3. The Western Legal Tradition

3.1. The Importance of the Category 'Tradition' in a Legal System

In the previous chapter of this study, it was pointed out that traditionality is not always appreciated in Western intellectual thought. Traditional thinking is often contrasted with progressive and independent thinking, and traditional teaching methods with innovative methods, etc.[571] Also, traditional communities are often not considered to be dynamic, self-critical or rational, and discussions in Western societies show a clear dichotomy between modernity and tradition.[572] Nevertheless, this view, which in essence suggests that the modern Western world appeared out of nowhere and did not require many years of development, H. P. Glenn considers to be unfounded.[573] According to him, everyone is part of a certain tradition, and therefore both Western societies and Western law have their own traditions, which are directly recognised by the representatives of the legal tradition itself.[574]

The question of why it is crucial for lawyers to analyse and learn about their legal tradition is answered by the very nature of law. Scholarly literature indicates that tradition is present in almost every legal system, and is even its 'most important feature'.[575] Although modern predominantly positivist law is considered to be 'post-traditional law',[576] 'the fact that modern law also retains a relation to its past, to its history'[577] cannot be denied. This means that 'legal practices derive their necessary conceptual, normative and methodological resources, even their very possibility, from

571 Glenn, *Legal Traditions of the World* (n 42) 1.
572 H Patrick Glenn, 'A Concept of Legal Tradition' (2008) 34 Queen's Law Journal 427, 429.
573 ibid citing Charles Taylor, A Secular Age (Cambridge: Harvard University Press, 2007), Harold J Berman, Law and Revolution: The Formation of the Western Legal Tradition (Cambridge: Harvard University Press, 1983) at 112.
574 Glenn, *Legal Traditions of the World* (n 42) 3.
575 Krygier, 'Law as Tradition' (n 509) 239.
576 Kaarlo Tuori, 'The Law and its Traditions' (1989) 12 Scandinavian Political Studies 490, 494.
577 ibid.

the law's subsurface levels'.[578] Thus, human beings almost never look at a perceivable or an interpretable object without prejudice or predetermined intentions.[579] Tradition forms each person's self-consciousness, world view and aspirations, directs the ways and means of implementing them, and is also important for the relationship of the individual with the surrounding living and non-living environment.[580] This means that the perception of objects of reality is carried out through the help of 'conceptual and interpretative means provided by a specific tradition'.[581] Therefore, this category becomes important in every legal system.

M. Krygier points out that every tradition, including legal tradition,[582] consists of the elements discussed previously in this study:[583] (1) pastness, which means that the content of every tradition was formed, or is believed to have been formed, at a certain time in the past; (2) authoritative presence, which indicates that traditional practices, doctrines and convictions from the past did not remain there, but rather became important and have acquired a certain authority in the lives, thoughts or actions of the present participants in a certain tradition; (3) transmission, which means that a tradition is deliberately or unconsciously transmitted from one generation to the next, rather than being suddenly transferred from the past to the present without any link with the latter.[584] This scholar claims that law, more than most other traditions, is adapted to preserve and maintain these elements and to systematically rely on them.[585]

578 Tuori, 'The Law and its Traditions' (n 576) 494.

579 ibid 491. K. Tuori calls this the 'philosophical-hermeneutical concept of tradition' which indicates 'that all human acts of consciousness, all acts of understanding, interpretation and cognition are bound to tradition; we humans never approach the object of our cognition or interpretation with a *tabula rasa* consciousness but always through the conceptual and interpretative means provided by a specific tradition. "Tradition" in this sense is equivalent to the preconceptions ("pre-understanding") and prejudices which – as Gadamer emphasizes – are necessary in order for the process of understanding and interpretation to be launched. We draw this "preunderstanding" from the culture into which we have been "thrown", in which we have grown up and internalised our fundamental conceptions of the world.' (ibid 491-492).

580 Linas Baublys, *Antikinė teisingumo samprata ir jos įtaka Vakarų teisės tradicijai* (Mykolo Romerio universitetas 2005) 12.

581 Tuori, 'The Law and its Traditions' (n 576) 491.

582 Krygier, 'Law as Tradition' (n 509) 240.

583 See '2.2. The Concept and Significance of the Biomedical Sciences as a Tradition'.

584 Krygier, 'Law as Tradition' (n 509) 240.

585 ibid.

Each tradition consists of elements of the real or imaginary past.[586] This is a fundamental feature of any tradition, law being no exception, which makes the legal past of every legal system relevant to the legal present.[587] As with any complex tradition, law captures and preserves a set of well-established but often conflicting beliefs, opinions, values, decisions, myths or rituals.[588] The maintenance of the past in law is institutionalised: legal sources are recorded, grouped by type, matter of obligation, importance, etc., which the participants in the legal system must later take into account when interpreting the law and formulating their arguments.[589] Thus, any legal tradition can be said to be characterised by the past, which means that the current law is a heritage created through the input of many centuries and the contribution of many generations of people with non-consistent visions recognising competing values and different views of the world.[590] This heritage is comprised of particular legal mechanisms, procedures and norms that are employed by consecutive generations to solve the relevant questions.[591] Therefore, understanding a particular legal tradition, even one that encompasses conflicting views, can help in better comprehending the vision of the lawmakers of the past when seeking the answers to current legal problems.

