HUMAN RIGHTS LITERATURE REVIEWS

Lithuania

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1. Relevant Legal Journals[1]

In the absence of specialized human rights law journals in Lithuania, articles dealing with human rights appear in general law journals. *Teisė*[2] is published by the Faculty of Law of Vilnius University four times a year. Although the majority of articles are in Lithuanian, this journal also accepts and publishes texts in English and Russian. *Jurisprudencija*[3] is an open access journal published by Mykolas Romeris University (Vilnius) twice a year. Apart from articles written in Lithuanian, it may accept articles written in English. *The Baltic Journal of Law and Politics*[4] is an open access joint publication of the Faculty of Political Science and Diplomacy and the Faculty of Law of Vytautas Magnus University (Kaunas), with a particular emphasis on interdisciplinary research, published twice a year in English and in an electronic form. *Teisės apžvalga*[5] is published by the Vytautas Magnus University (Kaunas), and it is an online journal published twice a year that accepts articles in Lithuanian and English. Students of the Faculty of Law of Vytautas Magnus University are involved in the publishing activities of this journal along the editorial board composed of established scholars. *Teisės problemos*[6] is published by the Law Institute of Lithuania (Vilnius), a research establishment founded by the Ministry of Justice of Lithuania, twice a year. As a general rule, articles are written in Lithuanian. Upon agreement with the editor, articles may be presented in other languages. The European Humanities University, founded in Minsk, Belarus, but operating in Vilnius, Lithuania, publishes an online peer-reviewed *Journal of Constitutionalism and Human Rights*,[7] which accepts articles in English or Russian. The journal is supported by the Council of Europe. At the time

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1 This review covers the period of 2014 to August 2017.

2 Teisė, 'Information for Authors', available at: http://www.journals.vu.lt/teise/information/authors (last accessed 28 March 2018).

3 Jurisprudencija, available at: https://www3.mruni.eu/ojs/jurisprudence/(last accessed 28 March 2018).

4 Baltic Journal of Law & Politics, available at: https://www.degruyter.com/view/j/bjlp (last accessed 28 March 2018).

5 Teisės apžvalga, available at: https://ejournals.vdu.lt/index.php/LawReview/about/editorialPolicies#focusAndScope (last accessed 28 March 2018).

6 Teisės problemos (Legal Issues), available at: http://teise.org/en/lti-veikla/teises-problemos/(last accessed 28 March 2018).

7 *Журнал конституционализма и прав человека* / *Journal of Constitutionalism & Human Rights*, available at: http://chr-centre.org/?page_id=8 (last accessed 28 March 2018).

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of writing (August 2017), the volumes for 2015 were the latest volumes published.

2. Noteworthy Human Rights Publications

The works of established scholars reviewed in this section fall into two categories. The first category comprises books in which authors produce an in-depth analysis and develop a line of complex argumentation with regard to one particular phenomenon or one particular legal act. The second category comprises books in which an attempt is made to embrace a broad array of issues related to a theme defined in a very general manner. The two categories are presented in turn, each subsection starting with the oldest publication.

In the first category, the monograph entitled *Crisis, the Rule of Law and Human Rights in Lithuania* by a group of scholars of the Faculty of Law of Vilnius University, led by Professor Egidijus Kūris, judge at the ECtHR, is noteworthy. It analyses how the global economic crisis, which hit Lithuania in 2008, affected the standards of the rule of law and human rights enshrined in Lithuanian law.[8] The book was written and published in Lithuanian.[9] Its shorter version was also published in English.[10]

The hypothesis that the economic crisis had a transformative effect on the legal system in Lithuania by lowering the universally acknowledged standards of rule of law and human rights is tested by exploring separate segments of the human rights catalogue, namely, the right to responsible government, freedom of economic activity, regulation of public finances, social rights, political and personal rights. In exploring these areas, some consideration is given to tensions between law and economic reality, law and politics, as well as law and society. In addition to traditional methods of legal research, a survey of the public opinion and of particular target groups, including professional lawyers, specifically designed and carried out within the framework of this research project, was used to find out how the crisis affected the attitude of the society towards the protection of human rights. Research addresses the response by the state to the crisis, which included both austerity measures and efforts to reform specific areas of governance, so that their financing and management could become more effective.

