

## IMPACT OF HUMAN RIGHTS ON PRIVATE LAW IN LITHUANIA AND OTHER EUROPEAN COUNTRIES: PROBLEMATIC ASPECTS

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**Abstract.** *The aim of this article is to investigate the problem how and to what extent human rights affect the relationships between private parties and what consequences this effect has for the development of private law in Lithuania and other European countries. Because Lithuanian legal doctrine lacks relevant research on this subject-matter, the author seeks to start and invoke the beginning of conceptual academic discourse on the matter. It is argued that despite the fact that in many countries the impact (whether direct or indirect) of human rights on private law has recently become a powerful means of developing the law, the application of human rights in private law has not only its positive side but it also invokes very serious problems to be solved and raises conceptual questions that should be answered. Thus, in order to ensure stable, reliable and respectable development of influence of human rights on private law as a beneficial tool to protect human rights in certain cases, there is a need for continuous, complex and multi-level academic conceptual comparative studies of the issue in order to answer how to reconcile the constitutionalisation of private law with the principles of legal certainty and proportionality and what are the criteria for the limits of the effect of human rights on private law in order to ensure a fair balance, protect stability and predictability in law.*

**Keywords:** *constitutionalisation of private law, human rights, private law, horizontal effect of human rights.*

## Introduction

The relationship between human rights and private law has only recently received considerable attention in the European legal academic discourse of private lawyers. Comparative studies show that when seeking effective protection of human rights and freedoms, human rights can directly or indirectly affect the “horizontal” relationships between private parties in different areas of private law. In many European countries such effect has recently become a powerful and effective means to develop the law, especially when national courts use human rights-based legal reasoning to re-interpret the existing private law in order to grant or deny private parties in certain situations a particular remedy and to find more fair and just solutions in specific cases. However, the application of universal standards as to what is regarded as fair in private relationship has not only its positive side but also raises conceptual questions on the predictability and stability of law and invokes the main problem of the subject-matter - how to set the balance of interests of private parties in private law relations when constitutional human rights are at stake.

In this article it is argued that in order to ensure stable, reliable and respectable development of the influence of human rights on private law as a beneficial tool to protect human rights in certain cases, there is an urgent need for conceptual academic discourse on the matter and the need for continuous, complex and multi-level scientific comparative studies of the issue concerned.

Therefore, the the analysis of the scope and limits of the impact of human rights on private law forms the subject-matter of the proposed issue. The article will mainly focus on identifying the main problematic questions that arise when analysing the problem of constitutionalisation of private law, such as how and to what extent human rights may influence private law in legal doctrine and case law in Lithuania and other European countries. Furthermore, because Lithuanian legal doctrine lacks relevant research in the subject-matter, the author seeks to start and invoke the beginning of conceptual academic discourse on the matter.

In view of the aim of the paper, the logical, analysis, and comparative research methods have been employed.

### 1. Problems and Relevance of Impact of Human Rights on Private Law in Europe

It is universally accepted in modern democratic states that human rights are of the highest virtue and their protection is the priority of internal and external policies of the states. During the XX century human rights have become universal values. However, the relationship between human rights and private law has only recently received considerable attention in the European legal academic discourse among private lawyers. This process was born with the democratic reinstatement of most continental Western European States after the Second World War and later, comparably, of the Eastern

European States after the fall of the Soviet Union. In the middle of the XX century, the old nineteenth-century civil codes were rendered compatible with human rights, as well as the social and economic human rights of the new Constitutions, which now claim to be legally more than just neutral systems of values. It was acknowledged that human rights not only protect the citizens against the State, but also assign the duty of protection to the State, which, especially through its legislation, also ought to provide sufficient protection of citizens against interference by other private actors. This also means that national Constitutions and conventions on human rights are no longer neutral systems of values, and human rights are no longer limited to their function as defensive rights against the State. The comparative studies show that seeking for effective protection of human rights and freedoms, human rights can directly or indirectly affect the “horizontal” relationships between private parties in different areas of private law: contract, property, tort, inheritance and family law<sup>1</sup> and in many European countries such effect has recently become a powerful and effective means of developing the law, especially when national courts use human rights-based legal reasoning to re-interpret the existing private law in order to grant or deny a particular remedy to private parties in certain situations.

