and the role of leading technology corporations in the digital age, many of which arose and operate in American jurisdictions.

(2) Different foci regarding threat. There seems to be a lot of emphasis on privacy protection from government invasions in the EU, while corporations are the main focus in the US. In particular, such differences are visible in the practice of the most authoritative courts of both jurisdictions. For example, such differences are visible in high-profile cases of the ECtHR when it considers direct abuses by the state and offers a test that is necessary when applied to regimes of mass data interception, as in the case of *Big Brother Watch and Others v. the United Kingdom* (2021), or indirect abuses, such as the lack of adequate privacy protection and clarity of law, as in *Benedik v. Slovenia* (2018). The CJEU confirmed that the general and indiscriminate transmission of bulk data is unlawful in *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and Other* (2020). In addition, in joint cases C-511/18, C-512/18, and C-520/18, named *La Quadrature du Net and Others* (2020), the CJEU ruled that Article 6 of the EU Charter of Fundamental Rights regarding the right to security "cannot be interpreted as imposing an obligation on public authorities to take specific measures to prevent and punish certain criminal offenses". This Article is a pebble on the scales of privacy, outweighing the interests of national security, at least with regard to massive interception and tracking.

Despite the significant shift that has occurred thanks to the case of *Carpenter v. United States* (2018), when the court ruled that access to records, including the locations of mobile phones, requires a search warrant, a tipping point appears not to have been reached concerning surveillance by technical means and the fact that, in the digital age, it is becoming more and more difficult for people to maintain private space. At the same time, the case of *United States v. Microsoft Corp* (2018) regarding the company's use of cloud data storage and its transfer abroad led to the adoption of new legislation and the expansion of the powers of law enforcement agencies.

(3) Different understandings of reasonable expectations. The understanding of this problem was formed in legal doctrines, and especially in judicial practice, in divergent ways, given the non-identical criteria for measuring justice and the rule of law in the EU and the US. We will dwell on this in a little more detail below.

At the same time, both described approaches seem to be shifting towards a gradual blurring of the distinction between actions performed in physical space and in cyberspace, including privacy violations. First of all, this is expressed in the granting of status to some areas (structures) of cyberspace, analogous to the status of the same spaces (structures) in physical reality. For example, in the case of *Packingham v. North Carolina* (2017), social

media was defined as a "protected space under the First Amendment for lawful speech", that is, it was defined as a place for freedom of expression, a public forum, and not a commercial structure. The fusion of online and offline environments is also expressed in the tightening of requirements regarding the handling of private data, no matter how technically difficult it is to organise it. In particular, in the case of *Orange Romania SA v. The Romanian National Supervisory Authority for the Processing of Personal Data* (2020), the CJEU set out detailed criteria for granting consent to the transfer of data, which must be freely-given, active, and informed. The third aspect, which is especially significant for various types of liability, concerns the infliction of damage in cyberspace, which is closer in both reality and understanding to real damage, including that of an intangible nature. Particularly in the cases of *Spokeo, Inc. v. Robins* (2016) and *TransUnion LLC v. Ramirez* (2021), it was discussed whether actions involving digital data inaccuracies fall under the definition of "concrete harm". Both cases, although not successful for either Robins or Ramirez, respectively, sparked a serious debate about harm. For instance, the Electronic Frontier Foundation's legal brief in support of Ramirez argued that the risks associated with unrestricted data collection by companies have "serious consequences" for many consumers (Brief of Amicus Curiae Electronic Frontier Foundation in support of Respondent, *TransUnion LLC v. Ramirez*, 2021).

This shift is especially important for criminal law, primarily because this means not only the expansion of some legal instruments, such as the addition of electronic evidence to the classical set of evidences of committed crimes, but also doctrinal restructuring, such as the increasing importance of the principle of equivalent treatment.

2.2. Reasonable expectations regarding privacy

The standard of reasonable expectations is an element of the principle of reasonableness, as well as an element of the rule of law and legal certainty. At the same time, in the digital age law is becoming increasingly uncertain, both in view of the lack of norms and principles keeping up with the development of technologies, which could effectively work in digital spheres, and in view of the growing uncertainty as such.

It appears that in US law reasonable expectations regarding privacy are based on criteria applicable to a particular case, and, in this sense, expectations start from the balancing standard. In the concurring opinion in the landmark case *Katz v. United States* (1967), Judge J. Harlan formulated a test of reasonable expectations of privacy, which includes two considerations: an individual must demonstrate an actual expectation of privacy; and the expectation is such that society recognises it as reasonable. However, this undeniably important test, although applied to technology-mediated interventions, primarily concerns the actions of public authorities, whereas in the digital age, such interventions are often carried out by businesses, organisations, and individuals. Remarkably, such interventions are not necessarily related to the criminal intentions of the subjects of law; on the contrary, these subjects may have the best and most conscientious of intentions, but as a result have a negative impact on the protection of privacy and human rights in general. The fact that human habits have changed over the past few years adds to these problems: the growing dependence on digital technology, daily access to social networks and applications, and the widespread use of mobile devices all affect the validity of individual expectations.

In EU law, the concept of reasonable expectations regarding privacy seems to be based on an individual's rights, even if their protection means serious economic losses and prevents unintended technological development. This approach seems to be at the heart of the GDPR, which "protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data" (Regulation of the European Parliament and of the Council 2016/679, 2016). At the level of judicial practice, this approach was once again supported by the impressive decision of the Court of Justice of the European Union, which effectively changed the system of data transmission of EU citizens and confirmed that the protection of certain human rights requires an adequate level of data protection (*Data Protection Commissioner v. Facebook Ireland and Maximillian Schrems*, 2020).

It was predicted that the number of devices connected directly to the Internet would rise to become three times the number of people by 2020 (Goad et al., 2021). This indicator not only reminds us once again of the amount of data that is processed upon connection, but also of the issue of control. Who controls these devices and this data? At first glance, it may seem that device owners perform these functions. However, in reality, the levers of control may not be in the hands of individuals at all, which ultimately calls into question control over their own lives and devalues the idea of privacy.

In the digital age, individuals and groups trust a significant share of private data and privacy issues to corporations – whether voluntarily, because they are used to considering their phones and blogs their personal space, or not quite voluntarily, because they are not aware that the "default" privacy settings are designed to collect data. It would be wise if reasonable privacy expectations were based, in the first place, on transparency, responsibility, and confidentiality. However, despite the growing popularity of privacy by design (PbD), in most cases default settings provide free access to a huge amount of data. To ensure that the desired level of privacy is achieved requires significant effort, as those settings are not user friendly at all, and lots of research and alterations need to be made to make one's digital presence safe. Less technologically able people cannot even imagine the risk that they are exposed to. They are also unaware that private information can now be primary, secondary, and even behavioural, and that even their mouse movements are registered. The paradoxical expectations of users regarding the personalisation of services and goods online with the full protection of private data can hardly be called reasonable. At the same time, it seems that most powerful players – corporations, governments, international organisations – support these paradoxical expectations of individuals.

As Luciano Floridi (2016) observed regarding different types of societies and understanding information society, "expectations change contextually" (p. 3). Floridi introduced the characterisation of expectations as indicators that can help gauge the maturity of a society and illustrate when the absence of a societal feature is informative. At the same time, this formula can be applied in a broader context: to the expectations of individuals in the digital age as such. It is worth considering that reasonableness and explicitness of expectations could be connected not only to the level of development of a particular society and the degree of its digitalisation, but also to the cultural layers, values, traditions, and legal doctrines that exist in this society.

Despite attempts by technologically capable professionals to implement legitimate privacy options that also provide users with meaningful privacy control (Feng et al., 2021), these features remain elusive. Privacy is not a set of options that can be turned on and off on a device. This is primarily the value for individuals and the basis for the preservation of today's shrinking living space. In order to ensure the effective legal protection of privacy in the digital era, it is necessary to change the underlying conceptual approach.

3. The protection of privacy in criminal law

3.1. The concept of private life in criminal law

To ensure real, effective protection of the right to privacy, countries reinforce it with both civil and criminal liability for acts of unlawful interference with the private life of an individual. It is important to note in this regard that the case law of the ECtHR warrants an array of legal instruments to ensure respect for privacy, and the nature of the obligation of the state to do so depends on the particular aspect of private life under contention (*Söderman v. Sweden*, 2013). Criminal liability, as *ultima ratio*, is applicable only for the most severe violations of human privacy. The requirement to identify a particular degree of seriousness of the interference with privacy when applying criminal liability pertains to the essence of the *ultima ratio* principle – the "ultima ratio principle has been connected to the relation between criminal law and other less intrusive legislative means" (Melander, 2013, p. 52). Hence, legal regulation to ensure the human right to respect for private life can consist of not only criminal but also of civil remedies; which of the remedies is appropriate and adequate should be decided after the assessment of each specific violation of the right to private life.

The changes in the concept of privacy discussed earlier are also relevant in the area of criminal law. The legal concept of private life in the most general sense is "linked with the state of an individual when the individual may expect privacy, or with legitimate expectations of private life" (Ruling in case No. 12/99-27/99-29/99-1/2000-2/2000, 2000; Ruling No. KT8-N4/2015, 2015). The right to privacy, first of all, seeks to ensure the development of each individual in their relationships with other individuals without external interference. On the other hand, criminal laws do not normally detail the concept of private life; therefore, a decision in criminal cases as to what belongs to the private life of a particular individual and which information is within the scope of private life of a particular individual is based on the assessment of all circumstances identified in the proceedings. Hence, it is noted in the case law of Lithuanian courts that any assessment of such circumstances as a whole needs to take into consideration the relationship of the information collected with the private life of a particular individual: whether it relates to truly sensitive aspects of private life; whether, although not being intimate in itself, it has been

collected in the ways interfering with privacy, which must normally be authorised by the court; or whether it is only more general information, quite often disclosed by the person themselves in different cases (Ruling in criminal case No. 1A-19-300/2019, 2019).

Privacy protection in Ukrainian law is based upon the Constitution of Ukraine (1996), which proclaims the right of everyone to inviolability of home (Article 30), privacy of correspondence, telephone conversations, telegraph and other correspondence (Article 31), as well as the inadmissibility of interference in private (personal and family) life if it is not provided for by the Constitution Ukraine (Article 32). Within the framework of Article 32, everyone is guaranteed the right to become acquainted with information about oneself that is not a state or other secret protected by law, as well as the right to refute false information about oneself and their family members, to demand the removal of such information, and to receive compensation for moral damage caused by the collection, storage, use, and dissemination of such inaccurate information. These articles were clarified in the decisions of the Constitutional Court of Ukraine. It is noteworthy that the Court found the following: "The right to private and family life <...> is considered as the right of an individual to be autonomous independently of the state, local governments, legal entities and individuals" (Ruling No. 2-rp, 2012).

It is also important from the perspective of criminal law that the abovementioned right is established not only in national law but also in international (European Union) legal instruments including, *inter alia*, in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), and in Article 7 of the Charter of Fundamental Rights of the European Union (Charter). It is clear that this legal category, although it does not lend itself to strict classification, should be described as broadly as possible in criminal law. In addition, the aforementioned Convention, in particular Article 8 thereof, equally serves as the foundation for the protection of the right to privacy in Ukraine. This is possible since the Convention has been ratified and implemented into the legal system of Ukraine as a directly applicable legislation, having priority in legal force over the laws of Ukraine.

Article 8 of the Convention, which lays down the right to the respect for private and family life, states that "everyone has the right to respect for his private and family life, his home and his correspondence". The provision on private and family life is also similarly worded in Article 7 of the Charter: "everyone has the right to respect for his or her private and family life, home and communications". These categories of privacy are also mentioned in the jurisprudence of the Constitutional Court of the Republic of Lithuania:

> "The Constitution provides that the private life of a human being is the personal life of an individual: the way of life, marital status, living surroundings, relations with other people, views, convictions, habits of the individual, his physical and psychological state, health, honour, dignity, etc. The inviolability of the private life of a human as established in Article 22 of the Constitution presupposes the right of a person to privacy. The right of a human being to privacy encompasses the inviolability of private, family and house life, physical and psychological inviolability of a person, secrecy of personal facts and a prohibition on publicising received or collected confidential information etc." (Rulings in Cases No. 14/98, 1999; No. 12/99-27/99-29/99-1/2000-2/2000, 2000; No. 34/2000-28/01, 2002; No. 3/01, 2003).

It follows from this jurisprudence that a guarantee of the inviolability of private life should also be regarded as one of the elements of the constitutional protection of human dignity: "Arbitrary and unlawful interference with the private life of an individual also means an assault against his (her) honor and dignity" (Ruling in Case No. 14/98, 1999).

It has been noted above that it is impossible to provide an exhaustive definition of private life and set its clear limits (*inter alia*, in criminal law); therefore, the status of particular data will depend on the context of a large number of circumstances at issue. It should, however, be noted that such a necessity does not exist in fact – as was pointed out by the ECtHR in the case *Niemietz v. Germany*. The Court noted in its judgment that

> "[t]he Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world

> not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings" (*Niemietz v. Germany*, 1992).

Although, as mentioned, an exhaustive definition of the area of personal privacy is actually impossible, its outline and internal structure, although in abstract terms, can, nevertheless, be defined with reference to the very description of the right to privacy provided in international and national legal acts and from its interpretations in the jurisprudence. Hence, mutually interrelated areas of personal independence can comprise, for example, private and family life, home and personal correspondence, or territorial, information, and communication privacy as relevant from the perspective dealt with in this article. Although such categorisations are of a more theoretical, methodological nature, they are helpful for a clearer understanding of the internal structure of the system chosen in criminal laws for criminal offences violating the private life of an individual.

For example, Chapter XXIV of the Criminal Code of the Republic of Lithuania (CC) sets out crimes against the inviolability of a person's private life. Violations of territorial privacy are criminalised in Article 165 of the CC, which provides for liability for unlawful intrusion into a person's dwelling; liability for communication privacy is established in Article 166 of the CC, which describes the elements of a violation of the inviolability of a person's correspondence; and privacy violations relating to the unlawful possession of information about the private life of another person are set out in Articles 167 and 168 of the CC. These articles define the unlawful collection of information about a person's private life, as well as the unlawful disclosure or use of such information. Similar criminal offences relating to violations of these areas of privacy can also be seen in the criminal laws of the Republic of Estonia and the Republic of Latvia. For example, the Estonian Penal Code (2002), *inter alia*, sets out the following criminal acts relevant in the aspect under consideration: violation of the confidentiality of messages (paragraph 156); illegal disclosure of personal data (paragraph 157); illegal disclosure of specific categories of personal data or data concerning the commission of an offence or falling victim to an offence (paragraph 1571); and illegal use of another person's identity (paragraph 1572). The Latvian Criminal Code (1999), *inter alia*, establishes criminal liability for violating the confidentiality of correspondence and information to be transmitted over telecommunications networks (Section 144) and illegal activities involving the personal data of natural persons (Section 145). These criminal offences are treated as criminal offences against the fundamental rights and freedoms of a person (Chapter XIV).

