VALIDITY AND EFFECT OF CONSTITUTIONAL RIGHTS
IN INTERPERSONAL RELATIONS
[ART. 25(1) SECTION 3 OF THE GREEK CONSTITUTION]

CHRISTINA AKRIVOPoulos*

INTRODUCTION

THOUGH in the US the influence of Constitutional Rights in interpersonal relations is contested by the state action doctrine, in Europe is taken as an axiom. The European theoretical dialogue is concerned by an altogether different question, even better a topic for a conflict. A conflict that focuses either on the direct - that is, derived from the Constitution - or, the indirect - law-mediated - effect of Constitutional Rights, and aims at identifying the whole issue of the interpersonal effect of Constitutional Rights, via one choice only: either the direct or the indirect one. However, the issue of the interpersonal effect of Constitutional Rights is a whole lot more complex and wider than any one of these possibilities, and in a way, it contains both.

The first part of this paper initiates from overrunning the theoretical conflict between the indirect and direct interpersonal effect of Constitutional Rights. Using as an example the 13/1999 decision of the Greek Supreme Civil Court, known as the Babiniotis case, we argue that the choice between the direct and indirect effect of Constitutional Rights is in fact insignificant, meaning that both can actually lead us to identical or even

* Master’s Graduate in Public Law, PhD Candidate in Constitutional Law at the Aristotle University of Thessaloniki (AUTH). Researcher of the Greek State Scholarship Foundation. I am grateful to Prof. Ifigeneia Kamtsidou for her encouraging comments on the Greek version of this paper. Special thanks also go to Szilvia Papp for doing the English revision. I am indebted foremost to Prof. Antonis Manitakis for his crucial and valuable comments and his constant support.


ERPL/REDP, vol. 19, no 3, autumn/automne 2007
better to neutral-equal judicial results. These results overrun the differentiation between the hermeneutical (indirect) and the law-creative (direct) interpersonal effect of Constitutional Rights, an effect in which the Constitution and the law both have their own clarified and indispensable position.

The second part of the paper focuses on the interpretation of Art. 25(1) section 3 of the Greek Constitution, revised in 2001. Though most Constitutions are silent or remain ambiguous as for the horizontal effect of Constitutional Rights, this Article addresses this issue by stating that: “These rights also apply to the relations between individuals to which they are appropriate”.

We argue that the new, revised Article of the Greek Constitution introduces a judicial model of application of constitutional rights that: [a] addresses solely the judge, [b] is open meaning that its application depends on the judicial reference to various constitutional articles, which establish Constitutional Rights, [c] is procedural and not substantial, [d] does neither presume nor enforces judicial reference to Constitutional Rights, while resolving an interpersonal controversy, nor does it determine a specific way of effect, [e] imposes the pursuit and enforcement of a specific norm of law, which appears to be the most suitable for resolving an interpersonal controversy.

1. From Constructing (Directly or Indirectly) to Interpreting the Interpersonal Effect of Constitutional Rights

There are two theoretical constructions addressing traditionally the issue of constitutional effect in interpersonal relations: that of the direct and the indirect drittwirkung. According to the indirect one, introduced by Dürig:

---


and the German Federal Constitutional Court\(^6\), Constitutional Rights as objective principles affect the interpretation of law, influencing the legal system in its entirety. According to Düri\(\text{g}\) this effect is indirect\(^7\), extremely hermeneutical and focuses on the specification of general clauses of law (for example the clause of abusive enforcement of rights or that of good faith\(^8\)). According to the German Federal Constitutional Court this effect addresses the possibility of the interpretation of any norm of private law (even a specific one\(^9\)), whereas in certain cases the Court accepts that an interpretation can occur also to the contrary of its literal meaning\(^{10}\). This theoretical construction supports the existence of a dividing line between the law-creative and the hermeneutical effect of Constitutional Rights, adopting the latter. Focusing on the judge, it tries simultaneously to protect the legislator as well. In a nutshell, it recognizes as much an effect of Constitutional Rights in interpersonal relations as the legislator has supposedly allowed\(^{11}\). This actually bespeaks the chief aim of the theory, namely the protection of private autonomy as outlined in private law, indeed the pro-

---


7 Known as the “cascade effect”, see R. Hon Sedley, Law and Justice 25 (Sweet & Maxwell 1999).


10 See 34 BverfGe, 269, 277.

11 Rodríguez-Ruíz, supra note 3, 105.
tection of the identity of private law, from the influence of the Constitution and Constitutional Rights\(^\text{12}\).

How this construction works in practice? Let us suppose, for example, that a private employer fires an employee because of a political opinion the employee has expressed. This dismissal is likely to be found unlawful. When the status of the Freedom of Speech is not constitutional, the unlawful dismissal may, in a given legal system, carry the *sanction* of damages but not of a specific performance. However, if the Freedom of Speech is upgraded to a level superior to the legislative, the employer may be awarded a *sanction* of a specific performance. To put it in another way, by upgrading the normative status of the Freedom of Speech and increasing its weight in private law, the Court is enabled to grant a remedy, which otherwise could not be granted\(^\text{13}\). Under these circumstances the indirect application of Constitutional Rights in private law, theoretically does not create a new system of rights. Instead, it works within a given private legal system; imbibing old tools with new contents or creating new tools with traditional techniques of private law. Nevertheless, we must observe that the constitutional upgrading of rights or claims acknowledged by private law, is likely to lead us to different outcomes. Outcomes a lot similar to the direct application of Constitutional Rights.

The construction of direct *drittewirkung* is adopted by Nipperdey\(^\text{14}\) and has initially been supported by the German Federal Labour Court\(^\text{15}\). In ac-

---

\(^{12}\) J. N. Eule / J. D. Varat, Transporting first amendment norms to the private sector: with every wish comes a curse, 45 *UCLA L. Rev.*, 1537, 1548-9 (1998). For a contradictory view on the subject see O. Gerstenberg, Private law and the new European Constitutional settlement, 10 *European Law Journal*, 766-786, 770 (2004). "...subjecting the ground roles of private law to constitutional norms does not eliminate, but enables choice, autonomy, and experimentalism...".


cordance with this construction as well, the effect of Constitutional Rights in interpersonal relations arises from the objective nature of Constitutional Rights as principles, radiating the entirety of the legal system. Their effect is not hermeneutical, though. On the contrary, it engages their subjective nature as opposed to the infringements that the private activity of individuals can cause on Constitutional Rights of others. As Nipperdey argues, “...the legal effect of (Constitutional Rights) is rather a direct, normative effect which modifies existing legislative norms, or creates new ones...”16. By this meaning that the effect of Constitutional Rights in interpersonal relations is viewed as absolute and law-creative17.

According to this theoretical construction an individual by claiming the protection that Constitutional Rights guarantee is likely to obtain a result in Court that otherwise would not be obtained. This argument is illustrated in German jurisprudence. For example in one case the plaintiff's health record was handed over to an insurance company by a private clinic. The Court ruled that the plaintiff was entitled to a relief on the basis that the clinic's action had breached his Constitutional Right to personal development, protected by the German Basic Law18. In its reasoning, the Court argued that the rights acknowledged in the Basic Law, “...secure a basic right obtained not only with regard to the State and its organizations, but also in relations of private law against every individual...”19. In another case, a plaintiff's picture was published in a newspaper in connection with drugs, leading him to sue the distributor. According to German private law, under such circumstances the plaintiff is entitled to a remedy only if he can prove pecuniary harm. Though this type of harm was not proven,

16 See H.-C. NIPPERDEY, supra note 14, 26.
17 The greatest objections against this theoretical construction are raised by the liberal notion of the division of powers and the protection of private autonomy. See RODRÍGUEZ-RUIZ, supra note 3, 114-117. In her opinion though “...basic rights may legitimately set limits to private autonomy because they are at the service of its protection...” ibid. 109.
19 See 24 BGHZ 76.
the Court held that the plaintiff was entitled to a remedy because his Constitutional Rights to Dignity and Personal Development had been breached

As we have observed, both of these theoretical constructions opt for a different way of applying Constitutional Rights in an interpersonal controversy (directly, or indirectly through the general clauses of law), expecting differentiated outcomes (law-creative as for the direct and hermeneutical as for the indirect one). On the contrary, the jurisprudence considers subconsciously the choice between the indirect and the direct theoretical construction insignificant to the extent that either one can lead to the same legal outcomes. This argument is adopted by Robert Alexy and is illustrated in his "radiation thesis".