The growing influence of human rights on the relationships between private parties under private law makes it possible to speak of the tendency towards the constitutionalisation of private law. This development, i.e. constitutionalisation of private law, was initially inspired by national Constitutional Courts<sup>2</sup> and by private law scholars who neglected to some extent the already well-developed public law doctrines of horizontal effect of human rights and positive obligations of the State. Later on, the major contributory factor was the development of multi-level jurisdictions, which had its effect on private law as well. Nowadays, the area of private law is no longer left to the exclusive competence of the traditional national civil court, but it is in Europe influenced substantially by the national constitutional jurisdiction (for example, the German Bundesverfassungsgericht) and/or by supranational jurisdictions, such as the European Court of Human Rights (Strasbourg) and the European Court of Justice (Luxembourg). This has not only brought about “a strong influence of “human rights thinking” in general, but also – at least to some extent – a shift of judicial power to decide what is “adequate and sufficient” with respect to the protection of human rights in private law issues”.<sup>3</sup>

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- 1 For example, see Mak, Ch. (ed.) *Fundamental Rights In European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*. Alphen aan den Rijn: Kluwer Law International: 2007; Smits, J. M. *Private Law and Fundamental Rights: a Sceptical View*. In Bark-huysen, T.; Lindenbergh, S. D. (eds.) *Constitutionalisation of Private Law*. Leiden/Boston: Martinus Nijhoff, 2005.
  - 2 Already in the 1950s the German Federal Constitutional Court recognised that human rights were not only relevant for the ‘vertical’ relationship between citizens and the State but also influenced the ‘horizontal’ relations between individuals governed by private law. The foundations for the protection of human rights in private law relations were laid by the Federal Constitutional Court in the famous *Lüth* case in 1958.1 (BVerfG 15 January 1958, BVerfGE 7, 198 (Lüth)).
  - 3 Lindenbergh, S. D. *Fundamental rights in private law: Anchors or goals in a globalizing legal order?* In Michael Faure & Andre van der Walt, A. *Globalization and Private Law, The way forward*. Edward Elgar, Cheltenham UK, 2010, Chapter 11, p. 367-382.

In order to understand the particular influence of human rights on private law and the effects, benefits and major problems of such influence, it is essential to clarify the field of the law (i.e. contracts, tort or property) in which human rights exert such influence, to answer the question as to who is applying human rights (the legislator or the court) and also to identify the way that human rights affect private law relationships or the method of reasoning.

Firstly, there are two main theories on the question how a person may be protected by human rights in private law. One of them concludes that human rights are directly applicable to private law. This theory is considered as a doctrine of “direct horizontal effect” of human rights and implies that a party in civil proceedings may directly invoke human rights as basis of a private law claim against the other party. From this perspective, human rights are used as a source of obligations by which other private parties are directly bound. According to the doctrine of “indirect horizontal effect”, human rights are not used as a source of obligation but only as a source of inspiration for interpreting the private law rules. Consequently, they influence the relations between private parties only indirectly “through the interpretation of open textured norms, general clauses and value-oriented concepts such as good faith, reasonableness or negligence, which leave a margin of interpretation for courts”.<sup>4</sup> Which of the theories prevails mostly depends on the legal traditions of a certain country, the field of law and the factual situation of a certain case. However, it should be noted that although different theories invoke different questions in a certain case (for example, in the same case direct effect may invoke a question whether a new private law remedy can directly arise from a human right, whereas indirect effect may invoke a question – can old private law remedies be indirectly shaped by human rights through interpretation), that does not mean that the outcome will always be different.

Secondly, what concerns the question who applies human rights, it has to be noted that the impact of human rights in private law has been mostly felt on the level of dispute resolution rather than the level of legislation, so the key role of applying human rights in private law and developing this phenomenon is on the judiciary side. Legislation in the field of private law usually expresses the general values protected by these rights and it is the task of the judges to make sure that the rules of private law are interpreted and applied in line with these values.

Finally, regarding the question of cases in which human rights may have an effect, it should be noted that the scope of such case patterns is very broad and covers practically all areas of private law starting from tort, contract, property issues to family and inheritance matters and even commercial and company law<sup>5</sup>. For example, it is acknowledged that tort law is mostly influenced by human rights. This is because personality and other human rights are traditionally protected by the tort law regime. Violations of bodily integrity or privacy are typical examples of both violations of human rights and tortious conduct as such. In addition to these more traditional cases, human rights are now often

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4 Busch, Ch. (ed.) *EU Compendium Fundamental Rights and Private Law A Practical Tool for Judges*. Sellier: European Law Publishers, 2011, p. 12.