Regulatory guarantees for the protection of privacy are specified in special legislation, primarily in the Law of Ukraine "On Personal Data Protection" (2010). In particular, it is interesting that this law contains a rather vague wording of private data, which may be classified as confidential information about a person by law or by the person concerned (Article 5). In addition, there are elements of privacy protection in sectoral legislation. In particular, the Criminal Code of Ukraine (2001) criminalises: violation of privacy (Article 182); violation of the inviolability of the home (Article 163); violation of the secrecy of correspondence, telephone conversations, telegraph, or other correspondence transmitted by means of communication or through a computer (Article 164); and theft, misappropriation, and extortion of documents (including private ones), stamps, and seals, their acquisition by fraud or abuse of office, or their damage (Article 357).

In order to qualify the criminal offences relating to privacy violations in a proper manner, it is important not only to understand that a person's private life is a broad category which does not lend itself to a precise definition in all cases, but also to understand that the right to the respect of private life must be interpreted dynamically, taking into account, *inter alia*, societal developments, as well as scientific and technological progress, which provides further possibilities for interfering into the private life of a person (Ruling No. KT13-N5/2019, 2019). In criminal law, these aspects can raise the question as to whether the elements of criminal offences established in criminal laws can, with technological developments, be applied when qualifying private life violations committed in cyberspace. This question, *inter alia*, relates to the specifics of cybercrime – the "move" of traditional crimes against privacy into cyberspace has changed the possibilities for their commission: they have acquired particular specifics according to communication possibilities in cyberspace as well as major differences from the criminal offences committed in the physical space. In order to find an answer to this question, the principle of equivalent treatment becomes relevant (Fedosiuk & Marcinauskaitė, 2013, p. 12).

The scientific literature notes that

> "[t]he evaluative principle of equivalent treatment in physical and cyberspace basically reflects the idea that legal provisions should provide equal requirements for the actions, performed both in physical and cyberspace. In the field of Criminal Law it would mean that an equal assurance of values in both of these spaces is provided through equal evaluation of criminal conducts committed in physical and cyber spaces" (Fedosiuk & Marcinauskaitė, 2013, p. 12).

The requirements of this principle are also reflected in the case law of Lithuanian courts in criminal cases concerning personal privacy; the interpretation provided in the case law makes privacy considerations also admissible in the context of cyberspace. For example, the Supreme Court of Lithuania held in the Ruling of 6 January 2015 in criminal case No. 2K-138/2015 that the offender, *inter alia*, had illegally accessed the victim's e-mail account and copied their private correspondence. Later, the offender sent such information collected in a criminal manner about the victim's private life to other persons via different e-mail addresses. The court of the cassation instance qualified such a criminal offence under Article 168 of the CC, i.e., as the public disclosure of unlawfully collected information about the private life of a person without the person's consent. It was noted in this criminal case that:

> "<...> first of all, <...> Article 168 of the CC criminalises not only private life violations in physical but also in cyberspace. <...> The provision laid down in Article 168(1) of the CC <...> regulates the privacy violation instances, which have been specifically distinguished by the legislator. Secondly, it is also important that public disclosure of information about another person's life can take place not only in physical but also cyberspace, therefore, the information made public on this space (e.g., by e-mail) has all the attributes of electronic data."

Such an interpretation offers an insight into an important aspect of the qualification of privacy violations in both physical and cyber spaces: irrespective of the space (physical or cyber) in which personal privacy is attacked, the same article of the criminal law can be applied to such offences. Such an approach also allows for the same protection of privacy in both spaces to be ensured. To be able to apply such an interpretation, it is necessary to use technology-neutral terms in the descriptions of criminal offences against personal privacy in criminal laws.

3.2. Relevant aspects of the violation of a person's private life using new technologies in Lithuanian and Ukrainian case law

With the development of various technologies, some information about personal, family, and home life has moved into cyberspace. Such a process can be viewed as natural as "[g]iven the extreme influx of technology in our society, it has become almost impossible to avoid its regular utilization" (Sisk, 2016, p. 119). On the other hand, considering the threats to privacy resulting from the opportunities opened by technologies, "[t]hese emerging technologies have forced us to ask a very important question: Is technology destroying our precious privacy?" (Dorraji & Barcys, 2014, p. 309). It is relevant in this regard to consider an overview of the case law of Lithuanian courts in criminal cases relating to personal privacy violations, and to assess how privacy violations are expressed when offenders make use of new technologies. The problems of the interpretation and application of the CC when criminal offenses are committed in cyberspace are also relevant.

At the same time, despite an impressive legal framework, the protection of privacy in the digital age in Ukraine seems to have remained rather ineffective, as evidenced by the lack of court cases at the Supreme Court level that address pressing issues of digital aspects of privacy, as well as relevant ECtHR decisions. Although the ECtHR has made quite a few decisions regarding Ukraine, and some of them concern privacy, a significant part of these cases has focused on the traditional aspects of privacy protection. For example, in the context of criminal law, these decisions were devoted to disproportionate interference in the secrecy of the paper correspondence of persons deprived of their liberty and serving sentences (*Belyaev and Digtyar v. Ukraine*, 2012); and in the context of protecting private data, they related to insufficient protection of sensitive information about the mental illnesses of persons (*Panteleyenko v. Ukraine*, 2006; *Zaichenko v. Ukraine (No. 2)*, 2015; *Surikov v. Ukraine*, 2017). Since the ECtHR does not go beyond its competence, considering the applications filed against the states parties to the

Convention by representatives of these states, it seems that the absence of cases on digital aspects of privacy may mean the absence of Ukrainian requests.

Attempts to solve the problem of the protection of privacy in the digital age have been made in recent years, however, the main method remains the introduction of rather formal changes in Ukrainian legislative acts without the development of appropriate judicial practice. A factor that will possibly contribute to the improvement of the situation may be the convergence of the legal framework of Ukraine and its harmonisation with EU legislation, primarily due to the Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part, signed in 2014.

Unauthorised access to the information stored in information registers. It should be noted that "[t]echnology was a primary factor in the rise of information collection" (Solove, 2004, p. 14). Technologies are used by state authorities to compile and systematise information, which, *inter alia*, can fall within the scope of personal privacy, in information registers, or in relevant information systems. It should be underlined in this regard that the fact in itself that information is already in the public domain does not necessarily exclude the protection available under Article 8 of the Convention. Even public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities; this is all the more true where the information concerns a person's distant past – for example, their criminal record (*M. M. v. the United Kingdom*, 2012). Personal data relating to the most intimate and personal aspects of an individual, such as health status, ethnic or racial origin, or criminal record, constitute particular elements of private life falling within the scope of the protection of Article 8 of the Convention. The protection of such data against any misuse is highly important (*Magyar Helsinki Bizottság v. Hungary*, 2016; *S. and Marper v. the United Kingdom*, 2008; *E.B. and others v. Austria*, 2013). The main problem in applying criminal responsibility in such cases is the relation between the abuse of office (Article 228 of the CC) and breaches of privacy. The purpose of criminalising the abuse of office is to ensure the normal, efficient, and lawful activities of institutions or persons with administrative powers or providing public services (Criminal Case No. 2K-87-942/2017, 2017). Such institutions also include the police. It should be noted that the fact that electronic data are officially collected and stored in public registers does not deny responsibility not only for abuse of office, but also for violations of privacy.

There have been cases in the case law of Lithuanian courts where they have identified misuse of access to information registers and other information systems where a large quantity of information, *inter alia*, relating to personal data, is held. For example, it was held in one criminal case that a police officer who had been authorised to work with information registers in the information system of the police collected data about the private life of a large number of individuals and later handed over such data to another person. The court held in this case that the police officer not only abused their official position, but also violated the right of the above-referred-to persons to privacy:

> "<...> The actions of A. A. and M. S. were not one-off or accidental, they had continued for a rather long time; as unlawfully requested by V. R., information had been collected about the life of a large number – 34 persons, this information concerned various private life aspects of the persons, it had been obtained using a large number of different information resources (VRIS CDB, AUDIT III information system, POLIS II browser), part the data collected had been illegally used for the benefit of private detective V. R., thereby causing damage to the victims. <...> the victims questioned during the trial confirmed that they had suffered both material and non-material damage as a result of the criminal acts of the convicted persons: after becoming aware that information had been illegally collected about their private life, they felt disquiet, suffered psychological problems, the feeling of insecurity because the circumstances in which the information collected had been used were unknown, they had fear because of themselves and their close ones" (Criminal Case No. 2K-348-648/2018, 2018).

According to the principle of equivalent treatment, the same CC Articles that criminalise violations of privacy in physical space were applied in this criminal case: Article 167 of the CC (Unlawful collection of information about a person's private life) and Article 168 of the CC (Unauthorised disclosure or use of information about a person's private life).

Unauthorised access to the content of electronic communications. Technological developments have expanded the possibilities of interpersonal communication through the use of social networks that connect member groups that share certain common interests by means of mobile applications, e-mail, which makes it possible to send and receive letters by means of electronic communication, etc. As a result, personal privacy can be violated through unauthorised access to such resources and, accordingly, to the content of private communications. As mentioned before, the transfer of a person's private life to cyberspace has created problems in the interpretation and application of the CC. More specifically, it has raised the problem of whether existing CC Articles that define crimes against the inviolability of a person's private life can be applied to qualify criminal offences in cyberspace. Noteworthy in this context is the notion that the concept of a person's private life is interpreted broadly to include a person's private life in both spaces – physical and cyberspace. Such a broader interpretation follows from the Lithuanian case law.

An overview of the case law of Lithuanian courts shows that there have been criminal cases where the privacy of personal communication has been violated; for example, through unauthorised access to a Facebook account. In one criminal case, it was identified that an offender

> "<...> had used a laptop <...> and a mobile phone <...> to log into the account of A. K. on www.facebook.com 485 times unlawfully and watch, without any authority, the messages sent by A. K. and her chats on electronic communication networks, follow her friends and see pictures, thereby violating the inviolability of personal correspondence" (Criminal Case No. 1-3799-888/2019, 2019).

In another criminal case, the court found violations of the victim's private life because the offender

> "<...> had logged into the personal account of S. J. on the social network www.facebook.com unlawfully and changed her login data without the consent and knowledge of S. J. by entering his own password for the account of S. J. on Facebook, and thereby unlawfully accessed this account. Without any knowledge and agreement of S. J., he shared personal pictures where she was nude in the section 'Story', used the chat application Messenger that was connected to the profile 'S. J.', watched the content of the information sent by electronic communication networks, correspondence with other persons, wrote messages to other persons on behalf of S. J., sent personal pictures of S. J., read replies, and breached the inviolability of communication of S. J. by such actions" (Criminal Case No. 1632-1091/2021, 2021).

In another criminal case, a violation of the inviolability of communication was found because the offender had accessed the application Tinder:

> "<...> at home <...>, unlawfully and against the will of D. V., [he] took away her mobile phone in the bathroom <...>, went to the bedroom and watched the content of information sent by electronic communication networks, correspondence with other persons on the application Tinder and SMS, and thereby breached the secrecy of the messages sent by technical correspondence devices by the victim" (Criminal Case No. 1-89-373/2021, 2021).

There are many criminal cases in the case law of the Lithuanian courts where the courts identified offenders logging into victims' e-mail accounts unauthorised, which enabled unauthorised access to private e-mails. For example, it was identified in one criminal case that, without permission from the victim, one person

> "<...> had unlawfully used the login name and password known to him, logged into the e-mail account <...>, accessed its settings where he rerouted letters to the e-mail account <...> he was using, and in this way watched the content of information sent by electronic communication networks, correspondence with other persons, and read replies" (Criminal Case No. 1-1569-914/2018, 2018).

The case law shows that it is guided by a broad concept of a person's private life, recognising that the expansion of cyberspace has led to new kinds of serious privacy violations. Private life must be interpreted dynamically, taking into account developing technologies. Such an approach allows for the more flexible interpretation of CC Articles, adapting existing norms to changes that have occurred since many activities "moved" into cyberspace. Therefore, relevant criminal offences such as violations of the inviolability of a person's correspondence, unlawful

collection of information about a person's private life, and unauthorised disclosure or use of information about a person's private life exist not only in the physical space but can also be encountered in cyberspace.

Unlawful collection of information through the use of the Global Positioning System (GPS). The use of technical devices to watch and spy on persons, *inter alia*, by using GPS, which enables tracking the location of a person, can lead to a breach of personal privacy. The scientific literature notes that "[t]oday <...> GPS ubiquitously appears in everyday devices from our cars to smart phones. Importantly, GPS-enabled devices allow their users to be tracked, raising privacy concerns <...>" (Scott-Hayward et al., 2015, p. 33). The Supreme Court of Lithuania (2014) held in this regard that

> "the scope of protection of private life against interference by another private person depends, *inter alia*, on the mutual relations of these persons, which determine the limits of privacy with respect to each other. Systematic collection of information about a person by means of GPS-enabled equipment can limit the person's right to privacy, in particular, where such information is used to exert some influence on the person" (Criminal Case No. 2K-213/2014, 2014).

Such an approach is also upheld by lower instance courts. For example, it was found in one criminal case that

> "R. D. had been illegally collecting information about private life, deliberately installed a location device GPS Tracker <...> inside the car <...> that belonged to his partner, and deliberately, intentionally and with premeditation kept tracking the location of the victim R. Z." (Criminal Case No. 1-741-1000/2018, 2018).

A breach of the inviolability of another person's private life was also found in another criminal case, where an offender

> "<...> attached a GPS Tracker <...> with tracking and listening functions under the rear bumper of the car <...> of his former spouse D. R., which made it possible to track the location of the car and unlawfully collect information about the private life of his former wife D. R. – the movement of her car and her location with the help of the above-referred equipment <...>" (Criminal Case No. 1-1109-729/2018, 2018).

These cases reveal that the use of new technologies forces us to rethink the understanding of a person's private life and recognise the new ways of committing criminal offenses against a person's privacy.

It follows that the positive impact of technologies in expanding the possibilities of personal communication also implies the risks of misuse of such technologies, which lead to violations of the right to privacy. With the changing *modus operandi* of offences against the inviolability of private life in the digital age, criminal law should identify such violations and ensure the protection of personal privacy both in physical spaces and in cyberspace in line with the pace and directions of development of modern technologies. Such an approach should be based on a broad concept of a person's private life, which allows for the proper application of the already existing CC Articles that establish criminal responsibility for crimes against the inviolability of a person's private life.