Research shows that during the crisis relevant legal standards were interpreted flexibly or, at times, even not applied, thus narrowing down the scope of protection of human rights and providing justification of this narrowing. All law-gov-

8 The Research Council of Lithuania funded the research project 'Challenges of economic crisis (recession) to the rule of law and human rights' (contract no. VPI-3.1-ŠMM-07-K-03085).

9 E. Kūris (Ed.), *Krizė, teisės viešpatavimas ir žmogaus teisės*, Šiauliai: AB "Titnagas", 2015, available online at: www12007.vu.lt/images/dotacija/Monografija-Krize-teises-viespatavimas-ir-zmogaus-teises-LT.pdf (last accessed 28 March 2018).

10 E. Kūris (Ed.), *Crisis, the Rule of Law and Human Rights in Lithuania*, Šiauliai: SC "Titnagas", 2015, available online at: www12007.vu.lt/images/dotacija/Book-Crisis-the-rule-of-law-and-human-rights-in-Lithuania-EN.pdf (last accessed 28 March 2018).

erned domains were pervaded by the crisis, although not to the same extent. Political and personal rights were constrained less than other segments of the human rights catalogue. Even in this area, however, the crisis was felt, as the decreased financial capacity precluded the reforms necessary to improve the conditions of detention. On the bright side, the crisis inspired and prompted certain structural reforms. In some areas, the reforms were successful (e.g. the reform of the law-making process); however, some were abandoned half-way (e.g. in liberalizing labour relations). On the downside, hastiness in the adoption of anti-crisis measures, followed by hasty corrections and the lack of dialogue between the authorities and the public not only exacerbated economic shock but also caused social shock and strengthened the perception of law as a political instrument used to disregard individual interests for the sake of overriding public goals.

Nevertheless, the perception of a law-governed state was not substantially undermined. The economic necessity did not change the views of society that the rights curtailed should be compensated for after the crisis, although it is understood that they may not be compensated fully. There were infringements of rights but they were perceived and treated as violations of law. It should be underlined that the crisis prompted a more active protection of the rights of an individual, including their defence in courts. The rather pessimistic hypothesis was thus more unconfirmed than confirmed.

A forthcoming study, entitled 'Application of the EU Charter of Fundamental Rights as a Standard for the Protection of Individual Rights on a National and Supranational Level',[11] by another group of scholars of the Faculty of Law of Vilnius University, led by associate professor Skirgailė Žalimienė, judge at the Supreme Administrative Court of Lithuania, also falls in the first category.[12] This study examines the relevance of the EU Charter on Fundamental Rights for domestic courts inter alia in situations where the Charter itself does not require its application. The study addresses the issue of the interplay of various human rights standards applicable at the domestic level, notably, the ECHR, the Charter and the domestic law standards, including constitutional ones. Specifically, the authors address the areas of the right to an effective judicial remedy, good administration, private and family life, social rights, as well as equality and dignity. A representative survey of government officials and law practitioners was used to find out how often the Charter is applied, and what is needed to encourage its broader and better application. The survey shows that Lithuanians very rarely rely on the Charter provisions to protect their rights. Only four in 10 legal practitioners apply the Charter in their work. Of those who do apply the Charter, the majority do so only one or a few times a year. When judges apply the Charter, they do so at their own initiative, i.e. not upon the request of the parties to a case. The survey implies that the scope of the application of the Charter as well as the

11 S. Žalimienė (Ed.), *ES chartijos, kaip individualių teisių gynybos standarto, taikymas supra- ir nacionaliniu lygmenimis*, Vilnius: Vilniaus universiteto leidykla, 2018 [forthcoming].

12 The Research Council of Lithuania funded the research project 'Application of the EU Charter of Fundamental Rights as a standard for the protection of individual rights on a national and supranational level' (Grant No. MIP-088/2014).

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practical relevance of the Charter are not sufficiently clear, and the study attempts to provide some clarity on the issue.