5 *Ibid.*, p. 26.

used in tort cases to establish what is in conformity with human dignity and what is not. This is apparent in particular in cases where difficult moral issues are at stake, such as in wrongful birth cases and etc. The influence of human rights in such cases may often be direct, i.e. “private law remedy can directly arise from a certain constitutional right even though the existing law does not directly establish such a possibility”<sup>6</sup>. By contrast, in contract law usually indirect effect prevails. Here human-rights based reasoning is “mostly used to protect weaker parties from unfair agreements or otherwise to strike balance between the freedom of contract and party autonomy on the one hand and other human rights such as social justice, human dignity on the other”<sup>7</sup>.

It has been mentioned that in many countries the impact of human rights (whether direct or indirect) to private law has recently become a powerful and effective means of developing the law. Human rights may lead private law to new horizons and they may provide incentives for more fair solutions in specific cases. And this is not only a matter of argumentation. It also stresses the importance of essential values and interests that might, in a more oriented civil law model, otherwise be disregarded. Human rights may thus “serve as a source of inspiration for what is considered a just solution in society, as a signal of the seriousness of a case in which human dignity is at stake, and - if necessary – as a crowbar to vindicate these interests”<sup>8</sup>.

However, the application of universal standards of what is regarded as fair in the relationship between the State and the citizen – which is of course what human rights were originally designed for – to private parties by some authors is treated not only with enthusiasm, but also with suspicion<sup>9</sup>. *So it should not be denied that the application of human rights into private law has not only a positive side but also invokes very serious problems that should be solved and raises conceptual questions that should be answered.*

Firstly, the doctrine of the influence of human rights on private law strengthens rights and freedoms of one party which can refer to a specific human right. But this is unavoidably at the expense of the freedom and autonomy of the other party who may invoke its rights in its favour. What should prevail among these private parties is often unclear and “in any event something cannot be easily decided at the level of constitutional rights themselves. Balancing these rights in case of a conflict between two private parties is typically a private law exercise”<sup>10</sup>.

6 Prominent examples of this in German legal development are the case law acknowledgment of the protection of personality rights under § 823 (1) of the BGB, and the granting of the remedy of non-economic damages (‘equitable compensation’, *billige Entschädigung*) in cases of personality rights violation (see BGH, 14 February 1958, BGHZ 26, 349 – *Herrenreiter*; BGH, 15 November 1994, BGHZ 128, 1 – *Caroline von Monaco* (no. 1), etc.).

7 See more in Mak, Ch., *supra* note 1.

8 Lindenbergh, S. D., *supra* note 3, p. 367-382.

9 See for example Smits, Jan M., *supra* note 1.

10 Fastrich, L. *Human rights and Private law* in Ziegler, K. S. *Human Rights and Private Law*. Oxford: Hart Publishing, 2007, p. 30. The author emphasises that the substance of freedom and autonomy means to be able to act according to your own will. The will may be strange, wrong, emotional, subjective or imprudent. It might not be in accordance with the values of the Convention. But if we accept freedom, to a certain degree we have to accept subjective values. If we do not accept private values in private law, we deny freedom and autonomy.

Secondly, Jan M. Smits, for instance, advocates scepticism by arguing that private parties are, as a matter of principle, not bound by human rights, because these rights are by their origin and nature meant to protect the free sphere of private parties from the state influence<sup>11</sup>.

Thirdly, human rights usually consist of rather ‘raw’ legal material that offers little guidance. It means that human rights are, at least in their original structure, rather vague and undetermined, which makes their implementation difficult. It makes the application as well as the outcome of the application of human rights in private law situations unpredictable and it can therefore affect legal certainty. This also raises the question of whether the judiciary can sufficiently deal with the application of human rights in individual cases and which cases are more suitable for the legislator to decide.

Also, as described above, the development and influence of human rights in private law seems to a large extent dependent on the existence and power of supranational jurisdictions. So “the application of human rights by an international court or institution may impose values that exceed or are contrary to the locally approved values. The universality of human rights seems to a certain extent to vary according to their nature as well as to the location of their application, and thus their weight may be valued differently in concrete situations”<sup>12</sup>.