1.1. Overrunning the Construction of Indirect and Direct “Drittwirkung”: The Babiniotis Case, Part I

This argument is explicitly encompassed in the 13/1999 decision of the Plenary Session of the Greek Supreme Civil Court, known as the “Babiniotis Case”. The decision refers to the cassation of the Prosecutor of the Greek Supreme Civil Court as opposed to the 18134/1998 decision of the First Instance Court of Thessaloniki, which had provided preliminary injunction against the circulation of the Babiniotis Dictionary. This decision found the inclusion of the word “boulgaros” interpreted in the dictionary as “supporter or player of the team of Thessaloniki (especially of PAOK)” offensive to the personality of the supporters. The 13/1999 decision of the Plenary Session of the Greek Civil Supreme Court annulled the former one. The majority, however, and this is the crucially interesting point of this decision, was cut in thirds: to one major and two minors, who

---

20 See 26 BGHZ 349.
21 R. ALEXY, Theorie of Constitutional Rights 355-6 (JULIAN RIVERS trans, Oxford Univeristy Press 2002). In his opinion the two theoretical constructions are outcome-neutral, since every outcome achieved in the context of one could also be achieved in the context of the other. Also see C. STARCK, Die Grundrechte des Grundgesetzes [The fundamental Rights of the Basic Law], Juristische Schulung [Jus] 243 (1981).
24 boulgaros= Greek for a citizen of Bulgaria, Bulgarian.
25 One of the sports teams of Thessaloniki, Greece.
even though expressing their argumentation in different ways (directly, indirectly, and not applying Constitutional Rights), actually ended up in the same jurisdictional outcome.

The first majority leans towards the construction of the indirect “dritt-wirkung”. On the one hand, it recognizes the PAOK supporters as holders of the civil right of personality (Art. 57 of the Greek Civil Code\textsuperscript{26}), which defines ethnicity as "a determinant element of the identity of an individual\textsuperscript{27}". On the other hand, the activity of the lexicographer is presented as a protected expression of the Scientific Freedom\textsuperscript{28} and the Freedom of Speech\textsuperscript{29}. The collision and the necessity of balancing between the competing rights of both sides, lead the majority to rank them hierarchically\textsuperscript{30}. Initially the Court by applying the Scientific Freedom and the Freedom of Speech considered those as freedoms that actually aim at safeguarding some of the "highest social interests\textsuperscript{31}" and thus evaluated them as superior as opposed to the civil right of personality. Furthermore, the way with

\textsuperscript{26} Art. 57 of the Greek S.C.C. Right of Personality: “Anyone who is unlawfully experiencing an offense in his personality has the right to demand its termination and that it is not repeated in the future” (author’s translation).


\textsuperscript{28} Art. 16(1): “Art and science, research and teaching shall be free and their development and promotion shall be an obligation of the State. Academic freedom and freedom of teaching shall not exempt anyone from his duty of allegiance to the Constitution” supra note 2.

\textsuperscript{29} Art. 14(1): “Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State” supra note 2.

\textsuperscript{30} The Supreme Court’s decision is thoroughly commented - though by a differentiated scope by Ιφ. ΚΑΜΤΣΙΔΟΥ, Η επιφύλαξη υπέρ του νόμου ως περιορισμός, εγγύηση και διάμεσος των ελευθεριών 305-306 [Ιφ. ΚΑΜΤΣΙΔΟΥ, Due process of law as limitation, guarantee and mediator of freedoms] (Sakkoulass Publishers 2001).

\textsuperscript{31} See 13/1999 S.C.C. supra note 22, 257.
which the Court applied these freedoms leads us to a negative determination of its content: This right is not limited in the context of the particular case but “as an inferior\textsuperscript{32}” in general to the exercising of the above-mentioned freedoms. The absolutism of the position described is categorical, while its formulation obscures first of all its connection to the construction of the indirect drittwirkung. The application of Constitutional Rights at the end determines the interpretation, the limits and the protective content and scope of Art. 57 of the Greek Civil Code, that is to say a specific norm of private law, and so their effect can be characterized as indirect, in a way that it becomes comprehensible by the theoretical construction of the indirect “drittwirkung”.

The third majority arrives to an identical result with that of the opinion exposed, leaning, however, towards the construction of the direct drittwirkung. Thus, both sides of the controversy are recognized straightforwardly as holders of Constitutional Rights without any reduction in provisions of private law\textsuperscript{33}. The supporters of PAOK are considered as holders of the Constitutional Right of Personality, whereas the lexicographer is granted the protection of the Freedom of Speech. According to the third majority when these rights collide “provided that their harmonization is impracticable, the value of the Free Speech should be evaluated via the Right of Information of the Public as opposed to the endangerment of the legal interest of personality\textsuperscript{34}”. The third majority, however, does not proceed to balance the colliding rights but simply takes a step forward from the opinion of the first majority. It is not the general “safeguarding of the highest freedoms” but more specifically, the Right of Information of the Public that balances in favour of the Scientific Freedom not only in this specific controversy but in all cases colliding. This opinion appears to adopt consciously the methodological construction of direct drittwirkung. It connects, in fact, the direct application of Constitutional Rights while resolving interpersonal controversies to the necessity of their evaluation. Based on this ascertainment, the decision of the First Instance Court, according to

\textsuperscript{32} Ibid. “…the right of personality even though possibly being infringed in this specific case, holds an inferior position as far as the legal interests of Free Speech and Freedom of Science are concerned…” (author’s translation).

\textsuperscript{33} Instead of Art. 57 of the Greek Civil Code, the Court applied Art. 5(1) of the Greek Constitution stating: “All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages” supra note 2.

\textsuperscript{34} See 13/1999 S.C.C. supra note 22, 259.
the opinion of the third majority, should be annulled: since it did not proceed acknowledging both sides of the controversy as holders of Constitutional Rights in a direct way, it did not consider their rights as colliding ones and did not balance them in the scope of a particular controversy.

The comprehension of the Babiniotis decision appears to encourage the presumption we made at the beginning of this paper: namely, that from a jurisprudential point of view the actual choice between the two constructions of drittwirkung is insignificant meaning that both can achieve identical legal outcomes. The first and the third majority adopt different ways of applying Constitutional Rights, which supposedly should be tending towards different outcomes, but they end up evoking identical legal consequences. This occurs because while we over-stress their differences, the theoretical constructions of direct and indirect drittwirkung share certain common admissions. Constitutional Rights as principles influencing interpersonal relations are alienated from their former addressee, the State and are held equally against private individuals. The main consequence of this alteration is that both sides of a specific interpersonal controversy are acknowledged as holders of Constitutional Rights. This alteration obliges both theoretical constructions to accept the fact that the influence of Constitutional Rights in interpersonal relations is not independent at the end from the balancing of the developed colliding interests. This resemblance is obvious in the reasoning of both the first and the third majority. Both take the objective nature of Constitutional Rights for granted, recognizing the subjects of the controversy as holders of colliding rights and both assess the need of balancing and ranking them. A balancing and

35  ALEXY, supra note 21, 357-8.
36  ALEXY, supra note 21, 357 “…None of the three theories transfers constitutional rights as state-directed rights by merely exchanging the addressee in the relations between citizens”.
38  NIPPERDEY, supra note 14, 23, ALEXY, supra note 21, 357, J. SCHWABE, Die sogennante Drittwirkung der Grundrechte 75 [About the so-called “drittwirkung” of Fundamental Rights] 75 (W. Goldman 1971).
ranking, that both turn out to be crucial for the application of Constitutional Rights in the particular controversy, since in both cases it is the constitutional provision of Scientific Freedom that overweighs the Right of Personality. At the end, in both cases, the application of Constitutional Rights leads to relatively general rules\(^{40}\) (the protection of the lexicographer as holder of the Freedom of Science and Speech in a democratic society for the first majority, the protection of the lexicographer’s activity as a means for protecting the Right of Information of the Public according to the third majority), on the basis of which private rights and claims of individuals are acknowledged.

