

The Horizontal Effect of Fundamental Rights in the Jurisprudence of the Supreme Court of Cyprus

PETROS KONSTANTINIDIS¹

Abstract

This article is concerned with the principle of horizontal effect of fundamental rights as this has been applied in Cypriot case law. The article begins with a brief introduction on the doctrine of horizontal effect and the various positions that have been expressed about this doctrine, as well as its development in private law. Following this analysis, reference is made to the landmark case of Yiallouros and the introduction into the Cypriot legal order of the above-mentioned doctrine by Cypriot courts. It will be indicated that, while the case of Yiallouros created new insights in the area of fundamental rights protection, at the same time it left issues of applicability of the doctrine and its effect of Cypriot private law unclarified. This article, therefore, seeks to consider how the above-mentioned gap is remedied through a review of case law in the Supreme Court of Cyprus following the case of Yiallouros.

Keywords: horizontal effect, direct effect, indirect effect, Cypriot legal order, vertical relationship, private law, private legal relationships, fundamental rights, Cypriot case law, common law principles, jurisprudence

Introduction

The term horizontal effect² is mainly understood as the impact that fundamental and/or constitutional rights have on private relationships. The historical *ratio* of having constitutional rights, ever since the rise of constitutionalism, was the protection of the individual citizen from the arbitrary and authoritative behaviour of the state, namely a relationship between authority and the governed (vertical relationship). Later, with the dominance of the capitalist model of development of liberal societies in the post-industrial era, violations of fundamental rights – not only by the state but by other, non-governmental bodies with power, such as private bodies – became identifiable. The standard, formal equality between private bodies assumed in the sphere of private law is negated by the fact that private bodies are often found in superior positions against each other, presuming potential violations of private rights. Such examples are clearly

1 Petros Konstantinidis is PhD cand. and Adjunct Lecturer in the School of Law, University of Nicosia.

2 In German literature, the term 'Drittwirkung' is preferred. Of course, over time relevant terminology has been developed. For example, the term 'horizontal effect' is found in English-speaking literature, or the rather circumlocutory term 'the absolute effect of fundamental rights'. On the issue of terminology, see G. Iliopoulou-Straga, *The horizontal effect of civil and social rights in the 1975 Constitution* [in Greek] (Athens: Sakkoulas, 1990), 28.

identified in employment relationships,³ where the employer, often monopolising the means of production, is in a position to unilaterally determine the terms of an employment contract. Other examples are the relationships between consumer and producer, where signs of negotiation inequality are identified (e.g. the relationship between the bank and the debtor).⁴

Based on the above, in mainland Europe of the mid-50s and mainly in Germany, the theory of horizontal effect was conceived, aiming at maximising the protection of the individual.⁵ Several different views as to the way, the form and the extent of the impact of constitutional rights on private relationships were posed in the context of the doctrine above, in jurisprudence as well as in theory. The main forms of horizontal effect which dominated were those of direct and indirect effects. Nipperdey,⁶ a German labour lawyer and ex-president of the German Federal Labour Court, was a major expresser of the direct effect. On a first level, he referred to the equal pay for equal work between men and women.⁷ According to the German theorist, constitutional rights in direct effect ('unmittelbarer *drittwirkung*') affect private relationships in unmediated ways, without inserting other rules of law so as to produce direct legal consequences, let alone on its own, such as the annulment of legal transactions or even the obligation to compensate for unlawful acts, in this way providing for new causes of action. On the other hand, by the concept of the indirect effect ('mittelbarer *drittwirkung*'), some other scholars tried to mitigate any negative consequences⁸ of an uncritical, direct form and thought that the fundamental rights affect private relationships in indirect ways, through indeterminate terms of private law (e.g. good faith, good customs, principles of morality), or, through an interpretation of private law rules which is

3 Besides, it is no coincidence that the theory of direct effect was born in the field of labour law and more specifically in the case-law of the German Federal Labour Court. For further analysis see: H. C. Nipperdey, 'Grundrechte und Privatrecht', in *Festschrift für E. Molitor* (Munich and Berlin: Beck, 1962).

4 For the sociological grounding of direct effect, see: G.K. Vlachos, *Sociology of Rights*, 2nd ed. [in Greek] (Athens: Papazisi, 1979).

5 For an overview of the German theory, see: E. Denninger, *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (Reihe Alternativkommentare), (GG, vol. 1, 2001, No. 31); H. Bethge, *Zur Problematik von Grundrechtskollisionen*, 1st ed. (Franz Vahlen Verlag, 1977), 19; W. Leisner, 'Grundrechte und Privatrecht', *Archiv für die civilistische Praxis*, 161. Bd., H. 4, (1962); C.-W. Canaris 'Grundrechte und Privatrecht', *AcP* (1984), 184; And in English, S. Markesinis, 'Privacy, freedom of expression and the horizontal effect of the Human Rights Bill: lessons from the Germany', *L.Q.R.*, Vol. 115, (1999), 47- 88.

6 See Nipperdey, 'Grundrechte und Privatrecht', 15.

7 H. C. Nipperdey, 'Gleicher Lohn der Frau für gleiche Leistung', *RdA*, (1950), 121; H. C. Nipperdey, *Soziale Marktsirtschaft und Grundgesetz*, 3rd ed. (Cologne: Heymann, 1965).