Finally, “existing labels that are used to describe the ways in which human rights may affect the relationships between private parties under private law do not always accurately reflect the extent of this effect in a particular legal system in practice”<sup>13</sup>.

It is obvious from the above, that the problems of relationship between private law and human rights are complex and raise many questions. One is a technical question: how do human rights influence private law or how human rights, which often stem from a public law tradition, fit into the structure of private law debates and what does this mean for the structure of private law?

The other problems are more human, inspiring questions *why* human rights play or should play a role in the resolution of disputes between contracting parties and *to what* extent do human rights affect private law? To what extent the argumentation of human rights may be used to legitimise the choice for a certain solution in a certain case and in which types of cases are such questions the most urgent?

Moreover, it encompasses questions regarding the roles of the legislator and the judges, as well as contract parties themselves, in the process of giving effect to human rights in contract law. What are the implications for the role of the (national) legislator and of the (national or transnational) judiciary? Can human rights provide sufficient guidance *ex ante* to influence the behaviour of private parties? What does their influence imply for the certainty for private law parties?

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11 Smits, M., *supra* note 1.

12 Mak, Ch. (eds.), *supra* note 1.

13 Cherednychenko, O. O. Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity? *Utrecht Law Review*. 2007, No. 2.



Finally, “given their role in raising the judicial awareness of political stakes in contractual disputes, could human rights justify an *ex officio* judicial intervention in a private legal relationship, aimed at the protection of a certain general interest?”<sup>14</sup>

The above problems and questions usually are at stake in a number of recent scientific studies. It is impossible to mention all the researchers and only the most important authors who have undertaken a comparative analysis on the subject-matter are listed below: Tom Barkhuysen and Siewert Lindenbergh<sup>15</sup>, Olha O. Cherednychenko<sup>16</sup>, Katja S. Ziegler<sup>17</sup>, G. Brüggemeier, Friedmann D.<sup>18</sup>, S.D. Lindenbergh<sup>19</sup>, Mak, Ch.<sup>20</sup>, Fedtke J.<sup>21</sup>, M. Smits<sup>22</sup>, Zucca L.<sup>23</sup>, etc. However, despite the majority of various scientific researches on the issue, the answers to the problematic questions raised above are usually complex and need to be answered in different ways, depending on a specific legal system and specific areas of private law: tort, contract, property, etc. In this respect, it is necessary to continuously explore different legal traditions on the issue and the influence of human rights in different areas. Also, recent researches show that answers to these questions are not static because of the dynamic nature of human rights, so they change depending on the development of certain society and its needs.

To sum up, it can be said that in order to ensure stable, reliable and respectable development of the influence of human rights on private law as a beneficial tool to protect human rights in certain cases, there is a need for continuous, complex and multi-level academic conceptual comparative studies on the issue concerned.

## 2. The *Status Quo* of the Human Rights’ Impact on Private Law in Legal Doctrine and Court Practice in Lithuania

While analysing the situation on the impact of human rights on private law in the legal doctrine and court practice in Lithuania, it is obvious that the same problems and questions on the issue of influence of human rights on private law in Europe are also at stake in Lithuania. More than that, at the current stage of the research it seems that in the Lithuanian law the understanding of the impact of human rights on private law is still insufficiently profound, compared to other European countries.

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14 Mak, Ch., *supra* note 1, p. 271.

15 Barkhuysen, T.; Lindenbergh, S. (eds.) Meijers, E.M. Institute of Legal Studies. *Constitutionalisation of Private Law*. Leiden, Boston: Martinus Nijhoff Publishers, 2006.

16 Cherednychenko, O. O., *supra* note 13.

17 Ziegler, K. S. *Human rights and private law. Privacy as autonomy*. Oxford, Portland: Hart Publishing, 2007.

18 Friedmann, D.; Barak-Erez, D. *Human rights in private law*. Oxford: Hart, 2001.

19 Lindenbergh, S. D. *supra* note 3, p. 367-382.

20 Mak, Ch., *supra* note 1.

21 Oliver, D.; Fedtke, J. *Human rights and the private sphere – a comparative study*. London and New York: Routledge, 2007.

22 Smits, M., *supra* note 1.

23 Zucca, L. *Constitutional dilemmas: conflicts of fundamental legal rights in Europe and the USA*. Oxford: Oxford University Press, 2007.

