

# Cyprus Civil Justice System Reform: Developing a National Identity

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## Abstract

*This article first outlines the existing problems of the Cypriot civil justice system. It then explains the improvements recommended by the recent report published by a committee under Lord Dyson, which are mostly drawn from the system of England and Wales. These proposals are then critically evaluated, arriving at the eventual conclusion that, while foreign systems may serve as positive examples, they too are affected by their own problems and must not be followed blindly.*

**Keywords:** civil justice reform, civil procedure, civil procedure rules, Cyprus law, Lord Dyson

## Introduction

The Secretary-General of the United Nations, António Guterres, during the Crans-Montana Conference on Cyprus in 2017 said that Cyprus should one day become ‘a fully-normal state’.<sup>2</sup> While Guterres was referring to issues of sovereignty, it is suggested that his statement could also apply to other public matters in the country, such as the area of civil justice, and law in general. Although Cyprus is a new state, founded only 60 years ago, it must create its own legal tradition reflective of its characteristics and further develop its own jurisprudence.<sup>3</sup>

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<sup>2</sup> A. Guterres, ‘Near-verbatim transcript of the press point on the Conference on Cyprus by the Secretary-General of the United Nations, António Guterres’ (UN Cyprus Talks.org, 20 June 2017), available at <http://www.uncyprustalks.org/near-verbatim-transcript-of-the-press-point-on-the-conference-on-cyprus-by-the-secretary-general-of-the-united-nations-antonio-guterres/>, last accessed 7 July 2019.

<sup>3</sup> The Republic of Cyprus is a quasi-common law jurisdiction, drawing influence mainly from English and Greek law. In 1960, when Cyprus became independent, practical and wider considerations advocated the preservation of the English legal system in most areas of the law. See Yiannakis Constantinides and Takis Eliades, ‘The Administration of Justice in Cyprus’ (2005) 1–9, available at [https://www.legislationline.org/download/id/5398/file/administration\\_of\\_justice\\_in\\_cyprus.pdf](https://www.legislationline.org/download/id/5398/file/administration_of_justice_in_cyprus.pdf) (last accessed 2 December 2019). When not otherwise provided by applicable statutes, the courts of Cyprus apply the English common law and the principles of equity. Cyprus’ private law and criminal law is mostly common law codified in statutes. Procedural law is also purely common law. Its public law, however, is derived from the continental tradition and is largely influenced by Greek law, rendering Cyprus a mixed legal system. Moreover, upon Cyprus’ accession to the EU, the Constitution was modified so as to acknowl-

Civil justice in Cyprus is regulated by the 1954 Civil Procedure Rules (hereinafter referred to as the *Rules*),<sup>4</sup> which have been amended and updated only in part. Essentially, since the Rules have not been revised in their totality, the English Rules of the Supreme Court, which were in force in 1960 when Cyprus gained its independence (i.e., the English Rules in the form in which they existed in 1958), as well as the White Book editions of that period,<sup>5</sup> remain authorities to Cypriot civil procedure. In other words, the Cypriot system of civil courts is regulated by a set of rules of another state. In 2015, there were significant amendments<sup>6</sup> to Orders 25 and 30 of the Rules in response to complaints relating to, *inter alia*, significant

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edge the full supremacy of EU law. See S. C. Symeonides, 'The Mixed Legal System of the Republic of Cyprus', (2004) 78 *Tulane Law Review* 441; N. Hatzimihail, 'Cyprus as a mixed legal system', 2013 6 *Journal of Civil Law Studies* 37.

<sup>4</sup> Achilles Emilianides refers to the following sources in his paper, 'Review Proceedings in the Supreme Court of Cyprus', to provide a general view of amendments made by the Supreme Court to the Civil Procedure Rules: 'see in general C. Satolias, *Judicial Practice* (Nicosia, 2014) [in Greek], C. Louca, *Civil Procedure*, Vol. I-V (Limassol, 1992-1996) [in Greek], C. Tsirides, *Pleadings and Questions Arising Out of them* (Limassol, 2013), [in Greek], A. Markides, *Lectures of Civil Procedure* (Nicosia, 2003) [in Greek], N. Koulouris, *Cypriot Civil Procedure* (Athens: Nomiki Vivliothiki, 2017) [in Greek], E. Odysseos, 'Civil Procedure in Cyprus', in *Symposium on Cypriot Juridical Issues* (Thessaloniki, 1974), 39–58 [in Greek], M. Nicolatos, 'Civil Procedure and Jurisdiction in Cyprus', *Cyprus and European Law Review*, Vol. 9 (2009), 435–444 [in Greek], S. Nathanael, 'An Overview of Civil Litigation as Practiced in Cyprus and Enforcement of Foreign Judgments', *Cyprus Law Review*, Vol. 26 (1989), 4034-4046'.

<sup>5</sup> See R.F. Burnand, *The Annual Practice, 1958* (London: Sweet and Maxwell, 1957).