However, law is traditional not only because of its past. It must have an authoritative presence.[592] It is precisely when the true or the imaginary past does not disappear without trace, but rather performs a normative or an authoritative role in relation to the values and convictions of its participants, including lawyers, that this element of tradition is considered to be fulfilled.[593] Nevertheless, the authoritative presence does not mean that today's lawyers must be experts in the legal system of the past and its application. F. W. Maitland argued that what is usually expected from a practising lawyer is not simply the knowledge of, for example, the law of the Middle Ages, but rather the knowledge of it interpreted by the

586 Krygier, 'Law as Tradition' (n 509) 240; Glenn, 'A Concept of Legal Tradition' (n 572) 430.
587 Krygier, 'Law as Tradition' (n 509) 240-241.
588 ibid 241.
589 ibid.
590 ibid 242.
591 Jevgenij Machovenko, 'Lietuvos viešosios teisės iki XVIII a. pabaigos istorijos tyrimų būklė ir perspektyvos' (2011) 79 Teisė 22, 26.
592 Krygier, 'Law as Tradition' (n 509) 245.
593 ibid 246.

contemporary courts in a way that is consistent with the facts of today.[594] According to M. Krygier, for lawyers, historical legal sources are important not for the purpose of revealing past events, but rather as authoritative material which may help in finding answers to current problems.[595] Thus, this authoritative presence determines the effect of the legal tradition, as a totality of elements from the past, when solving present legal issues.

Lastly, according to M. Krygier, tradition must be characterised by transmission. It is argued that traditions are dependent on real or imaginary continuity between the past and the present, which can be formalised or institutionalised, as for example in law or religion.[596] It is transmission that is connected with another important aspect of tradition, namely change. Authoritative interpreters in the field of law, for example, can strive to ensure that the interpretation of law would not diverge from the interpretation of the past. However, changes in tradition are inevitable,[597] even if they remain dependent on it.[598] Therefore, knowledge of a legal tradition is important for understanding how, over time, a specific legal system can react and change in response to new factual circumstances.

According to H. P. Glenn, as the participants in the legal system increasingly choose not to rely only on the legislation adopted by specific state-authorised entities, law is becoming more and more extensive, which encourages the search for a broad category allowing the organisation of both the different sources of law that are used and the relations among them.[599] This is why, according to the aforementioned scholar, knowledge about the legal tradition is essential, as it provides the measures to ensure a 'peaceful coexistence of different ideas and peoples'.[600] As indicated by L. Baublys, an understanding of a tradition provides us with methods for knowing the content of the existing law and the criteria for assessing it.[601] Also, according to H. P. Glenn, legal tradition is a certain basis allowing for the analysis of both positive law and the social norms that are outside

594 Krygier, 'Law as Tradition' (n 509) 248-249 citing The Collected Papers of Frederic William Maitland, ed. H. A. L. Fisher (Cambridge: Cambridge University Press), vol. 1, p. 491.
595 ibid 250.
596 ibid.
597 ibid 251-252.
598 ibid 254.
599 Glenn, 'A Concept of Legal Tradition' (n 572) 427.
600 ibid 444.
601 Baublys, *Antikinė teisingumo samprata ir jos įtaka Vakarų teisės tradicijai* (n 580) 13.

the boundaries of the law established by the state[602] and influence the legal system.

The latter aspect is especially important in the Western legal tradition, where, on the one hand, according to H. J. Berman, there is a prevailing belief that law is a special phenomenon, characterised by a certain relative autonomy, and can therefore be analytically distinguished from other spheres of social reality.[603] On the other hand, in this tradition, 'law is greatly influenced by religion, politics, morality and customs'.[604] That is why the Western legal tradition constantly raises the question of not only the relationship between the positive, state-established law and certain values beyond it, but also the connection between the latter and other areas of reality and their effect on the legal systems that belong to the Western legal tradition.

One example of the latter situation is the interpretation and application of Art. 53(a) EPC in deciding on the patenting of biotechnological inventions analysed in this study. In this situation, knowledge of the biomedical sciences influences the decisions made by the Office on the basis of Art. 53(a) of the Convention. However, even with this knowledge, biotechnological inventions are still regarded from the perspective of the Western legal tradition rather than in a neutral way.

3.2. The Concept of the Western Legal Tradition in the 21st Century

Classifying legal traditions and legal families is a rather challenging task,[605] simply due to each person's own preconceptions concerning 'what is important in law or a legal system'.[606] As a result, there are a variety of classifications of legal traditions and families.[607] Thus, the exercise and results of distinguishing and defining the Western legal tradition should be accepted and treated with caution.

602 Glenn, 'A Concept of Legal Tradition' (n 572) 428.
603 Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 24.
604 ibid (translated from Lithuanian into English by the author of this study).
605 Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (n 43) 3-4.
606 John W Head, *Great Legal Traditions* (Carolina Academic Press 2011) 11.
607 E.g. ibid 11-12.

Despite its multitude of meanings,[608] the word 'West' can be used to describe Western civilisation.[609] Nowadays, the latter term is often considered to encompass liberal, secular, capitalism- and market economy-oriented societies,[610] and from a geographical perspective, in some scholarly sources,[611] it is generally associated with Europe, including the United Kingdom and some of the countries that were part of the former British Empire.[612] According to H. J. Berman, Western civilisation has formed 'distinct "legal" institutions, values and concepts'[613] deliberately handed down from one generation to the next, resulting in a complex and broad phenomenon, i.e. the Western legal tradition.[614]

The above-mentioned scholar, while describing this legal tradition as originating in the 11th-12th century Gregorian Reform and the struggle for

608 Stevenson, *Oxford Dictionary of English* (n 459) 2016.

609 William H McNeil, 'What we mean by West' (1997) 41 Orbis 513, 513-514.

610 Gunther Hellmann and Benjamin Herborth, 'Introduction: Uses of the West' in Gunther Hellmann and Benjamin Herborth, *Uses of the West. Security and the Politics of Order* (Cambridge University Press 2017) 1-12, 2.