Firstly, despite the fact that in their recent jurisprudence the Constitutional Court and the Supreme Court of Lithuania have used human rights-based argumentation with rising enthusiasm<sup>24</sup>, to date there is no doctrinal discourse on this matter. For example, apart from several textbooks and other sources on contract, tort and human rights law there are no specific studies on the subject-matter in the Lithuanian doctrine. Firstly, monograph by Meškauskaitė L.<sup>25</sup> and the recent doctoral theses written by Šindeikis A.<sup>26</sup>, Venckienė E.<sup>27</sup> and Žiobienė E. could be distinguished.<sup>28</sup> The authors of the above-mentioned studies analyse some theoretical and practical problems of implementation of different human rights by means of constitutional and private law. However, they do not perform a conceptual evaluation of the influence of human rights on private law. Another source related to the same subject-matter is a monograph of the author of this article on the contemporary interpretation of non-pecuniary damage as a kind of civil remedy<sup>29</sup>. However, this monograph also deals with only one type of remedy the development of which was influenced by the constitutionalisation of private law. Furthermore, some articles on different aspects of human rights which are mostly related to the questions of the impact of the European Convention of Human Rights on the Lithuanian law are published in the Lithuanian scientific journal<sup>30</sup>.

Secondly, the protection of human rights by the tools of private law is still understood solely through the concept of positive obligations of the State which, especially through its legislation, ought to provide sufficient protection of citizens against interference by other private actors. Such practice has primarily been inspired by the European Convention on Human Rights, which came into force on 20 June 1995. It has been recognised by the rulings of the Constitutional Court that the European Convention on Human Rights is a part of the legal system of the Republic of Lithuania and that the

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- 24 For example, the Ruling of the Constitutional Court dated 29 December 2004 On the compliance of the Law on Restraint of organised crime with the Constitution of Lithuania, interpreting and applying Article 28 of the Constitution, which states that while implementing his rights and freedoms, a human being must observe the Constitution and the laws of the Republic of Lithuania and must not restrict the rights and freedoms of other people. Also, the ruling of the Supreme Court of Lithuania dated 8 November 2009 in civil case No. 3K-3-413/2009, 8 October 2009 in the civil case No. 3K-3-314/2009 of 26 June 2009, etc.
- 25 Meškauskaitė, L. *Žiniasklaidos teisė*. Vilnius, 2004.
- 26 Šindeikis, A. *Žodžio laisvė ir kitos konstitucinės vertybės: pusiausvyros nustatymo problemos*. Daktaro disertacija. Socialiniai mokslai, teisė [Freedom of speech and other constitutional values: issues of balancing: Doctoral dissertation]. Vilnius: Mykolo Romerio universitetas, 2011.
- 27 Venckienė, E. *Žmogaus orumas kaip teisinė kategorija*. Daktaro disertacija [Human dignity as legal category: doctoral dissertation], MRU, 2008.
- 28 Žiobienė, E. *Informacijos apie privatų gyvenimą apsauga*. Daktaro disertacija. MRU, 2003.
- 29 Cirtautienė, S. *Neturtinės žalos atlyginimas kaip civilinių teisių gynimo būdas*. Vilnius: Justitia, 2008.
- 30 See, for example, Jočienė, D. Freedom of expression and the right to privacy. *Teisė*. 2001. Nr. 38. P. 7–19, Jočienė, D. *The European Convention on Human Rights in the Lithuanian Legal System: Interaction Between the European Court of Human Rights and the Lithuanian Courts*. *Teisė*. 2007, Nr. 62. Jočienė, D. Pagrindinių teisių apsauga pagal Europos žmogaus teisių konvenciją ir Europos Sąjungos teisę. *Jurisprudencija*. 2010, Nr. 3(121), Lankauskas, M. Balansavimas tarp teisės į privatumą ir saviraiškos laisvės Europos žmogaus teisių teismo jurisprudencijoje. *Teisės problemos*. 2007, Nr. 2 (56), Birmontienė, T. Intersection of the Jurisprudences: the European Convention on Human Rights and the Constitutional Doctrine Formulated by the Constitutional Court of the Republic of Lithuania. *Jurisprudencija*. 2010, 1(119), etc.



functions of the Convention are not solely negative in the sense that human rights are merely addressed to the State to prevent it from encroaching upon human rights, but also that the Convention encompasses a positive duty to intervene in order to protect human rights and this means that it is valid in relation to protecting individuals from incursions into their liberties by fellow citizens<sup>31</sup>.