<sup>6</sup> The need for reform has been acknowledged since 1989 and the Judge Pikis Report. Other attempts followed with no result: Judge Stavrinakis' recommendations for amendments to the rules, which were based on the 1998 Woolf reforms in the United Kingdom, and Judge Kramvis report (2012). The recent amendments of Rules 25 and 30, which became fully effective in 2016, followed Judge Nathanael's suggestions in 2014. The amendments to Order 25 were extensive. The new Order 25 decrees that, after the filing stage and before the service, the plaintiff may amend the pleadings without the permission of the court, but if the pleadings have been served, the pleadings may be amended only once without the permission of the court before the summons for directions. After the summons for directions has been issued, the court will only allow an amendment in the case of a good faith omission, or in the face of new circumstances that did not exist during the pleadings stage, criteria which are stricter than the pre-existing Order 25. Finally, the amended Order 30 is broad in scope and covers the procedure for summons for directions, the new provision for a new two-tier track system, and a provision akin to the English 'overriding objective', a set of principles found in the very first section of the English Civil Procedure Rules ('CPR') which explains the way in which all other provisions should be read. See Constantina Zantira, 'The Civil Legal System in Cyprus: The Amendment of Order 30 of the Civil Procedure Rules and its Implications in Current Legal Practice' (*Michael Kyprianou Advocates – Legal Consultants Web Page*, 30 October 2014), available at <https://www.kyprianou.com/el/news/publications/view?publication=2014/civil-legal-system.html> (last accessed 7 July 2019).

delays in the administration of justice. The problems, however, remain, to a large extent, unresolved.<sup>7</sup>

This article will first set out the existing problems that plague the Cypriot civil justice system. It will then articulate the improvements recommended by the Review of the Rules of Civil Procedure of Cyprus (hereinafter referred to as the *Dyson Report*),<sup>8</sup> which are mostly drawn from the system of England and Wales. These proposals will then be critically evaluated, arriving at the eventual conclusion that, while foreign legal systems, and especially those in the same legal tradition, may serve as positive examples, they too are affected by their own problems, rules, and legal, social, and economic backgrounds, and must not be followed blindly.

### Existing Problems in Cypriot Law

One of the key challenges of the current Cypriot civil procedure is a linguistic one. The Cypriot Rules are ambiguous, internally inconsistent, and linguistically problematic. They were written in English in 1954 with no translation available, and since then several amendments have been made in Greek, resulting in a set of rules written partially in each language.<sup>9</sup> This phenomenon is problematic for various reasons. First, it requires individuals wishing to make use of the Rules to have a strong understanding of English, despite English not being an official language of the Republic of Cyprus. Second, there are inherent semantic issues with provisions being partly written in two different languages, leading to fundamental interpretative obstacles for anyone who does not speak both. Moreover, Order 1 of the Rules contains a glossary of English terms, whereas there is no such glossary provided for the Greek terms. All of the above issues limit the clarity and accessibility of the law, and therefore undermine the rule of law.

In 2018, the Structural Reform and Support Service of the European Commission contracted a Functional Review of the Courts System of Cyprus. The project was conducted by a review team from the Institute of Public Administration in Ire-

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<sup>7</sup> See e.g. Agis Georgiades, 'The recent amendments to Orders 25 & 30 of the Civil Procedure Rules', Lecture organised by the Paphos Bar Association at Neapolis University (Paphos, 25 November 2014) 5; Achilles Emilianides, 'Review Proceedings in the Supreme Court of Cyprus', (2-18) 30(1) *The Cyprus Review* 189–206.

<sup>8</sup> IPA Ireland, *Progress Report: Review of the Rules of Civil Procedure of Cyprus* (Dublin: IPA Ireland, 2018) [Dyson Report].

<sup>9</sup> IPA Ireland, *Functional Review of the Courts System of Cyprus*, (Dublin: IPA Ireland, 2018) 22.

land, which published the Functional Review of the Courts System of Cyprus (hereinafter referred to as the 'Functional Review Report') in March 2018.<sup>10</sup>

A further scoping mission that focused on the Rules of Civil Procedure was also undertaken and an expert group, under the leadership of Lord Dyson, produced the Dyson Report, which was published in June 2018 after consideration and comments by a Cypriot Rules committee. Both projects focused significantly on the current problems of Cypriot civil procedure and the consequences that arose from them. For example, the average length of a first instance civil trial in Cyprus is more than 1000 days,<sup>11</sup> with the length of court proceedings and the level of backlogs in litigation being among the highest in the EU.<sup>12</sup> The length of delay ranges from one to seven years and varies between districts, with significant delays in the courts of first instance and a further delay of up to five years if the case goes to appeal.<sup>13</sup> It was also identified that there is no method by which citizens of Cyprus can access information about their judicial system, making the law opaque and inaccessible for the average Cypriot.<sup>14</sup>

Other inefficiencies of the system that have been identified by the two aforementioned reports include the scarce usage of Alternative Dispute Resolution (ADR); the sometimes inefficient use of judicial and courtroom time with multiple adjournments; weak security in the courts; poor accommodation and courtroom infrastructure; the lack of standard processes and procedures; and inconsistent application of the rules.<sup>15</sup> Additionally, the absence of an electronic registration system means that in the courts of first instance, case management is unwieldy and difficult, and up-to-date statistical and management information on the progress of cases is not readily available.<sup>16</sup> Finally, the shortage of appropriately skilled staff in areas like stenography is negatively affecting judicial and court time, leading to serious delays in the production of official court records.

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<sup>10</sup> IPA Ireland, *Functional Review Report*.

<sup>11</sup> See EU Commission, *The 2019 EU Justice Scoreboard*, COM (2019) 198/2 (Luxembourg: Publications Office of the European Union, 2019) 12, available at [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2019\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf) (last accessed 7 July 2019).