8 Regarding the drawbacks and criticism expressed about the application of direct effect, particularly about the distortion of the subjective dimension of the right and the removal of private autonomy, see G. Dürig 'Freizügigkeit', in *Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte*, eds F. Neumann et al., (Berlin: Duncker & Humblot, 1972); E. R. Huber, *Rechtsstaat und Sozialstaat in der modernen, Industriegesellschaft* (Oldenburg, 1962); P. A. Papanicolaou, *Constitution and the Independence of Private Law* [in Greek] (Athens: Sakkoulas, 2006), 9.

consistent with the constitution.⁹ In this way, the fundamental rights in the form of constitutional values and principles are shared throughout and enrich the arrangement of private law. The whole issue does not limit itself to the aforementioned direct or indirect distinction. There exist in theory (e.g., Alexy¹⁰ and his ‘three-stage model of horizontal effect’) or in case law (e.g. the doctrine of the ‘State Action’ according to the U.S. Supreme Court¹¹) other approaches or conceptions, as well.¹²

In the Cypriot legal order of early 21st century, Cypriot case law engaged purely with the application of constitutional rights in settling private disputes. Therefore, in the landmark case of *Yiallouros*,¹³ the Supreme Court considered with the concept of horizontal effect for the first time, recognising it as a principle of jurisprudence, even though no explicit reference to a particular term is made.¹⁴ In the above case, the Supreme Court, after finding that the illegal recording of the employee’s telephone conversations by the employer consisted of an infringement of the constitutional right to private life¹⁵ and communication,¹⁶ directly appealed to the provisions of the constitution to find the relevant act unlawful and to rule for the equivalent damages. In the context of this study, I will try to analyse Cypriot courts’ application of the theory of horizontal effect of fundamental rights, as well as the consequences of the aforementioned application. For this reason, this article begins with a brief reference to the landmark Supreme Court Judgement in the case of *Yiallouros* and the conclusions that can be drawn from the said judgement. Following, I set out the questions arising from the way in which the case law handled the issue in subsequent

9 G. Dürig, ‘Grundrechte und Zivilrechtsprechung’, in *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung*, Festschrift für H. Nawiasky, ed. T. Maunz (München, Isar-Verlag, 1956), 157.

10 Which is a combination the three models of the horizontal effect: direct, indirect effect and state action (state obligation). According to this theory the above models doesn’t have any hierarchical relation between them, but each model could apply according the specific facts of the case. See R. Alexy, *A Theory of Constitutional Rights*, J. Rivers transl. (Oxford: Oxford University Press, 2002) p. 358.

11 See *Shelby v. Kraemer*, 334 U.S. 1 (1948).

12 See A. Barak, ‘Constitutional Human Rights and Private Law’, *Review Constitutional Studies*, Vol. 3 (1996).

13 *Taki Yiallouros v. Evgeniou Nikolaou*, 2001, Supreme Court of Cyprus [Τάκη Γιιάλλουρος ν. Ευγένιου Νικολάου [2001] 1 ΑΑΔ 558, ημερομηνίας 08/05/2001].

14 For a first analysis of the relevant case see: S. Papasavva, ‘Is There a horizontal effect of Human Rights in Cypriot Law? Comments and thoughts according the decision of the Hight Court in the Civil Appeal 9931, *Yiallouros v. Nicholaou*’ [in Greek], *Dikaiomata tou Anthropou*, (2002), 83.

15 Article 15(1) of the Cyprus Constitution: ‘Every person has the right to respect for his private and family life’. [Άρθρο 15 (1) του Κυπριακού Συντάγματος: «Έκαστος έχει το δικαίωμα όπως η ιδιωτική και οικογενειακή αυτού ζωή τηγχάνη σεβασμού»].

16 Article 17(1) of the Cyprus Constitution: ‘Every person has the right to respect for, and to the secrecy of, his correspondence and other communication if such other communication is made through means not prohibited by law’ [Άρθρο 17 (1) του Κυπριακού Συντάγματος: «Έκαστος έχει το δικαίωμα σεβασμού και διασφαλίσεως του απορρήτου της αλληλογραφίας ως και πάσης άλλης επικοινωνίας αυτού, εφ’ όσον η τιαυτή επικοινωνία διεξάγεται διά μέσων μη απαγορευομένων υπό του νόμου»].

judgements. Finally, the article ends with conclusive remarks on the application of the doctrine of horizontal effect in the Cypriot legal order.

The Case of *Yiallourou*: The Need to Protect Fundamental Rights

Before having purely dealt with the doctrine of horizontal effect and private relationships, Cypriot case law did progressively set the basis for introducing the said doctrine. Specifically, in the case of *Police v. Georgiades*,¹⁷ the Supreme Court recognised the universal validity (*erga omnes*) of fundamental rights, namely that these shall be protected from any form of infringement. Even though the above-mentioned judgement concerned the relationships between the state (as prosecutor) and an individual citizen (as the prosecuted), the Court did not miss the chance to demonstrate the universal character of fundamental rights, drawing upon sources beyond the constitution, such as the ECHR as well as the Universal Declaration of Human Rights. It is notable that even on a theoretical level, the position that fundamental rights have a horizontal effect on Cypriot private law¹⁸ was expressed.