The main findings of the study are the following. The Charter could only be considered as an effective instrument for the protection of individual rights if a person could directly invoke it to defend those rights in domestic and EU institutions. Currently, due to the uncertainty of the term "when … implementing Union law" in Article 51 of the Charter, it is difficult for domestic courts to decide whether it is possible or (and) necessary to apply the Charter. This uncertainty is an obstacle for the effective protection of Charter-based fundamental rights. As regards the practice of Lithuanian courts, research has shown that in terms of the scope of application, they also refer to the Charter in situations far beyond the scope outlined by the Court of Justice, i.e. also in purely domestic disputes.

The examination of the problem of how domestic courts should treat the Charter in order to ensure the highest possible level of the protection of fundamental rights leads to the following conclusions. Effective protection of fundamental rights can be ensured only if in every, including entirely domestic, case domestic courts carry out comparison between the standard of protection of fundamental rights enshrined in the Charter and in the domestic law. Where it is found as a result of such comparison that the Charter standard ensures a higher level of protection, this higher standard should be followed. When the dispute is not related to the EU law, there is no obligation on the national level to take the Charter into account, but the Charter in such situations can usefully be treated as a source of inspiration or a standard of good practice. When there is a sufficient connection with EU law, according to the principle of the primacy of EU law, the same level of protection of fundamental rights established under the Charter should also be ensured under domestic law. If a domestic court in such a situation chooses to apply the higher standard enshrined in the national constitution, it would presumably be incompatible with EU law. At the same time, as the Court of Justice and national courts cooperate using the amicable two-way interpretation, the national and the EU legal systems could be converged as a result of jurisprudence based on the legal principles that are common to the European legal tradition.

In the second category, two publications should be mentioned.

A study by a group of scholars of Mykolas Romeris University, entitled 'The Protection of the Rights of a Person: Problems and Solutions',[13] aims at examining how the guarantees provided in law are applied in reality. The issue is viewed through the prism of legal theories, international law, constitutional law, administrative as well as other branches of law, predominantly in the Lithuanian context. The authors address a variety of issues such as the need for further reforms at the ECtHR, the problem of the limits of the power of the parliament to adopt anti-constitutional amendments to the Constitution for the purpose of better protection of human rights, the scope of linguistic rights of members of national minorities, the notion of family in Lithuanian constitutional law, the rights of the

13 E. Bilevičiūtė & M. Vainiutė (Eds.), *Asmens teisių gynimas: problemos ir sprendimai : mokslo studija*, Vilnius: Mykolo Romerio universitetas, 2014.

patient, the role of a barrister in providing the state-guaranteed legal aid, etc. The message to the reader in the summary is that there is a need for further efforts to achieve internal consistency of the Lithuanian legal system in terms of human rights protection, and this should be done taking into account both the traditions of Lithuanian law and academic insights.

A collection of peer-reviewed papers by former and current researchers of the Institute of Law, entitled 'A Quarter of a Century in Exploring and Reforming Lithuanian Legal System',[14] was published to mark the 25th anniversary of the institute. Of interest to human rights lawyers, the book contains a paper[15] by Danutė Jočienė, previously a judge of the ECtHR and currently a judge at the Constitutional Court of Lithuania, dealing with the impact of the ECHR on the jurisprudence of the Lithuanian Constitutional Court. The paper examines the impact of the ECtHR cases *Paksas v. Lithuania*[16] and *Vasiliauskas v. Lithuania*,[17] as well as certain thematic human rights issues in the context of private life, equality of persons, etc. Notably, the author states that the Lithuanian Constitutional Court interprets the right of access to court as an absolute right, whereas at the ECtHR this right is understood as one subject to limitations. The author observes, however, that the latest cases of the Constitutional Court on this issue do not stress the absolute nature of this right and thus show a move towards the convergence of the viewpoints of the two courts.

3. Relevant Doctoral Theses

Doctoral theses covered in this section are presented in a chronological order, starting with the oldest.