At the same time, the Lithuanian courts often use human rights-based argumentation and jurisprudence of the European Court of Human rights when deciding cases where private law rules must be applied or old doctrines re-interpreted. For example, in one case where plaintiffs claimed non-pecuniary damage suffered because of the death of their mother who died in a factory during a huge fire, the Supreme Court re-interpreted the old model of legal regulation introduced in the new Civil Code, when non-pecuniary damage could be redressed only in cases prescribed by the law (Civil Code, Article 6.250(2)), as well as long-prevailing Lithuanian absolute and formal application of dogmatic rules of law regulating non-pecuniary damage. The Supreme Court recognised the possibility for redress of non-pecuniary damage in cases not only prescribed by the law but also in other cases for the infringement of other human rights and freedoms established by the Constitution. In the reasoning of its decision, the Court referred to the constitutional principle of compensation and the European Convention for the Protection of Human Rights and Fundamental Freedoms, also to Resolution of 15 March 1975 of the European Council of Ministers No. (75)7 and the practice of the European Court of Human Rights. The Court stressed that, according to the above-mentioned international law, a plaintiff is entitled to non-pecuniary damages in case of a victim's death, where a close, tight, sincere and emotionally firm family relationship exists between the victim and the plaintiffs. Therefore, considering that Article 6.284 of the Civil Code of Lithuania does not limit the scope of persons who can claim non-pecuniary damages for the death of their close family member, the Court listed the persons additionally entitled to claim non-pecuniary damages for the death of their family member: not only the dependants, whose rights are set by the law, but also other family members (e.g. adult children, irrespective of their dependency), if they had close, tight, sincere and emotionally firm relationship with the deceased prior to the accident<sup>32</sup>.

In another case, where the claim concerned tortious liability of state institutions for excessive duration of criminal proceedings and the claimant had been acquitted in a criminal case, which, however, took over five years to investigate, the claimant raised a question whether this was sufficiently prompt for the purposes of the European Convention on Human Rights and claimed pecuniary and non-pecuniary damage, notwithstanding the fact that no-fault liability of pre-trial investigation officers arose under Article 6.272(1) of the Lithuanian Civil Code only as a result of illegal actions which were expressly listed in the aforesaid law (e.g., due to illegal custody, illegal sentencing, etc.), and that an excessively long pre-trial investigation was not treated (as per wording of the Civil Code) as an omission giving right to claim non-pecuniary

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31 Rulings of the Constitutional Court of 20 April 1995 and of 21 December 2006, etc.

32 Ruling of the Supreme Court of Lithuania dated 26 September 2007 in the civil case No. 3K-3-351/2007.

damages. Consequently, the Supreme Court of Lithuania partly approved the decision of the appeal court which awarded compensation to the plaintiff by ascertaining that the length of the pre-trial investigation was excessive and not proportionate to the complexity of the case<sup>33</sup>.

All of the above-mentioned examples may be treated as model examples of the influence of human rights on tort law giving effective tools for the judiciary to adopt and re-interpret existing dogmatic rules in the changing life of the society. However, the most recent cases: one concerning tortious liability of the state for failure to adopt adequate and efficient legal framework ensuring care of psychiatric patients, so that they do not pose a risk to the lives of others<sup>34</sup>, and the other – where the Supreme Court awarded non-pecuniary damage for the plaintiff whose father and uncle were murdered in 1953 during the resistance movement against the Soviet occupation,<sup>35</sup> cannot be met only with enthusiasm and seem to be much more problematic, raising hot issues such as *how such practice complies with the principles of legal certainty and proportionality and what are the criteria for the limits of the effect of human rights on private law in order to ensure a fair balance, protect stability and predictability in law*.

For example, in the second of the above-mentioned cases, concerning tortious liability of a perpetrator of genocide, the Lithuanian courts were confronted with a question of damages against defendants after they were convicted for genocide on 4 February 2004. They were charged with, amongst others, killing of the plaintiff's father and uncle, who were the participants of the resistance movement against the Soviet occupation in the 1950s. The murders occurred in 1953, when the plaintiff was seven years old. The plaintiff claimed non-pecuniary damages and pecuniary damages for the death of her father and uncle.