611 František Dvornik, 'Western and Eastern Traditions of Central Europe' (1947) 9 The Review of Politics 463- 481; Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (n 43) 4; Hellmann and Herborth, 'Introduction: Uses of the West' (n 610) 1-2. The Western legal tradition may include countries with both (1) civil (continental) law systems and (2) common law systems (the United Kingdom (Scotland does not have a common law system), the United States, Canada, Australia and New Zealand) (Head, *Great Legal Traditions* (n 606) 12-13; H Patrick Glenn, 'Legal Traditions and *Legal Traditions*' (2007) 2 The Journal of Comparative Law 69, 85; Catherine Valcke, 'Comparative History and the Internal View of French, German, and English Private Law' (2006) 19 Canadian Journal of Law and Jurisprudence 133, 137). Despite the abundance of countries that are attributed to the Western legal tradition and the peculiarities of these two law systems, it is argued that both systems have long been influencing each other (Franz Wieacker and Edgar Bodenheimer, 'Foundations of European Legal Culture' (1990) 38 The American Journal of Comparative Law 1, 6-7). That is why the differences between them are much smaller than when compared to the Chinese, Islamic or Indian legal traditions (Wieacker and Bodenheimer, 'Foundations of European Legal Culture' (n 611) 4-5; Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 International and Comparative Law Quarterly 495, 502-503; Head, *Great Legal Traditions* (n 606) 12; Egidijus Kūris, 'Teismo precendentas kaip teisės šaltinis Lietuvoje: oficiali konstitucinė doktrina, teisinio mąstymo stereotipai ir kontraargumentai' (2009) 2 Jurisprudencija 131, 132). Therefore, it is reasonable to consider these two systems to be part of the Western legal tradition.

612 E.g. Australia, the United States, Canada and New Zealand.

613 Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 15.

614 ibid 16.

investiture, which were followed by the 'new canon law' and the formation of secular legal systems, argues that the analysed tradition 'refers to those nations, whose legal tradition originates from these events'.[615] According to him, it encompasses much of Europe, North and South America and even various other parts of the world.[616] Nevertheless, despite the attempts to define what 'West' is from a geographical point of view, scholarly literature suggests that this term may depend on the historical period[617] or the subject who uses this term,[618] meaning that although the '[g]eographical limits help in finding it [the West], eventually they change'.[619] However, H. J. Berman notes that the West is not just an idea, but also 'encompasses both a historical structure and a structure which has a history'.[620] Therefore, in this study, not the geographical boundaries of the Western legal tradition but the concept summarised by the aforementioned scholar is held to be the most important.

The concept of the analysed legal tradition provided by H. J. Berman covers a rather wide range of closely related features. In the Western legal tradition, according to the aforementioned scholar, it is possible to analytically distinguish law from other areas of social reality.[621] As a result, in this tradition, legal activities are entrusted to legal professionals,[622] who are trained in special educational institutions.[623] In the Western legal tradition, the law encompasses not only legal institutes, legal requirements, legal decisions, etc., but also legal science, which allows the analysis and evaluation of law.[624]

Moreover, in the Western legal tradition, law is perceived as a coherent, unified system,[625] which develops 'in time, from generation to generation, through the ages',[626] and whose viability is determined by the belief that it

615 Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 16.
616 ibid.
617 ibid.
618 ibid 17.
619 ibid (translated from Lithuanian into English by the author of this study).
620 ibid (translated from Lithuanian into English by the author of this study).
621 ibid 23-24.
622 ibid 24.
623 ibid.
624 ibid.
625 ibid 25-26.
626 ibid 25 (translated from Lithuanian into English by the author of this study).

has a continuous nature[627] and grows with the passing of the generations.[628] For H. J. Berman, there is an internal logic to this growth: 'in the Western legal tradition, it is assumed that change is not accidental, but emerges with a new interpretation of the past',[629] which means that law is characterised by its historicity.[630] According to the aforementioned scholar, historicity relates to the supremacy of law in relation to political authorities. This supremacy is manifested in the belief that in the West, since the 12th century, even under the rule of absolute monarchs, the law, until otherwise changed, constrained even the rulers.[631]

The Western legal tradition is also described as pluralistic, characterised by 'the coexistence and competition of different jurisdictions and different legal systems in the same society'.[632] This feature determined the complexity of the legal system and the competition among its different parts, but, according to H. J. Berman, it was also the factor which 'promoted the pluralism of Western political and economic life'.[633] The last feature of the Western legal tradition distinguished by H. J. Berman is the 'tension between reality and ideal',[634] which from time to time caused revolutions.[635]

Revolutions, according to the aforementioned scholar, are an important part of the understanding of the Western legal tradition. Indeed, the tradition analysed in this study emerged from a revolution[636] and was later interrupted by other revolutions,[637] during which the aforementioned characteristics arose. Thus, both the internal and external conflicts encouraging change are considered to be important factors that inspired new ideas and the formation of the Western legal tradition. On the one hand, over time,