<sup>12</sup> Dyson Report 8.

<sup>13</sup> IPA Ireland, *Functional Review Report* 35.

<sup>14</sup> See EU Commission, *The 2018 EU Justice Scoreboard*, COM (2018) 364 final (Brussels, 2018), 23, available at [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2018\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf), last accessed 7 July, 2019.

<sup>15</sup> *Ibid.* 8, 13, 40.

<sup>16</sup> *Ibid.* 7.

The inefficiency of the judicial system undermines the rule of law as well as the right to a fair trial under the European Convention on Human Rights.<sup>17</sup> It can also result in a negative perception of Cyprus as a place to do business, as noted in the Council Recommendation on the 2017 national reform programme of Cyprus.<sup>18</sup>

## **Recommendations of the Functional Review Report and the Dyson Report**

### *Infrastructural Changes*

The Functional Review Report recommends, *inter alia*, the establishment of a review group to specifically investigate the introduction of revised arrangements for the hearing of appeals, including the establishment of a second-tier Court of Appeal, which was first suggested in the Erotocritou Report of 2016 by the Supreme Court.<sup>19</sup> The Functional Review Report also recommends the establishment of a Judicial Training School and the introduction of objective criteria for the recruitment, assessment and promotion of judges to improve the quality of the administration of justice. Additionally, a proposed e-justice system envisages comprehensive digitisation of all major aspects of court administration and hearings, which will be implemented in all courts and court offices.<sup>20</sup> Further measures planned or in progress include a Commercial Court, which will take on high-value commercial cases as well as assume the admiralty jurisdiction of the District Courts.<sup>21</sup>

### *Overhaul of the Rules of Civil Procedure*

Regarding the rules of procedure, it has been argued that the Rules of Civil Procedure in Cyprus require fundamental and systematic attention.<sup>22</sup> Therefore, the first

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<sup>17</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (Strasbourg: European Court of Human Rights, 2010), Article 6.

<sup>18</sup> Presidency, Unit for Administrative Reform, 'Europe 2020: Cyprus National Reform Programme 2017', (2017) 12-13, available at <https://ec.europa.eu/info/sites/info/files/2017-european-semester-national-reform-programme-cyprus-en.pdf>, last accessed 7 July 2019.

<sup>19</sup> Supreme Court, 'Report of the Supreme Court on the Operational Needs of the Courts and other Related Issues', (2016).

<sup>20</sup> IPA Ireland, *Functional Review Report*, 25. See European Council, '2019-2023 Strategy on e-Justice', *Official Journal of the European Union* (13 March 2019), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313\(01\)&rid=7](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(01)&rid=7), last accessed 7 July 2019.

<sup>21</sup> *Ibid.*

<sup>22</sup> N. Kyriakides, 'Civil Procedure Reform in Cyprus: Looking to England and Beyond' (2016) 16(2) *Oxford University Commonwealth Law Journal* 262–291.

recommendation of the Dyson Report is that changes to the rules must be made *en bloc* rather than piecemeal.<sup>23</sup> This is justified on the basis that the Rules are linked in nature, and that there has been minimal revision to the Rules since 1958. It is generally accepted that there is a need for reform even though the process of making the necessary changes will be challenging.<sup>24</sup>

The second recommendation of the Dyson Report is that the overriding objective and case management provisions of the English Civil Procedure Rules must be incorporated into the Cypriot Rules.<sup>25</sup> These provisions provide the judge with the necessary tools to actively manage a case and impose restrictions to counter wasteful litigation procedures. Despite the similarities to English common law, Order 30, Rule 9 of the Rules is narrower in scope and has been neglected in practice.<sup>26</sup>

Another recommendation is for three pre-action protocols to be introduced: (1) a general pre-action protocol governing all proceedings not covered by their own specific protocol; (2) a personal injury protocol; and (3) a pre-action protocol on debt.<sup>27</sup> Pre-action protocols are a series of steps that must be taken by a person before bringing a claim to court. They have demonstrated their usefulness in England by preventing those cases that have not been subject to proper and due consideration, including the review of some arguments and evidence, from reaching court. In this way, pre-action protocols can also encourage ADR procedures prior to the commencement of a claim. It was agreed between the Expert Group and the Cypriot Rules Committee that the proposed pre-action protocols should take a more simplified form than those currently in force in England. Further, penalties were recommended for breach of pre-action protocols as follows:

Consideration should be given to the costs imposed when pre-action protocols are not adhered to. Certainty in relation to penalties, and their efficient imposition and collection, are very valuable in increasing adherence to the protocols.<sup>28</sup>

Under the current Rules, the costs for failing to comply in Cyprus fall far below those in comparable jurisdictions, thus undermining the deterrent effect of costs

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<sup>23</sup> Dyson Report 33.

<sup>24</sup> *Ibid.* 13.

<sup>25</sup> *Ibid.* 34.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* 37.