3.1. Indrė Pukanasytė's thesis 'The Electoral Law in the Jurisprudence of the Constitutional Court of the Republic of Lithuania and in the European Court of Human Rights'[18]

The thesis examines the case law of the two courts, aiming to assess to what extent it is compatible and to what extent it is, or could be, incompatible. The author comes to the conclusion that the Constitution of Lithuania and the ECHR establish essentially the same principles of electoral law. Incompatibility between

14 J. Paužaitė-Kulvinskienė & P. Ragauskas (Eds.), *Ketvirtis amžiaus tiriant ir reformuojant Lietuvos teisinę sistemą: recenzuotų mokslinių straipsnių rinkinys*, Vilnius: Akademinė leidyba, 2016, available online at: http://teise.org/wp-content/uploads/2017/01/Ketvirtis-amziaus-rinkinys.pdf (last accessed 28 March 2018).

15 D. Jočienė, 'Europos Žmogaus Teisių Konvencijos įtaka Lietuvos Respublikos Konstitucinio Teismo jurisprudencijai', *in* J. Paužaitė-Kulvinskienė & P. Ragauskas (Eds.), *Ketvirtis amžiaus tiriant ir reformuojant Lietuvos teisinę sistemą: recenzuotų mokslinių straipsnių rinkinys*, Vilnius: Akademinė leidyba, 2016, p. 187.

16 *Paksas v. Lithuania*, Application no. 34932/04, judgment [GC] of 6 January 2011.

17 *Vasiliauskas v. Lithuania*, Application no. 35343/05, judgment [GC] of 20 October 2015.

18 I. Pukanasytė, 'Rinkimų teisė Lietuvos Respublikos Konstitucinio Teismo ir Europos Žmogaus Teisių Teismo jurisprudencijoje', 2014 (PhD thesis on file at Mykolas Romeris University, Vilnius).

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the two sets of case law was found by the ECtHR only once, namely in *Paksas v. Lithuania*,[19] because the two courts differently assessed (1) giving preference to the same values enshrined in the Constitution and the Convention; (2) the feasibility of active suffrage (as well as feasibility of passive suffrage); (3) the proportionality of limiting the passive suffrage; and (4) the compatibility of permanent restrictions to passive suffrage in both the Convention and the Constitution. Having examined the case law of the two courts, the author reaches a conclusion that there are theoretical assumptions that the confrontation between the case law of the Constitutional Court and the ECtHR could occur regarding another restriction of passive suffrage (the right of the citizens of the Republic of Lithuania, who have citizenship of another state, to be elected in the parliamentary elections). The author qualifies her conclusion by conceding that such confrontation is not necessarily bound to occur in the future.

3.2. Nika Bruskina's thesis 'State Compensation to Victims of Crimes of Nazi and Communist Regimes: Interface between International and Domestic Law'[20]

The thesis addresses one of the very core problems of transitional justice. The choice of particular totalitarian regimes for analysis may be seen as influenced by Lithuania's historical experience, but it is also explained by the arguments of legal nature, inter alia by the fact that the ECtHR in cases related to crimes of the Communist regimes relies on its judgments and decisions concerning the crimes of the Nazi regime. The object of the thesis is the interface between international and domestic law of states, while establishing and enforcing the right of the victims of the Nazi and Communist regimes to state financial compensation. The thesis does not aim to analyse interstate compensation mechanisms and instead examines relations between an individual and the state. The interface between international humanitarian law and domestic law is outside the scope of the research and so is the interface between private international law and domestic law. Only the situation of direct victims is analysed.

The author reaches a number of conclusions. Most importantly, she notes that due to the impact of domestic law and a wide margin of appreciation of states, the interface between international and domestic law cannot ensure the maximum protection of the rights of victims of Nazi and Communist regimes in all cases. She then suggests expanding the jurisdiction of the ECtHR and the Human Rights Committee under the ICCPR, to establish a special international institution to decide on claims for compensation. Doubting the willingness of the states to undertake such new obligations, the author suggests that the recommendatory powers of the ECtHR, Human Rights Committee or a specialized institution should be considered. With regard to domestic practice, she recommends that a treaty or, more realistically, a set of guidelines on good practice in the area

19 *Paksas v. Lithuania*.