Yet, the facts of the case of *Yiallourou* are different in their entirety and are sufficiently capable of leading the Cypriot judge to inaugurate the theory of horizontal effect in the Cypriot legal order. To begin with, it is highlighted that the said case concerned a purely private dispute. As a matter of fact, it concerned a dispute arising from an employment relationship, thus a field with intense relationships of authority, but at the same time it was in this field where the theory of horizontal effect prospered.¹⁹ The facts of the case are summed up as follows: Yiallourou was the general manager of the Nicosia Sewage Board and Nicolaou was working as an engineer there. For one year, Yiallourou was illegally wire-tapping and recording Nicolaou's telephone conversations. Due to these actions, Yiallourou was suspended from his position and was criminally prosecuted. On the other hand, Nicolaou, with the filing of an action against Yiallourou, claimed damages for the infringement of his right to private life and communication. The legal grounds were Articles 15 and 17 of the Constitution respectively.

The Court's Judgement

The Court of First Instance, guided by, inter alia, the judgement in *Georgiades*,

17 [1983] 2 CLR 33.

18 See L. Loucaides, 'The right of personality' [in Greek], in *Topics of Cypriot Law*, L. Loucaides (Nicosia, 1998), 49, where he notes that contemporary tendencies of the law recognise that constitutional protection of individual rights does not operate only against the state but is extended against private interventions.

19 H. C. Nipperdey, 'Gleicher Lohn der Frau für gleiche Leistung', *Recht der Arbeit* 2 (1950), 121; Nipperdey, *Soziale Marktwirtschaft und Grundgesetz*; H. Huber, *Die Bedeutung der Grundrechte für die sozialen Beziehungen unter den Rechtsgenossen in Rechtsstaatlichkeit und Sozialstaatlichkeit* (E. Forsthoff, 1968), 259.

recognised the need to protect fundamental rights. Furthermore, the Court, appealing to the Court and particularly to Article 35²⁰ for the safeguard and proper application of fundamental rights, decided that their infringement gives their bearer a cause of action. In this context, the judge also mentioned the indefeasible human rights as individual rights. Consequentially, he found for the plaintiff, awarding him general damages of a punitive and aggravating character.²¹ As for the type as well as the level of the damages awarded, the Court said that despite the fact no material damage to the plaintiff was proven, by examining the kind and means of infringement of his constitutional rights, i.e. the purpose and duration of the infringement, it realised the victim had sustained humiliation. For this reason, the Court awarded 5,000 Cypriot Pounds (approximately €8500) as a just compensation.

On a second level, Yiallourous promoted the following grounds of appeal: a) the infringements of the particular fundamental rights are not unlawful since no such tort is provided for in the Civil Wrongs Law, Cap.148, which is the only proper law for the provision of domestic protection from civil courts; and, b) awarding punitive damages is not justified and not provided for in the absence of material harm.

For the purposes of the present study, only the first section of the Court's judgement is interesting. Following a combination of interpretations of Articles 35 and 30, par.1²² of the Constitution, the Court held that the infringement of rights and the restitution of this infringement by means of proper domestic remedies belong 'by nature in the sphere of judicial proceedings', in this way providing to the jurisdiction of civil matters the remedies of compensation aiming at restitution of vulnerable rights, reparation of harm caused, as well as prohibitory or mandatory injunctions. According to the judgement, delivery of justice is the appropriate field for the effective protection of constitutional rights. Yet, prior to reaching its decision, the Court engaged in interesting reasoning concerning the fundamental rights set in the second part of the Cypriot Constitution. In this way, the Court, as in the case of *Georgiades* (above), reaffirmed the universal character of individual rights and freedoms. This makes them valid *erga omnes*. Of importance is also the Court's statement that constitutional rights do not identify with and are not determined by reference to an individual's civil

20 'The legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of this Part.' (free translation from original): «Δι νομοθετικά, εκτελεστικά και δικαστικά αρχαί της Δημοκρατίας υποχρεούνται να διασφαλίζουν την αποτελεσματική εφαρμογή των διατάξεων του παρόντος μέρους, εκάστη εντός των ορίων της αρμοδιότητος αυτής».

21 *Papakokkinou v. Kanther* [1982] 1 CLR 65.

22 'No person shall be denied access to the court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional courts under any name whatsoever is prohibited.' Free translation from original: «Είς ουδένα δύναται ν' απαγορευθή η προσφυγή ενώπιον του δικαστηρίου, εις ο δικαιούται να προσφύγη δυνάμει του Συντάγματος. Η σύστασις δικαστικών επιτροπών ή εκτάκτων δικαστηρίων υπό οιονδήποτε όνομα απαγορεύεται».

rights. To the contrary, they correlate to the individual itself and they have a universal character since they identify with the nature and autonomy of the individual in their social and civil space.