1.2. Overrunning the Dilemma between the Hermeneutical and Law-Creative Effect of Constitutional Rights: The Babiniotis Case, Part II

The theoretical constructions of direct and indirect “drittwirkung” pose yet another dilemma: Is the effect that Constitutional Rights emanate in interpersonal relations hermeneutical or law-creative? Do Constitutional Rights represent criteria for an interpretation of general clauses or specific norms of private law or, on the contrary, do they act as directly applicable norms, modifying existing legislative ones, creating new rights\(^{41}\)? The answer to this dilemma is connected neither to the direct nor the indirect “drittwirkung” but instead to the clarified and indispensable role that norms

\(^{40}\) **ALEXY**, *supra* note 21, 358 “…the process of balancing under all three theories can lead to relatively general rules under which certain constitutional rights in certain areas of private law are entirely, or substantially, overridden…”.

of law and constitutional principles play in the issue of the interpersonal effect of Constitutional Rights\textsuperscript{42}.

The indeterminate nature of Constitutional Rights generates the possibility of multiple and often quite opposing solutions in a specific interpersonal controversy. The reasoning of the minority in the Babiniotis decision illustrates characteristically this argument. Although it resembles particularly to the reasoning of the first majority, being based on similar constitutional evaluations, it leads to a different legal outcome. Thus, while initially explicitly negating the possibility of Constitutional Rights effecting interpersonal controversies\textsuperscript{43}, it leans, however, towards the construction of indirect \textit{dritt wirkung}. Based on Art. 57 of the Greek Civil Code and taking for granted that the infringement of personality "can be referring to any determining element of the identity of an individual, to that of his national origin and on the basis of this to his integration into a specific nationality\textsuperscript{44}", the minority embraces the idea that the combination of the civil right of personality with the principle of human dignity (derived from Art. 2(1) of the Greek Constitution\textsuperscript{45}) renders it impossible for balancing, even against private activities protected by the Freedom of Science and Speech, such as that of the lexicographer.

Along with the first majority, the minority also adopts an absolute hierarchy of the colliding Constitutional Rights. At this point, it is not the objective dimension of the Freedoms of Speech and Science in a democratic society that weighs a right over another but the relation of personality with the non-balanced principle of human dignity that places the right of personality above the freedoms of the lexicographer\textsuperscript{46}. The misplaced connec-

\textsuperscript{42} See ALEXY, sup ra note 21, 364. See also R. GUASTINI, \textit{Lezioni di teoria costituzionale} [Lessons of Constitutional Theory] 177-8 (Giappichelli 2001).

\textsuperscript{43} See 13/1999 S.C.C. sup ra note 22, 260 "...these rights are applied only in relation to the State and not horizontally, between private individuals..." and then by overrunning this argument (the minority) accepts the effect of Constitutional Rights in interpersonal relations "...in any case though, these rights cannot be applied without certain limitations..." (author’s translation).

\textsuperscript{44} See 13/1999 S.C.C. sup ra note 22, 260.

\textsuperscript{45} Article 2(1): “Respect and protection of the value of human being constitute the primary obligations of the State” sup ra note 2.

\textsuperscript{46} See 13/1999 S.C.C. sup ra note 22, 261 “...The Constitutional Rights of Art. 2(1) and Art. 5(1), which acknowledge the principle of human dignity and of free development of personality, referring to an individual’s personality and to its central position in society, must be considered as overweighed as far as the Freedom of Speech and Scientific Freedom are concerned...” (author’s translation).
tion of personality with dignity, a value obviously associated not only with the Right of Personality but with each and every one of the Constitutional Rights and Freedoms\textsuperscript{47}, does not invalidate the fact that the minority with its reasoning achieves precisely the opposite result as the first majority. Thus by invoking the constitutional principle of human dignity, the minority leaned towards the positive protection of the civil right of personality, granting the supporters of PAOK the claim that the lexicographer should withdraw the interpretation of the word “boulgaros” that they considered offensive.

The comprehension of the reasoning of both the majority and the minority makes it explicit that the application of Constitutional Rights while resolving an interpersonal controversy comprises uncertainty as for the outcomes of a juridical crisis. It is also obvious that neither the choice between the direct or indirect way of applying Constitutional Rights can solve this uncertainty by itself. In the Babiniotis case the first majority, just as the minority guides “indirectly” the effect of Constitutional Rights, in relation to and via the civil right of personality and, however, they lead to the exact opposite legal outcomes. This happens because this uncertainty is innate, consequence of the indeterminate nature of Constitutional Rights and not a consequence of the way they affect interpersonal relations\textsuperscript{48}.

The overrunning of this deadlock, as argued here, lays in the distinction of the role that norms of private law and the principles arising from Constitutional Rights undertake to play in the issue of interpersonal effect of Constitutional Rights. As for norms of private law, their role is not that of a channel, an intermediary one that justifies formally the juridical crisis as far as the legislator is concerned, but a substantial, constitutive role in the interpersonal effect of Constitutional Rights\textsuperscript{49}. This role is illustrated per-

\textsuperscript{47} N. ROSENBERG, Dignity, Rights and Recent Legal Scholarship, 3 American Quarterly 429, 431-432 (1993), “…a general commitment to human dignity, for instance, eventually collides with competing dignity claims…(creating) the need to consider the particular context in which any general legal right such as dignity, might be applied…”. For a general discussion on the topic also see, The Constitution of Rights: Human Dignity and American Values (M. J. MEYER / W. A. PARENT eds, Ithaca, Cornell University Press 1992).

\textsuperscript{48} See ALEXY, supra note 21, 364.

\textsuperscript{49} As ROBERT ALEXY puts it they have a constitutive significance meaning that “…it is often unclear what constitutional principles require in a private law case. In this situation it is necessary that the civil courts are able to base themselves on authoritative sources, that is, on enacted norms, precedents, and commonly held doc-
suasively in the reasoning of the second majority\textsuperscript{50}. This reasoning, although leading to the same outcome with the first majority, negates any effect of Constitutional Rights in the controversy and without limiting the constitutionally protected activity of the lexicographer, it considers it incompetent to breach the right of personality\textsuperscript{51}. The second majority does not come to this conclusion because of the “higher” constitutional value of the scientific activity of the lexicographer but because of the aspects, characteristic and nature that it allocates according to an average individual. The logic of this reasoning is extremely simple. It accepts the protection of the civil right of personality provided for the supporters of PAOK and examines if the basic conditions for activating this protection are fulfilled. That is to say that in the first place it examines if there is an infringement. Based exclusively on criteria deprived of any legal character it leads to the conclusion that the specific private activity is by nature incompetent to breach the right of personality\textsuperscript{52}.