20 N. Bruskina, 'Valstybės kompensacija nacių ir komunistinių režimų nusikaltimų aukoms: tarptautinės ir nacionalinės teisės sąveika', 2014 (PhD thesis on file at Vilnius University, available online at: https://epublications.vu.lt/object/elaba:2186609/2186609.pdf (last accessed 28 March 2018)).

of state compensation to victims of totalitarian crimes should be considered. As regards the ECtHR, she suggests that more weight should be given to the suffering of victims, and a margin of appreciation of states should be narrowed down. Another possibility to consider is to take a different view on *ratione temporis* jurisdiction and to examine present-day claims of the Nazi and Communist victims for compensation, irrespective of the fact that the damage had been sustained before the entry into force of the ECHR or its Protocols.

3.3. Karolina Bubnytė's thesis 'The Role of Courts in Implementing the ECHR in Lithuania'[21]

The thesis combines theoretical analysis of the role of courts in implementing the ECHR and an empirical analysis of the case law of Lithuanian courts, with an analysis of that portion of the ECtHR case law which can be seen as a measure of evaluation of Lithuanian courts. The thesis then examines the influence of a pluralist legal context on the courts in the process of implementing the ECHR in an attempt to identify trends of jurisprudence. The author, who is a government agent to the ECtHR, examines issues that are of interest to practitioners as well as to scholars.

The thesis concludes that the in-depth transformation of domestic courts in Lithuania, just as elsewhere in Eastern and Central Europe, influenced *inter alia* by the ECtHR, has created assumptions for a deep internalization of the ECHR in the Lithuanian legal system. The Constitutional Court of Lithuania is particularly ECHR-friendly and internalizes the ECHR in a harmonizing manner. It recognizes a *de facto erga omnes* effect of judgments of the ECtHR and views the ECHR as an indirect standard of constitutional control. Other domestic courts of the highest instance seldom prioritize the ECHR with respect to the domestic law and even more rarely develop the ECHR standards independently. They do internalize the ECHR in applying it simultaneously with the Constitution, i.e. under a principle of a mirror. Yet this, too, shows their preparedness to act as the guarantor of ECHR rights at the domestic level. The ECtHR, in exercising control of the results of the internalization of the ECHR by the domestic courts, takes into account the position of domestic courts and quite often confirms it. This is caused by quite a high level of internalization of the ECHR by the Lithuanian courts. The processes of ECHR internalization in the national law and the conventionalization of the national law at the ECtHR are parallel. A high level of respect at domestic courts towards the ECHR would lead to a high level of respect towards the decisions of the domestic courts at the ECtHR. At present, there is no asymmetry in this respect either: as Lithuanian courts mainly internalize the ECHR in a limited way, there is no reason for the ECtHR to adapt its case law taking into account the position of the domestic courts. Under the conditions of legal pluralism, a dialogue of courts is particularly important to ensure mutual respect and overcome tensions. In this sense, a new procedure introduced by protocol No. 16 has the necessary potential to create equal partnership between domestic courts and the

21 K. Bubnytė, 'Teismų vaidmuo įgyvendinant Žmogaus teisių ir pagrindinių laisvių apsaugos konvenciją Lietuvoje', 2015 (PhD thesis on file at Vilnius University).

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ECtHR and to help develop pluralist legal standards. It is highly probable that Lithuanian courts, using this mechanism, will engage in the process of integrating overlapping human rights protection systems more actively than now.

3.4. Liudmila Ulyashyna's thesis 'International Legal Standards in the Field of Human Rights and Their Implementation: Doctrinal and Practical Study'[22]

The thesis was prepared at the European Humanities University and defended at Vilnius University under an existing arrangement between the two universities. The thesis is based on a monograph published earlier by the European Humanities University. Theoretical issues such as the notion of 'international human rights standards', the standards as *de facto* implementation of international human rights law, the status of the individual in international human rights law are analysed based on case studies drawn from the Belarusian legal system. The author analysed more than 100 decisions of Belarusian courts where international human rights law standards were applied. Importantly, the research shows how reliance on international human rights law can, in the words of the author, "impact national legal systems despite self-isolation, problems with division of powers and lack of real judicial independence."[23] Both the monograph and the thesis were written in English and are, therefore, comprehensible to a wide audience.