Conclusions

Legal regulation and law enforcement practices must be adapted to technological changes and must take into account innovative ways of committing serious privacy violations. In addition, it must be understood that there is primary, secondary, and behavioural private information, and complete anonymity and complete control is hardly possible in the digital age. Today, reasonable expectations that privacy can be protected should include revising the concept of privacy and applying effective mechanisms to protect it, using a responsible and ethical approach based on human rights. It is also necessary to take into account changes in the understanding of private and public. A combination of legal instruments should be used that can help protect privacy from interference by governments, businesses, organisations, communities, and individuals. It is advisable to consider all of the above-mentioned as relating to law in general and criminal law in particular.

The EU and US approaches to privacy demonstrate different understandings of the right to private life, its balancing with other fundamental rights and legitimate interests, and different attitudes as to the nature of the key

threats to and the main reasonable expectations regarding privacy in the digital age. At the same time, both approaches are shifting towards a gradual blurring of the distinction between actions in physical space and in cyberspace. The same is true for privacy intrusions.

Effectively ensuring the right to the respect for private life by means of criminal law is, among other things, connected with the proper unfolding of the content of private life while, *inter alia*, bearing in mind that it is impossible to provide an exhaustive definition and identify the scope of private life. Decisions in criminal cases as to whether particular information falls within the scope of the private life of a particular individual are made taking into consideration all the circumstances identified.

As technologies keep developing, the principle of equivalent treatment is relevant for the qualification of criminal offences against the inviolability of private life, which means that the same criminal legal measures must be applied for ensuring the right to privacy (irrespective of where – physical space or cyberspace – a criminal offence has been committed). The analysis of Lithuanian case law demonstrated the importance of such an approach.

The analysis of Lithuanian case law shows that, with the "move" of private life to cyberspace, this space has also become exposed to criminal offences which are committed by taking advantage of the possibilities offered by new technologies. The cases of unauthorised access to the information stored in information registers and to the content of electronic communications, alongside the unlawful gathering of information through the use of GPS, show that criminal law must be ready to respond properly to the changes in the *modus operandi* of crimes against personal privacy. It may not be excluded that the development of new technologies can bring new, unknown aspects pertaining to the use of technologies for intrusion into personal privacy.

The reasons for the low efficiency of privacy protection in the digital age in Ukraine may be regarded as the following: (1) problems with the rule of law and, accordingly, with the real independence of the judiciary; (2) the absence of a strong tradition of respect for privacy stemming from the Soviet past of Ukrainian society; and (3) the general weakness of democratic institutions in Ukraine, including the lack of a strong voice of civil society institutions on privacy issues in a digital context. This highlights the difference between strong and weak democracies in the post-Soviet period in countries such as Lithuania and Ukraine in particular. Both countries, which were under the yoke of the Soviet regime for a long time, have been restoring the values, traditions, and mechanisms of protecting the right to private life; however, Lithuania's path to its effective protection seems to have been more successful thus far.

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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

[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

[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

[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).

[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,

[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,

[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

[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]

[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

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

[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

[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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SHAPING BAD FAITH AS AN ABSOLUTE GROUND FOR THE INVALIDTY OF A TRADE MARK: EU, FRENCH, AND LITHUANIAN APPROACHES

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Abstract. The provision of bad faith as a ground for the invalidity of a trade mark is set out by the EU trade mark regulation, and has been incorporated in the national trade mark systems by the means of approximation of laws within the EU Members States in order to encourage the development of the internal market within the EU. However, the legislative background does not provide for any guidance for either the definition of or relevant factors for the assessment of the existence of bad faith. In recent years, the provision of bad faith as a ground for the invalidity of a trade mark has been subject to important developments clarifying its conditions and effects by the highest courts of the EU. This paper therefore aims to introduce the provision of bad faith, the conditions under which its existence is assessed, and its effects on the registered trade mark by also comparing the approaches at both the EU and national levels, as they are closely linked by the harmonised legislative framework in relation to bad faith as a ground for the invalidity of a trade mark.

Keywords: absolute ground for invalidity, bad faith, trade mark.

Introduction

"Creativity is without a doubt the most important human resource of all. Without creativity, there would be no progress, and we would be forever repeating the same patterns" (De Bono, 1999). Within the European Union, creativity as well as innovation are encouraged through means of enforcing intellectual property rights (European Court of Auditors, 2020). In a market economy, the primary relevance of those rights consists in their economic value (Opinion of Advocate General Sharpston, 2016). In this regard, intellectual property law plays an important role by not only encouraging creativity and innovation but also by compensating investments made by undertakings and, therefore, is important for the competitiveness of the EU. Intellectual creations, which can be protected by granting exclusive rights to their owners, can be distinguished into two types, namely: 1) industrial and 2) artistic and literary property[3]. Although intellectual property law encompasses protection for a wide range of different rights such as patents, trade marks, designs, copyrights, or geographical indications, the present article will only concentrate on trade marks following recent developments in the case law in regards to their protection.

Regulation (EU) 2017/1001 (the "Regulation 2017/1001") on the European Union trade mark, codifying all the previous regulations on the EU trade mark in order to clarify the EU trade mark system, defines a trade mark as a sign capable of distinguishing the goods or services of one undertaking from those of other undertakings and of being represented on the Register of European Union trade marks in a way which enables the competent

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authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor (see Article 4). In fact, trade marks create a connection between an undertaking and its goods or services commercialised under the sign, allowing consumers to repeat a pleasant experience which resulted from choosing to buy goods or services of that undertaking by recognising them under its trademark.

According to the case law, the EU trade mark regime is an autonomous system with its own set of objectives and rules peculiar to it; it applies independently of any national system (*Budějovický Budvar*, 2011, paragraph 36). However, in parallel to the EU trade mark system, national trade mark protection systems exist. This means that a trade mark can be registered at a national level or at the EU level, creating a coexisting system of protection of trade marks in the EU and leaving the choice to each undertaking to decide the scope of protection it seeks for. However, in principle, a trade mark registration system is based on the 'first-to-file' rule, meaning that a sign may be registered as a European trade mark only in so far as this is not precluded by an earlier mark. The latter can be registered whether within the EU, in a Member State, under international arrangements which have effect in a Member State, or in a trade mark registered under international arrangements which have effect in the European Union. The application of this rule is moderated, inter alia, by the provision of bad faith (*Peeters Landbouwmachines v. OHMI*, 2012, paragraphs 16 & 17). In fact, the registration of a trade mark can be considered vitiated and, therefore, declared invalid if the proprietor of a contested trade mark was acting in bad faith when lodging the application for the registration of that trade mark.

Following recent case law developments at the European level which have importantly shaped this ground for the invalidity of a trade mark, this paper aims to introduce the provision of bad faith, conditions under which its existence is assessed, and its effects on the registered trade mark at the European level, as well as its application at the national level.

1. Shaping bad faith: a definition

According to Article 59(1)(b) of Regulation 2017/1001, an "EU trade mark shall be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings, where the applicant was acting in bad faith when he filed the application for the trade mark". However, the EU legislature does not provide any definition of the term "bad faith". According to the settled case law, in such a situation, the meaning and scope of the term must be considered bearing in mind its usual meaning in everyday language whilst also taking into account the context in which it occurs and the purposes of the rules of which it forms a part (*EasyCar*, 2005, paragraph 21; *Wallentin-Hermann*, 2008, paragraph 17; *UGT-FSP*, 2010, paragraph 39).

Whilst in everyday language the concept of bad faith implies the presence of dishonest intention, it should be understood in the context of trade mark law and more particularly in the context of trade (*Koton Mağazacilik Tekstil Sanayi ve Ticaret v. EUIPO*, 2019, paragraph 45). In this regard, it is worth noting that a system of trade mark protection at the EU level has been established in order to promote the development of economic activities and continuous and balanced expansion within the internal market, mainly aiming at contributing to the system of undistorted competition in the Union (*Lego Juris v. OHMI*, 2010, paragraph 38; *ÖKO-Test Verlag*, 2019, paragraph 40) in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs enabling the consumer, without any possibility of confusion, to distinguish those goods or services from others which have another origin (*Merz & Krell*, 2001, paragraphs 21 & 22; *Arsenal Football Club*, 2002, paragraphs 47 & 48; *Alcon v. OHMI*, 2007, paragraphs 53 & 54). It follows that the absolute ground for the invalidity of a trade mark on the basis of the provision of bad faith aims to prevent registrations that do not comply with honest practices in trade. Therefore, a trade mark which was registered without any intention contrary to the above-mentioned essential function of guarantee of origin of goods or services does not fall under the scope of the provision of bad faith.

In order to meet the objectives of Regulation 2017/1001 and to achieve a well-functioning, competitive internal market, it is, however, crucial that the concept of bad faith is interpreted in a uniform way. In the *Malaysia Dairy Industries* (2013) judgement, subject to a preliminary ruling on the interpretation of Directive 2008/95 (now Directive 2015/2436), aiming at the approximation of the laws of the EU Member States and as far as it provides for the invalidity of a trade mark under the provision of bad faith, in the light of the settled case law, the Court of

Justice held that when the terms of a provision of EU law make no express reference to the law of the Member States for the purpose of determining its meaning and scope, they must normally be given an independent and uniform interpretation throughout the European Union, this being also applied to the concept of bad faith (see paragraphs 25 and 29).

It follows that the definition of bad faith, as it is apprehended by the Court of Justice, is uniform within the EU. A uniform application of that definition guarantees the absence of different interpretations of the concept of bad faith within the EU and, therefore, allows pursuing the objectives of a well-functioning and competitive internal market system.

2. Broad locus standi and temporal considerations of the assessment of bad faith

Bad faith constitutes an absolute ground for invalidity aiming to protect the general interest. Contrary to relative grounds for invalidity, the action for the invalidity of a trade mark on the basis of bad faith has a broad *locus standi*, as it can be brought before the competent authorities not only by the holders of earlier rights but by any natural or legal person (*Holzer y Cia v. EUIPO – Annco*, 2019, paragraph 56). However, as the good faith of the proprietor of a contested trade mark is presumed, it is for the applicant who brings the action before the competent authorities to prove otherwise (*pelicantravel.com v. OHMI – Pelikan*, 2012, paragraph 21).

As the EU legislation does not provide for any guidance on relevant factors to take into account in order to establish the bad faith of the proprietor of a contested trade mark, the case law provides examples of circumstances and factors that may lead to the conclusion that an application for the registration of a trade mark was lodged by an applicant driven by dishonest intentions.

The relevant moment to assess whether an application for the registration of a trade mark was lodged in bad faith is, in principle, the date of filing of that application (Regulation 2017/1001, Article 59(1)(b) and *Moreira v. EUIPO – Da Silva Santos Júnior*, 2019, paragraph 15). Consequently, circumstances that are taken into account for the assessment of the bad faith of the proprietor of a contested trade mark normally precede the date of the filing or, as the case may be, coincide with that date.

However, some of the circumstances prior to the filing might not be self-indicatory of the bad faith of the applicant, or might not be sufficient to establish bad faith but might appear as such when taken into account in combination with other circumstances following the moment of the filing of the application. In *Airhole Facemasks v. EUIPO – sindustrysurf* (2017), the General Court ruled that the actions of the proprietor of the contested trade mark following the filing of that trade mark – for example, failure to inform the applicant in whose request the trade mark registration had been lodged about the filing of the application, failure to transfer the trade mark despite the express undertaking to do so and, furthermore, giving notice to the applicant to cease using the contested mark, failing which it would bring infringement proceedings – together with other relevant circumstances preceding the filing, allowed for the conclusion that the proprietor of the contested trade mark sought to usurp the applicant's rights and, therefore, did not have any legitimate objective to lodge the contested trade mark registration in its own name (see paragraphs 41 and 42). In addition, in *Holzer y Cia v. EUIPO – Annco* (2019), the General Court upheld the EUIPO's assessment considering that the use of trade marks following the application for registration clarified the proprietor's dishonest intentions at the time of filing and needed to be given consideration in the assessment of the existence of the bad faith of the proprietor of contested trade marks (see paragraph 126).

The same approach concerning the relevant moment to assess whether an application for the registration of a trade mark was lodged in bad faith is also followed by national courts of the Member States of the EU. For instance, the Court of Cassation of France, after recognising that the relevant moment for assessing the bad faith of the proprietor of the contested trade mark is the date of the filing, censured the Court of Appeal for refusing to take into account the circumstance that the proprietor of the contested trade mark has refrained from any exploitation of the contested trade mark for the sole reason that it was subsequent to the filing date. The Court in question specified that, taking into account the subjective nature of the intentions of the proprietor which must be assessed in regard to all the relevant factors of a particular case, the latter can also be subsequent to the filing date (Decision No. 13-18.025, 2015; also, see to that effect Decision No. 15/05052, 2016). Similarly, the Supreme Court of

Lithuania emphasised that circumstances subsequent to the filing date shall be taken into account only if they confirm the relevant circumstances or play a role in identifying such circumstances on the filing date (Decision No. 3K-3-507/2009, 2009).

It follows that some circumstances that have occurred after the lodging of an application for the registration of a trade mark may be taken into account if they are likely to clarify the intentions of the applicant at the moment of the filing. Such an approach seems justified in regards to the complexity of the assessment of the subjective factor that is the intention of a proprietor of a contested trade mark and the variety of situations that arise from claims for the invalidity of the registration of a trade mark on the basis of the provision of bad faith.

In fact, on the one hand, allowing the contrary might constitute an artificial burden of proof on the applicant bringing the action before the competent authorities against the registered trade mark. On the other hand, the approach confined strictly to the circumstances preceding or coinciding with the moment of the very filing would risk not taking into account all of the eventually relevant factors of the case and, consequently, could lead to the erroneous assessment of the real motivation underlying the application for the registration of a trade mark.

3. Shaping the assessment of the bad faith of a proprietor of a contested trade mark: an overall assessment of the specific circumstances of each case

According to the settled EU case law, the provision of bad faith implies the existence of a subjective element which must be determined in light of the objective circumstances of the case (*ChocoladeFabriken Lindt & Sprungli*, 2009, paragraph 42). This not only means that the provision under Article 59(1)(b) of Regulation 2017/1001 is based on subjective criteria in contrast to relative grounds for the invalidity of trade marks, for instance, but also that the assessment of the bad faith of a proprietor of a contested trade mark cannot be confined to a pre-determined category of factors applicable to each case. National courts also follow this approach, without hesitating to emphasise the necessity of the assessment of the bad faith of the proprietor of a contested trade mark based on all relevant circumstances of a specific case (Decision No. 3K-3-482/2003, 2003; Decision No. 3K-3-325/2006, 2006; Decision No. 3K-3-250/2008, 2008).

As a matter of example, in *ChocoladeFabriken Lindt & Sprungli* (2009), which was subject to a reference for a preliminary ruling on the interpretation of Article 51(1)(b) of Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark (now Article 59(1)(b) of Regulation 2017/1001), the Court of Justice held that among all the relevant factors of the specific case at the time of the filling of the application stand, in particular: 1) the fact that the applicant knows or must know that a third party is using, in at least one Member State, an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought; 2) the applicant's intention to prevent that third party from continuing to use such a sign; and 3) the degree of legal protection enjoyed by the third party's sign and by the sign for which registration is sought.