Norms of private law, as the reasoning illustrates, bear a sufficiency on their own, which is based as much on their functional task to produce claims for individuals, as on their application by the jurisprudence and their elaboration by theory. This sufficiency determines also the way they mediate the application of Constitutional Rights and in particular the way they constitute\textsuperscript{53} their application while resolving interpersonal controversies. A formal citation of the legislative norms is not enough when the judge utilizes them in order to apply constitutional provisions but the exhaustion of their substantial content is required. In this lies the uncertainty of both the reasoning of the first majority and that of the minority. Instead

\textsuperscript{50} See 13/1999 S.C.C. supra note 22, 258-259.

\textsuperscript{51} See 13/1999 S.C.C. supra note 22, 258 “…the interpretation of the word ‘boulgaros’ with this controversial meaning in the Babiniotis Dictionary does not necessarily suggest its use, adoption or distribution by the lexicographer, but simply constitutes a neutral reference, which can be considered as unscientific but in any case remains a neutral reference…” (author’s translation).

\textsuperscript{52} See 13/1999 S.C.C. supra note 22, 258 “…consequently the controversial interpretation cannot be considered as an infringement of Art. 57 C.C., especially because the usage of the word with the above-mentioned meaning is characterized in the dictionary as ‘abusive-offensive’…” (author’s translation).

\textsuperscript{53} See O. GERSTENBERG, supra note 12, 769 “…private law is…the geometric location for formulating remedies for an infringement by one private individual on the constitutional right of another individual…”.
of using as their guide the substantial content of Art. 57 of the Greek Civil Code, they simply referred to it formally.

The fact, however, that norms of private law bear a certain sufficiency\(^54\) that the judge cannot ignore while utilizing them to apply Constitutional Rights in interpersonal controversies, does not mean that they are normatively self-sufficient or capable to exclude the guarantees deriving from Constitutional Rights\(^55\). On the contrary, often the application of Constitutional Rights seems to be essential for the justification of acknowledging private rights and related claims\(^56\). This meaning that the interpersonal effect of Constitutional Rights undertakes a role distinctive from that of the norms of private law.

In the *Babiniotis* case, on the basis of constitutional principles, rights of private law and related claims were acknowledged: the invocation of the Scientific Freedom of the lexicographer and the Right of Information of the Public excluded the claim of the supporters of PAOK for the interruption of the circulation of the dictionary or respectively, the invocation of the right of personality excluded the claim of the lexicographer for the continuation of the circulation of the dictionary. This effect of Constitutional Rights becomes even more obvious when contrasting the reasoning of the first, third majority and the minority with the second majority. In the first three, regardless of the way Constitutional Rights are applied (directly or indirectly), their application bears a significant consequence: the ac-

\(^{54}\) See BARAK, *supra* note 8, 21 “…human rights have always played a role in private law. Indeed, at the foundation of the private law systems are human rights ideals such as personhood, self-realisation and dignity…”.

\(^{55}\) On this argument see G. TAYLOR, Why the common law should be only indirectly affected by constitutional guarantees: A comment on Stone, 24 *MULR* 623, 639-643 (2000).

\(^{56}\) See the example given by ROBERT ALEXY of the *Blinkfüer* decision, 25 BVerfGE 256, *supra* note 21, 362-3 “…The Federal Constitutional Court starts by establishing that the objective order of values underlying the constitutional rights catalogue affects the question of what is unlawful for the purposes of §823 (1) Civil Code. This corresponds to the theory of indirect horizontal effect. The Federal Civil Court came to the conclusion that the boycott called by the Springer publishing house was not unlawful. This means that Blinkfüer has no right against Springer that it refrains from issuing the boycott call. This no right of Blinkfüer’s is, as has been shown above, equivalent to a permission to Springer to carry out the boycott. According to the Federal Constitutional Court, constitutional principles demand precisely the exact opposite outcome. This means that on the basis of constitutional principles, Blinkfüer has a right against Springer that the latter refrain from calling for a boycott…”.
knowledgement of private rights and related claims of individuals. On the other hand, in the reasoning of the second majority the absence of the application of Constitutional Rights (Scientific Freedom, Freedom of Speech) cannot lead to the acknowledgement of the lexicographer's private rights or any related claims, such as the continuation of the circulation of the dictionary. Instead, the continuation of the circulation of the dictionary is ensured because the civil right of personality of the supporters of PAOK is not infringed and thus no related claims can possibly be derived from it. This happens not because the lexicographer is a holder of the constitutionally protected Scientific Freedom but because his activity by nature cannot cause infringement in the right of personality.

These observations sustain the ascertainment that norms of private law have their own distinctive role to play in the issue of interpersonal effect of Constitutional Rights as much as Constitutional Rights do. A role that by excluding their mutual substitution imposes, however, their synchronized, intermingled and cohesive effect aiming at a) the application of norms of private law, in constituting and rationalizing the way Constitutional Rights are applied in interpersonal controversies and b) the application (or the invocation) of Constitutional Rights, in order to justify and acknowledge private rights or claims that could not be acknowledged otherwise.

By this meaning that the choice between the hermeneutical and the law-creative nature that the interpersonal effect of Constitutional Rights may hold, as a choice between a law-mediated or a law-substituting effect is insignificant. This being so, because the effect that Constitutional Rights develop in an interpersonal controversy is simultaneously as much hermeneutical as law-creative. Thus, they function first of all hermeneutically aiming at adopting general rules that can justify private rights and claims of persons and afterwards law-creatively, by requiring or excluding the existence of certain rights and claims in interpersonal relations, which in the absence of Constitutional Rights (as principles) would not be considered constitutionally necessary or possible. This interaction creates an interesting relation between constitutional principles and norms of private law.

2. THE JUDICIAL-PROCEDURAL PROTECTION OF THE INTERPERSONAL EFFECT OF CONSTITUTIONAL RIGHTS (ART. 25(1) SECTION 3 OF THE GREEK CONST.)

The recent constitutional revision added to Article 25(1) the section 3 of the Greek Constitution that states that: "These rights (…of man as an indi-
vidual and as a member of the society...according to the section 1 of Art. 25(1)\textsuperscript{57} also apply\textsuperscript{58} to the relations between individuals to which they are appropriate\textsuperscript{59}. This provision is obviously separated into two parts. In the first part, the \textit{validity} of Constitutional Rights as principles that imbue the entirety of the legal system is acknowledged, while in the second a general clause is adopted, which allows their \textit{effect} in interpersonal relations "to which they are appropriate". The distinction between \textit{validity} and \textit{effect} of Constitutional Rights in our opinion is crucial when interpreting this constitutional provision. While by \textit{validity} we refer to Constitutional Rights as principles, binding the entirety of the legal system and its bodies (legislative, executive, judicial), by \textit{effect} we refer only to their judicial adjudication and protection\textsuperscript{60}.

2.1. \textit{The Constitutional Acknowledgement of the Validity of Constitutional Rights in Interpersonal Relations. “These Rights Also Apply...”}

The explicit, constitutional acknowledgement of the \textit{erga omnes validity} of Constitutional Rights in interpersonal relations puts an end to the Greek

\textsuperscript{57} Art. 25(1) section 1 of the Greek Constitution: “The rights of man as an individual and as a member of the society and the principle of the constitutional welfare state are guaranteed by the State” \textit{supra} note 2.

\textsuperscript{58} \textit{Apply}, \textit{Application} is the English translation for the Greek word \textit{ισχύς [gel-tung]}, which in Greek has a quite different meaning. Literally it means that Constitutional Rights are existent or valid in interpersonal relationships. This concept is quite different from that of the application and so from now on we use the word \textit{validity} instead of \textit{application} (author’s note).


