Chapter 5: 
Greece: *Drittwirkung* and Taking Private Law Seriously in the Application of Constitutional Rights

Christina Akrivopoulou

Introduction

The latest revision of the Greek Constitution of 1975 – enacted in 2001\(^1\) – acknowledged the *Drittwirkung* of constitutional rights, as a constitutional principle,\(^2\) by stating that ‘[T]hese rights also apply to the relationship between individuals wherever appropriate’.\(^3\) This principle has been at the heart of renewed attention in Greek legal thinking concerning the relationship between the Constitution and private law. It is submitted that this principle provides the foundation for a ‘judicial model’ of application of constitutional rights in private law while also confirming the dialectic rather than conflicting relationship between the two areas. The following analysis approaches the adoption of such a model in the Greek legal order through three different lenses: (a) the controversy between direct and indirect *Drittwirkung* in the way it has initially been developed and understood by Greek legal theory; (b) the channels that the new constitutional principle creates for an exchange between the Constitution and private law, and between judge and legislator; and (c) the effect of the theoretical controversy on judicial practice and its own unique understanding of the issue.

---


A. The introduction of Drittwirkung into Greek legal theory

The origins of theoretical discussion concerning the Drittwirkung of constitutional rights can be traced back to the mid-1970s, shortly after the establishment of a new democratic order and the adoption of a new Constitutional Charter in Greece. To say that the entire discussion was literally a loan from the classic Drittwirkung debate developed in German legal theory would probably be an overstatement. Nevertheless, in a short period of time Greek thinking absorbed the problem (the effect of constitutional rights on private law and private relations), added its own unique and specific features, and articulated its own critical views and questions. In Greece, to begin with, the term Drittwirkung or ‘third party effect’ (τρίτης επίδραση), apart from its significance in identifying the issue – it is, after all, an internationally established term – was never accepted. Taking the view that individuals in their private relationships are not ‘third parties’ or ‘outcasts’ standing outside the classical state–citizen relationship, Greek jurists adopted differentiated and more descriptive terms such as ‘horizontal effect’ or ‘interpersonal effect’ of constitutional rights. Moreover, they focused strongly on tracing constitutional norms that could provide a stable and secure foundation for the acceptance of such a relationship between constitutional rights and the system of private law. A number of constitutional norms were suggested in this context, among them the principle of human dignity (Article 2(1)\textsuperscript{4}), the right to free development of the personality (Article 5(1)\textsuperscript{5}) and Article 25(1)\textsuperscript{6} subsection 1, in which the protection of constitutional rights is guaranteed as a duty of the state and as an expression of the rule of law.

The subject that mainly occupied Greek constitutional theory was, after all, not the acceptance of the interpersonal effect of constitutional rights as such but rather the way that this effect was

\textsuperscript{4} ‘Respect and protection of the value of the human being constitute the primary obligations of the State.’ See the translation by Tsatsos and Kontiadis, op. cit., at p 17.

\textsuperscript{5} ‘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.’ See the translation by Tsatsos and Kontiadis, op. cit., at p 19.

\textsuperscript{6} ‘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.’ See the translation by Tsatsos and Kontiadis, op. cit., at p 33.
actually to be implemented in judicial practice. It was thus never in doubt that constitutional rights, as principles, should bind persons in their private relationships; the question was rather how, to what extent, and in what form constitutional rights could play that role. In a nutshell, this debate reproduced the German controversy between direct and indirect *Drittwirkung*.\(^7\)

The theoretical constructions of direct and indirect *Drittwirkung* share two common assumptions. First is the fact that certain principles follow from the substantive content of constitutional rights.\(^8\) These principles normatively bind the legal system in its entirety, consequently affecting private law and individuals in their private relationships. Constitutional rights as principles influencing interpersonal relationships can, secondly, be distinguished from their former addressee, the state, and are held equally against private individuals. The main consequence of this second assumption is that both sides of a specific interpersonal dispute are acknowledged as the bearers of constitutional rights. This obliges both theoretical approaches (direct and indirect *Drittwirkung*) to accept the fact that the effect of constitutional rights in interpersonal relationships is, ultimately, not independent of the balancing of conflicting interests between individuals. These assumptions constitute the common ground on which the Greek notion of *Drittwirkung* developed.\(^9\)

Apart from their ‘family resemblances’, the Greek proponents of direct and indirect *Drittwirkung* adopted their own lines of argument. Those supporting the direct effect of the Constitution in private law thus focused on the necessity of such an application in order to set clear boundaries and limits in any private activities that could undermine the principles deriving from constitutional rights. This necessity was based on a sense of realism, mainly on the observation that the development of technology in a modern society, the relocation of power from the state to private players, and the growing power of the media had created an unfriendly and potentially suppressive environment for the enjoyment of constitutional rights. Consequently, constitutional rights as the basic set of principles,

---

commonly accepted by society in its entirety, should develop their protective effect beyond the classic state–citizen relationship and also cover interpersonal relationships. According to this approach, constitutional rights should be directly applied within the framework of a specific legal dispute between private individuals in order to guarantee effectively their protection. By ‘directly’ we mean that constitutional rights should be applied beyond the existing framework of private law, ignoring, discarding or altering any relevant private law norms. The effective achievement of the direct application of constitutional rights in interpersonal relationships was therefore considered to require implementing legislation.