Moreover, the Court, in its judgement, adopted the reasoning behind Article 13²³ of the ECHR in relation to the provision of effective remedy in the case of violations of rights protected by it. Specifically, the abovementioned Article gives the individual the right of an effective remedy before a national authority when rights protected under Convention are violated. The case-law of the ECtHR interpreted the said Article as a guarantee of providing effective remedy to each individual alleging a violation of their rights which are safeguarded by the Convention.²⁴

What is particularly interesting is that the Court set out the thoughts of the famous constitutionalist P. D. Dagtoglou, who, in the relevant chapter of his work, refers to the judgement of the German Constitutional Court and depicts the thought that constitutional rights ‘without doubt affect civil law. The legal order is not constituted by autonomous areas but is united with constitutional law being its head’.²⁵

Moreover, the Supreme Court invoked case law by the Supreme Court of the United States and the House of Lords. Particularly, in the case of *Arthur*²⁶ the Judicial Committee of the House of Lords examined the matter of negligence of a lawyer against their client and the latter claimed for remedies due to the former’s behaviour. In this case the Court decided that there must be a specific remedy due to the lawyer’s negligence. The Supreme Court of the United States kept the same line of thought by setting the principle that a breach of fundamental rights safeguarded by the Constitution gives rise to a cause of action²⁷ outright. Therefore, in both judgements, a cause of action had been recognised in case of breach of fundamental rights, and, as a result, a right to claim for a remedy existed where there was liability deriving from a wrongdoing. Based on the above, the Supreme Court rejected the appellant’s allegation relating to the inability of the direct invocation of constitutional rights to be the ground of the claim of the action. Hence, the Court dismissed the appeal and upheld the judgement issued by the court of first instance.

The Findings in the Case of Yiallouros

23 Right to an effective remedy: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’.

24 *Klass and others v. Federal Republic of Germany*, App. 5029/71, 6/9/1978.

25 See P. D. Dagtoglou, *Constitutional Law, Individual Rights A’* [in Greek], (Athens: Sakkoulas, 2005), 122-123. It is noted that the Supreme Court’s reference was to an older version of Dagtoglou’s work.

26 *Arthur J S Hall v. Simons* [2000] 4 All ER 673, 683.

27 *Webster Bivens, v. Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999.

On the face of it, one can observe that the Court called upon a constitutional provision in order to resolve a private dispute. Indeed, the invocation of constitutional provisions was direct and unmediated, without the intervention of legislation, namely, civil law. Realistically, the latter was impossible given the legal framework of tort in the Cypriot legal order. Thus, the Court's dilemma: on the one hand to provide judicial protection for the violation of privacy and on the other hand to abstain, assuming there was no legal framework in the field of civil law.

It was due to the absence of the regulation of private life and communication in civil law, that the Court resorted to the Constitution.²⁸ Therefore, the Court assumed that the constitutional provisions were legal rules with direct effect upon the resolution of a private dispute. In this way the Court created new causes of action, which did not precede private law.²⁹ In this way, one could argue that Cypriot case law introduced the theory of horizontal effect in the Cypriot legal order in its strongest form, i.e. in its direct form since the Court directly invoked constitutional provisions as points of regulating individual actions and, in extent, resolving a particular private dispute.³⁰ In the present case, the fundamental rights acted as 'other civil rights' in the form of a violation of a constitutional rule which generates (new) causes of action.³¹

Yet, the wording of the relevant judgement, as well as the regulatory frame of the Cypriot Constitution, favours different approaches, such as different forms of effect of the fundamental rights on Cypriot private law, beyond that of direct effect. In particular, Articles 3432 and 35 of the Cypriot Constitution can be characterized as the constitutional, or regulatory opening to the theory of horizontal effect upon Cypriot law. The wording of Article 35 can accommodate indirect effect as well. Specifically, the wording of Article 35 refers to the protective – secure conceptualization of the fundamental rights, a position on which several theorists based their analysis of indirect effect.³³ The said conceptualization is not confined by a defensive character

28 Wrongdoings in the Cypriot legal order are regulated by the Tort Law Cap. 148 which is sort of a codification of the case law of the English Courts. For the most part, Cypriot private law is regulated by common law and equitable principles. See Article 29 of the Courts of Justice Law 14/1960.

29 See H. C. Nipperdey, *Soziale Marktsirtschaft und Grundgesetz*, p. 97.

30 For further analysis of the judgement of *Yiallouros* see P. Konstantinidis, *The Horizontal Effect of the Fundamental Rights in the Cypriot Legal Order* [in Greek], (Nicosia: Hippasus Publishing, 2016), 41.

31 See K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. III, Allgemeine Lehren der Grundrechte (München: C.H.BECK, 1988), 1539. Also, the same approach is taken by the Supreme Court of Ireland which refers to 'constitutional tort' accepted as a direct invocation of the constitutional rights. see *Meskeel v. CIE* [1973] IR 121, *Glover v. BLN Ltd* [1973] IR 388 and the relevant position taken by T. Kerr and T. Cooney, 'Constitutional Aspects of the Irish Tort Law', *DULJ*, Vol. 1. (1981).

32 'Nothing in this Part may be interpreted as implying for any Community, group or person any right to engage in any activity or perform any act aimed at the undermining or destruction of the constitutional order established by this Constitution or at the destruction of any of the rights and liberties set forth in this Part or at their limitation to a greater extent than is provided for therein.'

33 See C.-W. Canaris, *Grundrechte und Privatrecht: eine Zwischenbilanz* (Berlin: Walter de Gruyter, 1999), 37.

of rights but is focused on their protective function which is an inherent duty of the judge in the resolution of private disputes. This enables the civil judge, by the means of civil law apparatus, either in the form of legislation or case law, to indirectly allow the effect of constitutional rights. To an extent, it can be said that the Supreme Court achieved this by its judgement in *Yiallourous*: the adoption of the House of Lords case law principles, namely ‘where there is a wrong there must be a remedy’, produced an interim case law principle with which the indirect effect of fundamental rights upon private relationships is allowed.