\textsuperscript{60} See A. \textit{MANITAKIS, Κράτος Δικαίου I & Δικαστικός έλεγχος της συνταγματικότητας των νόμων 422 [A. MANITAKIS, Rule of Law & Judicial Review] (Sakkoulas Publishers 1994).
theoretical discussion about its constitutional basis. This discussion was to a large extent in vain, since, in any case, the validity of Constitutional Rights is derived from their nature as principles, binding the entirety of the legal system. That makes the character of the first part of the provision affirming, without enriching it, since otherwise supposedly we should accept that after its establishment, the objective nature of Constitutional Rights as principles is derived from this and is not inherent by nature. Thus we would accept that the acknowledgement of the objective nature of Constitutional Rights is possible on the basis of an element external to their conceptual content.

This specific provision puts an end also to the pursuit of authority as an exclusive requirement of the validity of Constitutional Rights between individuals. The theory of authoritarian private relations remaining faithful to the traditional anti-authoritarian nature of Constitutional Rights extends the position that the individual holds against the State as well as against private power. However true, since the danger to Constitutional Rights emanates from both the state and non-state power, such an interpretation would lead to the restriction of the holders supposedly protected by the revised provision, since by definition it would exclude the constitutional protection in relations where the holders are not participating in an authoritarian relation. It would also exclude the protection granted to any holder of private power from potential infringement of their Constitutional Rights. Moreover, the restriction of the validity of Constitutional Rights

61 A number of constitutional provisions were suggested in the Greek theory: the principle of human dignity (Art. 2(1)), the free development of personality (Art. 5(1)), Art. 25(1) section 1 etc.

62 KUMM, supra note 39, 574-596.

63 See RODRIGUEZ-RUIZ, supra note 3, 106 "...in the context of a normative constitution public power must always respect basic rights. However, public power’s subordination to basic rights refers to the normative content that they already have; it does not come to qualify their content...", also see E.-W. BÖCKENFÖRDE, Grundrechte als Grundsatznormen [Fundamental Rights as Principles] in: Staat, Verfassung, Demokratie 161 (Shurkamp 1992).


65 For the same argument see W. RÜFNER, Drittwirkung der Grundrechte. Versuch einer Bilanz [Third effect of fundamental Rights. In attempt of a balance] in: Gedächtnisschrift für Wolfgang Martens 215, 228 (W. de Gruyter 1987), K. STERN, Das Staatsrecht der Bundesrepublik Deutschland, Bd. III/1 1586, 1591,
in authoritarian private relations would misinterpret also the effect deriving from them in interpersonal relations, which presupposes that they are not perceptible neither as rights of a citizen against the State, nor as rights against “private substitutes” of the State, but as fundamental, objective principles that can justify private rights and claims for individuals.

By this we mean that Constitutional Rights operating in interpersonal relations get isolated from their initial addressee, the State, and conceptually tend to operate as principles. This transformation has mainly a hermeneutical significance and excludes any separation between Constitutional Rights that by nature can operate in interpersonal relations and Constitutional Rights that because of their “public presupposition” do not operate horizontally\(^{66}\), meaning that it overruns precisely this distinction.

Provided that Constitutional Rights being individual, social or political are necessarily transformed into and operate in interpersonal relations as principles, the criterion of exclusion of their interpersonal effect is not whether they refer to a public relation but their own hermeneutical endurance\(^{67}\). In other words, to what extent can their conceptual, substantial content sustain interpretations and evaluations leading the judge to the justification of the acknowledgement of individuals’ private rights. A characteristic example is given by the decision 309/1981 of the First Instance Court of Rhodes\(^ {68}\), which by enhancing Art. 20(2)\(^ {69}\) of the Greek Constitu-
Constitutional Rights in Interpersonal Relations

The Right of a Prior Hearing in front of the administrative authorities, established a general principle of disciplinary law, regulative in public as well as in interpersonal relations.

Now, how much though does the explicit constitutional acknowledgement of the validity of Constitutional Rights establish in our Constitution a new principle? If we accept that the main characteristic of such a principle would be the possible optimization of the protection that Constitutional Rights provide for individuals, then the answer to this question has to be negative. At first, because the acknowledgement of the validity of Constitutional Rights does not grant to those the nature of principles, since they have this characteristic by nature. Second, the optimization of the protection of Constitutional Rights cannot be accomplished simply by the invocation of their validity. Instead it raises a clearly hermeneutical question in a specific interpersonal relation and it also seems to be subjective and closely related to the outcome of the balancing between competing rights of individuals. However, not even the acknowledgement of the validity of Constitutional Rights itself can intensify the application of Constitutional Rights while resolving interpersonal controversies, meaning that the application is not an end in itself but is simply the means for the judge to locate and apply the most appropriate norm of law - from the entirety of the legal system - in order to resolve an interpersonal controversy. However, the explicit constitutional acknowledgement of the validity of Constitutional Rights in interpersonal relations invigorates an axiom, a premise of legal order that the implementer of law cannot dispute any more.

69 Art. 20(2): “The right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests” supra note 2.

70 RODRÍGUEZ RUIZ, supra note 3, 106. For ROBERT ALEXY also the extent of the interpersonal effect of Constitutional Rights “…is in the final instance a matter of balancing interests…” supra note 21, 357.

71 K. GÜNTER, The Sense of Appropriateness. Application Discourses in Morality and Law (JOHN FARELL trans, State University of New York Press 1993). Klaus Günther’s distinction between discourses of justification and discourses of application provides a basis for such an account. His theory elaborates on the conceptual difference between arguments that claim that there are sufficient grounds to adopt a norm (justification), and arguments claiming that a given norm is the most appropriate one to regulate a specific situation (application). The justification of a norm thus embraces every instance of its application. During the application a norm is presumed valid and must prove to be appropriate, meaning the most suitable one for the solution of a case under all circumstances. Also see R. ALEXY, Justification and application of norms, 6 Ratio Juris 157 (1993).
rejection of the horizontal effect of Constitutional Rights in interpersonal relations after establishing Art. 25(1) section 3 is inconceivable.

2.2. The Constitutional Acknowledgement of the Interpersonal Effect of Constitutional Rights “...the Relations between Individuals to which they are Appropriate”

If the first part of the provision of Art. 25(1) section 3 (These rights also apply to...) acknowledges the erga omnes validity of Constitutional Rights as principles, the second part (...the relations between individuals to which they are appropriate) recognizes the way in which this operation affects the interpersonal relations, that is to say the interpersonal effect of Constitutional Rights.

Effect and validity of Constitutional Rights are two different connotations, although closely inter-connected in a relation tending from being specific towards general. The effect of Constitutional Rights binds individuals in their interrelations while exercising or enjoying their private autonomy. In this case Constitutional Rights, functioning as principles, represent the reasons: the justification of the acknowledgement or the negation of private rights of individuals and the foundation of claims or obligations for them. The erga omnes validity of Constitutional Rights entrusts the bodies of the State with the protection of individuals, thus referring to their legislative, administrative and judicial protection. The fact that Constitutional Rights are valid as principles for the entirety of the legal system obliges the bodies of the State to take them into consideration, either during legislation or decision-making. From this obligation arises also their duty to protect Constitutional Rights in interpersonal relations, a duty that is identical with their juridical protection.

The term interpersonal effect of Constitutional Rights that has been adopted in the present paper instead of the term drittwirkung (or third

72 There are other pragmatic and substantial arguments against non-application of Constitutional Rights in interpersonal relations: [a] dangers for Constitutional Rights emanate not only from the State, but also from private parties, [b] a truly normative Constitution also applies to individuals, [c] if we do not accept the “horizontal effect” of Constitutional Rights, in what way can we regulate the operation of the State in the private sector?