This ‘realistic’ justification of direct application of constitutional rights in private law challenged an important normative constraint: the notion of separation of powers. The giving of direct effect to constitutional rights lay in the hands of the judge, broadening his discretion, while at the same time undermining the competence of the legislator to regulate interpersonal relationships via private law norms. In order to avoid a deadlock, the Greek proponents of direct Drittwirkung suggested ways of limiting its most dramatic effects. Among them were the proposed balancing between conflicting constitutional rights, the application of constitutional rights only in cases of ‘power’ relationships between private parties (e.g., labour relationships),10 and the direct application of civil, but not political or social, rights.

These ‘limited’ versions appeared to be as problematic as the original ‘direct’ approach, though for different reasons. First, from a merely constructive point of view, it was difficult for the Greek legal system to adopt a model of direct application. This difficulty was a result of the Greek variant of judicial review, which does not involve a distinct legal action for the direct control of the ‘constitutionality’ of private law norms.11 Moreover, the set of proposed

11 In Greece, ‘judicial review’ has three unique characteristics: (a) it is exercised by courts of any kind and jurisdiction; (b) it is never the main object of legal reasoning and always exercised to the framework of a legal action of a private or public nature; and (c) it is ‘specific’ in the sense that it refers only to those legal norms which are of decisive importance for a judgment. See E. Spiliotopoulos, ‘Judicial Review of Legislation Acts in Greece’ (1983) Temple Law Quarterly 463 at 466.
The identification of private power relationships seemed difficult and blurry, and its invocation did not lead to clear conclusions (though in real life in these kinds of relationship the infringement of constitutional rights seems to be more substantial) because in many cases even the relationship between equal parties can lead to similar results (e.g., the relationship between spouses). The distinction between directly applicable and non-applicable rights – based, in turn, on the difference between civil and political or social rights – was equally unclear, mainly for the reason that rights are complex in nature (e.g., the freedom of expression is both civil and political in character). In the end, the ‘limitations’ outlined above merely reproduced the stereotype of the classic state-citizen relationship, either by imitating it (e.g., relationships of private power) or by qualifying it (non-applicability of social and political rights between individuals). Apart from that, the notion of balancing was really a natural consequence of the fact that in private relationships both parties are equally bearers of constitutional rights. Moreover, its ‘limiting’ significance was reduced by the fact that the balancing of interests between opposing constitutional rights can provide sustainable arguments for both parties, and, thus, could often lead to serious deadlocks, such as controversial decisions and ambiguous justifications.12

The indirect Drittwirkung approach, on the other hand, seemed a lot more realistic and adaptable by the Greek legal system. Its invocation implies the joint application of constitutional rights and private law norms. According to its proponents, it implies a mild, friendly, purely hermeneutical relationship between the Constitution and private law. This approach was aimed at the legislator and based on a rather simple premise – that the private law system should combine its integrity and unity with a set of founding principles derived

---

12 In the decision known as the ‘Babiniotis Case’ (13/1999), the Greek Supreme Civil Court dealt with a dispute between a Greek football team and the writer of a dictionary. The supporters of the team are often called ‘Voulgarions’ by their adversaries on the field, and this is considered to be offensive. The writer, Mr Babiniotis, included this term as an offensive interpretation of the word ‘Voulgarian’ in his dictionary. The Court was divided. The majority supported the writers’ freedom of expression but the minority concluded – with the exact opposite reasoning – that the protection of the right of personality of the fans should prevail. Court cases referred to in this text and the footnotes are available by their number and year of publication at http://www.lawdb.intrasoftnet.com.
from constitutional rights. Constitutional rights appeared to provide fertile ground for a careful review of the private law system, enabling it to face new challenges and threats that interpersonal relationships and private activities could pose for the rights of the individuals. At the same time the private law system could preserve its unity, and the equilibrium between legislator and judge would remain intact. Under this approach, the ‘interpersonal’ effect of constitutional rights could be presented as an ongoing dialogue between discrete but mutually open legal systems – the constitutional order and private law. This scheme could involve both general clauses of private law or even specific norms which require further interpretation and concrete implementation, or should be understood in the light of principles derived from constitutional rights. It thereby acknowledged the effect of the Constitution on private law as being primarily hermeneutical in character. This notion could increase the normative importance of the Constitution for the entire legal order by improving the protection of the constitutional rights of individuals.13

B. The ‘interpersonal’ effect of constitutional rights as a constitutional norm, Article 25(1) subsection 3 of the Greek Constitution

As we have noted earlier, the constitutional revision of 2001 added to Article 25(1) of the Greek Constitution a third section stating that ‘[T]hese rights also apply to the relationship between individuals wherever appropriate’.14 The explicit constitutional acknowledgement of the *erga omnes* effect of constitutional rights in interpersonal relationships put an end to the Greek theoretical discussion about its constitutional basis.15 Furthermore, this acknowledgment strengthens an axiom, a fundamental premise of the legal order that cannot any longer be disputed. It is inconceivable that the horizontal effect of constitutional rights in interpersonal relationships could be contested following the introduction of Article 25(1), section 3 of the Constitution.

---

13 G. Taylor, ‘Why the common law should be only indirectly affected by constitutional guarantees: A comment on Stone’ (2000) MULR 623 at 639–43.
14 Ibid, note 2.
The ‘horizontal effect’ does not only concern constitutionally acknowledged rights. The expression used – ‘[T]hese rights …’ – refers to the first subsection of the article stating that: ‘The rights of man as an individual and as a member of society and the principle of the constitutional welfare state are guaranteed by the State.’\textsuperscript{16} The constitutional provision thus also includes any ‘rights of man’ deriving from European or international law (such as the European Convention of Human Rights). \textit{Drittwirkung} as a constitutional principle thereby develops a rather interesting procedural relationship with rights (either human or constitutional). It functions as a mediating device which facilitates the application of constitutional or human rights in interpersonal disputes.