Even though the formulation used by the Court in this decision did not imply that the establishment of bad faith is limited to the existence of these three factors listed above, it resulted from the following case law that these factors were constantly relied on not only by the EU courts but also by the national courts (Decision No. 12/13080, 2013).

However, it should be noted that these three factors constitute only examples of a number of circumstances which can be taken into account for the assessment of the intentions of the applicant for the registration of a trade mark (*Peeters Landbouwmachines v. OHMI – Fors MW*, 2012, paragraph 36). Recently, in *Koton Mağazacilik Tekstil Sanayi ve Ticaret v. EUIPO* (2019), whilst explaining the factors relevant for the assessment of the bad faith of the proprietor of the contested trade mark arising from the *ChocoladeFabriken Lindt & Sprungli* case (2009), the Court of Justice held that it cannot be inferred from the latter decision that the application for the registration of a trade mark is to be considered to be lodged in bad faith only in that situation. The highest Court of the European Union underlined that there could be other situations that are not related to the situation which arose from the *ChocoladeFabriken Lindt & Sprungli* case (2009) and in which the bad faith of the proprietor of the contested trade mark could be characterised (see paragraphs 51 and 52).

In parallel, other circumstances have been taken into account in the context of the overall assessment of the existence of the bad faith of a proprietor, such as the origin of the contested sign and of its use since its creation, the commercial logic underlying the filing of the application for registration of that sign as an EU trade mark, and the chronology of events leading up to that filing (*Pangyrus v. OHMI – RSVP Design*, 2015, paragraph 68; *Holzer y Cia v. EUIPO – Annco*, 2019, paragraph 54). As the number of different factors that may be taken into account by the competent authorities is important, the present paper will describe only a few of them, given recent developments in their regard by the competent authorities within the EU.

3.1. Broad interpretation of the factor relating to the prior knowledge by the proprietor of the contested trade mark of the use of a similar or identical sign for similar or identical goods or services capable of being confused with the sign for which registration is sought.

In regards to the factor relating to the prior knowledge by the proprietor of the contested trade mark of the use of a similar or identical sign for similar or identical goods or services capable of being confused with the sign for which registration is sought, it should firstly be noted that the scope of that knowledge is not confined to the European Union market (*Koton Mağazacilik Tekstil Sanayi ve Ticaret v. EUIPO*, 2019, paragraphs 51, 52 & 55). In *Target Ventures Group v. EUIPO – Target Partners* (2020), the General court censured the Board of Appeal for upholding the Cancellation Division's analysis and restricting its own examination to whether the intervener had knowledge of the use by the applicant or a third party of the sign TARGET VENTURES in the context of its business activities within the European Union, as in doing so the Board of appeal applied that factor in an incomplete manner (see paragraph 47).

Secondly, both European and national courts admit that the knowledge of a proprietor of a contested trade mark of the use by a third party of a sign can be personal or general. The first scenario concerns, for instance, the knowledge resulting from the direct relations of the parties when the proprietor of a contested trade mark has a substantial holding in the other party's share capital and occupies a high-level position in the third party's management or on its board of directors (*SA.PAR.v. OHMI – Salini Costruttori*, 2013, paragraph 25), or even when parties carry out a joint communication operation for a specific project (Decision No. 05-10.462, 2007). The second scenario concerns situations where the proprietor, acting in a particular economic sector, is presumed to have knowledge of that sector and of its actors (*Holzer y Cia v. EUIPO – Annco*, 2019, paragraph 110), such knowledge being able to be inferred, for instance, from the significance (Decision No. 10/13268, 2011), notoriety, or duration (*ChocoladeFabriken Lindt & Sprungli*, 2009, paragraph 39) of the sign in that economic sector. However, awareness of the use of a sign does not always result automatically from knowledge of the field of the activity and its actors by the proprietor of the contested trade mark. In fact, French courts ruled that, to be taken into account, the previous use of a sign must enjoy a certain consistency. For instance, the Court of Appeal of Bordeaux held that the low volume of previous exploitation, limited to the agglomeration of Bordeaux and devoid of real notoriety, legitimised the ignorance of its depositor (who was not a professional chocolate maker), being furthermore specified that the banality of the formula does not allow one to immediately rule out the hypothesis that the idea of the creation of a specific sign came to the mind of the applicant without his knowledge of a previous use (Decision No. 11/05041, 2013).

Thirdly, one rather interesting aspect of the present factor under analysis concerns the identity or similarity of the contested trade mark and the earlier sign, as well as the identity or similarity of goods or services that the contested trade mark and the earlier sign cover. In fact, the situations that arose in front of the courts concerned mostly registrations of quasi-identical or highly similar signs for identical or similar goods or services that, by their nature, did not cause any particular problem for the assessment of this factor for the establishment of bad faith. In parallel, in some cases the General Court seemed to criticise the absence of the analysis of the likelihood of confusion by the EUIPO (*Feng Shen Technology v. OHMI – Majtczak*, 2012, paragraph 40).

However, the Court of Justice has recently clarified that such a requirement is not mandatory. In *Koton Mağazacilik Tekstil Sanayi ve Ticaret v. EUIPO* (2019), the intervener lodged an application for the registration of a figurative European trade mark – Stylo & Koton – in respect of goods in class 25 and services in classes 35 and 39 of the Nice Agreement. Firstly, the appellant filed a notice of opposition relying on its two earlier figurative trade marks Koton registered, respectively, for goods in classes 25 and 35; and 18, 25, and 35. The opposition

succeeded in respect to classes 25 and 35. However, the figurative trade mark Stylo & Koton was registered for the services in class 39 that were dissimilar to the goods and services covered by the appellant's trade marks. The appellant then filed an application for a declaration that the trade mark was invalid on the basis of the provision of bad faith. This action failed before the Cancellation Division as well as the Board of Appeal, the latter's decision being upheld by the General Court. Before the Court of Justice, the intervener claimed that it did not make sense to assess the existence of bad faith in the absence of any likelihood of confusion. The EUIPO, however, advanced that considering that the finding of bad faith presupposes the existence of a likelihood of confusion would amount, as the appellant argued before the General Court, to misconstruing the difference between the absolute ground for invalidity referred to in Article 52(1)(b) of Regulation No. 207/2009 (now Article 59(1)(b) of Regulation 2017/1001) and the relative ground for invalidity referred to in Article 53(1)(a) (now Article 60(1)(a) of Regulation 2017/1001) of that Regulation. The Court of Justice agreed with the EUIPO and the appellant, and ruled that the General Court misread the case law of the Court of Justice and conferred too restrictive a scope on the provision of bad faith when considering that "bad faith on the part of the applicant for registration presupposes that a third party is using an identical or similar sign for an identical or similar product or service capable of being confused with the sign for which registration is sought" (see paragraph 57). The Court of Justice insisted that it is exactly in this regard that the absolute ground for invalidity on the basis of Article 52(1)(b) of Regulation No. 207/2009 (now Article 59(1)(b) of Regulation 2017/1001) is different from the relative ground for invalidity referred to in Article 53(1)(a) (now Article 60(1)(a) of Regulation 2017/1001).

Moreover, in *Holzer y Cia v. EUIPO – Annco* (2019), the General Court also emphasised that the applicant for a declaration for invalidity invoking bad faith cannot be systematically required to establish the existence of a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation 2017/1001, between the earlier trade mark of which he is the owner and of the contested mark. As the EUIPO and the intervener noted at the hearing, doing so would largely deprive the provisions of Article 59(1)(b) of Regulation 2017/1001 of their effectiveness (see paragraph 56). In addition, it seems that this approach will also most likely be followed at the national level (Decision No. NL20-0021, 2021).

It follows from the previously cited case law that the factor related to the prior knowledge by the proprietor of the contested trade mark of the use of a similar or identical sign for similar or identical goods or services capable of being confused with the sign for which registration is sought has been subject to a number of important clarifications in recent years. These clarifications have resulted in the broad interpretation of this factor, which requires taking into account the specific circumstances of each case in respect of the rationale behind the provision of bad faith, mainly the protection of general interest and sanctioning unfair practices within the internal market.

In addition, it should be noted that this factor is, however, applied with some precaution by the EU courts, which refuse to consider it as sufficient to establish the bad faith of the proprietor of a contested trade mark on its own. In fact, in *ChocoladeFabriken Lindt & Sprungli* (2009) and *Malaysia Dairy Industries* (2013), the interveners, Member States, suggested that the factor in question should suffice in order to establish the bad faith of the proprietor of the contested trade mark. Moreover, they added that asking to prove the intentions of the proprietor would put too heavy a burden on the applicant for the invalidity of a trade mark on the basis of the provision of bad faith. However, the Court of Justice did not follow this approach, ruling that consideration must also be given to the applicant's intention at the time when they file the application for registration. That the emphasis on the fact that the prior knowledge by the proprietor of the contested trade mark of the use of a similar or identical sign for similar or identical goods or services capable of being confused with the sign for which registration is sought is not enough to conclude the existence of the bad faith of the proprietor of a registered trade mark is also clear in the national courts' case law (Decision No. 12/13080, 2013; Decision No. 3K-3-507/2009, 2009).

On the one hand, such an approach seems justified as the provision of bad faith is intended to protect general interest and to sanction the actions of the proprietor that are inconsistent with honest practices, instead of protecting earlier rights. On the other hand, given the heavy consequences of the declaration of the invalidity of a trade mark on the basis of the provision of bad faith, it is not surprising that the choice of the burden of proof consisting in establishing the dishonest intentions of the proprietor is also heavier on the applicant for the declaration of the invalidity of a contested trade mark.

3.2. The intentions of a proprietor of a contested trade mark, a subjective factor to be assessed in light of the objective circumstances of a case

Another factor taken into account by the competent authorities for the assessment of the existence of bad faith at the time of the filing of the registration of a trade mark concerns the intention of the proprietor of a contested trade mark. The particularity of this factor lies in its subjective nature. The intention of the proprietor therefore needs to be determined in light of the objective circumstances of each case, as this is the only way to objectively assess the existence of bad faith (*ChocoladeFabriken Lindt & Sprungli*, 2009, paragraph 22). It results from the case law that attempts to, for example, appropriate a trade mark of the other party, register a trade mark without the intention to use it, or create an association with earlier rights in order to exploit them commercially may characterise the bad faith of the proprietor of the contested trade mark.

As far as the attempts to appropriate a trade mark of another party are concerned, in *Tehrani v. EUIPO – Blue Genes* (2021), when considering the circumstances surrounding the application for registration of the contested trade mark, the General Court took into account a distribution agreement between the proprietor of a contested trade mark and the predecessor of the other party, signed one year preceding the filing of the registration of the contested trade mark. That agreement expressly acknowledged that the rights of the Earnest Sewn sign, which was identical to the contested trade mark, were owned by the predecessor of the other party. The proprietor argued that it was irrelevant to take the distribution agreement into account whilst assessing the existence of his bad faith because acting as a managing director did not make him a party to that agreement. He added that, consequently, none of the terms in that agreement had any binding effect with regard to him (see paragraph 42). However, the General Court was not convinced by the proprietor's arguments and pointed out that, in regards to the intention of the proprietor of a contested trade mark which is a subjective factor, the fact of acting as a natural person is irrelevant for the assessment of that intention (see paragraph 49). What mattered for the General Court was not the specific legal value or binding nature of the agreement in question, but its substantive content (Cornu & Dumont, 2021) as well as the sequence of other events – for example, entering into negotiations with the other party's predecessor in law aiming to acquire exclusive rights to the Earnest Sewn trade mark following the termination of the distribution agreement and the registration of the identical trade mark in his own name a few months later. The General Court underlined that the sequence of events resulted in an actual attempt to appropriate the trade mark in one or another way.

The national courts also consider intentions aiming to appropriate a trade mark of the other party as characterising the bad faith of the proprietor of a contested trade mark. For instance, the Court of Cassation of France censured the judges of the appeal instance for not having investigated if the proprietor of a contested trade mark, BéBé Lilly, sought to appropriate this name by depriving the author of a song of the possibility of using it in his activity and of developing works containing this name (Decision No. 15-15.750, 2017).

However, the registration of a trade mark without any intention to use it constitutes a more delicate issue for the assessment of the bad faith of the proprietor of a contested trade mark. In this regard, it has been argued that the provision of bad faith should be limited to cases of applications for the registration of a trade mark without genuine intention to use the trade mark. However, this approach has not been followed by the EU courts (*ChocoladeFabriken Lindt & Sprungli*, 2009). In fact, under EU trade mark law, proprietors have five years to put their registered trade mark in genuine use (Regulation 2017/1001, Article 18). This means that proprietors of registered trade marks are not obliged to know the use which will be made of the trade mark applied for at the moment of the filing of this registration.

In addition, the mere fact that the applicant had no economic activity corresponding to the goods or services covered by the registered trade mark is not in itself sufficient to conclude the existence of the unfair intentions of the proprietor when lodging the application of their trade mark.[4] What matters is, in fact, whether or not the applicant for the registration of the trade mark had the intention either of undermining, in a manner inconsistent

[4] In *Peeters Landbouwmachines/OHMI – Fors MW* (2012), the General Court underlined that it was legitimate for an undertaking to seek the registration of a trade mark, not only for the categories of goods and services which it markets at the time of filing the application, but also for other categories of goods and services which it intends to market in the future.

with honest practices, the interests of third parties, or of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, in which case this registration would have no rationale in the light of the objectives pointed by Regulation 2017/1001 (*Sky e. a.*, 2020, paragraph 81).

Therefore, the mere fact that a proprietor of a contested trade mark registered a trade mark without any intention to use it at the time of filing cannot automatically lead to the recognition of the bad faith of the proprietor of that trade mark. In fact, it is only if it results from other circumstances surrounding the registration of the contested trade mark that the proprietor lodged the application in order to prevent a third party from gaining access to the market (*Sky e. a.*, 2020, paragraph 44) or to gain economic advantages from opposing the registration of identical or similar trade marks of other applicants (*Copernicus-Trademarks v. EUIPO – Maquet*, 2016, paragraph 126), that the registration of a trade mark without any intention to use it at the time of the filing may characterise the unfair intention of the proprietor of a registered trade mark which needs to be taken into account for the assessment of the existence of bad faith.

At the national level, the courts also had occasion to underline that if the absence of any intention to use the sign may be considered as a relevant circumstance to assess the existence of the dishonest intentions of the proprietor of a contested trade mark at the time of filing of the registration, this sole fact is not sufficient to conclude the bad faith of that proprietor (Decision No. 3K-3-507/2009, 2009). It has also been specified that, if at the time of the action brought before the competent authorities under the provision of bad faith, the fact that the proprietor does not use the registered trade mark is not in itself indicatory of the proprietor's bad faith, especially when such an absence of use has not lasted more than 5 years since the registration (Decision No. 2A-505-798/2016, 2016).