Notwithstanding the fact that the Law on the Entry into Force of the Civil Code in 2000 did not allow retroactive application of the Civil Code, the Lithuanian Supreme Court stressed the need to take the Constitution into consideration and referred the case to the Constitutional Court, which delivered its ruling on this issue in 2010. The

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33 Ruling of the Supreme Court of Lithuania dated 6 February 2007 in the civil case No. 3K-7-7/2007, 12 February 2010 in the civil case No. 3K-3-75/2010.

34 In this case concerning state liability for regulatory omission the plaintiff claimed damages, she was a mother of a twelve-year-old child who was shot dead by a paranoid schizophrenic after entering his apartment. She argued that apart from the killer, tortious liability was carried also by the state and Vilnius municipality, because they allegedly failed to take adequate measures (i.e. adopt the necessary legal framework) in order to prevent a similar situation from happening. The Supreme Court decided to reverse and return the case for reconsideration to the Court of Appeal, setting the legal standard that the courts were supposed to apply in order to decide similar cases. For this purpose, it referred to the practice of the European Court of Human Rights on positive obligations of states to ensure the right to life, i.e. the obligation to take reasonable preventive measures to counter a real and immediate danger to human life posed by another private person, of which the authorities knew or ought to have known. A further interesting finding of the Lithuanian Supreme Court was that, since the case involved a pressing need of public interest, it was the courts' duty to investigate ex officio both (a) the circumstances that led to the tragic event as far as legal regulations were concerned, and (b) whether the medical treatment institutions met their duty of due care under the circumstances, disregarding the fact that the claimants had not even raised the issue (ruling of the Supreme Court dated 24 May 2010 in civil case No. 3K-3-184/2010).

35 Ruling of the Supreme Court dated 28 February 2011 in the civil case No. 3K-7-70/2011.

Constitutional Court decided that the legislation should state the right to demand compensation for damage from the perpetrators of genocide and that this right should not be subject to a period of prescription. Therefore, the legislative omission with regard to civil liability for crimes against humanity neither precluded nor excused the courts from fulfilling their duty to administer justice by filling the legal gaps ad hoc and to apply the law. In view of the ruling of the Constitutional Court, the Supreme Court decided accordingly that the prescription period did not apply to claims for the compensation of non-pecuniary damage for crimes against humanity, and that non-pecuniary damages were to be assessed on the basis of the rules of the Civil Code, applied by analogy. Consequently, the Supreme Court awarded non-pecuniary compensation to the plaintiff, stating that, in case of grave human rights violations (such as torture, killings, etc.) non-pecuniary damage was in principle presumed, including the damage that was suffered by the closest relatives and family members.<sup>36</sup>

The above-mentioned court decisions show that the issue of the scope and limits of influence of human rights on private law is of great importance in Lithuania. However, as referred above, there is no discourse on the matter in theory and no conceptual view on the issue concerning the way and the extent of the effect of human rights on private law. Therefore, it is obvious that current lack of understanding might cause problems of stability and progress in legal relationships. In addition, the lack of legal doctrine on the subject-matter may result in wrong interpretation and application of legal norms in legal disputes. Such practice demonstrates a vacuum in the Lithuanian jurisprudence and this makes it hard to foresee the judgments of courts in cases on the issue.

All of the above situations illustrate urgent necessity to start a conceptual and detailed study on the issue and to assess how and to what extent human rights may influence private law in the legal doctrine and case law in Lithuania. Thus, this article may be considered as the first attempt to invoke appropriate academic discussion on the matter.

## Conclusions

1. It is now accepted that seeking for effective protection of human rights and freedoms, human rights can directly or indirectly affect the “horizontal” relationships between private parties in different areas of private law and in many European countries such effect has recently become a powerful and effective means of developing the law, especially when national courts use human rights-based legal reasoning to re-interpret existing private law in order to grant or deny private parties a particular remedy in certain situations.

2. The application of universal standards of what is regarded as fair in the relationship between the State and the citizen – which is of course what human rights were originally designed for – to private parties is treated by some authors not only with enthusiasm,

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36 *Ibid.*

but also with suspicion and has not only its positive side but also invokes very serious problems that should be solved and raises conceptual questions that should be answered.

3. Despite the majority of various scientific researches on the issue in Europe, the answers to the problematic questions concerning human rights' impact on private law are usually complex and need to be answered in different ways, depending on the specific legal system and specific areas of private law: tort, contract, property, etc. In this respect, it is necessary to explore different legal traditions on the issue and influence of human rights in different areas. Also, recent researches show that answers to the problematic questions are not static because of the dynamic nature of human rights, so they change depending on the development of certain society and its needs.