In the course of the Greek discussion surrounding \textit{Drittwirkung} that was reopened by the constitutional acknowledgement of the theory, a set of arguments has been put forward concerning its modification in the light of Article 25(1), subsection 3. It has, in particular, been proposed that the constitutional norm serves as a legal justification for the interpersonal effect of constitutional rights.\textsuperscript{17} The theoretical and legal justification of such an effect is, however, founded on the objective character of constitutional rights as principles. This is regarded as the common premise underlying both direct and indirect \textit{Drittwirkung}. Any theoretical and legal justification of the interpersonal effect of constitutional rights thus lies in their very nature, and it is not a quality that can be granted to them by virtue of the Constitution. A constitutional norm can affirm but not confer on constitutional rights their objective character as principles radiating throughout the entire legal order.

Another argument specifically supports the identification of Article 25(1) of the Constitution with the theoretical construction of direct \textit{Drittwirkung}.\textsuperscript{18} This approach is based on a very simple argument: nowadays, threats to the rights of the individual are multiplied and stem from both public and private activities. The direct application of constitutional rights can address such threats and thus strengthen the protection of the individual. On the surface, the

\textsuperscript{16} Supra, note 2 at 33.
\textsuperscript{18} P. Eleftheriadis, ‘Constitutional Reform and the Rule of Law in Greece’ (2005) \textit{West European Politics} 317 at 321.
principle seems to be neutral, considering the direct or indirect effect of constitutional rights in private law as equally acceptable solutions. There is a role for both the Constitution and private law to play as far as *Drittwirkung* is concerned. This role should thereby not consist either of a mere reduction of private law or a domination of the issue by the Constitution but to their mutual exchange and peaceful coexistence. To understand Article 25(1) of the Constitution as a case of direct *Drittwirkung* places far too strong limitations on the competences of the legislator, over-emphasises the discretion of the judge, and disrupts the equilibrium between the powers of the state. Seen in this light, it seems preferable to accept that the provision seeks to intensify the application of constitutional rights in private law and constitutes a guideline for the judge by asking him to focus on the protection of constitutional rights when resolving interpersonal disputes.

From this follows a third argument. Identifying Article 25(1) of the Constitution with direct *Drittwirkung* imposes an obligation on the judge and gives individuals a (corresponding) right or claim. This means that if the judge does not apply constitutional rights in an interpersonal dispute, he will himself breach an obligation deriving from a constitutional provision which establishes the right of the individual to enjoy constitutional rights. The question is, in other words, whether by not invoking the constitutional rights of individuals in an interpersonal dispute the judge might actually be infringing them.

There is no doubt that the judge has a key role to play in the application of constitutional rights in private law. His role is to ensure that constitutional rights take effect in private relationships. His main obligations and competences are, however, not determined by *Drittwirkung* as a constitutional principle but rather by his commitment to the notion of separation of powers, his respect both towards the legislator and the Constitution, and his obligation to grant judicial protection to the individual. Constitutional acknowledgment of *Drittwirkung* cannot trump these other commitments. Bearing these in mind, it is suggested that *Drittwirkung* as a constitutional principle obliges the judge to give effect to constitutional rights provided that their application has been requested by the parties involved. This means that he is obliged to take into consideration a claim that the constitutional rights of one of the parties were violated, meaning that he has to examine the credibility of the argument and balance it against the constitutional rights of the other
party (even if that party has not raised a corresponding claim). Beyond that, it is part of his own discretion whether he will base his decision on the application of constitutional principles in order to resolve an interpersonal dispute or not. That will depend on the way he interprets the specific facts of the case: as an infringement of rights or as a violation of private law. Article 25(1) of the Constitution thus imposes on the judge a duty to justify any reluctance on his part to apply constitutional rights in private relationships if he has been specifically requested to do so by one or both the parties. He is, furthermore, not obliged to choose between direct or indirect effect of a constitutional right, between the application of constitutional principles or private law norms, or even to guarantee that the outcome of the balancing between the opposing interests of the parties involved is intrinsically fair. He is merely obliged to take into account the arguments of the parties concerning their constitutional rights, and to justify his decision to grant judicial protection or to deny it.

C. The judicial approach: four models of exchange between the constitution and private law

Article 25(1), subsection 3 is addressed to the judge. The judge, in addition to his key role in the process of applying constitutional rights in private law, is also in the important position of interpreting this constitutional provision. The question here is whether he identifies the constitutional principle of ‘horizontal effect’ of constitutional rights with one of the opposing theoretical approaches of *Drittwirkung* (the direct or indirect one).

While theory often acquires a one-sided view of such complex matters, legal practice is forced to confront the ever-changing reality, is expected to provide concrete and justified solutions to specific interpersonal disputes and find a way to overcome theoretical debates such as the one concerning direct and indirect *Drittwirkung*. In Greek court practice we can identify arguments that show that both direct and indirect *Drittwirkung* – both the Constitution and private law – have a role to play in resolving interpersonal disputes. The Greek courts have not resolved the problem of giving interpersonal effect to constitutional rights via one route only – either direct or indirect effect. On the contrary, they seem to adopt a more substantive and less constructive way of bringing to bear on private
law the effect of constitutional principles, treating Drittwirkung as a much more complex and wider issue than a choice between direct and indirect effect. Moreover, the judicial approach redirects our attention from the ‘entrance’ to the ‘exit’ of constitutional rights in private law, meaning that we can draw very interesting conclusions by analysing not only the way constitutional rights enter into interpersonal disputes but also, and mainly, by looking at legal outcomes. By focusing on the outcomes which the interpersonal effect of constitutional rights can achieve, we can overcome the distinction between the hermeneutical (indirect) and the potentially legislative (direct) interpersonal effect of constitutional rights – an effect in which the Constitution and the law both have their own clear and indispensable function.