627 Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 26.
628 ibid.
629 ibid (translated from Lithuanian into English by the author of this study).
630 ibid.
631 ibid.
632 ibid (translated from Lithuanian into English by the author of this study).
633 ibid 27 (translated from Lithuanian into English by the author of this study).
634 ibid (translated from Lithuanian into English by the author of this study).
635 ibid.
636 12th century Papal Revolution.
637 Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 15. According to H J Berman, the main revolutions are as follows: (1) the Papal Revolution of the 12th century; (2) the Lutheran Revolution in Germany; (3) the Anglo-Calvinist Revolution in England; (4) the Great French Revolution; (5) the American Revolution; (6) the Russian Revolution (Berman, 'The Western Legal Tradition in a Millennial Perspective: Past and Future' (n 103) 742-750).

the Western legal tradition was interrupted by revolutions, each of which, while seeking a new vision of justice, was aimed against the legal system then in existence, but on the other hand, this tradition survived the aforementioned revolutions, with their help renewed itself,[638] and continued to develop organically.[639]

Although revolutions are an important factor in the development of this tradition, bringing novelties, in reality all of the changes are a continuation of what has already happened in the past, because changes in the Western legal tradition do not happen accidentally, but rather by redefining the past for the needs of the present and the future.[640] The author of this study holds that such revolutions include both World Wars of the 20th century, when, according to H. J. Berman, on the one hand the identity of the Western legal tradition was at risk of being lost, but on the other hand there arose a possibility to create a partnership with the newly emerging world order.[641] In view of this, it is considered that the discussion of the concept of the modern Western legal tradition in this study is informed by the ideas that emerged after the Second World War, one of the most prominent of which is the emergence of an international system for the protection of human rights.

After that war, it was understood that, as long as the law is perceived merely as a system of orders issued by the competent entities to which society must unconditionally submit, and the value of human beings is not recognised, it would be impossible to achieve peace or justice in the world. The war showed the consequences of an absolute disregard for the value of human beings. That is why shortly afterwards, on 10 December 1948, the Universal Declaration of Human Rights[642] (the 'Declaration') was signed, announcing to the world that every human being is of value and

638 Berman, 'The Western Legal Tradition in a Millennial Perspective: Past and Future' (n 103) 750-751.

639 Harold J Berman, 'The Western legal tradition: The interaction of revolutionary innovation and evolutionary growth' in P Bernholz, M E Streit and R Vaubel (eds), *Political Competition, Innovation and Growth* (Springer 1998) 35-47, 39-40.

640 Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 26.

641 Berman, 'The Western Legal Tradition in a Millennial Perspective: Past and Future' (n 103) 751.

642 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (Declaration).

that his/her life and dignity must be respected.[643] This document contains a list of human rights which, while not in fact universally accepted and applied throughout the world, lay down minimum conditions of respect for dignity of an individual.[644] Thus, in the mid-20th century, when the legal system became highly human-centred, the human person became a value giving meaning to any state and to the whole legal system, and dignity was recognised as the basis of human rights.[645]

Although the idea of the protection of human rights as universal rights is not considered exclusively Western,[646] according to the scholarly literature, the West was the first to modernise on this issue.[647] Also, despite the fact that the purpose of the Declaration was to reconcile different religious, economic and other views,[648] the concept of human rights, due to its particularly prominent role in the West, appears predominantly Western.[649]

643 E.g. Tade M Spranger, 'Case C-34/10, Oliver Brüstle v. Greenpeace e.V., Judgment of the Court (Grand Chamber) of 18 October 2011' (2012) 49 Common Market Law Review 1197, 1197.

644 Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (n 43) 232 citing Upendra Baxi, The Future of Human Rights (New Delhi: Oxford University Press, 2nd edn, 2006) and William Twining, 'Human Rights: Southern Voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai, and Upendra Baxi' (2006) 11 Review of Constitutional Studies 203–80.

645 The Preamble of the International Covenant on Civil and Political Rights establishes that 'rights derive from the inherent dignity of the human person' (International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)), whereas the Preamble of the Declaration establishes that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' (Declaration). One of the most recent examples is the Charter of Fundamental Rights of the European Union, in which human dignity is mentioned in the first provision, whereas the right to life and other rights are mentioned in the following provisions (Charter of Fundamental Rights of the European Union, OJ, 2016 C 202, p. 389, Articles 1 and 2 (EU Charter of Fundamental Rights)).

646 Arvind Sharma, *Are Human Rights Western?: A Contribution to the Dialogue of Civilizations* (Cambridge University Press 2005) 24; Darren J O'Byrne, *Human Rights in a Globalizing World* (Palgrave 2016) 110.

647 Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (n 43) 234.

648 James V Spickard, 'The Origins of the Universal Declaration of Human Rights' (1999) <http://bulldog2.redlands.edu/fac/Spickard/OnlinePubs/OriginUDHR.pdf> accessed 30 May 2023.