However, the fact that the proprietor filed the registration without any intention to use the trade mark but rather to, for instance, force third parties to subscribe to licenses with that proprietor may lead to the conclusion of the existence of the bad faith of the proprietor at the filing of the application of a trade mark (Decision No. 03-12.319, 2004). In fact, the courts go even further in recognising that, if the trade mark right conferred by the registration can affect the general interest of other operators in the same economic sector in a way that the registration is intended to make a sign unavailable to all those who have a legitimate interest in using it, the registration of the contested trade mark may be considered to have been filed in bad faith (Decision No. 03-12.319, 2004). Moreover, the Court of Cassation of France ruled that the Court of Appeal vitiated its reasoning by an error of law when dismissing the action on the basis of the provision of bad faith after considering that the producer, who attributed the pseudonym to the artist to designate the artist herself, knew that that artist needed to have this pseudonym at her disposal for her artistic activities at the time of the filing of the registration of the trade mark. Therefore, it has been considered that the registration of the contested trade mark was driven by the proprietor's intention to deprive the artist of a sign necessary for her activity and, therefore, that this action constituted bad faith (Decision No. 04-15.641, 2006).

However, if the proprietor of a contested trade mark has a legitimate interest in registering the contested trade mark – for instance, when several producers are using identical or similar signs for identical or similar goods capable of being confused with the sign for which registration is sought in order to prevent use of that sign by a newcomer in the market who tries to take advantage of that sign by copying its representation (*ChocoladeFabriken Lindt & Sprungli*, 2009, paragraphs 48 & 49), when the reputation of a sign justifies a proprietor's interest in ensuring legal protection for its sign (*ChocoladeFabriken Lindt & Sprungli*, 2009, paragraphs 51 & 52), or when such registration is in line with the proprietor's legitimate commercial strategy which consists in developing its commercial activities (*Cipriani v. EUIPO – Hotel Cipriani*, 2017, paragraphs 45 to 47) – then the circumstances surrounding the registration of the contested trade mark may fall out of the scope of the provision of bad faith.

3.3. Commercial strategy of the proprietor of a contested trade mark: between legitimate and dishonest actions in the course of trade

In regards to the commercial strategy of the proprietor, which can be described as a set of coordinated actions to achieve key opportunities in order to make business profitable, it is worth remembering that, in the context of trade, trade marks constitute assets of companies used in commerce in order to distinguish their goods or services

from other competitors' goods or services. Therefore, for the registration of a trade mark to be considered as filed in good faith, the intention behind the proprietor's commercial strategy should aim to engage fairly in competition within the internal market (*Holzer y Cia v. EUIPO – Annco*, 2019, paragraph 31; *Koton Mağazacilik Tekstil Sanayi ve Ticaret v. EUIPO*, 2019, paragraph 46) in order to attract and retain customers via the quality of its goods or services.

Whilst the good faith of the proprietor of a contested trade mark is, in principle, presumed, the absence of any credible alternative explanation of the aim and content of its actions may lead the competent authorities to consider the course of the actions as a part of a commercial strategy as characterising the proprietor's bad faith. In this regard, the proprietor is best-placed to provide information regarding its intentions at the time of applying for the registration of that mark and to prove that those intentions were legitimate (*Birkenstock Sales v. EUIPO*, 2016, paragraph 136; *PayPal v. EUIPO — Hub Culture*, 2017, paragraphs 51–59).

In *Holzer y Cia v. EUIPO – Annco* (2019), the General Court upheld the Board of Appeal's decision, considering that the sequence of different circumstances – among others, the creation of trade marks identical or similar to the other party's trade marks and their registration for watches, a market segment close to the goods covered by the other party's trade marks, without that party's consent who expressly opposed the use of those trade marks – provided the proprietor with the implementation of trade strategies resulting in creating an association with earlier signs (see paragraphs 124–126). The General Court was not convinced by the proprietor's argument that the registration of its trade marks in Europe was part of a commercial strategy seeking to extend the protection of its earlier Mexican trade marks as the latter did not provide any evidence which could contradict the conclusion that the registration and use of the contested trade marks had different objectives from the registration and use of its trade marks in Mexico (see paragraphs 160 and 161).

In addition, strategies seeking to create an association are rather common in regards to well-known and reputed trade marks in order to 'free-ride' on their reputation (see to that effect Sim*ca Europe v. OHIM — PSA Peugeot Citroën*, 2014, paragraph 56) and to benefit from their attractive force (*Moreira v. EUIPO – Da Silva Santos Júnior*, 2019, paragraph 55). In fact, creating such an association may confuse consumers who would choose goods or services under the contested trade mark intending to receive goods or services from the same origin and experience the same quality as they would under the reputed trade mark.

However, even in the absence of a reputed or well-known trade mark, if it can be inferred from the circumstances of a particular case that the proprietor of a contested trade mark had an interest in using its trade mark in such a way as to create an association with the earlier sign, such a use may characterise the bad faith of the proprietor resulting from its commercial strategies consisting of exploiting the earlier sign (*Holzer y Cia v. EUIPO – Annco*, 2019, paragraph 163*)*. The existence of such an intention must nevertheless be motivated (*SBG v. EUIPO – VF International*, 2021, paragraphs 71–75).

In conclusion, the reviewed case law provides for a rather harmonised approach applied by EU and national authorities for the assessment of the existence of bad faith. Such an approach consists of a set of different factors taken into account by the competent authorities, with consideration given to the particular circumstances of each case. It also follows from the abovementioned case law that the assessment of the existence of the bad faith of the proprietor of a contested trade mark is based on an elastic approach, often pondering different factors and without being confined to a limited category of specific circumstances in order to address the complexity and variety of situations arising from actions under the provision of bad faith.

4. Shaping the consequences of the establishment of the bad faith of the proprietor of the contested trade mark

Once the relevant factors of a particular case have been assessed and have led to the conclusion of the existence of the bad faith of the proprietor of the contested trade mark, the registration of that mark is to be declared invalid. According to Article 62(2) of Regulation 2017/1001, this means that "the EU trade mark shall be deemed not to have had, as from the outset, the effects specified in this Regulation". In fact, the invalidity of a trade mark incurs

loss of any exclusive rights on a trade mark initially granted to the proprietor by the registration of that mark.[5] Moreover, in principle,[6] the declaration of the invalidity of a trade mark has a retroactive effect. This means that a trade mark is considered to have never existed and, therefore, as such could not have produced any effects that could in any way be opposable to third parties.

As regards the scope of this invalidity, according to Article 59(3) of Regulation 2017/1001, "where the ground for invalidity exists in respect of only some of the goods or services for which the EU trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only". This provision suggests that the application of a trade mark should be considered as divisible and that the declaration of the invalidity of a trade mark could, therefore, result in its partial or total invalidity, bearing in mind that the conditions for the existence of an absolute ground for the invalidity of trade mark are met for all or a part of the goods or services covered by that registration.

If the General Court seems to have suggested that the application for the registration of a trade mark should entail invalidity in its entirety if it was filed in bad faith (*SA.PAR. v. OHIM — Salini Costruttori*, 2013, paragraph 48), the Court of Justice, in a framework for a preliminary ruling, following the Advocate General's opinion, recently held that the provision under Article 59(3) of Regulation 2017/1001 also applies for the invalidity of trade mark registrations filed in bad faith (*Sky e.a.*, 2020, paragraph 71).

From a practical point of view, it cannot be excluded that recent clarification of the approach to take in regards to the request for declaration of the invalidity of a trade mark filed in bad faith may appear not to be easily applicable in some situations, as it could seem difficult to divide goods or services that were applied for in good or bad faith. In fact, the question remains open as to whether it is possible to have the intention to file an application for the registration of a trade mark in good faith for some goods or services and in bad faith for others. Also, as the Advocate General already underlined in her conclusions in *Koton Mağazacilik Tekstil Sanayi ve Ticaret v. EUIPO* (2019), some applicants may feel initiated to apply for a larger set of goods or services in order to prevent the whole trade mark from being totally invalided (Opinion of Advocate General Kokott, paragraph 59). All of these concerns are without doubt related to the particularity of the absolute ground for invalidity based on bad faith, as it hinges on the subjective circumstances that led to the filing of an application for the registration of a trade mark in contrast to inherent defects sanctioned by the other absolute grounds for invalidity.

Nevertheless, the divisibility of an application for the registration of a trade mark when the bad faith of the proprietor is established seems justified in light of the Regulation, which does not formulate any difference between the scope of effects resulting from different absolute grounds for invalidity or priority given to economic interest, allowing competitors to register signs capable of indicating the origin of goods or services covered by the registered trade mark, and is conceivable in regards to the predictability of law.

Furthermore, this approach is now also consistent among the highest EU courts, as the General Court has recently upheld the Board of Appeal's decision to partially invalidate the contested trade mark in regards to only duplicate goods or services (*Hasbro v. EUIPO – Kreativni Dogadaji*, 2021).

In contrast, at the national level, the establishment of bad faith may result either in the invalidity of the contested trade mark or in the transfer of ownership (Moatty & Cousin, 2017). As a matter of fact, the consequences of the establishment of bad faith will depend on the interest actually affected by the bad faith of the proprietor of a contested trade mark. Notwithstanding the fact that the provision of bad faith aims to protect general interest, if

[5] For different exclusive rights of the proprietor of a trade mark, see Article 9 and the following of Regulation 2017/1001.

[6] According to the Article 62(3), there are some exceptions to the retroactive effect of the invalidity of a trade mark in so far as, "subject to the national provisions relating either to claims for compensation for damage caused by negligence or lack of good faith on the part of the proprietor of the trade mark, or to unjust enrichment, the retroactive effect of revocation or invalidity of the trade mark shall not affect any decision on infringement which has acquired the authority of a final decision and been enforced prior to the revocation or invalidity decision or any contract concluded prior to the revocation or invalidity decision, in so far as it has been performed before that decision; however, repayment, to an extent justified by the circumstances, of sums paid under the relevant contract may be claimed on grounds of equity".

an interest of a third party has been affected, the existence of the bad faith of the proprietor of a contested trade mark may also result in the transfer of its ownership (Article L712-6 of French Intellectual Property Code). However, if the interest affected is general, the action brought before the courts based on the provision of bad faith can only result in the invalidity of the contested trade mark (Decision No. 12-29.157, 2014).

As far as the scope of the invalidity is concerned, in parallel to the EU courts, it is settled case law that the invalidity can be declared in regards to a part of goods or services covered by the contested trade mark or for all of them (Decision No. 96-22367, 1999). Unsurprisingly, the Court of Cassation of France censured the judges of the appeal instance for declaring the contested trade mark invalid for all the goods covered by that trade mark without explaining how the proprietor of the contested trade mark acted in bad faith in regards to all the goods registered under that trade mark. The Court in question considered that the contested trade mark could have been invalided only in regards to some goods that corresponded to goods alleged to have been counterfeited, designed, and marketed by the other party (Decision No. 14-28.232, 2017).

It follows that the effect attached to the action brought before the courts on the basis of the provision of bad faith will depend on the question of whether it has been brought before national or EU courts. However, the scope of those consequences is now harmonised at both levels as the vitiated registration may incur either partial or total invalidity.

Conclusions

In conclusion, the bad faith issue constitutes one of the most dynamic areas of trade mark law. As new forms of bad faith occur constantly, it is justified that the competent authorities leave the door open for the assessment of the existence of bad faith at the time of the filing of the application without confining it to a limited set of circumstances, but rather relying on the particular circumstances of each case. However, despite the large variety of scenarios, some similar patterns can be recognised at both the EU and national levels, which also leads to a rather harmonised approach to assessment within the EU. In this regard, it results clearly from the case law that the most important factor to assess in the framework of actions seeking the invalidity of a trade mark on the basis of the provision of bad faith is the intention of the proprietor of a contested trade mark underlying the application for its registration. Taking into account the subjective nature of this ground for invalidity, circumstances such as the knowledge, either personal or general, by the proprietor of the contested trade mark of the use of a similar or identical sign for similar or identical goods or services, its commercial strategy, or its interest in registering that trade mark with regard to a particular situation on the market constitute objective circumstances that have often been taken into account by the competent authorities in order to assess the existence of the bad faith of the proprietor of a contested trade mark. Consequently, the provision of bad faith is interpreted as a ground for invalidity, fulfilling the objective of sanctioning the disrespect of a registration which was made in breach of legal rules organising undisrupted competition within an internal market and, as such, incurring serious consequences.

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THE INTERPRETATION OF SMART CONTRACTS IN THE EU AND THE USA

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Abstract. This article argues that the current rising trend in the use of smart contracts requires a radical update of existing legislation. It intends, in the first instance, to outline a notion of the "smart contract", and then to highlight different understandings of it in the EU and the USA. This article analyses the existing legislation specifically enacted to address smart contracts. From a comparative perspective, the issue of how the existing contract law adapts to regulate and enforce smart contracts in the common and civil law countries is discussed. In light of this, the author analyses whether a smart contract conforms with the common law and civil law requirements for the formation of a valid and legally binding contract. The author concludes that the common principles of traditional civil law will likely apply to agreements memorialised in code. This paper also outlines the notion that the emergence of "crypto-legal structures" is required due to the peculiarities of the incorporation smart contracts into different legal systems.

Keywords: smart contract, crypto-legal structures, legal recognition, judicial recognition, blockchain.

Introduction

The current stage of social and economic development is characterised by the profound impact of technologies. In order to keep up with technological progress, the legal system is constantly developing and improving: new norms are being created and existing ones are being changed; and gaps and contradictions in legislation are being eliminated. Sometimes, however, economic and social relations develop more rapidly than the legal norms regulating them. The most striking example is blockchain technology, contributing to the rise of smart contracts. The origination of smart contracts all over the world requires the radical update of existing legislation, or even the development of new legal avenues in order to regulate the market for new objects of economic relations.

At present, the legal nature of a smart contract both at the national level of states and at the international level is not clearly defined. Therefore, an analysis of smart contracts in various jurisdictions is very timely.

The academic literature has not yet addressed the nature of smart contracts by considering different understandings of them in the EU and the USA. Existing legal literature that is dedicated to smart contracts can be classified into three main groups. The first group of authors tend to explore the technology underlying smart contracting and provide resemblances to existing legal doctrines. In particular, this group includes: Kevin Werbach and Nicolas Cornell (2017), who came to the conclusion that smart contracts could not displace contract law; and Max Raskin (2017), who stated that smart contracts are simply a "new form of preemptive self-help". The second group of authors focuses primarily on the drawbacks of smart contracts. For instance, according to James Grimmelmann (2019), all smart contracts are incomplete and ambiguous, while Jeffrey M. Lipshaw (2019) argued that traditional contracts will continue to exist alongside smart contracts. The final group of scholars analyse the regulatory challenges arising from smart contracts. For example, the work of Reggie O'Shields (2017) presented the legal

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and regulatory issues connected with the application of smart contracts, and Adam J. Kolber (2018) explored third-party harms arising from smart contracts and possible regulations.