Even more, the Supreme Court’s incorporation of the principle of the corresponding US Court, namely that ‘the violation of fundamental rights, bestowed by the Constitution, induces, with no other, a cause of action’, indicates another form of horizontal effect which flourished mainly in the American order: that of the positive obligation, or, as is commonly known as the doctrine of ‘State Action’. According to this position, as expressed in the landmark judgement of *Shelley v. Kraemer*,³⁴ once a violation of fundamental rights by individuals is identified, at the bottom-line this violation is done by public bodies in the form of protective orders and prohibitions. In other words, the judge, as a body of state authority and by applying private law, acts as an institution of state authority, who owes it to provide effective judicial protection. Thus, for American Courts, the private body is not bound by fundamental rights but only by the state and its bodies, which include judicial authority, whereas state authorities, including the Courts, are meant to protect fundamental rights within the context of private individual relations, as well.³⁵

Yet, the Supreme Court’s realisation of the Court’s duty to protect rights through the remedies provided in law, as an inherent authority of the Courts, points towards another form of effect, relating to the horizontal effect described above and intertwined with the nature of judicial authority: the judiciary model.³⁶ This model states that the fundamental rights do not have direct or indirect effect in private relationships and as a result can only bind the state. Yet, judicial authority is part of what is defined as one of the three state functions of the state. Therefore, judicial authority cannot apply case law principles or develop common law in ways which contravene or violate constitutional rights.

Regardless of the abovementioned approaches, through *Yiallourous*, not only was

34 334 U.S. 1 (1948).

35 The dogma of ‘State Action’ received criticism as to its ineffectiveness as well as to its inability to set the framework for judicial intervention. Ch. L. Black Jr., ‘Foreword, “State Action”, Equal Protection and California’s Proposition 14’ *Harvard Law Review*, Vol. 81 (1976), 69; E. Chemerinsky, ‘Rethinking State Action’, *Northwestern University Law Review*, Vol. 80 (1986), 506; G. Taylor, ‘The Horizontal Effect of Human Rights Provisions, the German Model and its Applicability to Common – Law Jurisdictions’, *King’s College Law Journal*, Vol. 2, (2002), 200.

36 See A. Barak, ‘Constitutional Human Rights and Private Law’, 224-26.

the horizontal effect of fundamental rights accepted but the effect of the Constitution upon private law in general was recognised. It can be said that the methodology of the Supreme Court clearly privileges direct effect of the rights, since in the present instance Articles 15 and 17 of the Cypriot Constitution acted as ‘other’ rules of private law.

Yet, the direct and unmediated invocation of constitutional rights in private relationships indicates important issues of the need to protect private autonomy and in extent the untold shrinking of the subjective character of rights. It is well known that the primary and historical ratio of constitutional rights was to regulate the vertical relationship between state and civilian, limiting and framing the authority of the former against the latter.³⁷ The wording, as well as the regulatory content of the constitutional rights, is not available for the resolution of private disputes.³⁸ Nor did the legislator have such regulatory authority.³⁹ This is because the Constitution, as the highest form of law of the state, includes its basic operational rules as well as the primary rules governing vital relationships, allowing a wide margin for the common legislator to exercise his/her discretionary power.⁴⁰

Another question arising from the direct form is the danger of suspension of private autonomy, mainly in the context of contract, with the direct consequence being the limitation of the subjective character of rights, granting them a functional role.⁴¹ What should primarily characterize private autonomy is that individual legal intention and inherently individual rights are characterized by egocentrism – a subjective element – since they operate around the centrality of the individual or the common interest of a group of individuals, without insinuating ethical or deontological elements in the cause of a wrongdoing.⁴² In practice, this can be interpreted as, for example, the right of the individual to choose their other contracting party on the basis of their own subjective criteria and not on external, objective patterns, even though this choice may show signs of disparity. As a result, an uncritical invocation of the direct effect of rights carries

37 D. Korsou, ‘Civil rights in private law’, *Xenion Honourary Volume for Panayiotis Zepos*, Vol. 1 [in Greek] (Athens, Freiburg/Br-Koln, 1973), 188.’

38 According to Mangoldt and Klein ‘it is impossible for public rights to exist in a private law relationship’ See Von Mangoldt and Klein, *Das Bonner Grundgesetz (Kommentar)*, *Grundgesetz*, Vol. 1 (Luchterhand 1957), 65.

39 See W. Schächtzel, ‘Welchen Einfluss hat Art. 3, Abs. 2’, *Recht der Arbeit*, Vol. 2, (1950), 250.

40 See A. Papanicolaou, Constitution and the Independence of Private Law, 9. One can argue that this is not entirely correct. Thus, in constitutionalism and in the first radical movements, the French people did not request the safeguard of individual freedoms against authority but against the privilege of certain classes of the French clergy. See W. Leisner, ‘Grundrechte und Privatrecht’, 23.

41 See Ch. Th. Anthopoulos, *The problem of the functional bindingness of fundamental rights* [in Greek], (Thessaloniki: Sakkoula, 1993), 43.