649 Sharma, *Are Human Rights Western?: A Contribution to the Dialogue of Civilizations* (n 646) 145.

Meanwhile, in certain regions or countries that in the scholarly literature are referred to as 'non-Western', despite international legal acts, human rights are criticised and even rejected as culturally unacceptable.[650]

This prevalence of human rights, especially in countries of the Western legal tradition, can be attributed to the fact that the focus on the individual as a special creature[651] is not an entirely new phenomenon that emerged in the middle of the 20th century. The granting of a special status to the human being has long been a feature of this tradition, linked to Judeo-Christian philosophy, which the Western legal tradition itself has made into one of its predecessors.[652] The ideas presented by these religions indicate that a human being is created in the image of God, who has long been considered the basis of lawfulness in the Western legal tradition.[653]

Since the 12th century, Western civilisation has been partly characterised by individuals having rights that they could exercise not only in economic or social relations with other individuals, but also against the legislators.[654] Later, at the end of the 18th century, the ideas of the 'rights of a man' which the nation-states had to ensure emerged in the West.[655] It was through the influence of the above-mentioned religions and ideas that the human person acquired the status of a special creature in the Western philosophical, legal and political thought. For a long time, human behaviour had been

650 E.g. Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (n 43) 232-233. It is believed that such critics emphasise duties, not rights; mutual trust rather than detailed rules; and mediation in disputes rather than formal court litigation procedures (Berman, 'The Western Legal Tradition in a Millennial Perspective: Past and Future' (n 103) 760 citing Raimundo Pannikar, *Is the Notion of Human Rights a Western Concept?,* 120 Diogenes 75 (1982)).

651 The fact that the human is a special being did not always mean that his/her rights and freedom were respected at all times in the Western legal tradition (see e.g. Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (n 43) 233-234).

652 See further Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 17-18.

653 *The Bible. The Book of Genesis* <https://www.bible.com/bible/59/GEN.1.ESV> accessed 30 May 2023; Remi Brague, *Ekscentriškoji Europos tapatybė* (AIDAI 2001) 53. The connection between religion and law is particularly emphasised by H J Berman in his second book 'Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition' (Harold J Berman, *Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition* (Belknap Press 2003)).

654 Berman, 'The Western Legal Tradition in a Millennial Perspective: Past and Future' (n 103) 760.

655 ibid.

regulated by the immutable commands of God; however, now this function has essentially been taken over by human rights, which took on particular significance in the aftermath of the Second World War.[656]

The aspects discussed above illustrate the continuing development of the Western legal tradition as a coherent system. This means that, although revolutions are an important factor in shaping this tradition, the development of institutions in the West has always been steady, and 'every generation deliberately continued the work of previous generations'.[657] Thus, the development in this legal tradition is an organic process of growth,[658] which implies that, even in the course of a revolution, the Western legal tradition strives not to stray away from its roots. In this tradition, 'changes arise from a new interpretation of the past in response to the needs of the present and the future'.[659] Hence, from the perspective of the Western legal tradition, the emergence of a system for the protection of human rights corresponds to this organic growth, since the principles arising from ancient religions and subsequent ideas and the perception of the importance of the human being were adapted to the new situation that arose after the aforementioned war.

The human status currently prevailing in the legal systems of the Western legal tradition is very close to I. Kant's ideas of the 18th century stating that '[i]n the whole of creation everything one wants and over which one has any power can also be used *merely as means*; a human being alone, and with him every rational creature, is an *end in itself*: by virtue of the autonomy of his freedom he is the subject of the moral law, which is holy. Just because of this every will, even every person's own individual will directed to himself, is restricted to the condition of agreement with the *autonomy* of the rational being, that is to say, such a being is not to be subjected to any purpose that is not possible in accordance with a law that could arise from the will of the affected subject himself; hence this subject is to be used never merely as a means but as at the same time an end'.[660] It is argued in the scholarly literature that it is I. Kant's view of the

656 Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (n 43) 227.

657 Linas Baublys and others, *Teisės teorijos įvadas* (Mes 2010) 27 (translated from Lithuanian into English by the author of this study).

658 Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 20.

659 ibid 26 (translated from Lithuanian into English by the author of this study).

660 Immanuel Kant, *Practical Philosophy* (Mary J Gregor ed and tr, Cambridge University Press 1999) 210.

individual that is the basis of the contemporary system of the protection of human rights reflected in the above-mentioned Declaration.[661] In the more than 70 years since the adoption of this document, numerous treaties, pacts and conventions have set out detailed parameters of the commitments in question and established values, among which human dignity and human rights are highly important.[662] The human being has become an element that embodies the politics of a country and its legal system. It has been recognised that each human being is a special value to be protected by the law and that the protection of human rights is essential to meet basic human needs. These standards have penetrated many areas of life, including the field of scientific research.[663]

This perspective on the human being, as a standard for evaluating the legal system, can be associated with deontological ethics, which holds that actions are considered good or bad, right or wrong, not because of their consequences, but in themselves.[664] This means that the purpose and consequences do not provide any value to the action, because it is important to follow the principle or the obligation itself. Consequently, at least from the perspective of the countries belonging to the Western legal tradition, a legal system which essentially denies human rights is not considered to be appropriate, and in especially extreme situations even its status as a legal

661 Catherine Dupre, 'Unlocking human dignity: towards a theory for the 21st century' (2009) 2 European Human Rights Law Review 190, 190.

662 E.g. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950) (European Convention on Human Rights, as amended), Articles 2-3 (European Convention on Human Rights); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 Articles 4 and 5.

663 In 2001, at a meeting of ministers of science, Kōichirō Matsuura, the Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO), stressed the need to protect human rights and human dignity from the misuse of science and technology (United Nations Educational, Scientific and Cultural Organization, 'Bioethics: International Implications' (proceedings of the Round Table of Ministers of Science, Paris, 22-23 October 2001) <https://unesdoc.unesco.org/ark:/48223/pf0000130976> accessed 30 May 2023, 2); Speech by Mr Philippe Séguin, President of the National Assembly of the French Republic (International Bioethics Committee: proceedings of the third session, v. I) <https://unesdoc.unesco.org/ark:/48223/pf0000105160> accessed 30 May 2023, 120. See also ICCPR, Art. 7; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Art. 15.

