1 INTRODUCTION

Some say that human rights are not relevant to private law because these rights are effective only in the relationship between a state and its citizens. Others might say that human rights do not affect the right of private parties to enter into contracts or to draw up wills that are entirely arbitrary and contrary to human rights.

This article need not be written if these statements turn out to be correct. After all, we are supposed to discuss the role of the European Convention on Human Rights – a human rights convention to which all European states are parties – in the development termed the constitutionalisation of private law.

But are these statements correct, or should we conclude rather that human rights are increasingly relevant to private law, as others say? The answer to this question is not evident and it is interesting to examine the role played in private law by human rights.

The focus of this article therefore is the question whether and if so, and to what extent, human rights influence private law (not considering procedural law) and thus contribute to the constitutionalisation of this area of law. We confine ourselves to the European Convention on Human Rights (ECHR or
Convention), because the rights contained therein apply to all European states. Moreover, we will only examine to what extent the Convention finds – directly or indirectly – application in private law, without considering whether the standards of the Convention are a material addition to the effective national private law standards. As practitioners of constitutional and administrative law as well as European law we are not equipped to answer this last question. This we would like to leave to civil law practitioners.

To come straight to the point: the conclusion of this article will be that the ECHR definitely plays a role in private law. Partly for that reason it can no longer be said that private individuals are entitled to arbitrariness. Although this role of the ECHR should not be overestimated, it should certainly not be underestimated.2

Below we will explain this statement step by step. For a good understanding we will first make some general comments about the extension of the human rights concept (paragraph 2). This will be followed by a general discussion of the different ways in which human rights affect private law relations (paragraph 3). More specifically, the ECHR will be discussed, in which context first the status of this Convention in the national legal system will be considered (paragraph 4), with a focus on the significance of the ECHR for private law (paragraphs 5 – 8). We will end with some concluding remarks (paragraph 9).

# 2 Extension of the Human Rights Concept

First some general comments about the development of the human rights concept.

Anchored in national, European and international documents, human rights have gained importance over the past few decades. Human rights are invoked increasingly in legal practice and the interpretation of human rights standards become ever more refined. Parties hope to reinforce their position in legal proceedings by invoking human rights. They think – in Dworkin’s words – of human rights as trumps.3 Judges in turn are forced to pronounce a judgment

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2 This article is partly based on our consultative report for the Dutch Civil Law Society, De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht: het Straatsburgse perspectief, Deventer 2005, p. 1-101 (with many detailed references to case law and literature).