Greek courts have gradually developed four models by which constitutional rights are invoked in interpersonal relationships. All of these models guarantee a balanced relationship between the Constitution and private law, though each of them has a different scope and adopts a distinct methodological approach or different construction: (a) via general clauses of private law (e.g., the clause preventing abusive enforcement of rights);19 (b) by a joint application of constitutional rights and private law rights (e.g., the private right to personality);20 (c) by interpreting and enforcing not general but specific norms of private law according to principles derived from constitutional rights (e.g., the legal action aiming at renunciation of paternity); and (d) by applying constitutional rights directly (without the mediation of private law norms) in order to determine the legitimacy of individual private activities (e.g., the unlawful use of tapes and videotapes in civil or criminal trials).

I. Constitutional rights and general clauses of private law

General clauses of private law, such as that preventing abuse of rights, play a very important and practical role in the realisation

---

19 Article 281 of the Greek Civil Code declares: ‘The exercise of a right is prohibited if it obviously exceeds the limits imposed by good faith or the good usages or the social or economic scope of the right.’

20 Article 57 of the Greek Civil Code declares: ‘Anyone who unlawfully experiences an infringement of his personality has the right to demand its termination and that such infringement is not repeated in the future.’
of the interpersonal effect of constitutional rights. Initially, such clauses were used as flexible, catch-all rules designed to provide ‘just’ or ‘fair’ results in private disputes. In addition to their classic function, nowadays these clauses facilitate the transfer of constitutional principles and values into the private law system, and are considered to be their reflections. In a legal order based on a normative liberal constitution, they thereby also function as expressions of equal autonomy between individuals or, in a more literal sense, as means for the protection of the weaker party in a private relationship (labour relationships, contracts). In other words, the general clauses of private law ‘activate’ the interpersonal effect of constitutional rights in private relationships in cases where the enjoyment of one individual’s private autonomy suppresses or endangers the enjoyment of constitutional rights by another. The function of general clauses thus lies in their ability to create a minimum of equal autonomy enjoyed by both parties. Obviously, their importance is not limited to their role as ‘entrances’ or ‘gateways’ for constitutional rights into private law. Their function is, from a purely constructive point of view, very important since they advance the metamorphosis of highly abstract and general constitutional norms into specific provisions (of private law) which can be applied in concrete legal situations and provide specific claims and remedies for the individuals concerned. In addition, they facilitate a balancing between the conflicting rights and interests of individuals in interpersonal disputes.

A very interesting example can be drawn from Greek case law concerning labour relations and, more specifically, the right of the employer to ‘manage’ his enterprise. This right derives from private autonomy and is acknowledged in the Greek Civil Code. It enables the employer to make all choices necessary to maintain the viability of his enterprise, including his ability to dismiss his employees.

---


22 O. Gerstenberg, ‘Private law and the new European Constitutional settlement’ (2004) *European Law Journal* 766 at 769: ‘… private law is … the geometric location for formulating remedies for an infringement by one private individual on the constitutional right of another individual …’
The Greek civil courts have gradually developed a set of general rules which limit this right of the employer by invoking the employee’s constitutional right to personality via the general clause which prohibits abusive enforcement of rights (see Article 281 of the Greek Civil Code).\textsuperscript{23} As the courts have stated on many occasions, the rights of the employer cannot be considered as absolute but are restrained – as any other private right – by the fundamental principles that follow from constitutional rights.\textsuperscript{24} The constitutional protections of the personality and dignity of the employees thus stand as obstacles in the way of a one-sided decision of their employer to dismiss them when this decision cannot be justified by financial considerations, is not considered as an appropriate means to secure the viability of his enterprise, or in cases where it affects the constitutional rights of the employee in a disproportionate manner (e.g. the dismissal of an employee only two years before his retirement and after many years of loyal service).\textsuperscript{25} Moreover, based on these rules, the employee has acquired the right to retain his position as a right deriving from the constitutional protection of his personality against unjustified or

\textsuperscript{23} This was considered to be the basic line of argument in the decisions of the Greek Supreme Civil Court in such cases. In its judgments nos. 115/1992 and 34/1993, the S.C.C. has stated that as a result of the employers’ right to regulate his enterprise, he has the right to deny the employees services, unless his denial is abusive (according to Article 281 of the Greek Civil Code).

\textsuperscript{24} In Case No. 145/1998 of the Rodopi Court of First Instance, the protection of human dignity and the freedom that the individual enjoys to participate in social and financial activities are considered to be the boundaries of the employers ‘management’ rights. In judgment No. 1881/1996, the Athens Court of First Instance stated that the employee enjoys the right to his position as a substantial base of his social and economic existence. In Case No. 1910/1997, the Athens Court of First Instance considered the ‘management rights’ of the employer to be limited by the employees’ dignity, free development of personality, and freedom to participate in social and financial life. Moreover, under these circumstances the employee enjoys the right to offer his services which the employer cannot reject without a legal justification.