<sup>28</sup> *Ibid.*

and penalties.<sup>29</sup> The authors of the Dyson Report suggest, however, that the swift imposition and collection of penalties are perhaps more significant than their severity; the Rules Committee ought to consider approaches such as the English ‘pay as you go’ approach or staying proceedings until pre-action protocol obligations have been complied with.<sup>30</sup>

Furthermore, the Dyson Report suggests that statements of truth and witness statements be adopted.<sup>31</sup> In England and Wales, affidavits are only used in relation to search orders, freezing orders, and summary judgment against a State. The benefits of having a litigant sign a statement of truth include making it difficult for parties to amend their pleadings such that changes to their factual case contradict their previous pleaded case, requiring careful attention by parties to their case at an early stage, and reducing the ability of a party to advance conflicting allegations of fact in a pleading. By using statements of truth for witness statements, the inconvenient process of affidavits may no longer be necessary. If affidavits are retained, the Dyson Report recommends that the Supreme Court end the practice of swearing all affidavits before the Registrar and instead allow such swearing to take place before other persons, such as practicing lawyers. This is recommended with the view to tackle the substantial inconvenience, expense, and loss of time of court staff, lawyers, litigants and witnesses under the existing system for swearing affidavits in Cyprus.

### **Alternative Dispute Resolution and Other Recommendations**

A further recommendation in the Dyson Report is for the judiciary to encourage mediation across all cases with possible costs sanctions occurring for failure to heed the encouragement.<sup>32</sup> Additionally, it is recommended that there be three tracks for ADR: First, a Low Value Claims Track for claims less than €3,000: the procedure will have a very simple claim form, no expert evidence or, if so, a court appointed expert, and perhaps dealt with on paper. Costs should follow the event and be subject to a cap of a specific sum, for example €200 (subject to the court’s discretion to rule otherwise). There should be no right of appeal in this track. Second, an Intermediate Claims Track for disputes of €3,000 to €25,000 where the procedure will be the same as the Fast Track in the English Civil Procedure Rules (CPR), i.e., the

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<sup>29</sup> Ibid. 37.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid. 47.

<sup>32</sup> Ibid. 45.

cases allocated to this track will be usually dealt with in a one-day trial. Third, a track is required for all other claims. The track system is justified on the basis that the principle of proportionality is fundamental in developing and applying Rules of Civil Procedure and cases of higher importance for the litigants should be allocated more resources by the legal system.

Moreover, the Dyson Report proposes that much of the English Part 36 rule be followed, but in a considerably simplified form.<sup>33</sup> Part 36 provides the mechanism for the plaintiff or the defendant to offer a settlement, with severe consequences for the other party if the offer is refused and the other party achieves a less favourable outcome at trial. The rule has proven useful in England, though it has become unnecessarily elaborate. The authors of the Dyson Report note that a potential problem arises in Cyprus in relation to the question of sanctions with costs alone unlikely to deter refusal to settle. A solution may be to uplift costs recoverable by the plaintiff for the period after the offer is made but refused, and to deprive the plaintiff of a substantial proportion of his pre-offer costs and reduce the recoverable amount at judgment by some substantial percentage. The Dyson Report recommends that sanctions be costs and suggests increasing (or decreasing) the rate of interest awarded on any sums awarded by the court.<sup>34</sup>

### **Evaluating the Efficacy of the Recommendations and the Lessons from the English Reform**

The recommendations, primarily derived from the English system, have been aimed at reducing the caseload of courts by implementing systems that efficiently decide or dispose of cases, as well as acting as deterrents against frivolous lawsuits. Some measures are also directed at replacing or refurbishing existing systems through digitisation or liberalisation.

The Cypriot Rules Committee correctly pointed out that in drafting a new set of rules, special attention should be given to the current structure of the Cypriot system, its culture, and customs.<sup>35</sup> For example, the English system is designed to operate in an environment with law firms with large numbers of employees, while the largest firms in Cyprus do not have more than 20 partners and most practitioners operate alone. Also, the per capita income in Cyprus is lower than in England

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<sup>33</sup> Ibid. 59.

<sup>34</sup> Ibid 59.

<sup>35</sup> Ibid, 32.



and costs must be adjusted in a way not to hinder the right of access to justice.<sup>36</sup> Additionally, the social, economic, and business framework in Cyprus is different from that in England.<sup>37</sup>

The failings that have been observed within the English system ought to be carefully considered in any effort to emulate such a system. The following section of this article will take the form of a review of recent scholarship assessing the success of Lord Woolf's overhaul of English Civil Procedure Rules, culminating in Parliament's enactment of the Civil Procedure Rules 1998, measured against the overriding objective of the reforms themselves.

A consistent critic of the Woolf reforms, Michael Zander QC, holds that the case management idea, which constituted a central tenet of the 1998 CPR overhaul, was devised on an ill-informed, if not incorrect, basis. This was, he asserts, a result of the idea that 'the ills of civil litigation could be ascribed to the way that lawyers conducted cases and that the way to cure the ills was to transfer the responsibility for the progressing of cases from the lawyers to the judges'.<sup>38</sup> Such a characterisation of the situation in the late 20<sup>th</sup> century is not, Zander holds, an accurate one. According to his article, the KPMG Peat Marwick 1994 Study on Causes of Delay in the High Court and County Courts identified the actions of lawyers as just one of multiple causes of delay, including the nature of the case, the actions of parties themselves, difficulties in acquiring expert reports and other external factors, court procedures, and court administration. 'Excessive adversarialism', identified by Lord Woolf as the biggest contributor to delays, was not mentioned at all by the KPMG Report.<sup>39</sup> KPMG went as far as to explicitly advise against 'active court con-

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<sup>36</sup> The Real GDP (in Euros) per capita in Cyprus in 2018 was €23,300, while that of the UK was EUR 32,400. Eurostat, 'Real GDP per capita', European Commission website (18 August 2018), available at [https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=sdg\\_08\\_10&plugin=1](https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=sdg_08_10&plugin=1) (last accessed 19 March 2019).