74 See ALEXY, supra note 21, 490-491.

75 See ALEXY, supra note 21, 484-487.
party effect) attempts to intensify the distinction between the validity and the effect of Constitutional Rights. The individuals do not form a “third person” in the classic relation of State-citizen, meaning that Constitutional Rights are neither valid in nor affect interpersonal relations the way they do in the classic relation of State-citizen. If in this relation validity and effect are identical, due to the acknowledgment of subjective rights of the citizen, in interpersonal relations the validity and the effect of Constitutional Rights are two dimensions connected but distinguishable. The validity of Constitutional Rights obliges the bodies of the State to protect the Constitutional Rights of individuals, while their effect compels individuals in their interpersonal relations. In other words the term interpersonal effect attempts to represent a relation which by definition would exclude the State. The choice of the term individuals as opposed to the term private strengthens the independence of this relation, which excludes any comparison with public relations or more precisely, relations of public nature.

2.3. The Complex Relation between Validity and Effect of Constitutional Rights

The distinction between the erga omnes “validity” of Constitutional Rights, as principles that inspire the entirety of legal order and their “effect” in interpersonal relations, does not lead to an absolute segregation. On the contrary, it helps comprehending a pre-requisite relation between them, a relation tending from being general towards specific. “Validity” and “effect” of Constitutional Rights are connected, at the end, at the stage of the juridical protection of individuals as holders-subjects of Constitutional Rights. This connection is represented in the provision of Art. 25(1) section 3 of the Greek Constitution. This meaning that the erga omnes va-

---

76 Based on this concept the term has been strongly criticized throughout German and Greek theory, J. Scwabe, supra note 38, 10, X. Ανθοπούλος, Η τριτενέργεια των συνταγματικών δικαιωμάτων ως συνταγματική αρχή, Μια ανάλυση του άρθρου 25 § 1 εδ. γ’ του Συντάγματος [Ch. Anthopoulos, The third-party effect of Constitutional Rights as a constitutional principle, An analysis of Art. 25(1) section 3 of the Greek Constitution], 15 Δικαιώματα του Ανθρώπου, Δημιουργία 687, 682, [Human Rights] (2002).

The validity of Constitutional Rights holds the condition of their effect in interpersonal relations, that is to say, the condition of their juridical protection. The second part of the provision addresses the judge, proclaiming him to apply norms of private law in a way compatible with the evaluations that are derived from Constitutional Rights, so that he ensures their protection from any infringement originating from an interpersonal relation.

This way the effect of Constitutional Rights constitutes a procedural and *applicative* norm of the effect arising from Constitutional Rights at the stage of the juridical protection of individuals, aiming at the acknowledgement of private rights and claims. The legal consequence obtained from the application of this norm is precisely the justification based on constitutional evaluations of the juridical protection of private rights of individuals.

Enlightening, as for the relation between the *validity* and the *effect* of Constitutional Rights in interpersonal relations at the stage of their juridical protection and for the projection of the legal consequences that may be gathered from the second part of the revised constitutional provision, is the comparison of three decisions of higher Greek Civil Courts referring to the Right of Privacy between spouses. Thus, with the decision 381/1987, the Greek Supreme Civil Court prevented the *erga omnes validity* of the Right of Privacy accepting that “the infringement of this right... does not refer to its protection against private individuals” and consequently negated its effect in the specific controversy, keeping in mind that “in the reciprocal obligation of spouses for life-sharing, the duty to preserve marital faith is also comprised.” On the contrary, the Cassation Court of Thessaloniki in the decision 1782/1981 accepted the *erga omnes validity* of the Right of Privacy, thus assuming its *effect* in interpersonal relations “(it) is not per-

78 “*Kompetenznormen / Competence norm*” for ALEXY, *supra* note 21, 223. Here the term “applicative norm” is preferred instead of the term “competence norm” because it does not concern a state competence performed directly against citizens but mediates a state competence via the application of a Constitutional Right of an individual against another. Consequently we cannot determine it in a purely negative manner as in the case of a norm of competence that refers exclusively to the State-citizen relationship but we must determine it also positively since it concerns individuals’ relations. This dimension is also perceived by ROBERT ALEXY, *supra* note 21, 488.
Constitutional Rights in Interpersonal Relations

mitted to public or private authorities to violate the private sphere of an individual\(^{83}\), an *effect* specialized in the decision 606/1982\(^{84}\) of the Cassation Court of Peiraias "while balancing the interests between spouses, the preservation of dignity, secrecy and free speech is a superior interest than the right spouses hold to sustain their arguments\(^{85}\)."

As it results from the comprehension of the jurisprudence, *validity, effect* and juridical protection of Constitutional Rights are connected amongst them in a pre-requisite relation. If the acknowledgement of the *erga omnes validity* of Constitutional Rights holds the condition of their *effect* in interpersonal relations\(^{86}\), then this *effect* constitutes the condition of juridical protection of an individual against another\(^{87}\). Furthermore, the *effect* of Constitutional Rights and the juridical protection of individuals are identified in a way that on the basis of constitutional evaluations private rights of individuals are acknowledged or ignored, as it results from the above-mentioned jurisprudential examples, where the effect / juridical protection of the Right of Privacy led to the negation of the right spouses hold to sustain their arguments in Court.

If, at this point, we accept that the second part of the revised constitutional provision is a procedural norm, a norm of application addressing solely the judge, then there are two questions remaining open: how this norm functions, what rights are consequent for individuals from its application and, respectively, what kind of obligations does it raise for the judge.

2.4. The Procedural Form of the Interpersonal Effect of Constitutional Rights

The argument that the second part of the revised constitutional provision constitutes a norm of procedural nature, an *applicative* and not a purely

---


\(^{85}\) *Ibid.* 385-6 (author’s translation).

\(^{86}\) See MANITAKIS, *supra* note 60, 421 “…the same Art. 25(1) of the Const. 1975/1986)…imposes on the state authorities an obligation to protect Constitutional Rights …” (author’s translation).

\(^{87}\) See ROBERT ALEXY’s observation “…The breach of the constitutional right…thus cannot be a breach of a negative status right. It is a breach of a positive status right against the state to be protected from interferences by other private individuals…” *supra* note 21, 360-361.
*competence* norm - and surely not a hermeneutical one\(^{88}\) - is reinforced by its unique, procedural nature. Indeed, this norm, to be exact, imposes on the judge the obligation to protect holders of Constitutional Rights from any infringement caused by the behaviour of other individuals. Thus we are talking about a norm that is not based solely on the State-citizen relation but a norm which mediates\(^{89}\) the protection of the rights that certain individuals hold against others.

This uniqueness is evident from the way the norm operates, even more so, by the process it refers to. The judge applying Constitutional Rights in interpersonal relations, balancing and ranking them while resolving interpersonal controversies cannot infringe them with his reasoning\(^{90}\), he can only examine whether an infringement caused by other individuals occurred and if so, to offer juridical protection. The question is how this protection, this application is carried out? It is carried out the way it is indicated in the second part of the revised provision. The judge while resolving interpersonal controversies applies Constitutional Rights of individuals “…in relations between individuals to which they are appropriate”. Interpreted in this way, the provision engages a procedural and referential nature, arranging the application of Constitutional Rights of individuals “…in relations between individuals to which they are appropriate”. Although this process has a procedural and referential nature, it has nevertheless substantial elements, mainly evaluative ones, deriving from the substantial nature of Constitutional Rights, holders of which are individuals. The substantial and evaluative elements of this process could be positioned at two stages: that of the *preference* and the *balancing* of Constitutional Rights. *Preference*, on the one hand, refers to the specific application of a substantial constitutional right that is indeed infringed by the be-

---

\(^{88}\) Given that it is not of substantial nature. For a contradictory view see [VENIZELOS, supra note 66, 137.](#)

\(^{89}\) ALEXY, *supra* note 21, 363.