However, as yet no research has been undertaken on the concept of smart contracts in the EU and the USA. This study is a first attempt to analyse the different approaches to the concept of a smart contract in these two main Western legal traditions. The first part of this article will present a broad approach to the smart contract, identifying a workable definition of the concept. The second part of the article will then consider the understanding of smart contracts and their regulation in the EU and the USA, where the adoption of this concept will be identified through legal and judicial recognition. The understanding of this form of contract and its regulation in the EU and the USA differs, and the reasons for these distinctions can be found in the different legal systems and certain peculiarities of legislation in the EU Member States and the USA. While there are many differences between common and civil law countries, this article only covers a few key conceptual differences. In particular, this article will consider whether a smart contract conforms with the common and civil law requirements for the formation of a valid and legally binding contract.

The ultimate goal of this paper is to evaluate how the existing contract law in the common and civil law countries adapts to regulate and enforce smart contracts in the absence of a uniform legislative framework regarding smart contracts. This will be followed by a proposition as to how to harmonise the US and EU approaches to smart contracts.

In this paper, a combination of traditional legal research methods with an empirical study considering the regulatory framework of smart contracts will be undertaken. For mapping the differences in understanding smart contracts in the US and the EU, the comparative law method is used.

1. Defining smart contracts and their key features

Any discussion about smart contracts and their impact on today's contract law must begin by identifying a workable definition of the concept. As should become apparent, there is much debate and confusion around the notion of smart contracts.

Initially, the concept of a smart contract was introduced by a well-known American scientist, a specialist in the field of law and cryptography, Nick Szabo in 1994. According to Szabo, a smart contract should be understood as a computer program that fulfills the provisions of the contract. Herewith, the goals of smart contract are to execute the terms of the agreement, including payment conditions, confidentiality etc.; diminish the need for intermediaries. Related economic goals include lowering fraud loss, arbitration and enforcement costs, and other transactions costs (Szabo, 1994). Thus, smart contracts allow the digital codification of entire legal institutions, and ensure that the corresponding rights and obligations are automatically enforced

More than two decades later, on 30 July 2015, the first open digital platform, Ethereum, was launched, which allowed for the creation of decentralised online services – called blockchain technology. Ethereum is a decentralised platform for developing applications based on blockchain and smart contract principles. Before the Ethereum platform, applications based on blockchain technology only performed a highly specialised set of actions. This web-based software allows a program written in any programming language to be ran. This makes the process of writing various applications on such a platform simple and highly efficient. Ethereum makes it possible to develop an unlimited number of applications on its own basis, rather than creating a new blockchain every time. The rules of Ethereum technology allow the user to register any type of transactions with any kind of assets without restrictions, excluding intermediation between the parties of smart contracts (Yurasov & Pozdnyakov, 2018). In this connection, the parties conclude smart contracts without classical legal procedures and the banking rules for financial transactions.

Hereby, due to the nature of this new phenomenon and the complex technology with which it is associated, in legal science there is no consensus about the definition of smart contracts and their legal nature. It should be noted that the smart contract category can be defined in the technical and legal senses. In other words, smart contracts may be: 1) computer code that does not represent any legal contract but simply executes a predefined logic; or 2) computer code that has certain legalese properties, i.e., a program with a predefined logic based on legal structures

that is expected to act in a certain way, or the (partial) execution of legalese (e.g., a contract) through computer code, where the code resembles the legalese (Lennart, 2020).

For some, a smart contract does not refer to a contract in a legal sense, but instead to a computer code that automates business processes without the need for recourse to the courts of law to resolve disputes – this is the so-called smart contract code. For instance, Novoselova (2017) indicates that "the technical side of the smart contract is reflected in its definitions as a type of encoding, a way of functioning of the blockchain; as a code fragment that is implemented on the blockchain platform and initiated by the blockchain-transactions and organizes the entry of records into the database". Descriptions of the conditions and the execution algorithms of smart contracts are issued in the programming and use of mathematical tools (for example, cryptography with a public key), which eliminates the ground for discrepancies in the interpretation of the terms of the transaction. Execution is also carried out automatically due to the work of pre-set parameters in a computer system without the participation of parties. Records of obligations and committed transactions are automatically stored in distributed format and cannot be changed by anyone. This approach stems from the idea that a smart contract is only a piece of software – only a technical phenomenon, which it is not possible to regulate by legal means.

For others, however, a smart contract is a legal contract that is partly or wholly represented and/or performed by software. In other words, the contractual obligations of a party to the contract are discharged through the automated performance of the software. However, it should be noted that rather than viewing smart legal contracts and smart contract code as two separate concepts, the reality is that there is a relationship between them: for a smart legal contract to be implemented, it will need to embed one or more pieces of code designed to execute certain tasks if predefined conditions are met – that is, pieces of smart contract code. Smart legal contracts, therefore, are functionally made up of pieces of smart contract code, but, critically, exist under the umbrella of an overall relationship that creates legally enforceable rights. As a result, every smart legal contract can be said to contain one or more pieces of smart contract code, but not every piece of smart contract code comprises a smart legal contract (ISDA & Linklaters, 2017). In particular, the French researcher Guerin (2017) points out that one should distinguish between a program (a smart contract) that operates on the blockchain platform and a traditional contract. As a result, the smart contract is, as it were, overlaid on the traditional civil contract. Such an approach is based on the dual nature of smart contracts, including technical and legal aspects.

Technically, a smart contract is created by a transaction that contains the contract's byte code in the data field. In turn, the contract byte code for forming a transaction can be obtained by compiling from the source code of the smart contract. To be more specific, source code is connected with the statements created in the programming language which are generated by a human/programmer. Source code is easy to read and modify; it is provided to the language translator, which converts it into machine-understandable code, called machine code or object code. The computer cannot understand direct source code, but understands the machine code and executes it. The intermediate code between the source code and machine code is termed byte code; it is a low-level code that is the result of the compilation of a source code which is written in a high-level language. Byte code is also understandable only by the machine.

In this article, references to smart contracts are intended as references to a smart legal contract, which require a deeper analysis. In the literature, there are different approaches regarding the legal nature of smart contracts. Despite the existing definitions of a smart contract, the doctrine does not provide an answer to the question: is it possible to consider a smart contract as a contract, and if so, what type of contract is it?

Efimova and Sizemova (2019) clarify that the place of the smart contract is among special non-independent contractual designs that reflect the features or the special legal consequences of any civil law contract if it meets the criteria specified by the law. Other authors define a decentralised smart contract as any digital agreement which is: (a) written in computer code (thus, a piece of software); (b) run on blockchain or similar distributed ledger technology (thus, decentralised); and (c) automatically executed without any need for human intervention (thus, smart) (Caria, 2019). Taking into account both basic concepts and emphasising the aspects of automation and enforceability, some authors have defined smart contracts as an agreement, automated by the computer and enforced by legal means or computer code actions (Clack, Bakshi & Braine, 2017). Other scholars and legal operators have defined smart contracts as: "self-executing electronic instructions drafted in computer code"

(O'Shields, 2017); "contracts that are represented in code and executed by computers" (Mik, 2017); and programs that execute contractual obligations and use legal remedies (Tjong Tjin Tai, 2018).

Savelyev (2016) believes that smart contract is a legal agreement and suggests the following definition: a contract, concluded in the electronic form, performed on the blockchain platform, which provides the self-enforceability of the provisions, upon arising conditions embedded in it. Savelyev also claims that a smart contract can be considered as a agreement having a legally-binding nature for several reasons. Firstly, it applies to relations related to digital assets, which represent economic relations, the object of civil law. Secondly, despite the automatic performance of the smart contract, the will of the party is necessary to make it effective. Finally, the mere fact that the contract is concluded by electronic means does not mean that it is not a contract.

To summarise, there is a limited consensus on a core definition, according to which smart contracts have a solely electronic nature and feature the implementation of software; some add to this definition the requirement that such contracts run on blockchain or similar distributed ledger technologies and, thus, may be called decentralised smart contracts.

It is the view of this article that, in order to elaborate a clear definition of a smart contract, it is necessary to compare it with the traditional contract, highlighting its distinctive features. For instance, in the classical agreement it is required to identify their parties to provide a valid consent. However, public blockchains assume decentralised transactions because of countless amount of participants. Moreover, digital identification of the participants does not mean the same as the real identification with the use of official identity documents (Vidal, 2018). Nevertheless, this problem is not unbridgeable because of the establishment of identification requirements. In other words, the identity of the parties, acting pseudonymously, could be established through the link to their personality.

It also has to be emphasised that another feature distinguishing a smart contract from a traditional one is its self-enforceability. The automated fulfilment of obligations involves the implementation of obligations not by the actions of the parties, but with the consent of the parties with the help of an electronic platform through the introduction by the parties of the appropriate commands (contractual conditions). Due to this, it becomes possible to make legal relations self-enforceable. On the one hand, this could be regarded as an advantage of the smart contract since an algorithm (computer program) is able to independently fulfil obligations and track their fulfilment. On the other hand, there are certain difficulties associated with the self-enforceability of smart contracts. Unlike the performance of traditional contracts, the performance of a smart contract cannot be stopped – neither voluntarily by the parties (they cannot breach or amend it), nor by any official authority or other supervisor (Paech, 2017). In this regard, a smart contract is described as technically binding for all the parties independently of the change of intentions of the parties or circumstances (Savelyev, 2016). Therefore, the automatic nature of a smart contract creates certain difficulties, one of which is that the smart contract cannot be changed and neither party can suspend execution under it. Further, it is not clear how to relate the impossibility of suspending performance under a smart contract to certain legal norms, such as good faith or unilateral refusal to perform the contract.

Also unclear is the situation related to liability in case of system errors. In this case, the question as to the party responsible for system errors remains unclear: the parties themselves, the protocol/program developer, or third parties. In addition, given that a smart contract cannot be forged, destroyed, or changed, the question arises as to the possible way of renegotiating the terms of the agreement due to a significant change in circumstances. In order to solve this problem, this article proposes to initially prescribe in the program code of the smart contract the possibility of changing the terms of its execution or the participation of a third party. Moreover, the development of the idea of the automatic enforceability of a smart contract has led to the emergence of a new category of entities that are not parties to a contract implemented through digital technologies but still have the ability to influence its execution, called oracles. According to M. Mekki (2019), an oracle is a person or computer application that connects events that occur in the virtual world of the blockchain and events that occur outside of it, in the real world. The oracle can be an individual or legal entity, a program, a physical device, etc. The oracle can also be an organisation that has the necessary competence in a particular field, including legal professionals such as notaries, lawyers, or bailiffs (Gossa, 2018). Such individuals are necessary to collect, process, certify, and include blockchain information that is important for the implementation of a smart contract, which is located

outside the contract, in the physical world, and it is the oracles who are able to solve the difficulties associated with the self-enforceable nature of smart contracts.

It has to be noted that the form of conclusion of the smart contract itself is not new, which converges it towards the traditional contract. Thus, the current legislation of the USA and the EU provides for the possibility of concluding agreements in electronic form (Kirillova, Zenin, Kovaleva, Baskakova & Fatkulin, 2020). Accordingly, contracts can also be concluded in the form of program code: the legislator equates the electronic form with the written form. When considering smart contracts as a written form of a contract, it is worth recalling the legal prerequisites for the emergence of such contracts and this theory in general, namely the UN Convention on Contracts for the International Sale of Goods (1980), where Article 13 provided for the possibility to recognise the written form and the exchange of messages by telegraph and teletype, which was later supplemented through the prism of international rules for the interpretation of trade terms (Incoterms, 1990). These rules recognised the importance of computer communication for contractual relations, and also specified that both parties to the agreement should have the same legal position in relation to this process – i.e., mutual recognition of the electronic form of the transaction.

In general, it can be concluded that a smart contract is not a separate type of obligation or contract. It is more acceptable to understand a smart contract as a new way to fulfil obligations entered into the form of software code. Smart contracts should be considered as contracts in the legal sense, with the definition of a smart contract as any digital agreement that: a) is written in computer code (software); b) works on the blockchain or similar distributed book technologies (decentralised); and c) is automatically executed without the need for any intermediary.

2. On the meaning of smart contracts in common and civil law traditions: differences in two approaches

The term *legal structure* refers to a legal system's "skeletal framework; it is the permanent shape, the institutional body of the system, the tough rigid bones that keep the process flowing within bounds" (Friedman, 1969). Essentially, each "[s]tructure becomes . . . custom or habit" such that "social meanings clump about each structure," giving them "social-psychological and cultural boundaries" (Friedman, 1969). As a result, structures are "patterns of behavior that persist over time – vessels or containers that the culture slowly welds into shapes" (Friedman, 1969). It could be stated that legal structures are closely connected with legal traditions, and that the roots of a legal system emanate from the unique historical and political context of that system and thus significantly influence the form of legal structures in the system.

Continental European civil law was developed on the codification of Roman law, therefore the word *system* is connected with the substantive doctrine, stated in the codes with common principals and detailed rules. In English common law the word *system* is associated with the law in its actual performance, finding ways to solve the disputes in accordance with previous judicial decisions (Brouwer, 2018). Thus, the compared legal traditions have interpreted the *system* in a different way. This incongruity leads to the formation of two approaches to the *legal unity*. In a civil law countries legal unity means following the statutory law, while in a common law countries – compliance with the previous court decisions (Brouwer, 2018). Thus, in the Roman-Germanic legal family, codification is the main form of legislative systemisation. Meanwhile, the common law legal system is characterised by the sociological approach to law, under which *law* is understood as a highly organised form of social control which is implemented by judicial and administrative control (Karamanukyan, 2018).

At the present time, when the state takes the obligation to resolve conflicts in industrial society, law becomes the most important means of exercising social control. All other types of social control today operate under the supervision of and in accordance with the requirements of law. The goal of law is to settle social conflicts and achieve civilised relations between people. This right should not serve to divide members of society, but, on the contrary, to strengthen harmony and cooperation between them. In this regard, the leading role belongs to the judges who formulate such a concept of law in the process of jurisdictional activity. They "fill" the legislation with rights, making appropriate decisions and acting in this case as subjects of law-making. As a result, laws are recognised by the courts as living organisms, changing and upgrading through judicial decisions (Karamanukyan, 2018). In other words, the courts, in adjudicating legal disputes and carrying out justice, create precedents via the interpretation of laws and regulations, adapting them to a changing society.