<sup>37</sup> See e.g. <https://countryeconomy.com/countries/compare/cyprus/uk> (last accessed 7 July 2019). See CEPEJ, *Study on the functioning of judicial systems in the EU Member States*, Parts I and II (Strasbourg: European Commission, 2018), available at [https://ec.europa.eu/info/sites/info/files/20180405\\_-\\_eu\\_scoreboard\\_-\\_indicators.pdf](https://ec.europa.eu/info/sites/info/files/20180405_-_eu_scoreboard_-_indicators.pdf) and [https://ec.europa.eu/info/sites/info/files/20180404\\_-\\_eu\\_scoreboard\\_-\\_country\\_fiches.pdf](https://ec.europa.eu/info/sites/info/files/20180404_-_eu_scoreboard_-_country_fiches.pdf) (last accessed on 7 July 2019).

<sup>38</sup> M. Zander 'Zander on Woolf' [2009] *New Law Journal* 368.

<sup>39</sup> M. Zander, 'The Woolf Reforms: What's the Verdict?' in Déirdre Dwyer (ed.), *The Civil Procedure Rules Ten Years On* (Oxford: Oxford University Press, 2009) 420.

trol at the interventionist end of the spectrum'.<sup>40</sup> More damningly, Zander observes that Lord Woolf knew about the KPMG report, but chose not to refer to it at all.<sup>41</sup>

In her 2008 Hamlyn lectures, Hazel Genn describes how 'the polemic of the Interim Report was supported principally by anecdotal evidence combined with fragments of research material drawn from a number of different sources'.<sup>42</sup> Genn continues that Lord Woolf's analysis was taken on trust because of the platform created by the Woolf road shows, which allowed for dramatic explanations of experiences in the civil justice system and resulted in the documentation of the worst experiences from a small sample size.<sup>43</sup>

The result, as Adrian Zuckerman has diagnosed, has been the creation of a 'poorly-used management infrastructure',<sup>44</sup> in which the CPR system is now burdened with the judiciary's one-dimensional perception of the court's task. Lord Woolf's innovation came in the form of the CPR's overriding objective which introduced a new concept of justice, one that was 'committed to proportionality rather than [...] an unalloyed commitment to the achievement of what Woolf described as substantive justice'.<sup>45</sup> The effect, however, has been entirely undermined by judicial discretion. As Zuckerman argues, instead of abiding by the management directions that it has given, the court is willing to reconsider them through CPR 3.9, which allows the court to provide relief from sanctions. The result, he argues, is that, notwithstanding the assertion of court control of the litigation process, the court remains reluctant to enforce adherence to its own management orders.<sup>46</sup>

Before reforms to CPR 3.9, in considering whether to exercise its discretion, the court was required by CPR 3.9 to consider a list of nine non-exhaustive factors,

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> H. Genn, *Judging Civil Justice* (Cambridge: Cambridge University Press, 2010) 64.

<sup>43</sup> Ibid.

<sup>44</sup> A. Zuckerman, 'Litigation Management Under the CPR: A Poorly-Used Management Infrastructure' in *The Civil Procedure Rule* (no 39) 89-107.

<sup>45</sup> J. Sorabji, 'The Road to New Street Station: Fact, Fiction and the Overriding Objective' (2012) 23 *European Business Law Review* 77-89. In his Interim Report on Access to Justice (1995), Section I, Chapter 4, paras 5 and 6 Lord Woolf highlighted the tensions that exist between a desire to achieve perfection and a desire to achieve a system of justice that is not inaccessible to most people on grounds of the time and cost involved. He quoted tellingly from a 1970 broadcast by Lord Devlin: 'Every system contains a percentage of error; and if by slightly increasing the percentage of error, we can substantially reduce the percentage of cost, it is only the idealist who will revolt'.

<sup>46</sup> Zuckerman (no 44) 99.

such as the interests of the administration of justice, whether the application for relief has been made promptly, whether the failure to comply was intentional, etc. The initial CPR 3.9 long checklist of factors resembled a menu or ‘Laundry List’,<sup>47</sup> containing a variety of factors that bore little relationship to each other and contained no particular normative message.<sup>48</sup> There was information overload.<sup>49</sup> On top of that, the Court of Appeal had failed to develop a coherent policy for enforcing compliance with rules and case management directions, especially concerning CPR 3.9.<sup>50</sup>

Such a state of affairs was recognised and ostensibly addressed in the reforms of CPR 3.9, following Sir Rupert Jackson’s review of the Woolfian reforms. The reformed provision, Zuckerman proposes, contains a coded message urging the court to take their case management responsibilities more seriously.<sup>51</sup> It is not, however, clear that the right balance between procedural non-compliance and relief from sanctions has been struck. Rather, Masood Ahmed argues the new approach falls short of providing clear guidance as to how to achieve an appropriate balancing of the principles of proportionality and efficiency with substantive justice, as demonstrated by the extent to which judicial and extrajudicial guidance have pulled in two opposing directions. It is hoped that the refinement and continued critique of the approach to case management—from judicial understanding and attitudes, to robust enforcement practices—are considered and reflected in the update of Cyprus’ civil procedure rules.<sup>52</sup>

Moreover, regarding the recommendations on moving towards ADR, the value and appropriateness of ADR is taken for granted, both in general and specific forms of ADR (mainly arbitration and mediation).<sup>53</sup> Hazel Genn argues that, by promot-

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<sup>47</sup> As Levy explained, according to human behaviour theories a judge will recognise the relevant factors in the ‘Laundry List’, but having done so will fail to give the optimal weight to each factor in the integration process. The more considerations, the more confusion that is caused. I. Levy, ‘Lightening the Overload of CPR Rule 3.9’ (2013) 32 *Civil Justice Quarterly* 139, 140.