664 Larry Alexander and Michael Moore, 'Deontological Ethics', *The Stanford Encyclopedia of Philosophy* (rev edn, 2020) <https://plato.stanford.edu/entries/ethics-deontological/> accessed 30 May 2023.

system may be questioned. The incorporation of human rights into a legal system[665] reveals one of the essential features of this tradition which has been proposed by H. J. Berman, i.e. autonomy.[666]

Nonetheless, religious, political or moral considerations may influence the adoption of certain human rights legislation. Also, not all human rights hold the same weight in all cases, which is why in certain situations they can collide with each other. In addition, with legal systems regulating interpersonal relations among human beings, other living and non-living objects from the surrounding world, to which the same standards cannot be applied as those applied to people, inevitably come into the sphere of legal regulation. In these situations, a deontological human status-based approach may not seem suitable for making a legal decision, and this process may be influenced by other spheres of reality, such as religion, politics, morality, economics, customs or scientific knowledge of the surrounding environment. Therefore, although the Western legal tradition is considered to be comparatively autonomous from other areas of social reality, the influence of the latter on the former is undeniable.[667]

This means that, in certain cases, the Western legal tradition, consistent with its fundamental values, also deems knowledge provided by other areas of reality to be important, and in turn capable of being used when forming 'fundamental agreements'.[668] In such situations, it may be necessary to take

665 Carl Aage Nørgaard, 'The Implementation of International Human Rights' Agreements within a Domestic Legal System' (UniDem, Warsaw, 19-21 May 1993) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(1993)005-e> accessed 30 May 2023. Human rights are considered to be international law and must be included in the national legal system (Danutė Jočienė, 'Įžanga' in Danutė Jočienė and Kęstutis Čilinskas (eds), *Žmogaus teisių problemos tarptautinėje ir Lietuvos Respublikos teisėje* (Eugrimas 2004) 6).

666 According to H J Berman, although religion, politics, morality and customs have a strong influence on law, it is possible to analytically distinguish it from these spheres of social reality. E.g. politics and morality may determine legislation, but in the Western legal tradition they are not treated as the law itself (Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 24).

667 ibid.

668 According to A MacIntyre, tradition is an argument that is continuous in time, in which certain fundamental agreements are set and updated through two types of conflicts: (1) conflicts with critics and enemies who do not belong to the tradition and reject all or essential parts of those agreements; and (2) internal interpretative debates, which are the basis for expressing the significance and logical basis of the essential agreements, and which help the tradition progress (MacIntyre, *Whose Justice, Which Rationality?* (n 500) 12).

into account arguments from other spheres of reality and the impact of these decisions on the surrounding environment when choosing an action strategy and making decisions. Naturally, the consequences of the decisions taken are weighed. In these often extreme cases, such as war, it can be difficult to treat a human being as an end in himself/herself;[669] it may be necessary to choose between protecting one person's life and saving the lives of hundreds. There are also situations where, for example, it is necessary to decide between other values which do not have the same status as a human being. When making decisions in these situations, especially if the consequences of decisions are important, the deontological approach may not be very practical.

In such cases, the philosophy of utilitarianism based on categories of 'pain' and 'pleasure',[670] which states that 'the greatest happiness of the greatest number should be the guiding principle of conduct'[671], may become relevant. Classical utilitarianism argues that actions are correct if they tend to increase happiness and wrong when they create the opposite of happiness; happiness here is understood as pleasure and the opposite of happiness as pain or the absence of pleasure.[672] This means that a decision will be based on the consequences it is likely to entail, and the most suitable option that brings the greatest benefit will be chosen.

The discussion above shows that decision-making in the legal systems of the Western legal tradition is accompanied both by deontology and utilitarianism. The existence in legal systems of the aforementioned two philosophical branches, the former of which relating to the suitability of decisions for the observance of certain principles and the latter to the assessment of the consequences in reality, reveals one of the characteristics of the Western legal tradition indicated by H. J. Berman: the tension between the ideal and reality, which is the factor that leads to revolutions renewing the legal tradition in question from time to time.[673]

Based on what has been analysed above, it is to be held that the protection of human rights currently plays a crucial role in the legal systems of the Western legal tradition. Although the latter was reinforced by an

669 Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (n 43) 236.
670 Jeremy Bentham, *An introduction to the principles of morals and legislation* (London, 1789) 21.
671 Stevenson, *Oxford Dictionary of English* (n 459) 1959.
672 David Miller, 'Utilitarizmas', *Blackwell politinės minties enciklopedija* (2005) 591.
673 Berman, *Teisė ir revoliucija: vakarų teisės tradicijos formavimasis* (n 41) 27.

event that can be considered revolutionary, the Second World War, in the Western legal tradition the human person has always been treated as a special being, which demonstrates the continuity and organic growth of this legal tradition. The emphasis on the value of a human being in the legal system of the Western legal tradition can be related to deontological ethics, which indicates that actions are considered to be good or bad, right or wrong, not because of their consequences but because of their nature.

In a legal system forming part of this tradition, the deontological approach to decision-making is not always optimal, especially when the consequences of decisions play a key role. Despite the importance of the human being in this legal tradition, situations often arise where human rights have to be weighed against one another. There are also other values that do not have the same status as a human, but which nonetheless may need to be protected. Therefore, the utilitarian approach becomes relevant when the decision in question does not directly affect, or at least does not harm, human life and dignity. Based on this school of thought, decisions are made by assessing the consequences of actions, i.e. by taking into account the arguments and knowledge provided by other realms of reality. This situation reveals the relative autonomy of the legal systems belonging to the Western legal tradition.