\textsuperscript{25} In Case No. 1881/1996, the Athens Court of First Instance applied a proportionality test on the employers’ decision to dismiss an employee who had worked loyally in his business for many years, was very close to his retirement, and was financially supporting his wife and family. The proportionality principle guided the judge to weigh between the reasons of the dismissal and its effect on the employee’s rights to livelihood, personality and dignity. The court held that the principle of proportionality obliged the employer to use milder means in order to pursue his financial interests and ‘management’ rights.
abusive decisions by his employer.\textsuperscript{26} In this way the courts have been able to limit dismissals based on personal or political considerations\textsuperscript{27} or motives of a clearly disproportionate nature.\textsuperscript{28} It is obvious that the ‘indirect’ effect of constitutional rights is not crucial in these cases but rather the fact that constitutional rights can be developed in cases of conflict between private rights in interpersonal disputes, that they function as the foundation for the limitation of these private rights, and that they simultaneously create general rules which can serve as a foundation for claims, remedies or restrictions of the individuals involved.\textsuperscript{29}

2. Constitutional rights and rights established by private law

Specific private rights cannot be equated with general clauses because the latter are the mediators of rights and their joint application with specific rights (either constitutional or established in private law, e.g., property rights) is the necessary precondition in order to provide claims and protection to the interests of the individual. The existence and significance of the (private) right of personality (article 57 of the Greek Civil Code) constitutes one of the special features of Greek \textit{Drittwirkung}. This right has developed a very interesting relationship with a number of constitutional rights. Primarily, it

\textsuperscript{26} In Case No. 3646/1992, the Athens Court of First Instance underlined the importance of using the proportionality principle in resolving labour disputes because of their character as relationships of power. Moreover, the court indicated that the employee’s interest in retaining his position is constitutionally protected and socially desirable.

\textsuperscript{27} In Case No. 259/1995, the Thessaloniki Court of Appeal dealt with the dismissal of an employee who was also a union member. The court performed a proportionality test on the reasons that had motivated his employer to dismiss him (his activities as a syndicalist). According to the judgment, the employee has the right to enjoy his freedom to express any idea, political or syndicalist, while the employer has the obligation to respect this freedom.

\textsuperscript{28} Such as decisions of the employer which are degrading for the status of the employee (e.g., transfer of the employee, demotion, or verbal or sexual abuse). In Case No. 1227/1993, the Greek Supreme Civil Court concluded that these cases should be regarded as cases of unjustified dismissal, giving the employee the right to resign and claim damages.

\textsuperscript{29} T. Ramm, ‘Diritti fondamentali e diritto del lavoro’ (1991) \textit{GDLRI} 359.
retains a sufficiently distinct ‘core’ that can protect the individual effectively against a number of infringements. It protects the physical integrity, health, name and honour of the individual. Its qualities are nevertheless restricted to the ‘civil’ characteristics of the individual (concerning mainly his financial or contractual activities). Because of its strictly ‘civil’ nature, it seems inadequate to protect the individual in other equally vital dimensions of his personal and ethical integrity. In order to create new claims deriving from the private right of personality, the courts apply it together with specific constitutional rights. Their joint application has hermeneutical and normative consequences. It broadens the content of the private right of personality, which acquires new elements, new dimensions or even new rights (e.g., privacy, the protection of personal data, the protection of the image, or dignity).30 Their joint application also has normative consequences in founding the claims necessary for individuals in order to protect their interests. What is very interesting is that after this process these rights and claims are added to the core of the (private) right of personality (in ways that resemble legal precedents) meaning that their joint application with specific constitutional rights is no longer needed in order to provide the necessary protection on future occasions.

The most interesting example is illustrated in a set of cases dealing with the protection of the environment as a specific aspect of the private right of personality. Greek courts have dealt with a

---

30 In Case No. 1189/2001, the Athens Multimember Court of First Instance decided a dispute between a politician and an AIDS patient. The politician has been photographed with the patient during his visit to a hospital. He then printed the photograph in a brochure which he used for his electoral campaign, along with a comment about his humanitarian effort concerning AIDS patients. The AIDS patient invoked the protection of the private right to personality along with Article 9(1) sub-s 2 of the Greek Constitution, which acknowledges the right to privacy, and Article 2(1) (human dignity). The court accepted privacy and human dignity as interests protected by the private right to personality, ordered the politician to cease any present or future use of the photograph, and granted damages to the patient. Moreover, in Case No. 2364/2002, the same court dealt with a dispute between an actress and a magazine editor. The magazine had published a series of personal pictures of the actress without her consent. The court applied the private right of personality and Article 9(1) sub-s 2 of the Greek Constitution, which acknowledges the right to privacy, as well as Article 5(1), which protects the right of the individual to his own image. According to the judgment, privacy and the protection of the image (as dimensions of the private right of personality) could support the actress’ claim for damages.
number of activities which either violate or degrade the cultural or physical environment as infringements of the private right to personality. In a recent case, Greek courts were confronted with a controversy between a famous Greek singer and the monastic community of Meteora. The singer staged a video clip for her songs in the monastic city of Meteora. More specifically, she sang, danced, and was photographed and filmed inside the monastic area and in the presence of the monks. Afterwards, she used this audio-visual material to promote her music. The monks claimed that these activities breached their private right to personality. The court accepted their argument, basing its reasoning on the invocation of Article 24(1) of the Greek Constitution. This provision protects the enjoyment of the cultural environment both as a civil and social right. Based on this constitutional principle, the courts concluded that the normative content of the private right of personality should also include the interest of individuals in the full respect of their natural and cultural environment. Following this approach, the courts identified certain claims and remedies which could be invoked by the monastic city, and developed specific prohibitions for the singer (to cease the present and abstain from any future use of the photographic or videotaped material). The characteristic feature of this case is the fact that a collective and constitutionally protected interest,