<sup>48</sup> A. Higgins, ‘CPR 3.9: The Mitchell Guidance, the Denton Revision, and why Coded Messages don’t Make for Good Case Management’ (2014) 33 *Civil Justice Quarterly* 379, 382.

<sup>49</sup> S. Sime, ‘Sanctions After Mitchell’ (2014) 33(2) *Civil Justice Quarterly* 135, 136.

<sup>50</sup> A. Zuckerman, (2013) ‘The Revised CPR 3.9: A Coded Message Demanding Articulation’ (2013) 32(2) *Civil Justice Quarterly* 123.

<sup>51</sup> *Ibid.*

<sup>52</sup> M. Ahmed, ‘Procedural Non-Compliance and Relief from Sanctions After the Jackson Reforms’ (2015) 5(1) *International Journal of Procedural Law* 71–95.

<sup>53</sup> Forms of ADR in England and Wales can include mediation, arbitration, early neutral evaluation, and Ombudsmen schemes. On the landscape of ADR provisions in England and Wales, see Civil Jus-

ing mediation as a central element of the civil justice system, Lord Woolf's CPR reforms '...redefined judicial determination as a failure of the justice system rather than as its heart and essential purpose'. Further, Genn states that 'mediation has routinely been made out not so much on the strength of its own special benefits, but by setting it up in opposition to adjudication and promoting it through anti-adjudication and anti-law discourse'.<sup>54</sup> Drawing on large-scale data analysis, conducted as part of an English Ministry of Justice commissioned research project, Genn argues that the evidence failed to demonstrate that court-based mediation schemes result in shorter case length durations as compared to non-mediated cases.<sup>55</sup> Moreover, whilst time limited mediation can avoid trials in cases not involving personal injury,<sup>56</sup> unsuccessful mediation is shown to frequently increase the costs for parties by an estimated amount between £1,500 and £2,000.<sup>57</sup>

Criticism of the perceived enthusiasm for ADR emanates not just from commentators, but from prominent judges as well, albeit in an extrajudicial capacity. Lord Neuberger MR (as he then was) warned that lawyers ought not to have excessive enthusiasm for mediation so much so that they were blinded to its potential flaws:

[L]et us not get carried away by zeal. Zeal for justice, zeal for one's client are fine, but zeal for a form of dispute resolution or any other idea, theory, or practice is not so healthy. It smacks of fanaticism, and it drives out one of the three most important qualities a lawyer should have – scepticism or, if you prefer, objectivity. (The others being honesty and ability.) Overstating the virtues of

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tice Council, ADR Working Group, *ADR and Civil Justice* (Interim Report, October 2017) available at <https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf> (last accessed 12 July 2019), at 15–16. In the EU law, the Directive 2008/52/EC is designed to facilitate access to alternative dispute resolution mechanisms and to promote the amicable settlement of disputes, while encouraging the use of mediation in the EU. On the transposition of the EU Mediation Directive in Cyprus, see A. Emilianides and X. Xenofontos, 'Mediation in Cyprus' in C. Esplugues et al. (eds), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, Vol. 1 (Antwerp: Intersentia, 2012) 87–96. Recent developments in the area of ADR in Cyprus include the draft law on mediation of family disputes, which is currently under parliamentary review and the proposed reform of the mediation law 159/2012. See A. Plevri 'Mediation in Cyprus: Theory Without Practice', (2018) 30(1) *The Cyprus Review* 233–258.

<sup>54</sup> H. Genn, 'What Is Civil Justice for? Reform, ADR, and Access to Justice' (2012) 24(1) *Yale Journal of Law & the Humanities* 397, 409.

<sup>55</sup> H. Genn, P. Fenn, M. Mason, et al., *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure* (London: Ministry of Justice, 2007) 71.

<sup>56</sup> *Ibid.* 73.

<sup>57</sup> *Ibid.* 110, 183.

mediation will rebound in the long term, even in the medium term, to the disadvantage of mediation.<sup>58</sup>

This was not the only speech that Lord Neuberger gave in warning against the perceived ‘zeal’ for ADR.<sup>59</sup> In his speech delivered during the Fourth Keating Lecture, in May 2010, Lord Neuberger emphasised that all forms of ADR cannot alone generate the framework through which justice is secured for the common citizen. In the absence of formal adjudication provided by the courts, ADR would be ‘mere epiphenomena’.<sup>60</sup>

Lady Hale, in a November 2011 speech, also noted the enduring importance of the courts in spite of the dominance of praise for ADR. On one level, commercial confidence is fundamentally built on the knowledge that ‘contracts will be enforced by an independent and incorruptible judiciary’.<sup>61</sup> At a more fundamental level, the judiciary also has a role in securing justice for all citizens:

But everyone else in society also needs to know that their legal rights will be observed and legal obligations enforced. [...] If not, the strong will resort to extra-legal methods of enforcement and the weak will go to the wall.<sup>62</sup>

The above noted judicial statements reflect the ongoing critique and benefits of ADR. In particular, two points should be noted. First, ADR is a means to an end, i.e. greater access to civil justice. It is an important mechanism in solving disputes, though it is not the only mechanism. Second, the framework and principles of justice, as developed by formal court adjudication, remain the foundations of ADR. Even if civil disputes are settled out of court, parties ultimately ‘bargain in the shadow of the law’.<sup>63</sup>

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<sup>58</sup> Lord Neuberger of Abbotsbury, ‘Educating Future Mediators’, Speech at the Fourth Civil Mediation Council National Conference: Educating Future Mediators (11 May 2010).

<sup>59</sup> See also Lord Neuberger of Abbotsbury, The Gordon Slynn Memorial Lecture 2010: Has Mediation Had its Day? (11 November 2010), available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/moj-speech-mediation-lectureA.pdf> (last accessed 7 July 2019).

<sup>60</sup> Lord Neuberger of Abbotsbury, The Fourth Keating Lecture: Equity, ADR, Arbitration and The Law: Different Dimensions of Justice (19 May 2010).

<sup>61</sup> Lady Hale, Justice of the Supreme Court of the United Kingdom, *Opening Address at Law Centres Federation Annual Conference* (28 November 2011), available at <http://www.supremecourt.gov.uk/docs/speechII125.pdf> (last accessed 7 July 2019).

<sup>62</sup> Ibid.

<sup>63</sup> R. H Mnookin and L. Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88(5) *Yale Law Journal* 950–997.

These points raise questions about the form that an ADR scheme, mandatory or otherwise, might take in the Cypriot context. Even if ADR methods are encouraged, questions remain in regard to how this should be done and the appropriate attitude that the judiciary should take. The cultural shift that was sought with the introduction of Lord Woolf's reforms aimed to move civil justice in England away from the traditional adversarial process to settlement through ADR. Indeed, CPR 1(4)(2)(e) conferred on the court the authority to order parties to try to settle their case using ADR. It also gave the court the power to award adverse costs orders if, in the court's view, the party refuses unreasonably to comply with a request, from either the court or the opposing party, to partake in ADR. The Court of Appeal in *Halsey v Milton Keynes General NHS Trust* considered this rule.<sup>64</sup> Following *Halsey*, and both major civil justice reforms that followed the Lord Woolf reforms, English courts have neither a jurisprudential nor legislative mandate to compel litigants to engage in ADR.

The result, Barbara Billingsley and Masood Ahmed assert, has been an opposing and erratic approach to mediation by the English judiciary. Even though reforms have spoken with a unified voice against compulsory ADR, judicial approaches and extra-judicial attitudes towards the issue of compulsion have been anything but consistent. The authors consider *PGF II SA v OMFS Co 1* to illustrate the adverse effect of the uncertainty brought about by the formal rejection but implied acceptance of compulsory ADR,<sup>65</sup> leading parties 'to engage in expensive satellite litigation that may find its way to the Court of Appeal'.<sup>66</sup> In light of this, Billingsley and Ahmed recommend that England should instead follow the Canadian approach of legislating compulsory ADR, thus providing greater consistency and predictability to ensure litigants undertake ADR efforts. The legislative approach to mandating ADR varies in Canada among the different civil jurisdictions—ranging from civil procedure rules specially requiring all litigants to participate in ADR by remaining silent on the issue—judicial approaches and attitudes are reasonably consistent.<sup>67</sup>

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<sup>64</sup> *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. The Court said that there was no presumption in favour of using mediation but there was an obligation on parties not to unreasonably refuse an invitation to mediate. A number of years later *Nigel Witham Ltd v Smith and Anor* (No 2) [2008] EWCH 12 (TCC) endorsed the principles in *Halsey*.

<sup>65</sup> *PGF II SA v OMFS Company Limited* [2013] EWCA Civ 1288.

<sup>66</sup> B. Billingsley and M. Ahmed, 'Evolution, Revolution & Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada' (2016) 45(2/3) *Common Law World Review* 204.

<sup>67</sup> *Ibid.*

These views are not limited to academic review. In December 2018, the Civil Justice Council (CJC) Working Group on ADR published its Final Report making a raft of recommendations including measures to raise public awareness of ADR, improve availability, and increase court/government encouragement of ADR. The report built on the CJC's Interim Report, published in October 2017, which called for greater consideration of mandatory pre-action of ADR. Though reticent in expressing support for such a measure, the report gave airtime to a number of the arguments advanced in favour of compulsion, including: that a change in rules, even temporarily, can lead to a change in culture; that mediation can be effective in the majority of cases; that compulsory mediation would avoid the waste of energy and costs involved in arguing about whether or not to mediate; that parties are never under an obligation to settle; that there is no convincing evidence that ADR is less successful when compulsory; that compulsion gets rid of the 'who blinks first' issue; and that there already exists a number of effective or actually compulsory ADR in processes in England and Wales, such as the Claims Portal for small claims, Acas (Advisory, Conciliation and Arbitration Service) Early Conciliation Process for employment disputes, the Family Mediation Council's MIAM (Mediation Information and Assessment Meeting), and Family Dispute Resolution.