The above-described concept of the Western legal tradition is illustrated by the situation in the European patent system: in the face of the ever-faster advancement in science and technology, this legal system is required to make decisions based on Art. 53(a) EPC regarding new objects and processes brought about by the development of biotechnology. This requires a closer look not only at the scientific, technological or even economic aspects involved, but also at the protection of human dignity, life and other important issues related to the physical and mental well-being of individuals. It is precisely in the decisions made in the European patent system that the aforementioned ethical theories (deontology and utilitarianism), which are prevalent in Western philosophy and form the basis for the tests and standards used in the case law of the EPO for the interpretation of Art. 53(a) EPC of the Convention, are evident.

3.3. The Situation in the Western Legal Tradition in the 21st Century

According to E. Shils, the existence of tradition is determined both by the limited ability to escape from it and the desire to continue and preserve it: a society retains most of what it inherits, not because it is fond of it, but because it understands that, without it, it might not survive.[674] Usually, societies cannot imagine a reliable substitute for what they have inherited, even if the existing tradition does not seem to be sufficiently adequate.[675] However, even if it is unavoidable, a particular tradition is not necessarily acceptable, and therefore its participants may try to change it according to their will.[676]

As the above-mentioned author states, there are both endogenous and exogenous factors that can prompt changes in a tradition. The former cause changes in a tradition which are implemented by those who are part of the tradition in question, and these changes are perceived as improvements.[677] These changes are not determined by exogenous circumstances, but are considered to be the result of the relationship between the tradition and its members.[678] The latter appear when the members of a particular tradition are influenced by other traditions which encourage this tradition to change.[679] These changes in one tradition can be influenced by the other's economic, political and/or military power, its efficiency and convenience, or its superior intellectual persuasiveness.[680]

Similar ideas were raised by A. MacIntyre, who pointed out that each tradition faces two types of conflict: internal and external.[681] According to this author, internal conflicts in a tradition lead to an 'epistemological crisis', which is defined as a situation in a tradition in which 'conflicts over rival answers to key questions can no longer be settled rationally'.[682] The signs of this crisis are as follows: (1) historically based beliefs are rejected; (2) methods and arguments, which so far have been used to

674 Shils, *Tradition* (n 499) 213.
675 ibid.
676 ibid.
677 ibid.
678 ibid.
679 ibid 240.
680 ibid.
681 MacIntyre, *Whose Justice, Which Rationality?* (n 500) 12.
682 ibid 362. According to A MacIntyre, the rationality of a tradition lies in its development, which consists of certain stages (ibid 354-356).

achieve rational progress, reveal discrepancies, inconsistencies and new problems; (3) measures within the framework of a specific tradition seem to be inadequate to resolve these problems.[683]

According to H. J. Berman, the Second World War provided a temporary rise that lasted until the end of the 1950s, allowing the Western nations to understand that they are capable of both collective action and individual sacrifice in pursuit of common traditional goals.[684] However, despite the optimistic ideas presented by F. Fukuyama at the end of the 1980s about the triumph of the West and its ideas,[685] it is now recognised in the legal[686] and philosophical[687] literature, as well as in the media,[688] that the Western world is facing a crisis.

Although it is extremely difficult to fully agree on and to define the scale of this crisis, the political, international security and trade problems that the West is currently facing are hard to deny. One example that can be mentioned is the current human rights situation, which gives grounds for concern about the future.[689] This view is based on the infamous human rights violations in response to terrorism threats,[690] the temporary restraints of human rights during the economic crisis[691] or other emergencies,[692] as well

683 MacIntyre, *Whose Justice, Which Rationality?* (n 500) 362.

684 Harold J Berman, *Faith and Order. The Reconciliation of Law and Religion* (Scholars Press 1993) 2.

685 Francis Fukuyama, 'The End of History?' [1989] The National Interest 3, 4.

686 See e.g. Roger Brownsword, 'Human Rights – What Hope? Human Dignity – What Scope?' in Søren Holm and Jennifer Gunning (eds), *Ethics, Law and Society*, vol 1 (1st edn, Routledge 2005) 189-209.

687 See e.g. Claude Levi-Strauss, *Antropologija modernaus pasaulio problemų akistatoje* (Žara 2011); Topi Heikkerö, 'The Fate of Western Civilization: G. H. von Wright's Reflections on Science, Technology, and Global Society' (2004) 24 Bulletin of Science, Technology & Society 156, 157.

688 See e.g. Martin Jacques, 'The Death of Neoliberalism and the Crisis in Western Politics' *The Guardian* (London, 21 August 2016) <https://www.theguardian.com/commentisfree/2016/aug/21/death-of-neoliberalism-crisis-in-western-politics> accessed 30 May 2023; Herborth and Hellmann, 'Introduction: Uses of the West' (n 610) 3.

689 Roger Brownsword, 'Human Rights – What Hope? Human Dignity – What Scope?' (n 686) 189-209.

690 See e.g. Alfonsas Vaišvila, 'Terorizmas ir kova su terorizmu – dvi grėsmės žmogaus teisėms' (2005) 68 Jurisprudencija 11, 11.