---

31 In Case No. 1531/2002, the Volos Court of First Instance considered the destruction of a small forest as an infringement of the private right of personality of the local residents. According to the court, the constitutional protection of the environment is a fundamental dimension of the civil personality of the individual. In Case No. 438/2001, the Syros Court of First Instance reviewed a dispute concerning the installation of an air wire station for transferring electric energy to the island of Tinos. The residents of the island considered the installation as detrimental to the environment. The court accepted the argument, considering the constitutional protection of the environment as an element of the private right of personality. In Case No. 304/2005, the Thessaloniki Court of Appeal was confronted with a dispute concerning an antenna serving cellphones on the roof of a building. The residents challenged this as a violation of their private right of personality. Invoking previous decisions, the court accepted their argument concerning the constitutional protection of the environment as an element of the private right to personality.

32 Case No. 349/2002 of the Trikala Court of First Instance.

33 Meteora is a holy Greek mountain where a monastic community is located since the Byzantine era.

34 ‘The protection of the natural and cultural environment constitutes a duty of the State and a right of every person.’ See the translation by Tsatsos and Kontiadis, op. cit., note 3, at 33.
such as the interest in the environment, can acquire an intense individualistic dimension when it is combined with a private law right.\footnote{A characteristic case concerning this argument is a Cypriot judgment known as the \textit{Red Arrows} case (\textit{Kostakis v Republic of Cyprus}), which was published on 4 August 2006 by the Provincial Court of Lemessos. The court dealt with a dispute concerning a contract between the British military base on the island of Cyprus and the Republic of Cyprus, which allowed British military aircraft (the ‘Red Arrows’) to flight near the city of Lemessos. Kostakis was an autistic child, suffering from an unusual form of acute hearing (meaning that the sound of the aircraft was intense for him). Kostakis claimed that due to flights that the Red Arrows had conducted not only near but actually over the city his physical and psychological condition was completely undermined. The sound of the aircraft, intensified in his ears, made his presence intolerable. The court considered the contract between the British base and Cyprus as infringing the environment and, in particular, infringing Kostakis’ personality and inner privacy – thus transforming a general interest into an individual one.}

The synthesis between private law rights and constitutional rights, geared towards the creation of new rights that can protect the individual against modern risks and threats emanating from private society (e.g., technology or mass media), is a characteristic feature of the effect of constitutional rights on interpersonal relationships.\footnote{G. Alpa, ‘Il diritto costituzionale sotto la lente del giusprivatista’ (1999) \textit{RDC} 15 at 22.} In addition, it provides a very interesting argument against those who claim that \textit{Drittwirkung} (and especially its ‘direct’ variant) literally destroys the protection of private autonomy by the way it is constructed and made operational within the private law system. Nevertheless, the Constitution represents the main source of private autonomy and that is why constitutional rights, when applied jointly with rights protected by private law, are able to strengthen, expand and enrich their normative content. Consequently, limits to the private autonomy of individuals are not an issue of either the ‘direct’ or ‘indirect’ application of constitutional rights but rather the outcome of a balancing between the rights of the parties involved in a private relationship.

3. Constitutional rights and specific norms of private law

The theoretical construction of indirect \textit{Drittwirkung} introduces an unjustified distinction between general clauses of private law and more specific legal norms. Despite the fact that general clauses of law offer the more appropriate framework for facilitating the exchange
between constitutional rights and private law, it would seem that
the complete exclusion of legal norms with a more specific content
from this function is not justified.37 In Greek court practice, the effect
of constitutional rights on specific norms of private law is based on
the German notion of verfassungskonforme Gesetzesauslegung,38
meaning a constitutionally minded interpretation of private law
norms. This notion imposes on the judge the duty to choose from dif-
ferent but nevertheless acceptable interpretations of a specific norm
of private law the one interpretation that is compatible with the
principles deriving from constitutional rights. The most important
feature of this method is that the effect of constitutional rights on
private law is a consequence of an inherent balancing process which
takes place between a specific norm of private law and constitu-
tional principles. This feature distinguishes the approach from the
previous two, where the effect of constitutional rights on private
law was the outcome of a balancing exercise between the opposing
rights and interests of the individuals involved in a dispute. The un-
derlying justification of the notion lies in the fact that it enables the
judge to avoid judicial review of private law and thus protects the
intentions of the legislator. At the same time, the judge is in the po-
sition to ‘amend’ the content of a private law provision by means of
a constitutionally minded interpretation of the legislative text.

Distinctive examples of such a constitutionally minded interpre-
tation of private law can be found in a number of cases concerning
the legal ability of the child to renounce his father.39 In the early
1980s, children who were born in wedlock were automatically
recognised as natural descendants of the mother’s husband and
were unable to renounce their father under the Greek Civil Code in
case they were in fact not blood-related. This was a right the Greek
Civil Code gave only to the legally acknowledged father (see
Articles 1471 and 1475 of the Code). The Greek courts invoked
Articles 2(1), 5(1) and 21(1)40 of the Greek Constitution to find

37 This argument was supported by the German Federal Constitutional Court.
38 K. Hesse, Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland
(20th edn, 1999), p 30.
40 ‘The family, being the cornerstone of the preservation and the advancement
of the Nation, as well as marriage, motherhood and childhood, shall be under the
that human dignity, the free development of personality, and the constitutional protection of the family and child, in combination, include the right of a child to uncover its true origins and recover its true identity. On this constitutional basis, the courts re-interpreted the private law norms in question and gave the child a ground to support the legal action aimed at renouncing the legally recognised father. What the Greek courts did on this occasion was to avoid discarding as unconstitutional the specific norms of private law by reshaping their scope and meaning so as to be compatible with the invoked constitutional rights.