\(^{90}\) ALEXY, *supra* note 21, 359 “…The question is, in what does a constitutional right consist, which a civil court is capable of infringing by the content of its judgment…A right can only be infringed by those against whom it is held. If civil courts can infringe the constitutional rights of citizens by the content of their judgments, then the rights being breached must be rights of the citizen against the judiciary, that is, against the state…”. This point is the essence of the view of J. SCHWABE, Bundesverfassungsgericht und Drittwirkung der Grundrechte [The jurisprudence of the German Constitutional Court and the third effect of fundamental rights] 99 *Archiv des öffentlichen Rechts [AÖR]* 443 (1975).
haviour of an individual concerning its correlation to the properties of an individual and the case history of an interpersonal relation and is thus an issue of an accurate subordination. On the other hand, it states a question of interpretation and evaluation between the rights of individuals presented as colliding ones in a specific interpersonal controversy since, in any case, one of those will be preferred to ground the norm as the base of the juridical decision\textsuperscript{91}.

Preference as an evaluative element of the judicial application of Constitutional Rights while resolving an interpersonal controversy is associated with their balancing. Indeed, as it occurs also from the first part of this paper, the balancing is attached to the effect of Constitutional Rights in interpersonal relations as much as in cases of their direct as of indirect application\textsuperscript{92}.

Balancing and preference are identified with the effect of Constitutional Rights in these cases, resulting consequently from the fact that Constitutional Rights in interpersonal relations are always developed competing against the rights of others. This effect independently from the construction it appears in (direct or indirect) is always evaluative and substantive. Indeed, the acknowledgement of private rights of individuals and the claims derived from those, at the end are based on the evaluative outcome of the balancing and the preference of competing Constitutional Rights\textsuperscript{93}.

The evaluative nature of the outcome of the interpersonal effect of Constitutional Rights comprises also the reason for which the application of constitutional provisions as principles in interpersonal relations is possible also without any mediation of the law. This happens because the justification derived from constitutional evaluations and the application of norms based on those, lead to the acknowledgment or the negation of rights and claims, thus not comprising two different stages but actually one that embraces the interpretation, the formation and the application of the rights,

\textsuperscript{91} It is a matter of hierarchy between competing constitutional principles, see Guastini, \textit{supra} note 42, 165.

\textsuperscript{92} For this argument see A. Μανιτάκης, Η επίδραση του Συντάγματος στις ιδιωτικές έννομες σχέσεις [A. MANITAKIS, The influence of the Constitution on interpersonal relations] in: \textit{Symposium in Honor of Professor Ioannis Deligiannis} 246, 272-4 (\textit{Annals of the Aristotle University of Thessaloniki Law School} 1992).

\textsuperscript{93} For Robert Alexy “…if one considers the matter in terms of outcome, it is not the construction, but the evaluation with which it is combined, which is the decisive issue…” \textit{supra} note 21, 358.
aiming always at determining the most appropriate norm to resolve an interpersonal controversy\(^94\).

The interpretation of the second part of this provision at this point leads us to define it as a norm of procedural nature. A norm allowing the judge to apply Constitutional Rights of individuals while resolving interpersonal controversies, thus protecting them from the behaviour of others. This way we answer the question how this norm functions. Not entirely though, since this question is related to the rights derived from the constitutional guarantee of this process, for individuals against the judge himself.

2.5. The Judicial Protection of the Interpersonal Effect of Constitutional Rights

The definition of the procedural nature of the revised provision previously led us to two observations. First, to associating the interpersonal effect of Constitutional Rights with their juridical protection and second, to analyzing the mediatory role that it places on the judge concerning infringements of the rights of individuals. These observations favour the argument that as opposed to the ability of the judge to interfere in the protection of the Constitutional Rights of individuals in interpersonal relations, there is a right they hold against the judge himself. This presumption is strengthened by the acknowledgment of the interpersonal effect of Constitutional Rights as a constitutional norm, for which the application of Constitutional Rights in interpersonal relations is transformed from a simple ability to an obligation for the judge. A right of this kind imposes the obligation for the judge to protect the Constitutional Rights of individuals from any possible infringements\(^95\).

The judge in any case, based on the literal interpretation of the second part of the provision, has the final word to whether the application of Constitutional Rights in an interpersonal controversy seems appropriate,

\(^94\) Rodríguez-Ruiz, supra note 3, 115 “...the justification of a norm with argument that there are sufficient grounds for its adoption comprises an account of all the possible present and future circumstances of its application. The justification of a norm thus embraces every instance of its application...”.

\(^95\) Following the point of Robert Alexy “...we can create such a construction (a unified one) by adopting a right of the citizen against the civil courts that they take adequate account of the constitutional principles which support the position argued by the citizen. If this right is breached, so also is the constitutional right to which the relevant constitutional principle belongs. This construction is explicitly related to adjudication...” supra note 21, 361.
meant that he has the discretion to decide: whether the construction of the direct or indirect effect of Constitutional Rights is appropriate for this application, whether the evaluation of an interpersonal relation according to constitutional provisions is appropriate, whether the balancing of colliding Constitutional Rights of individuals is appropriate. This discretion is not based only on the parlance of the revised provision, on the term appropriate but is also absolutely compatible with the substance of its independent, jurisdictional role.

This means that the content of obligation of the judge, as derived from the second part of the revised provision and from the right of individuals it refers to, is quite narrow. First, it does not oblige the judge to apply Constitutional Rights while resolving any specific interpersonal controversy. The judge while resolving an interpersonal controversy is bound as much by the Constitution as by norms of law, provided that they are not incompatible with the constitutional evaluations derived from Constitutional Rights. This is owed to the fact that if the *erga omnes validity* of Constitutional Rights raises the question of the obligation of their juridical protection for the judge, then existing norms of law raise the question of the obligation to respect the legislator’s will.

If the judge applies in any case Constitutional Rights while resolving an interpersonal controversy, what obligations are derived for him from the provision of Art. 25(1) section 3? To be even more specific, is it possible for individuals to annul a juridical decision either because the judge did not proceed correctly to subordinate a certain interpersonal relation to appropriate constitutional rights, or because he has misinterpreted or at the end misbalanced or mispreferred them? We will have to accept that an inappropriate subordination leads to the violation of a substantial norm of law, which is to say of specific Constitutional Rights of individuals, and not to the violation of the provision of Art. 25(1) section 3 itself. This opinion is supported on the one hand by the fact that the second part of this provision has a referential and a procedural nature, and on the other

---

96 See ALEXY, *supra* note 21, 364 “...constitutional principles in no way lay down precisely one solution in every case. There are innumerable private law cases in which more than one solution is constitutionally possible. In these cases private law norms have a constitutive significance...”.

97 See ALEXY, *supra* note 21, 363 “…the judge is not simply bound to substantive constitutional principles, but also to many other further obligations, such as those arising from the formal principles of respect for the decisions of the democratically legitimated legislature and regard for precedent...” also CANARIS, *supra* note 9, 225.
hand by the fact that the inappropriate subordination does not infringe the rights of individuals but supports solely an evaluation of whether there has been an infringement of a constitutional right caused by the behaviour of another individual, which would justify a juridical protection.

Respectively, the interpretation, the balancing and the preference of colliding Constitutional Rights can ground the questioning of the reasoning of a juridical decision. This questioning concerns also the substantial content of Constitutional Rights of individuals. The same observations are also valid in the case of a “gap of law” or “gap of protection”. The assumption whether a gap of law exists or the ways it could be filled is not subject to the revised provision but to the substantial content of Constitutional Rights of individuals. Even the reluctance of the judge to resolve an interpersonal controversy because of a “gap of law” could not be considered as violation of Art. 25(1) section 3 but as a transgression of its jurisdictional role.