In their Final Report, the CJC Working Group on ADR noted 'no or very little support for anything approximating to blanket or automatic referral to mediation'. However, they also acknowledge that the 'proposal to entertain some form of notice to mediate procedure on the British Columbia model received widespread support'. It is hoped that developing the recommendations made in the Dyson Report, the IPA would consider and make use of the research and consultation undertaken as part of the CJC Working Group on ADR's mandate.

ADR should neither be enforced in isolation nor for its own sake. However, an increase in the use of ADR in Cyprus will likely alleviate the caseload on the courts and allow quicker access to dispute resolution. Again, it is suggested that the Interim and Final Report of the CJC Working Group on ADR will be useful in the development of ADR in Cyprus, building on the comparative review undertaken in the context of the Functional Review Report. Any jurisdiction seeking to amend or adopt ADR needs to first decide on its underlying cultural attitude towards ADR and then clearly and consistently articulate it. This will further enhance legal clarity and consistency. Cyprus' fresh starting point, and the lessons learned from other ju-

risdictions, gives Cyprus a unique opportunity to adopt the benefits of ADR without resorting to it unnecessarily.

Another recommendation of the Dyson Report is that Cyprus ought to adopt the current rules surrounding disclosure in England and Wales as governed by CPR 31.<sup>68</sup> The Dyson Report concedes that ‘in England, the whole issue of disclosure is under scrutiny’;<sup>69</sup> however, this concession is dismissed as the Dyson Report’s authors assert that the critique is only relevant in relation to ‘very complex and high value claims’.<sup>70</sup> In response, the Cypriot courts might regulate such claims by imposing directions under the rules on disclosure under its case management powers. However, this seems unsatisfactory in light of findings presented by Hodge M. Malek. Malek concludes that the rules are far from clear and user-friendly, and have not been applied with reasonable certainty or in a cost-effective manner, despite the fact that the rules of disclosure post-1998 may assist in determining the facts and in reaching a just conclusion of a dispute.<sup>71</sup> In particular, Malek argues that the rules in the CPR are likely to be confusing for the layman due to the expanding body of case law within which interpretive rules are found.<sup>72</sup> The potentially massive photocopying cost, mostly borne by the client in England and Wales, is also an issue that may limit access to justice.<sup>73</sup> One’s legal rights should not depend on financial status. Malek makes the observation that there will always be a trade-off between cost-effectiveness and information accessibility.<sup>74</sup> The English balance leans towards the latter,<sup>75</sup> but it may not be the right system to follow. Cyprus must seek its own balance.

Finally, in order to tackle the abusive use of adjournments by parties before Cypriot courts, the American experience of the ‘Rocket Docket’ system, developed during the 1970s in the US District Court for the Eastern District of Virginia and later spread to other district courts, should be taken into account. The key characteristics of this system include the early scheduling of pre-trial procedures and a

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<sup>68</sup> Dyson Report 58.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> H.M. Malek, ‘Proportionality and Suitability of the Disclosure Regime Under the CPR’ in *The Civil Procedure Rules* (no 39) 291–292.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid, 292.

<sup>74</sup> Ibid, 283.

<sup>75</sup> Ibid, 292.



completion of disclosure that adheres to strict and short deadlines.<sup>76</sup> Additionally, once the case is assigned for trial, the date is set and judges rarely consent to continuances.<sup>77</sup> Arguments from Cypriot lawyers against a ‘Rocket Docket’ system can be addressed by pointing to how the system currently works in the Supreme Court, where most cases set before the Court are heard on their fixed date.

## Conclusion

Reform of the civil justice system is a difficult enterprise for which there are no easy answers. However, it is possible to establish guiding principles. Adrian Zuckerman notes there are three self-evident preconditions to good management: a well-defined objective; adequate powers available to managers to achieve this objection; and personnel that understand and are committed to achieving this objective through the said powers. However, the presence of a management infrastructure is not sufficient to deliver the desired results. The efforts of managers to use such management tools are essential.<sup>78</sup> Thus, if reforms in Cyprus are going to see a new CPR management infrastructure put to good use, attention must be paid to the means through which judges will be encouraged to promulgate the overriding objective. It is apparent, for both case management and ADR, that the role of the judiciary is central in determining the means of successful CPR reform in Cyprus.

It has been announced that a draft set of rules are going to be released in 2019, while a number of bills for the reform of the justice system are before the House of Parliament.<sup>79</sup> This reform is welcome and essential for the future of Cyprus and its citizens. Cyprus will improve its international reputation for respect of the rule of law, its profile as a place to do business, and the benefits of reform to all stakeholders—including the judiciary, lawyers, and courts users—will be both visible and real.

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<sup>76</sup> R. Fox, *Justice in the 21<sup>st</sup> Century* (London: Routledge, 2012) 30.

<sup>77</sup> J. Apple, ‘Management in American Courts’ (1996) 1(18) *Issues of Democracy* 30. See also Dyson Report 15.

<sup>78</sup> Zuckerman (no 44) 94.

<sup>79</sup> As Dr Michael Mulreany, Assistant Director of the General Institute of Public Administration of Ireland said during his speech on the presentation of the Functional Review of the Courts System of Cyprus, ‘undue delay is a false friend’. Dr Michael Mulreany, Speech on Presentation of Functional Review of the Courts System of Cyprus (Nicosia, 27 March 2018).

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