The Greek discussion on the topic considers constitutionally minded interpretation of specific norms of private law to be a form of direct Drittwirkung. This position is supported by the fact that the effect of constitutional rights under this approach is really not interpretative (indirect) but rather a way of creating legislation (direct). More specifically, the principles deriving from constitutional rights fill the ‘gaps’ in the law and thus function as a creative source of private law norms in those cases where the legislator has not predicted the need to regulate a particular legal relationship or has ignored the need to protect a certain legal interest. If this argument is indeed valid and we envisage these gaps as blank parts of the private law system (tabulae rasae), then allowing judges to fill these gaps directly, even with regard to constitutional principles, must be an infringement of the notion of separation of powers.41 Even more difficult to understand is how a private relationship or an interpersonal controversy can be created in the absence of private law norms. In the cases commented on earlier, there was no existing legal ‘gap’ but merely an anachronistic private law norm which was modernised through the influence of principles derived from a set of constitutional rights. The judge did not create a new legal action, private right, claim or remedy but merely extended the existing private law protection in order to include both the child and the legally recognised father. What the judge did was to invoke constitutional rights in order to provide a foundation for adapting the existing norms of private law to evolving societal realities.

41 R. Alexy, op. cit., note 9, at 364.
4. Constitutional rights beyond private law norms

The constitutional amendment of 2001 in Greece added in Article 19(3) a norm stating that: ‘[U]se of evidence acquired in violation of this article and of articles 9 and 9A is prohibited.’ This norm is addressed to the judge and puts him under a binding obligation to exclude from consideration any unlawfully obtained evidence, especially evidence concerning the private sphere of the individual protected by Articles 9(1), 9A, and 19(1) of the Greek Constitution. This norm has been strongly criticised in Greek theoretical discussion because of its absolute character and the deadlocks it causes in criminal proceedings where the search for truth is considered fundamental. This is the reason why the courts in criminal trials allow the submission of evidence even when the private sphere is infringed in order to protect: (a) the value of human life; (b) the defendants’ innocence until proven guilty; and (c) the search for truth. In civil trials, by contrast, the protection of the private sphere is considered to be absolute, thereby restricting any submission of evidence that infringes privacy, the protection of personal data, or the secrecy of communication between individuals. Such a limitation seems less problematic in civil proceedings where the protection of private autonomy (and thereby of the private and personal life of the individual) is considered the core foundation of a fair trial. What is very characteristic about this approach is that the effect of constitutional rights is not an outcome of the balancing between the opposing rights of the concerned individuals but rather of a balancing between constitutional principles which takes place beyond the realm of private law and on a highly abstract level: human

42 ‘Every person’s home is a sanctuary. The private and family life of the individual is inviolable.’ See D. Th. Tsatsos and X. I. Kontiadis, op. cit., note 3, at 21.
43 ‘All persons have the right to be protected from the collection, processing, and use, especially by electronic means, of their personal data, as specified by the law.’ See D. Th. Tsatsos and X. I. Kontiadis, op. cit., note 3, p 22.
44 ‘Secrecy of letters and all other forms of free correspondence or communication shall be inviolable.’ See D. Th. Tsatsos and X. I. Kontiadis, op. cit., note 3, p 30.
46 These limitations were proposed in Case No. 42/2004 of the Greek Civil Court concerning the use of evidence in a criminal trial by the defendant, even though they were considered to infringe the private sphere.
dignity, privacy and freedom of communication versus the search for truth and the right of the individual to present evidence in order to support in court his or her arguments.\textsuperscript{47} In this case we see a form of direct \textit{Drittwirkung} due to the fact that Article 19(3) of the Greek Constitution is self executing, meaning that it is directly enforced in private disputes, without mediation by provisions of private law.

This high level of abstraction is evident in cases that preceded the constitutional amendment.\textsuperscript{48} One of the leading decisions was Case No. 1/2001 of the Greek Supreme Civil Court.\textsuperscript{49} Here the Court justified the absolute priority of the protection of the private sphere in civil cases concerning the admission of evidence with a set of constitutional principles. According to the Court’s reasoning, the protection of human dignity and the private sphere of the individual provides the foundation for the enjoyment of the freedom of communication between individuals. As the Court emphasised, this freedom provides individuals with, inter alia, the right to express themselves freely at any time or place, and without fear that their thoughts or words are monitored or recorded. This freedom is so important to a democratic society that it justifies any absolute restriction on the submission of evidence which could possibly violate it. In a more recent decision, Case No. 3922/2005, the Supreme Administrative Court gave protection to the private sphere via the invocation of the constitutional right to privacy along with Article 8 of the European Convention of Human Rights. The case concerned a town mayor who had invited a young woman to his home, promising that he would hire her as a civil servant in exchange for sexual intercourse. The woman had videotaped their meeting and submitted the material to the Court, demanding his resignation.