While analysing the differences between these two systems, it is notable to mention the essence of such a principle of law as "freedom of contract". The heart of common contract law lies in the freedom of commerce and the freedom to conclude contracts. For the common law countries, freedom of contract means, first and foremost, the economic freedom to voluntarily engage in economic transactions without any risk of statutory interferences (Lawrence, 1994). Here, the emphasis is on the formal nature of legal consumer rights, where human capital is used to stimulate future spending and economic growth. Unlike in common law jurisdictions, today's conception of freedom of contract in the EU can best be understood as a consumer protection conception that restricts freedom of contract in commercial transactions through statutory regulation. Hence, compared to the civil law approach, the common law view on the role and function of contract law is much more economical. Its primary purpose is to guarantee freedom of contract, not to protect the rights of consumers.

It should also be emphasised that trends in civil law countries focusing on the principle of good faith (a general principle of law) are not shared by common law countries. To be specific, civil law countries recognise the concept of good faith, distinguishing between moral and legal norms. The components of good faith, as a notion belonging to the matter of law, are based on honesty as a manifestation of conscience within moral norms, which is translated as a value that entails the compliance of individual life with moral norms. In order to invoke good faith, all its attributes must be found both anterior to and simultaneous with the moment when the agreements meet to perfect a legal act, and subsequently for its execution (Dobrilă, 2012). Most European civil codes contain general provisions on good faith as a concept and, also, as a concrete application in contractual relations. In particular, following the principle of good faith, each party has a duty at the pre-contractual stage to disclose any information that is relevant and material to the other party's consent to enter the transaction. For instance, a party has a duty at the pre-contractual stage to disclose any information that is relevant and material to the other party's consent to enter into the transaction, according to Article 1112-1 of the French Civil Code. The parties may neither limit nor exclude this duty. In addition to imposing liability on the party who had the duty to inform, their failure to fulfil this duty may lead to the annulment of the contract under the conditions provided by Articles 1130 and following. According to Section 242 of the German Civil Code, contracts must be negotiated, formed, and performed in good faith. This is according to the so-called principle of good faith and fair dealing. In case of breach of pre-contractual duties, liability based on Section 311 of the German Civil Code is possible (*culpa in contrahendo*, a common contract law concept meaning "fault in conclusion of a contract").

On the contrary, in the common law countries there exists no legislation according to which there is an obligation to negotiate contracts in good faith, and no general duty to disclose information at the pre-contract stage. Each party should take care of its own interests by making necessary inquiries. In particular, in the leading English House of Lord's case *Walford v. Miles*, a pre-contractual duty to negotiate in good faith was denied on the ground that this would be inconceivable with the nature of negotiations in which each party pursues its own interests. An agreement according to which parties decided to negotiate in good faith is not effective in real life. "Negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content" (*Walford v. Miles*, 1992). American courts have also largely refused to recognise the duty to negotiate in good faith in the absence of additional procedural deficiencies. Some courts refuse to find contracts unconscionable per se, demanding additional, specific evidence that the consumer did not have a meaningful opportunity to read and understand the contract or to request information they were interested in (*Westmoreland v. High Point Healthcare Inc.*, 2012). For example, the New Jersey Supreme Court held in *Stelluti v. Casapenn Enterprises* (2010) that a "fairly typical adhesion contract" could not be found procedurally unconscionable where the complaining consumer had ample time to review and consider the contractual provisions, and could have contracted elsewhere for the same services with less onerous terms.

All things considered, the legal systems described above have inherent conceptual differences which could affect the legal approach to a smart contract.

Firstly, in the common law countries there is a need for greater awareness about the main conditions of the smart contract. Due to the lack of codified acts, the participant has the responsibility to provide in advance all the details of the smart contract in a clear and accessible form. This conclusion is inevitable because a party does not ordinarily owe a general duty to disclose to the other party – each party should take care of its own interest by making necessary inquiries. In contrast, in the civil law countries, the participant shall be bound to fulfil the

performance in accordance with the requirements of good faith, disclosing any information that is relevant and material to the other party of the smart contract.

Secondly, different approaches to such terms as system and legal unity in general can cause difficulties associated with the incorporation of smart contracts into the current legislation. In that respect, common law countries due to the flexibility of its law should deal with blockchain technologies more effectively. A common judge has the right to apply certain general principles of law to the to new technology (Moringiello & Reynolds, 2013). Writing for the California Supreme Court, Justice Tobriner explains that it is necessary to consider the new case, taking into account the circumstances in which it arises. This statement, in the light of development of new technologies, has become obvious. (*Steven v. Fid. & Cas. Co.*, 1962).

As a result, the nature of the challenges involving the incorporation of smart contracts into the law is different. Common law countries call for the careful application of existing precedents to the new cases due to the flexibility of the classical civil law. Meanwhile, in the civil law jurisdictions the creation of the new legal rules is necessary.

3. The recognition of smart contracts

The preceding paragraphs provide separate analyses of the understandings of the notion of a smart contract and its features in the common and civil law countries, emphasising conceptual differences. Having discussed them, this paper now turns to considering perhaps the most difficult of issues with respect to smart contracts: how the existing contract law adapts to regulate and enforce smart contracts. In this regard, it should be noted that the legal nature of smart contracts in the national laws of states is not clearly defined, which makes it possible to use this construction in different ways. Recognition of smart contracts can be achieved by two different regulatory alternatives: enacting special provisions tailored to smart contracts; or abstaining from this strategy, leaving the question to the judiciary which should examine the legal status of smart contracts on a case-by-case basis by applying the general principles of contract law.

3.1. Legal recognition: the current legal framework

An international legal framework specifically designed for smart contracts does not exist (Mukherjee, 2018). However, the topic is clearly under consideration at the legislative/regulatory national level. Thus, several states in the USA have recently turned their attention towards smart contracts.

For example, in the State of Arizona, a smart contract is defined as: “an event-driven program, with state, that runs on a distributed, decentralized, shared and replicated ledger and that can take custody over and instruct transfer of assets on that ledger” (Arizona ALS 97, Arizona Sess. Laws 97, Arizona Ch. 97, Ariz. HB 2417, 2017).

The State of Tennessee modified and expanded on this definition, and defined a smart contract as: “an event-driven computer program, that executes on an electronic, distributed, decentralized, shared, and replicated ledger that is used to automate transactions, including, but not limited to, transactions that:

(A) Take custody over and instruct transfer of assets on that ledger;
(B) Create and distribute electronic assets;
(C) Synchronize information; or
(D) Manage identity and user access to software applications”.
(State of Tennessee, Public Chapter No. 591, Senate Bill No. 1662, 2018).

A note following the Wyoming statute (Chapter 29 – Digital Assets, Section 34-29-103) provides that:

(a) A smart contract, record, or signature could not be considered as not legally binding only because a blockchain was used to create, store, or verify the smart contract, record, or signature.

(b) In a proceeding, evidence of a smart contract, record, or signature must not be excluded solely because a blockchain was used to create, store, or verify the smart contract, record, or signature.

(c) If a law requires a record to be in writing, submission of a blockchain which electronically contains the record satisfies the law.

(d) If a law requires a signature, submission of a blockchain which electronically contains the signature or verifies the intent of a person to provide the signature satisfies the law.”

Moreover, the states of Delaware (Delaware S Res Bill 69, 2017), Vermont (Vermont S Res Bill 135, 2017), Nevada (Nevada S Res Bill 398, 2017), Hawaii (Hawaii HR Bill 1481, 2017), New Hampshire (New Hampshire HR Bill 436, 2017), Illinois (Illinois HR 120, 2017), and California (Assemb. B. 2658, 2018) have all sought or seek to pass legislation to recognise and capitalise upon the use of smart contracts and blockchain technology (Catchlove, 2017). Thus, these states recognise the legally binding effects of smart contracts that are fully automated and executed on a blockchain, even if there is no corresponding traditional contract in word-format. Therefore, parties to a smart contract might be able to ensure that their smart contract is legally binding if they elect the law applicable to the contract to be that of Arizona, Delaware, Tennessee, or any other jurisdiction that recognises the legally binding effects of smart contracts.

At the EU level, it is important to note that uniform legislation does not exist today. However, at the national levels of several EU Member States, legislative frameworks have already been passed in order to recognise the legal effects of smart contracts. For instance, lawmakers in Monaco recently approved a bill that creates a legal foundation for ICO. Law No. 1009 of 10 March 2020, voted in on 16 June 2020, establishes a legal framework for smart contracts by stating that they "constitute legal acts and produce effects of law", and by adding that the inscription of a legal act in a blockchain (chain of blocks) is presumed to constitute a faithful, enforceable, and durable copy of the original, bearing a certain date.

Moreover, the legal structure of a smart contract in Italian national legislation is of particular interest. In Italy, the terms *smart contract* and *distributed ledger technology* were enshrined in the Law "On Urgent Provisions for Supporting and Simplifying the System of Business and Public Administration", which was published on 12 February 2019 in the *Official Gazette* of Italy. This law defines, for example, distributed registry technologies as technologies and information protocols that use shared, distributed, reproducible, and simultaneously accessible registries, decentralised and encrypted, that allow data to be registered, authenticated, updated, and stored, regardless of whether it is encrypted or not, and that cannot be changed or tampered with. This law also provides that the storage of electronic documents using distributed registry technologies becomes legally effective from the moment of appearance of the electronic time stamp, and therefore can be used as evidence in court. The second term which is set out in this law is a smart contract, which represent a computer program based on distributed registry technologies, the use of which is legally determined by two or more parties based on previously concluded agreements. In other words, a smart contract is a translation of an agreement or contract between two or more persons into a computer program that can certify that certain conditions are initiated and automatically executed (for example, goods are delivered after payment, a dispute settlement agreement is created and executed when the positions of both parties coincide, etc.). In addition, smart contracts are equated with the written form of a transaction, but participants in such a transaction must be identified in accordance with the procedure provided for by law. This procedure is developed by the Digital Italy Agency, which sets the appropriate technical standards. The consequences for such transactions are similar to those that occur in an electronic environment. Thus, a smart contract is considered as a method (or mechanism) for ensuring the execution of the contract (Proposta di modifica n. 8.0.3 al DDL n. 989, 2019).

Smart contracts, then, are the most promising mechanism for concluding contracts in terms of the digitalisation of this process. However, their legal status remains completely unclear, and most jurisdictions around the world still do not have specially developed regulation. Currently, the legal regulation and the practice of applying smart contracts in different countries is at the formation stage. Despite this, various legislatures in some US States (e.g., Arizona, Tennessee, Wyoming) have already enacted legislation specific to smart contracts in order to clarify that smart contracts cannot be invalidated, valid, or enforceable just because a contract is processed, executed, or otherwise applied through a smart contract – i.e., via computer code. Some European jurisdictions also explore similar legal avenues by defining the notion of a smart contract in the legislation, in particular Monaco and Italy. However, generally speaking, the fact that there is no specific regulation on such matters clearly does not mean that existing laws and general principles of law do not apply to them, or that they are not regulated at all. In the absence of specific rules, existing laws should regulate these technologies.

3.2. Judicial recognition: smart contracts and their compatibility with the requirements of contract formation

With all of the advantages of smart contracts that are enshrined in practice, classical contract law, which has formed a fully-fledged and high-quality theory of transactions, should be taken into consideration. Unique nature of smart contracts raises one of the most important questions concerning the ability of existing contract law to regulate and enforce them.

The smart contract concept creates many concerns when one tries to apply classic concepts of contract law. Moreover, such challenges have a universal nature as they cut to the core of contract law provisions, which are more or less the same regardless of jurisdiction. The main problem here lies in the fact that smart contracts are created and developed in a technical universe "parallel" to the legal realm, without a backward glance towards any legal considerations, in a way similar to the Internet in its early days (Savelyev, 2016).

To find out whether a smart contract can be considered as legally binding contract, it is necessary to establish if it meets the main requirements for the formation of a traditional contract in the common law and civil law countries. In particular, the following elements will be analysed: 1) consent through an offer and acceptance by a natural person or legal entity (similar to the "meeting of the minds" under common law); 2) the cause of the obligation (like "consideration" in the common law); and 3) the intention to create legal relations.

3.2.1. Offer and acceptance

For the emergence of rights and obligations under a smart contract, as with any other agreement, it is necessary to reach an agreement, which is expressed in the will of the parties. It is necessary to mention that the so-called offer–acceptance mechanism is the traditional method for concluding a contract in the Romano-Germanic and Anglo-Saxon legal families, but with some particularities.

Generally speaking, an offer could be described as an expression of one party to the defined provisions on condition another party will likely agree to them (Corbin, 1963/2001). The second element of a legally enforceable contract is the acceptance of the offer by the counterparty (Scholz, 2017). Acceptance according to the U.S. law means a "meeting of the minds", where the parties have come to an agreement about the main conditions of the contract.

Properly completed acceptance of the offer determines the moment of conclusion of the contract. The agreement is considered to be concluded between the parties at the moment of reaching an agreement on all significant issues in the form required by law. Determining the moment of concluding an agreement has an important practical meaning, for the following reasons in particular:

1) Establishing the legal status of the parties that entered into a contractual relationship (the legal capacity of individuals and the legal personality of legal entities).

2) Establishing the legislation applicable to the contract (if, during the negotiations or execution of the contract, there have been changes in law).

3) Determining the rights and obligations of the parties, including the ownership rights received by the acquirer at the moment of the agreement conclusion in some legal systems (USA, Britain, France). There are two systems for establishing the transfer moment of ownership to the purchaser of a property: by virtue of only one agreement on the sale (USA, Britain, France), or subject to the transfer of the property (most of the EU States, including Germany). In France, the buyer's ownership of the object being sold arises when agreement about the thing and the price is reached, despite the thing has not yet been delivered to the buyer or the price is paid to the seller. (French Civil Code, Article 1583). Likewise, in the United States, under a "sale of an individually defined product agreement", title to the goods passes from seller to buyer at the time of the conclusion of the contract, in the absence of agreement, custom, common business practice, or intent of behaviour. If the goods are not individualised at the time of the conclusion of the contract, if they are not available, or if they are not the property of the seller, the ownership of the things passes to the purchaser after "the goods in accordance with the contract are unconditionally allocated for the performance of the contract by the seller with the consent the buyer or the buyer with the consent of the seller". On the other hand, in the Federal Republic of Germany and other countries, where the acquisition of ownership by the buyer is associated with the transfer of a thing, the transfer of a property is often understood as its physical delivery or symbolic delivery (for example, the transfer of a key to a building)

– in other words, the "physical transfer of things" or "obtaining actual control of the thing" in the sense of para. 1 § 854 of the German Civil Code.

4) Determining the place of conclusion of the contract, which can often affect the choice of applicable law in contracts with a foreign element (Zenin, 2005).