4. The protection of human rights by the tools of private law in Lithuania is still understood solely through the concept of positive obligations of the State which, especially through its legislation, ought to provide sufficient protection for citizens against interference by other private actors. Current lack of academic discourse on the problems of constitutionalisation of private law in the Lithuanian legal doctrine and no conceptual view on the issue concerning the way and the extent of the effect of human rights on private law might cause problems of stability and progress in legal relationships.

5. Thus, only a systematic and conceptual approach to the phenomenon of the influence of human rights on private law and a detailed study on how and to what extent human rights may influence private law in the legal doctrine and case law can produce constructive suggestions regarding the improvement of the existing legal norms and legal practice on the issue, so that, on the one hand, the constitutionalisation of private law could become an effective tool for judges to decide cases where human rights are at stake, and, on the other hand, ensure fair balance, stability and predictability in law.

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## ŽMOGAUS TEISIŲ ĮTAKA PRIVATINEI TEISEI LIETUVOJE IR KITOSE EUROPOS ŠALYSE: PROBLEMINIAI ASPEKTAI

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**Santrauka.** Šiame straipsnyje nagrinėjamos žmogaus teisių doktrinos, paprastai analizuojamos konstitucinės teisės kontekste, įtakos privatinės teisės vystymuisi Lietuvoje ir kitose Europos šalyse problema. Autorės nuomone, daugelyje Europos šalių efektyvios žmogaus teisių apsaugos poreikiu grindžiamas teismų sprendimų, sprendžiant civilines bylas, argumentavimas remiantis žmogaus teisių doktrina (angl. *humanrights' based argumentation*) tapo puikia priemone, leidžiančia plėtoti ir vystyti privatinės teisės institutus bei plėsti asmens teisių apsaugos ribas. Šis reiškinys, dar vadinamas privatinės teisės konstitucionalizacija, teisės doktrinoje įvardijamas tiesioginiu ir/ar netiesioginiu horizontaliu žmogaus teisių doktrinos poveikiu privatinei teisei ne tik vertikaliame santykiyje žmogus-valstybė, bet ir horizontaliu lygmeniu tarp privačių teisės subjektų. Lietuvoje, deja, žmogaus teisių problematika iki šiol suprantama ir analizuojama tik arba per valstybės negatyviąsias pareigas, arba per valstybės pozityviąsias pareigas teisinio reguliavimo priemonėmis siekiant užtikrinti efektyvią žmogaus teisių apsaugą horizontaliuose santykiuose. Tokia teisės doktrinos pozicija ir teisės doktrinos vakuumas toliau negali būti toleruojamas, nes Lietuvos teismų praktika akivaizdžiai rodo, kad bendrosios jurisdikcijos teismai, ypač bylose dėl žalos atlyginimo, neretai naudojami Konstitucijoje įtvirtintų žmogaus teisių apsaugos poreikiu grindžiamu argumentavimu reinterpretuodami ankstesnę praktiką ir plėsdami žmogaus teisių apsaugos ribas privatinuose santykiuose, ypač kai tai susiję su asmeniui padarytos žalos atlyginimu. Autorės nuomone, nesant konceptualaus doktrininio požiūrio į nagrinėjamą žmogaus teisių įtakos privatinei teisei problematiką, kyla reali grėsmė teisiniam stabilumui ir apibrėžtumui bei didelė teismo klaidų, sprendžiant civilines bylas, tikimybė arba dėl pernelyg liberalaus žmogaus teisių doktrinos taikymo civiliniuose santykiuose, arba, priešingai, pernelyg griežto ir separatistinio požiūrio į bylas, kuriose kyla aktualūs žmogaus teisių apsaugos klausimai. Todėl šiuo straipsniu, pateikiant Europos šalių patirtį privatinės teisės konstitucionalizacijos srityje bei iškeliant probleminius su tuo susijusius klausimus, siekiama pradėti būtiną akademinę diskusiją šioje srityje bei pagrindžiama konceptualių, dinamiškų, sisteminių bei tarpdisciplininių mokslinių tyrimų žmogaus teisių ir privatinės teisės srityje būtinybė.

**Reikšminiai žodžiai:** žmogaus teisės, privatinės teisės konstitucionalizacija, privatinė teisė, horizontalus žmogaus teisių poveikis.

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