42 See K. Ch. Chrysogonos and S.V. Vlachopoulos, *Civil and Social Rights*, 4th reviewed ed. [in Greek], (Athens: Nomiki Vivliothiki, 2017), 74, where they accept the primary role of subjective and defensive dimension of rights and in a secondary and subsidiary level their theorisation as objective rules of law.

the danger of suspending private autonomy and gradually ‘constitutionalizing private law’.⁴³ Additionally, in such a case, legal insecurity might be intensified, transforming the civil judge into a constitutional judge for the resolution of private disputes. To the contrary, private law should have as many as possible *in abstracto*, predefined regulatory constructions for the resolution of private disputes.⁴⁴

All of the issues above, arising from the case of *Yiallouros*, have not been answered, or at least, the extent of the effect of rights considered to be a priori causes of action upon private relationships has not been clarified. Yet, it is a fixture of Cypriot case law that the Courts’ exclusive purpose is the resolution of specific disputes and they act without practical purpose neither for the sake of academic discussion.⁴⁵ But at the end of the day the issue of the horizontal effect through Cypriot Case law is not merely a theoretical matter. Case law after the *Yiallouros* case did not follow the trend of the *Yiallouros* rationale and neither elaborated the above issue.

But the question arising in the present case is whether direct effect is the proven solution for the horizontal effect of constitutional rights in the Cypriot legal order, given that legal precedence is the primary source of law, despite the casuistic character of a case. Or is the peaceful incorporation of the direct form causing problems for future cases that will be dealing with similar issues? The relevant case law that followed the abovementioned judgement illuminated the entire problematic.

Post-*Yiallouros* Age: The Indecisive Approach of Case Law

Even if the abovementioned judgement was characterized as a legal landmark⁴⁶ in the project to protect fundamental rights, questions were left open as to the future application of horizontal effect, and particularly if the choice of the direct effect is not just in that specific case but the *a priori* solution for future disputes. The case of *Yiallouros* left unanswered questions as to the potential dangers of direct effect, especially regarding contractual freedom, and has generally failed to clarify the consequences that might be effected upon private autonomy. This was shown by the Supreme Court judgements which followed, where a hesitation or avoidance of opening up or expanding upon the issue is evident. In particular, in the cases of *Nikolas*⁴⁷ and *Montanios*,⁴⁸ the invocation of constitutional rights in the context of private relations arose once more, this time in the sensitive context of contractual relationships. In *Nikolas* the applicant was a

43 See T. Barkhuysen and S D. Lindenbergh, *Constitutionalisation of the Private Law* (Martinus Nijhoff Publishers: Leiden/Boston, 2006).

44 P. Papanicolaou, *Constitution and the Independence of Private Law*, 12-16.

45 See *In the matter of the Application made by the General Attorney according to the Extradition Act (97/70) v. In the matter of Luchian Marina Tudor* [2011] 1 AAD 1176. [in Greek].

46 Konstantinidis, *The Horizontal Effect of the Fundamental Rights*, 26.

47 *Charalambos Nicolas v. Cyprus Airlines* [2010] 1 AAD 513 [in Greek].

48 *Michael Montanios v. Board of Advocates Pension Fund* [2003] 1 AAD 610 [in Greek].

pilot employed by the respondents, based on an employment contract. Nevertheless their employment relationship was terminated by the employers because the applicant failed to reach the expected performance level required by his position. As a result, the applicant was unable to enter into a future employment contract with another company. One of the arguments promoted before the Court by the applicant was the violation of the constitutional right to occupation in order to support his case for an illegal termination of employment. The Supreme Court refrained from examining the matter of horizontal effect, holding that this specific dispute is within the ambit of administrative, not civil law.

Had the judgement above been within the ambit of private law it would have been obvious that the Court would have to deal with a clash of constitutional rights, namely the right to occupation for the applicant against the right to freedom of contract of the respondents. This is because the acceptance of direct effect intensifies clashes between constitutional rights.⁴⁹ Thus, the Court had three options: a) to accept the direct effect of fundamental rights, as this was expressed in the judgement of *Yiallouros*, and therefore hold that there is a violation of the right to occupation, yet leading to the suspension of the right to contract freely; b) to deviate from the abovementioned judgement of *Yiallouros*, which would mean violating the right to judicial protection or would generate a condition of legal insecurity since the Court would deviate from the principle of precedence; and, c) the Court would have to balance between the two abovementioned contradicting rights with a clear privilege given to the right to contract freely. In this case the Supreme Court would have a first class opportunity to clarify and examine in depth the doctrine of horizontal effect as this was adopted by the *Yiallouros* case. The Supreme Court's approach was similar in the case of *Montanios*, where the Court was confined to mentioning that the law governing pension rights of lawyers was constitutional and there was no issue of violation of any constitutional right of the application when they decided, after their retirement, to go back to practice law, leading to the suspension of pension benefits by the relevant pension authority.