Generally speaking, there exist two approaches to determining the time of acceptance an offer being effective. The first concept is that acceptance takes place when information about the consent to enter a contractual relationship reaches the offeror. This is the basis of the system for obtaining acceptance by the offeror. Most consistently, the system of obtaining acceptance by the offeror is carried out by German law. In accordance with § 130 of the German Civil Code, any expression of will, and therefore acceptance, becomes valid when it reaches the addressee. Accordingly, the contract under German law is considered concluded at the moment the offeror receives the acceptance, and the place of conclusion of the contract is the place of residence or location of the offeror. The second concept is the recognition that the contract is formed at the moment when the offeree sends their declaration of acceptance to the offeror. The provider takes the risk of delay or even loss of the letter of acceptance in the post office, and the contract is considered concluded at the moment of delivering the letter to the post office. Such a system is called the mailbox theory or the postal rule. This concept is very popular in common law countries. British courts affirmed the validity (effectiveness) of an emailed notice of an arbitration reference regardless of the fact that the recipient's staff assumed the email was "spam" and ignored it (*Bernuth Lines Ltd v. High Seas Shipping Ltd*, 2005). Following this rule, not only is the offeree unable to revoke their acceptance once they have sent it, but the offeror cannot revoke their offer after an acceptance has been sent to their address. They can only revoke it if the communication of acceptance is not in the course of being transmitted to them. Therefore, in this specific case, it is the offeror and not the offeree who bears the risk of communication. This approach was traditionally favored by British courts because they perceived that the acceptance rule might result in each side waiting for confirmation of receipt of the last communication ad infinitum (Sasso, 2016). In the USA, there is also the general principle that the offeror must be notified of acceptance. In this case, it is recognised that the offeror is notified of acceptance and the contract arises at the moment when the letter containing the notice of acceptance is dropped into the mailbox. The system of sending, or the theory of the mailbox, received legislative confirmation in the United States in paragraph 26 of Article 1201 of the Uniform Commercial Code, according to which the acceptor notifies the offeror of acceptance when they take measures reasonably necessary in the ordinary course of business to notify the offeror, regardless of whether the message actually reaches the offeror.

To return to the question of smart contracts, it is necessary to mention that a smart contract fulfils the offer requirement through a posting on the blockchain ledger which occurs in an effort to elicit acceptance (Catchlove, 2017). An offer is a web page that contains a proposal to conclude a contract with a link to the program code, signed with the offeror's private key and placed in the distributed registry. For example, a smart contract for the initial placement of digital assets – so-called tokens – may contain an offer to buy an asset for the amount provided by the state fiat currency or to exchange cryptocurrency for the proposed asset with the indication of exchange rate, payment methods, and contract execution. Thus, the web page contains the essential terms of the contract and can be considered as an offer. An offer to conclude a smart contract in the form of a web page without access restrictions may be recognised as "public" in some legal systems (for example, Germany and France), in which case it is addressed to an indefinite circle of people. In this case, any person who has performed the necessary actions for the purpose of acceptance of a smart contract will be authorised to require the offeror to fulfil the commitments of the contractual obligations. This fact should be taken into account and, if necessary, certain restrictions should be applied when accessing the web page where it is hosted.

Acceptance of a smart contract is confirmed through the act of performance of the self-executing smart contract, and must be carried out in a form similar to an offer; that is, in the form of an electronic message signed with the acceptor's private key. The party that developed these standard terms and conditions must ensure that they are available on the website. The content of such conditions should be expressed in terms that do not allow for different interpretations and exclude ambiguity. Since the smart contract is formed in the form of an accession agreement, the acceptance of the smart contract cannot change its program code or, consequently, its terms. As such, there is no possibility of a counteroffer. Therefore, the ultimatum principle formulated in British law applies: take it or leave it.

In addition, offer and acceptance in a smart contract could be also expressed in the following forms: 1) in a written contract that the parties conclude at the entrance to the blockchain and in which they negotiate, in particular, the terms of future smart contracts or the procedure for determining them – in this case, this can be applied to the design of the framework contract; and 2) in the form of click-wrap agreements, the terms of which are set out in electronic form whereby acceptance is offered by clicking the *I agree* box. Considering these explanations, in most cases, the offer to accept the terms of click-wrap agreements corresponds to the characteristics of a public offer. Acceptance in this case is expressed by performing specific actions (Savelyev, 2017).

Essentially, the initial stage of a contractual agreement is not very different between smart contracts and traditional contracts because before any contract can operate, two parties must agree to some set of contractual terms (Raskin, 2017). Meanwhile, the moment of signing a smart contract is very important from the perspective of determining the time of acquisition of rights and obligations by parties. The determination of the moment of conclusion of the smart contract differs between the approach that exists in the continental legal system family (the time of receipt of acceptance by the offeror), and that of Anglo-Saxon law (the moment when the acceptance was sent, i.e., the mailbox theory). From the perspective of this paper, the moment of conclusion of a smart contract can be clearly defined, since the software of the code is activated only at the time of making a corresponding entry about the acceptance of the offer in the next block of distributed registry entries.

In the field of smart contracts an acute question is related to the possibility of reaching a "meeting of the minds", when one part of the contracting process is completed without human involvement. Meanwhile, the answer to this question may be positive taking into account legal principles contained in the Electronic Signatures in Global and National Commerce Act (hereinafter the ESIGN Act) and the Uniform Electronic Transactions Act (hereinafter UETA). According to them, the actions of the electronic agent (software) are equal to the actions of natural person or legal entity. Hence, if both parties read and understand the terms written in computer code, which is also verifiable by a third-party adjudicator (courts or arbitral tribunals through the use of experts to distil the meaning of the computer code), then there is nothing preventing that meeting of the minds from being enforced and valid (Kaulartz & Heckmann, 2016).

3.2.2. Consideration and the cause

In the Anglo-Saxon legal family, ideas about contract formation are in some sense different in comparison with Roman law. In particular, the American researcher Christopher Octave (2004) points out that in common law a contract is considered as a promise, confirmed by a counter-provision, whereas, in the Roman legal tradition, a contract is an agreement.

The proponents of the doctrine of causa associate it with the Roman law. Thus, article 1131 of the French Civil Code stipulated that "an obligation without 'cause' or founded on a wrong 'cause' or an illicit 'cause' can have no effect". Indeed, causa in the Roman law means any basis for the actions (Lorenzen, 1919).

According to German approach, "every lawful agreement entered into with the serious intention of being legally binding would directly produce of its own force obligatory effect, without regard to the form in which it was expressed" (Lorenzen, 1919). Domat stated that it is necessary to distinguish between bilateral, real, and gratuitous contracts. The causa of the obligation of each party in a bilateral contract consisted in the obligation assumed by the other. In the case of a real contract, the executed consideration should be regarded as the cause; in case of donations - the purpose for which the gift was presented (Lorenzen, 1919). Broadly speaking, the causa defines the real actions of the participants and the reasons for concluding an agreement.

On the other hand, to be a legally binding contract under common law, the parties should exchange their promises. It is said sometimes that causa originates from the English doctrine of consideration. As Simpson (1975) observed, treatise writers in the early 19th century considered consideration as a version of the doctrine of causa.

The doctrine of consideration is one of the most fiercely debated aspects of contract law in common law jurisdictions. Consideration emerged during the sixteenth century as an element of actions in assumpsit (breach of promise or undertaking) (Ricks, 2000) – despite its controversial status, however, it remains an essential requirement for the formation of contracts not in deed form.

Consideration is a fundamental prerequisite in English contract law, according to which a promise will not be enforceable unless it is supported by consideration. The main characteristics of the concept of consideration are the following: 1) consideration should include real benefit to the promisor; 2) adequacy of consideration is not required (Lorenzen, 1919). English courts do not question the adequacy of consideration, but there must be some exchange of value. In other words, the "exchange" need not be of equivalents. "A Court is concerned only with the presence of consideration and does not make an assessment of the comparative value of the acts or promises of the parties towards one another" – nominal consideration is sufficient (*Melmerley Investments Ltd v. McGarry*, 2001). According to Gordley (1995), American courts connect the doctrines of consideration with the consequences of the contract on the wealth of the parties.

In relation to smart contracts, it is interesting to note that the consideration for such contracts is in performance (*Carlill v. Carbolic Smoke Ball Co Ltd*, 1892). The consideration requirement is satisfied by smart contracts since they, by definition, entail an exchange of digital assets. Therefore, sufficient consideration will normally be both conceptually and pragmatically present in smart contracts in order to render them legally enforceable.

3.2.3. The intention to create legal relations

The requirement of "the intention to create legal relations" is one of the most important terms of a valid contract in the common law countries. English law specifically requires the existence of the "intention to create legally binding contract" for enforcing a contract, despite the existence of "consideration" for the contract (Gulati, 2011).

According to the legal literature, a declaration of intent leading to the conclusion of a contract can be expressed by the parties through the exchange of assets or services with one another. A similar transaction-based interpretation has also been outlined in regard to smart contracts (Koulu, 2016). A declaration of intent by acting upon it can, for instance, take place in the purchase of items from a vending machine. In this case, the proprietor selling items and services via the vending machine has implicitly displayed its desire to conclude a contract with the terms specified by the vending machine. This is supported, for example, by the fact that the proprietor has first had to obtain the vending machine and a location for it, set up the vending machine, fill it with products, program the vending machine, and make it operational before any contracts can be concluded. The user also expresses their will to be bound to the transaction similarly via the vending machine (Saarnilehto, Hemmo, & Kartio, 2012).

Expressions of intent when entering a smart contract have many similarities with a tacit agreement, when a contract is entered by parties exchanging assets. When one party transfers an amount to a smart contract and the other party begins to act based on a smart contract, expressions of the intentions of both parties are included in the actions taken. Although there is no intentional expression, action by the other party is necessary in order to be bound by the contract. Here, the "creator" of the smart contract announces their desire to conclude contracts by building a smart contract on the blockchain and transferring certain assets to it. The other party to the smart contract expresses its will by acting in accordance with the terms of the contract, therefore accepting the offer. Finally, when the preconditions specified in the smart contract are met, it performs itself automatically.

Hence, it is almost certain that the intention to create legal relations will be found in most smart contracts (Durovic & Janssen, 2019). Moreover, "consideration" should be indicative of such an intention. Therefore, as far as common law countries are concerned, there should not be any separate requirement of proving an "intention to create legal relation". Declaration of intent is an immovable part of a smart contract, and is closely connected with the execution of a contract.

Therefore, even though smart contracts fulfil the requirements for the formation of contracts, there exist different understandings of the incorporation of smart contracts into the law. This fact, in turn, can pose a challenge to cooperation between countries.

The corollary of this is the necessity of a special legal structure emerging: so-called *crypto-legal structures*. Crypto-legal structures are the result of implementing legislation through smart-contracting, semi-autonomous, cryptographic computer code. Firstly, law is created through legislation or regulation written in words, and is then implemented through computer code. Due to the direct interaction of the crypto-legal structure, new legal

principles and issues could occur. This will give rise to new substantive legal issues and cause shifts in legal culture and legal structures (Reyes, 2017). In other words, the emergence of cryptolaw has the potential to disrupt the fundamental difference between legal structures. By translating statutes and regulations into cryptographic, smart-contracting computer code to create crypto-legal structures, the gap between the importance of computer codes in common and civil law jurisdictions will narrow.

New legal principles that would be implemented through computer code represent a method of the harmonisation of common and civil law. Most of these differences can be transcended, as they pertain to specific rules rather than deeply ingrained principles and legal cultures. It is the position of this paper that the following rules should be incorporated in order to provide a unanimous approach to smart contracts:

1) The civil law approach to the principle of good faith should be used, in light of which the issuer shall be bound to fulfil the performance in accordance with the requirements of good faith. This means that all the main conditions of the smart contract should be disclosed, so that any participant can clearly understand them before entering the contract.

2) The civil law approach to such principles of law as "freedom of contract" should be used. Given the need to protect a weak party in an obligation, one should understand the applicability of consumer protection legislation to smart contracts. It is necessary to provide the responsibility of a professional entity (sellers, persons providing services, and other persons) for introducing into the program code rules which violate consumer rights. Such a responsibility should arise from a professional subject even in the absence of their fault.

3) The definition of the moment of conclusion of a smart contract should differ both from the approach existing in civil law (the moment of receipt of the acceptance by the offeror) and from the approach of Anglo-Saxon law (the moment of sending the acceptance, that is, the mailbox theory). The moment of conclusion of a smart contract should be clearly defined, since the program code is activated only at the time of making a corresponding entry on the acceptance of the offer in the next block of entries in the distributed registry. Moreover, it should be provided that offers are freely revocable within a fixed time, after the expiration of which the offer becomes irrevocable. The validity period of the offer must be recorded on the web page. Acceptance of a smart contract must be expressed in the form of an electronic message signed with the acceptor's private key.

To summarise these provisions, the implications of crypto-legal structures could decrease the gap between different legal systems. Meanwhile, being an extreme form of code as law, crypto legal structures could enable organisations to effectively comply with encoded rules and to ensure that parties make appropriate transactions.

Conclusion

Scholars and legislators have not yet developed a unified approach to the definition of a smart contract and its legal nature. This is due to the fact that the smart contract is a new phenomenon. However, the use of smart contracts is expanding every year due to a number of advantages based on the use of blockchain. These advantages, which are provided by the characteristics of this technology, include: the impossibility of unilaterally changing terms; self-enforcement; synchronisation and encryption of information; and the simultaneous availability of information to all participants in the transaction. The main positions regarding the legal nature of a smart contract are: recognition of its program functioning on the basis of a distributed, decentralised registry; and an electronic contract, or method of contract execution. Such contradictions in the understanding of a smart contract and its legal nature complicate its application. In forging this connection, the author formulated a definition of the smart contract as a new way to fulfil obligations entered into, in the form of software code.

This research has shown that the experience of the legislative regulation of smart contracts in the EU and the USA is different. In most countries, there is no legal regulation of smart contracts. However, Monaco, Italy, and some US states (Arizona, Tennessee, and Wyoming) have definitions of a smart contract at the legislative level.

Meanwhile, in the absence of specific regulation on smart contracts, existing rules and law principles should be applied to them. Thus, by interpreting smart contracts through traditional contract law doctrine, it can be stated that smart contracts integrate all of the elements of a contract (offer, acceptance, consideration (causa), and intention to create legal relations). For this reason, a smart contract should be legally binding in the common and civil law countries. However, the differences in the domestic legal systems on certain fundamental issues – such as the binding nature of offers, good faith, freedom of contract, and moment of conclusion of contract – gave rise to intense discussions on these differences and their importance regarding their application to smart contracts.

As a way of reaching a uniform approach between these differences, this paper suggests creating crypto-legal structures, implementing the legal rules of both legal systems through computer code. These rules should represent a compromise between the USA and EU approaches, as representatives of different legal traditions, to interpreting smart contracts through traditional contract law doctrine. This could contribute to the bridging of the gap, providing a uniform understanding and global regulation of smart contracts.

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