3.5. Jevgenija Vienažindytė's thesis 'Bosphorus Presumption and the European Union's Accession to the ECHR'[24]

The thesis examines what effect the EU accession to the ECHR would have on the famous *Bosphorus* presumption,[25] which, according to the author, is better defined as the presumption of compliance of the act of the state with the Convention rather than the equivalent protection presumption. This is so because in every individual case equivalency of fundamental rights in the international organization is established rather than presumed. The main statement defended in the thesis is that despite the EU accession to the Convention, the *Bosphorus* presumption would be further applied considering the scope of accession, conditions, aims and outcomes of application of the presumption in question. The in-depth technical analysis results *inter alia* in findings that the presumption should be qualitatively revised by establishing clear conditions for the application of presumption and for adapting this presumption so that it could be used in examining the merits rather than the admissibility of a case.

22 L. Ulyashina, 'International Legal Standards in the Field of Human Rights and Their Implementation: Doctrinal and Practical Study', 2015 (PhD thesis on file at Vilnius University).

23 'EHU lecturer defends PhD on human rights', available at: www.ehu.lt/en/news/show/ehu-lecturer-defends-phd-on-human-rights (last accessed 28 March 2018).

24 J. Vienažindytė, 'Bosphorus prezumpcija ir Europos Sąjungos prisijungimas prie Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos' (PhD thesis on file at Vilnius University, available online at: http://gs.elaba.lt/object/elaba:19574752/19574752.pdf (last accessed 28 March 2018)).

25 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, judgment (Grand Chamber) of 30 June 2005, p. 156.

3.6. Inga Malinauskaitė – van de Castel's thesis 'Rights of the Data Subject in Online Social Networks'[26]

The thesis specifically deals with the access right and the right to be forgotten in online social networks. It also explores how the protection of these rights can be improved. The author holds that while at the level of regulation the rights of the data subject are protected under the relevant EU data protection acts, online social networks fail to comply with the law and, therefore, protection of the rights of the data subject is ensured only partially. In light of specific features and the global nature of online social networks and in pursuance of ensuring more effective protection in online social networks, the author recommends applying not only the legal rules, but also the co-regulation method. The thesis combines analysis from the theoretical, human rights, technological advancement, EU law and Lithuanian law perspectives. The human rights perspective provides a sound starting point. Analysis conducted in the thesis is based on the understanding stemming from the European tradition as reflected in the ECHR and the EU Charter of Fundamental Rights that data protection rights are privacy-related human rights and, consequently, the protection of these rights requires enabling the data subject to actively protect their interests.

4. Summary

Major human rights publications of the covered period were collective works, where every author was responsible for one chapter or one paper in the book. This can be to some extent explained by the fact that the majority of authors are professionals, who divide their time between the academia and elsewhere (judges, barristers, civil servants). Although the works produced in this manner may lack internal consistency in terms of the approach, they benefit from the practitioners' view on what kind of research is practically relevant. Thus, the study on the application of the EU Charter by the domestic courts at the very outset asked the questions that arise in the everyday work of courts. As, generally, there is a tendency to produce shorter individual pieces of writing, one should note that broader projects devoted to in-depth analysis focusing on one particular issue have been greatly stimulated by funding from the Research Council of Lithuania.

As regards the subject of research by Lithuanian authors reviewed in this text, both the themes of local and of general interest attracted the attention of scholars and were explored. The choice of research questions was influenced by the global economic crisis, EU-wide interest in the application of the EU Charter in member states, the challenges to privacy posed by modern technologies, but also by the specific Lithuanian experience in these and other contexts, often as a result of European court cases. As far as research methods are concerned, in the two research projects devoted to a particular issue analysis of legal documents

26 I. Malinauskaitė – van de Castel, 'Duomenų subjekto teisės virtualiuose socialiniuose tinkluose', 2017 (PhD thesis on file at Mykolas Romeris University, Vilnius, available online at: https://repository.mruni.eu/handle/007/14648 (last accessed 28 March 2018)).

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was usefully supplemented by data from specifically developed sociological surveys.

As a result of cooperation between Vilnius University and the European Humanities University, a research project on the relevance of international human rights for legal practitioners in Belarus led to a successfully defended PhD thesis, which is a fact that shows that research into human rights at Lithuanian universities is not restricted to the Council of Europe and the European Union area, which effectively responds to the needs of the region.