In any case, it was a matter of time before the Cypriot Courts engaged in greater depth with more specific matters regarding the doctrine of horizontal effect. This was seen in the very recent case of *Costas Gregorion a.o. v. Attorney General a.o.*⁵⁰ The specific case offered the Supreme Court a first class opportunity to examine matters relating to horizontal effect and other aspects of private relationships, specifically in the area

49 See Dagtoglou *Constitutional Law, Individual Rights A'*, 131, where he supports that the conflict of individual rights is often if the horizontal effect of these rights is accepted. To the contrary, A. Demetropoulos, *Constitutional Rights, Constitutional Law Tradition* (Athens: Sakkoulas, 2004), 239, suggests that the problem of the conflict of rights is not created by the application of horizontal effect.

50 Civil Appeal no. 204/2011, dated 24/05/2016, available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2016/1-201605-204-111.htm&qstring=204%20w%2F1%202011.

of contractual relationships, therefore giving way to clarifying any issues arising from the case of *Yiallouros*.

Nevertheless, the Supreme Court was unwilling to examine more thoroughly the issues of horizontal effect. The court's decision only used the civil-law mechanisms to resolve the dispute, yet, from the writer's standpoint, this judgement is prone to criticism with evident elements of scientific errors. The question, in the Court's judgement, does not focus mainly on the result of the judgement but on the methodology and legal reasoning of the Supreme Court, as well as to the extent to which the Court's ratio decidendi was correct and justified.

An interesting question arising from the abovementioned case relates to the extent to which the principle of equality affects private, and more specifically contractual, relationships. In particular, the crucial facts of the *Gregoriou* case can be briefed as follows: the second respondent was an airline company under receivership due to severe financial problems. In this context, it issued a particular compensation deal for all employees voluntarily resigning. A group of individuals took this compensation deal and resigned based on written agreements. Later, the respondent issued two additional compensation deals for voluntary resignation, with higher compensation to that of the first deal that had been issued. As a result, more employees resigned in this second phase. The initial group which resigned complained and applied to the Court, alleging a violation of the right to equal treatment, invoking the doctrine of horizontal effect of the fundamental rights. Therefore, the crucial question which had to be questioned by the Supreme Court in that case was whether the principle of equal treatment can have horizontal effect upon private relationships.

The Supreme Court, in a confused syllogism, held that there was no issue of violation of the principle of equal treatment. Indeed, the Court, even though it stated that the concept of horizontal effect is recognised by Cypriot case law, held that this doctrine does not apply to an employment contract since, as per the Court, this was terminated by an agreement between the parties as to the amount of the compensation. Also, the Court invoked common law principles, namely the principle of estoppel in the sense that the applicants accepted the offered compensation and therefore there can neither be a violation of their right nor any waiving of any right.

To begin with, the Court's position that the concept of horizontal effect does not apply in the case of an employment contract, because this was terminated by an agreement on the amount of compensation, is, historically to say the least, a legal error as to the sights of development of the abovementioned principle.⁵¹ Let us not forget that the said theory mostly grew in the area of labour law, where the traditional forms

51 The Court's willingness to apply the principle of horizontal effect on labour law is expressed at a different part of the Court's judgement. This, given the origin of the theory of horizontal effect, should be regarded as an obvious condition.

of accumulation of private authority and financial power flourish, at the same time indicating elements of substantial inequality between typically equal private bodies.⁵² One tangent of the doctrinal grounding of the theory of horizontal effect has to do with the social dimension of rights for the suspension of specific elements of inequality in the area of private relationships, especially where elements of private authority are traced.⁵³ Therefore, in this instance, the Court should not have excluded the examination of matters of horizontal effect from the outset. To the contrary, due to the fact that the specific dispute arose in the area of labour law, which is de facto a field of power relationships, the principle of horizontal effect should have been examined at least as a prima facie issue by moving, in this way, the burden of proof on the respondents as the employers.⁵⁴

Neither is the Court's position that there is no issue of waiving away fundamental rights properly justified in its reasoning. Even though it does refer to relevant Cypriot case law recognizing the unlawfulness of waiving away a right, yet, there is a logical gap in its judgement, as it is not justified why they did not find a waiving away of the applicants' rights given that, at the time they received the compensation, the applicants signed and accepted that they would have no claim against the respondents. As a result, the Court should have, at least in the wording of its judgement, examined whether this clause was abusive or at least violated the right to contract freely.

Of great interest is also the relationship between constitutional rights and common law principles. In the particular case, the Supreme Court invoked the equitable principle of estoppel, resulting in the exclusion of the application of a fundamental right of upon a private dispute. Yet the question arises from the following: both in the cases of *Georgiades* and *Yiallouris*, the universality of the constitutional rights was recognised, in all collateral legal areas. This means, inter alia, that private law (legislation and case law), besides complying with the constitution, be interpreted according to it.⁵⁵ It is notable that countries with common law tradition recognised the influence of the constitutional text or in any way the fundamental rights in the common law.⁵⁶ Indeed,

52 See A. I. Manesis, *Constitutional Rights A' individual freedoms – University Lectures*, 4th ed. [in Greek], (Thessaloniki: Sakkoulas, 1981), 52, where it is suggested the essence is whether evidence of authority, even private, are evident in each case. It is only in those cases where horizontal effect is imaginable (e.g., the relationship of employer and employee).