691 Egidijus Kūris, 'Ekonominė krizė ir teisinė sistema: įtampų triada' (2015) 94 Teisė 7, 10-12.

692 E.g. on the refugee crisis see Alison Smale and Melissa Eddy, 'Migrant Crisis Tests Core European Value: Open Borders' *The New York Times* (New York, 31 August

as military interventions happening in certain countries based on human rights violations.[693] The category of human dignity is also considered problematic. Despite its well-established position in international and European legal acts[694] as well as attempts to define its basic minimal content,[695] it is open to interpretation; consequently, to this day, it creates tension both within the legal systems and in their relationships with various spheres of reality, such as science or technology.

Other more permanent phenomena can also be alarming. One example is collateralism,[696] which is described as a situation where specialised international organisations (especially those promoting trade) prioritise the implementation of their functions, treating human rights as secondary aspects.[697] According to R. Brownsword, the EPOrg can be considered to be such a type of organisation.[698] Another example introduced by this author is incrementalism. The default position of this approach is to allow actions having a potential risk factor to be carried out, except where there is a real safety concern.[699] Also, by allowing certain actions, it is almost impossible to ban them later on, i.e. there is a tendency to move only forward.[700]

In the situations discussed above, human rights begin to lose their status. An increasing number of members of the Western legal tradition begin to perceive them as too abstract and therefore ineffective, weak and unable to withstand negative phenomena such as the economic crisis, or even, on the contrary, as an appropriate tool allowing strong states to influence weak ones. Different crises, as well as the changing social, technological

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2015) <http://www.nytimes.com/2015/09/01/world/europe/austria-migrant-crisis-truck.html> accessed 30 May 2023. See also Roger Brownsword, 'Human Rights – What Hope? Human Dignity – What Scope?' (n 686) 189-209.

693 O'Byrne, *Human Rights in a Globalizing World* (n 646) 109 and 147.

694 Van Overwalle, 'Human Rights' Limitations in Patent Law' (n 97) 243-244.

695 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655, 680.

696 The term was suggested by Professor S. Leader from Essex University (see Sheldon Leader, 'Collateralism' in Roger Brownsword, *Global Governance and the Search for Justice* (Hart Publishing 2005) 53-68).

697 Sheldon Leader, 'Trade and Human Rights II' in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer, *The World Trade Organization: Legal, Economic and Political Analysis* (Springer New York 2005) 663-696, 683; Roger Brownsword, 'Human Rights – What Hope? Human Dignity – What Scope?' (n 686) 193.

698 Roger Brownsword 'Human Rights – What Hope? Human Dignity – What Scope?' (n 686) 194.

699 ibid 195.

700 ibid 194-195. For further threats to human rights, see ibid 189-209.

and economic environment of the 20th and 21st centuries, create a tendency towards striving for the goals of scientific and technological advancement, which encourages the employment of arguments based on utilitarianism in the process of decision-making, and not the protection of human life, as expected in the mid-20th century.

One example of the crisis of the Western legal tradition could be also the difficulties encountered in the interpretation and application of Art. 53(a) EPC in attempting to resolve issues related to the patenting of biotechnological inventions. In the absence of clarity in the interpretation and application of the above-mentioned provision of the Convention, the protection of legitimate expectations and legal certainty deteriorates. In this situation, it is not only support for the granting of exclusive rights to specific inventions that is diminishing, but also trust in the benefits of the whole patent system and its transparency in the eyes of creators, developers and users of inventions.

As A. MacIntyre points out, a tradition that is unable to overcome a crisis by itself may seek for answers in another tradition, simultaneously acknowledging its superiority.[701] The European patent law analysed in this study, as a part of the Western legal tradition, if unable to find answers concerning the patenting of biotechnological inventions, may use arguments based on knowledge of the biomedical sciences to interpret and apply the provisions of the Convention. Deciding on the basis of the above-mentioned EPC provision runs the risk that, even concerning human body-related inventions, instead of deontological ethics, a utilitarian approach can be employed. In the light of all this, both in the context of patenting of biotechnological inventions based on Art. 53(a) EPC and in other cases, it is important to understand in which circumstances the dominant approach will be the deontological one and when the utilitarian one will prevail, as well as what impact this will have on the development of the Western legal tradition.

3.4. Preliminary Conclusion

Despite the fact that traditionality is not always viewed favourably, the category 'tradition' is important in every legal system, including those belonging to the Western legal tradition. Knowledge of a particular legal tradition makes it possible to understand how objects and processes are

701 MacIntyre, *Whose Justice, Which Rationality?* (n 500) 364-365.

valued and perceived within the legal system under that tradition, and to predict how, in the light of new circumstances, this system will respond and continue to evolve.

The Western legal tradition, having survived great turmoil in the first half of the 20th century, can be characterised by its attention to human life and human rights. The above-mentioned attitude towards the human being as a value is based on deontological ethics, which indicates that actions are considered good or bad, right or wrong, not by their consequences, but by themselves. However, in making decisions that do not adversely affect a human being, as well as in situations where different human rights compete with one another or with other non-human objects in the world, or where the consequences of decisions play a key role, utilitarianism becomes important.

The dynamics of the above-mentioned ethical theories employed in decision-making are determined by the relationship between the legal systems belonging to the Western legal tradition, based on their fundamental principles and values, and other spheres of reality, providing knowledge concerning the surrounding environment. This relationship is illustrated by situations in the European patent system in which, when making decisions on the granting of patents for biotechnological inventions under Art. 53(a) EPC, not only the principles and values of the Western legal tradition but also arguments based on the knowledge provided by the biomedical sciences are employed.