If, however, these assumptions are valid then how can we determine the obligation of the judge? This obligation is located in the connection of the interpersonal effect of Constitutional Rights with its juridical protection, in the frame of the judge’s mediatory role. Furthermore it is demarcated by his discretion as described above, to found: [a] the application of Constitutional Rights or the law, [b] the subordination of the historic case of an interpersonal relation in a constitutional right, [c] the interpretation of one or more constitutional rights, [d] the balancing or the preference of any of those, on the substantial content of Constitutional Rights as principles and not on Art. 25(1) section 3. The frame of the obligation founded on this Article can be considered as a “space” for the juridical protection of Constitutional Rights of individuals, limited by the judge’s discretion as described.

98 See ALEXY, supra note 21, 487-8.

99 A role which is utterly connected to the normative character of the Constitution and not to the issue of the interpersonal effect of Constitutional Rights. For this argument see RODRIGUEZ-RUIZ, supra note 3, 120 “...In sum, the direct third-party effect of basic rights does not by itself alter the liberal division of powers, but merely stresses the oddity of introducing a normative constitution, and, eventually,...court within the scheme...”. This role imposes on the judge certain limitations. See GERSTENBERG, supra note 12, 785 “...fidelity to the Constitution means that judges must take into account which view of moral right is, as a matter of political morality, the better one, not as a form of court-centric judicial paternalism, but as a way of initiating a debate over principle in which they can join...".
With this background the judge is obliged by the *erga omnes validity* of Constitutional Rights to mediate their *effect* while granting them juridical protection, provided that it has been requested. He is obliged to take into consideration the *appeal* of the constitutional rights of individuals as well as their constitutional positions\(^{100}\). This procedural obligation has already been derived from the substantial content of Constitutional Rights as principles and now is derived from the “norm of application” established by Art. 25(1) section 3 as well, consisting of a certain obligation for the judge. In this case, the term *appropriate* is transformed from a simple discretion into a burden of proof addressing the judge, meaning that the revised provision grounds a reason for the annulment of a juridical decision as far as its reasoning is concerned. Thus it poses on the judge the burden to justify any possible reluctance in applying Constitutional Rights. More specifically, the judge is obliged to justify any negation of providing juridical protection, either implementing norms of law or Constitutional Rights in an interpersonal controversy.

### 2.7. Conclusion: The Judicial Protection of Constitutional Rights in Interpersonal Relations according to the Constitution and the Law

The most important hermeneutical aspect presented in the second part of this paper is perhaps drawn by the extremely misshaped grammatical and technical structuring of Art. 25(1) section 3. The provision semantically separated into two parts, allows us to decode the distinction between *validity* and *effect* of Constitutional Rights, while the adopted term *appropriate* allows us to found both the discretions of the judge and a right for juridical protection with a distinctive content for individuals. Summarizing the interpretation of this provision, at this point we can state that it acknowledges the *erga omnes validity of Constitutional Rights as principles* radiating the entirety of the legal system, as a condition of their effect in interpersonal relations and of their juridical protection. This provision has a *procedural* nature and addresses solely the judge, granting him a procedural discretion of applying Constitutional Rights in interpersonal controversies directly or mediated by the law. It also addresses individuals providing them the right to request their Constitutional Rights to be taken into consideration.

\(^{100}\) See ALEXY, *supra* note 21, 362 “…it simply gives him a right that the constitutional principles counting for his position be taken adequate account of…”.
A potential identification and not a clear distinction between validity and effect of Constitutional Rights could provide the base for an interpretation of Art. 25(1) section 3, possibly equating the interpersonal effect of Constitutional Rights with their direct - that is to say without the mediation of the law - application in interpersonal relations. This interpretation would fail to notice the distinguishable role that as much Constitutional Rights (role of justification) as norms of law (constitutive role) possess in the issue of interpersonal effect of Constitutional Rights. It would overlook mainly the fact that the revised provision determines only the process of the effect of Constitutional Rights in interpersonal relations. The outcome itself of this effect is a matter of substance and of evaluation, independently from the provision and concerns the interpretation and the balancing of the Constitutional Rights of individuals as well as the application of the law. In the end it would overlook the fact that the outcomes of the application of Constitutional Rights in interpersonal relations lie beyond the law, even while being intermediated by it, since they justify the acknowledgment of private rights and claims for individuals.

By this we mean that the application of the provision of Art. 25(1) section 3 does not close but indeed introduces a non finito discussion concerning the effect of Constitutional Rights in the frame of certain and specific interpersonal controversies. As pointed out beforehand, before the revision in 2001: "At the end it is not the way of the effect of Constitutional Rights in a private legal relation that bears a significance, meaning whether it is direct or indirect. This dilemma represents a mainly academic concern. Interesting and important is the fact that constitutional provisions safeguarding individual rights played a crucial role in resolving a specific private controversy and that the judge evaluated the actions or behaviours of private individuals or to be exact evaluated legally an interpersonal legal relation based mainly on constitutional norms and criteria. (It is also important that) Constitutional Rights and legal interests protected by them affected determinately the specific private legal relation providing valid and mutually accepted criteria of a legal evaluation101".

By this we mean that the revised provision may indeed state partially the evident and confirm what holds and arises anyhow from the nature and the normative character of Constitutional Rights. The procedural norm established does not remain however without legal importance, since it arranges and necessitates the application of Constitutional Rights when resolving judicially an interpersonal controversy, thus rendering their effect in inter-

101 MANITAKIS, supra note 92, 253 (author’s translation).
personal relations firm and obligatory. The invocation of Constitutional Rights in interpersonal controversies may be useful or function as a base for the foundation or the justification of private rights or claims either for the constitutional evaluation of behaviours of individuals or for the balancing of colliding Constitutional Rights or interests.

ABSTRACTS/RÉSUMÉS

The paper analyses the revised Article 25(1) section 3 of the Greek Constitution which acknowledges the horizontal effect of Constitutional Rights in the Greek legal system. Its interpretation uncovers a distinction between validity and effect of Constitutional Rights based on Robert Alexy's "Radiation thesis". This distinction facilitates the adoption of a "judicial model" of applying Constitutional Rights in interpersonal controversies, while confirming the dialectic and not conflicting relationship between the law and the Constitution. The paper confronts the dilemma between the direct and indirect effect of Constitutional Rights. Using as an example the Babiniotis case of the Greek Supreme Civil Court, the author suggests that the horizontal effect of Constitutional Rights is a matter of substance and balancing between competing values rather than that of construction. In this concept, the new constitutional provision functions as a procedural norm outlining the application of substantial Constitutional Rights in interpersonal controversies.

Cette communication analyse l’article 25(1) révisé, section 3, de la Constitution grecque qui reconnaît l’effet horizontal des droits constitutionnels dans l’ordre juridique grec. Son interprétation met en évidence une distinction entre validité et effet des droits constitutionnels fondée sur la "Radiation thesis" de Robert Alexy. Cette distinction facilite l’adoption d’un "modèle judiciaire" d’application des droits constitutionnels dans les conflits entre individus tout en confirmant la relation dialectique et non pas conflictuelle entre la loi et la Constitution. La communication examine le dilemme entre effet direct et effet indirect des droits constitutionnels. Précisément pour exemple l’affaire Babiniotis devant l’Aréopage (Cour de cassation), l’auteur suggère que l’effet horizontal des droits constitutionnels est un problème de fond et une mise en balance de valeurs concurrentielles plutôt qu’un problème de construction. Dans ce concept, la nouvelle disposition constitutionnelle fonctionne comme une norme procédurale qui ébauche l’application de droits constitutionnels substantiels dans les conflits entre individus.

F. Vogin