53 See H. Huber, *Die Bedeutung der Grundrechte für die sozialen Beziehungen unter den Rechtsgenossen*, in the *Volum Rechtsstaatlichkeit und Sozialstaatlichkeit* (E. Forsthoff, 1968), 259, where a reference is made to the change of the liberal state to the 'social state'/rule of law' paradigm with the extensions of the guarantee of the content of the rights and towards the field of private law. Also see A. Manitakis, *Rule of Law and Judicial Review of Constitutionality* [in Greek] (Athens: Sakkoulas, 1994), 250.

54 See *Commercial Bank of Australia v. Amadio* [1983] 46 ALR 402.

55 A. Manitakis, *Rule of Law and Judicial Review*, 250, and T. Greg, "Why Should the common law be only indirectly affected by constitutional guarantees?" (2002) 26 (3), *Melbourne Law Review*, 5-6.

56 See C. Saunder, 'Constitutional Rights and the Common Law', in *The Constitution in Private Relations*

it has been expressed that fundamental rights should have indirect effect on private law through common law principles.⁵⁷ It has also been expressed that some case law principles should obtain a different regulatory content as they are now enriched with fundamental rights.⁵⁸ Therefore, in this case, the Court's judgment creates the impression that a case law principle of the common law is an inflexible rule of law even where issues of violation of fundamental rights arise.

Finally, the total absence of analysis of, or at least reference to, European Law in the line of thought of the Supreme Court, even though the applicants did appeal to the rights in the Charter of Fundamental Rights of the European Union, is remarkable. More specifically, the Court did not examine potential breaches of directions relating to equality in working environments. In this way the Court neglected and missed a first class opportunity to determine the impact of the Charter on the domestic law of Cyprus and the extent to which it advances (direct or indirect) horizontal effect on private legal relationships.⁵⁹

Conclusion

It is now well established in the contemporary legal civilization that constitutional rights and more generally fundamental rights have gained a universal character affecting all areas of law. Now, constitutional provisions are not confined in a regulatory role but they develop a new dynamic, by which fundamental rights are a web of principles and values⁶⁰ enriching legislation and producing values by which social relationships are governed. Thus, the rule of law is no longer defined as a simple, typical and procedural sum of rules hierarchically ordered, aiming at the limitation of state authority, the establishment of individual rights and legal security but as a sum of principles and values of ethical-political content, directing and inspiring state actions

Expanding Constitutionalism, eds A. Sajao and R. Uitz (The Hague: Eleven International Publishing, 2005), 183.

57 See T. Greg, 'Why Should the common law be only indirectly affected by constitutional guarantees?', *Melbourne Law Review*, Vol. 26, No. 3, (2002), 623.

58 See. C. Deliyanni, C. Dimitrakou and C. M. Akrivopoulou, *Fundamental Rights and Private Relations in Greek and European Law* (Athens: Sakkoulas, 2015), 39 – 43, with reference to the judgement in the case of *Douglas v. Hello! Ltd* [2001] QB 967 where the Court gave a new interpretative content to a common law principle in order to extend the protection of private life.

59 For the influence of the Charter of Fundamental Rights of the European Union as effected by national Courts, see C. Stratilatis and C. Papastylanos, 'The EU Charter of Fundamental Rights seized by the National Judges, National Report: Greece', in *Research Institute for International and European Law* (2015), 7. See also ECJ, C-43/75, *Defrenne v Sabena*, 08/04/ 1976, ECJ C-402/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (2008, September 3).

60 For the concept of constitutional rights as principles and values see Alexy, *Theory of Constitutional Rights*, 44, as well as, Manitakis, 'Rule of Law and Judicial Review of Constitutionality', 159.

as well as governing interpersonal relationships. Additionally, at the level of judicial control, they take the shape of evaluating and adjudicating conflicting constitutional interests.⁶¹ This is because, in a private dispute, both individuals are constitutional rights holders, sometimes even of the same rights. In other words, a claimant who argues that a specific act violates his constitutional right A, the defendant will provide his constitutional right B in order to support his defense. So, in such case we are in front of conflict rights. However, in order to resolve the dispute, we should refer to the weighing mechanism, based inter alia on the principle of proportionality.⁶²

The Supreme Court case law should move within this reformed field. The case of *Yiallouros*, recognizing the universality of these rights, was the first step. Nevertheless, this success remains ‘stagnant’, endangered with its indirect setting-aside or even its wrongful application. The relevant cases which followed that of *Yiallouros* indicated an unwillingness and reticence of Cypriot case law to analyse the issue of horizontal effect in greater depth and cast light upon blurry areas arising from its application.

Therefore, the Supreme Court should develop the appropriate conceptual – interpretative framework for the correct analysis of the doctrine of horizontal effect in the Cypriot legal order. Such mechanisms can advance the effect of these rights on private relationships and where possible on relationships of authority, the principle of proportionality and adjustment of conflicting rights.⁶³ As a matter of fact, several authors call the Courts of the common law to adopt the interpretative frames of the Federal Constitutional Court of Germany.⁶⁴

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61 Manitakis, ‘Rule of Law and Judicial Review of Constitutionality’, 170.

62 See Alexy, *Theory of Constitutional Rights*, 357-58.

63 See P. Konstantinidis, *The Horizontal Effect of the Fundamental Rights in the Cypriot Legal Order*, 53.

64 S. Markesinis, ‘Privacy, freedom of expression and the horizontal effect of the Human Rights Bill’, 84-88.

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