\textsuperscript{48} Case No. 130/1996 of the Greek Supreme Civil Court concerned the dispute of a divorced couple in relation to the custody of their child. The ex-husband submitted evidence concerning his ex-wife’s sexual affairs in order to support her inability to raise their child. The court commented in general on the conflict between the private sphere and the submission of evidence in a civil trial. Similarly, Case No. 748/2000 of the Greek Supreme Civil Court underlined the inherent conflict between privacy and the right to present evidence.

\textsuperscript{49} The dispute was related to the existence of a testimony, which was, according to a tape-recorded discussion between the opposing parties, destroyed.
The Court referred to the *Caroline of Monaco* decision,\(^{50}\) emphasising that even public figures enjoy a reasonable expectation of privacy, especially when their sexual life is concerned, and declined to consider the evidence.

These cases have developed another type of effect between constitutional rights and private law, which is characterised by an abstract invocation of the constitutional principles involved while reference to the ‘real’ events that led to the interpersonal dispute is rather limited. The balancing between constitutional rights provides the judge with the necessary principles to use as a standard in evaluating the circumstances in which the individuals obtained their evidence in order to support their respective positions in court. In this way, a purely procedural issue acquires a more substantive character. The effect of constitutional rights in such private disputes could be considered as ‘direct’, since any mediation of norms of private law is precluded by Article 19(3) of the Constitution, which is self-executing and directly effective in private law.

Under a normative (self-executing) Constitution, courts are obliged to enforce constitutional rights in interpersonal disputes even in the absence of private law norms. The legislator does not monopolise the protection of constitutional rights but provides the guidelines necessary for their application in interpersonal relationships. In the absence of such guidelines, the activity of the courts in applying constitutional rights is not prohibited, but it becomes much more difficult, the reason being that the ‘direct’ application of constitutional rights is intimately related to their balancing (which can often result in ambiguous outcomes). This danger is mainly a consequence of the general and abstract nature of constitutional norms and of the equality that individuals enjoy in their private relationships, which can render possible more than one constitutionally acceptable outcome in a particular case. The private law norms used as guidelines in such cases offer a helpful safety net for the judge, providing him with objective arguments in order to justify preferring one legal solution over another.

The most common argument against direct *Drittwirkung* is that it threatens the principle of the division of powers because it is considered to be a form of legislation. This argument often over-estimates

\(^{50}\) *Von Hannover v Germany*, European Court of Human Rights decision of 24 September 2004.
the judges’ competence. The legislator is always able to change the law by introducing new norms and thus overcoming judicial solutions in matters concerning the application of constitutional rights, or even to change the normative foundations on which they were previously based. The problem with direct *Drittwirkung* does not lie in the judge substituting for the legislator but in the judge being identified with the constitutional text (considering himself as the ‘constitutions mouthpiece’\(^{51}\)). In cases concerning Article 19(3) of the Constitution and the absolute protection of the private sphere against unlawfully obtained evidence commented on above, it is not the direct application of the constitutional rights involved (privacy, the protection of personal data, and the secrecy of communication) that provokes criticism but rather the judgment being seen as an indisputable authority. The judge seems indifferent to the real facts of the case, does not seek a balance between privacy rights and the right to present evidence and supporting arguments in court (as part of a fair trial), and does not take into consideration that unlawfully extracted evidence in many cases uncovers criminal acts (e.g., extortion in case 3922/2005 of the Supreme Administrative Court and violation of the right to express the last will in case no. 1/2001 of the Greek Supreme Civil Court).

D. Conclusions: taking private law seriously in the application of constitutional rights

Contemporary Greek discussion of *Drittwirkung* is influenced by the acknowledgement of the principle in the Constitution and tends to overestimate the ability of constitutional rights to protect the individual in private relationships. As pointed out, the abstract character of constitutional principles renders them incapable of providing specific claims and remedies to the individual. Their co-existence with private law norms thus seems not only necessary but also indispensable. The system of private law should, moreover, not be underestimated (if for other reasons) as far as the interpersonal effect of constitutional rights is concerned. In many cases it incorporates constitutional values in the form of general clauses or (even) specific norms. It also has a ‘constitutive’ function in the application

\(^{51}\) Rodriguez-Ruiz, op. cit., note 2 at 121.
of constitutional rights by providing the normative background for coherent and justified court decisions. The interpersonal effect of constitutional rights as a constitutional principle should, in consequence, lead to an ongoing exchange and mutual influence between the Constitution and private law. *Drittwirkung* is thus not merely a methodological concept but a reflection of the evolving dialogue between the Constitution and private law.

In this conceptualisation the role of the judge alters significantly while that of the legislator remains intact. The application of constitutional rights in private law enables the judge to strengthen the judicial protection granted to the individual against both society and the state. This intensified application of constitutional rights also facilitates the evolution of the private law system in order to embrace constitutional values which are considered to be of fundamental significance. At the same time, respect for private law norms seems to be critical in order to maintain the equilibrium between judge and legislator. In this relationship, the judge is obliged to apply both private law norms and constitutional rights in order to guarantee the judicial protection of individuals. Even after the constitutional acknowledgement of *Drittwirkung*, Greek courts seem to understand their role as one of mediators between the law and the Constitution, taking seriously their obligations towards the legislator as well as the protection of the individual. In the absence of a constitutional court in Greece, and in a constantly changing world which creates new threats for rights and moral issues such as abortion, euthanasia or bioethics in the very centre of the social and political dialogue, their role could nevertheless become even more substantial and dynamic.