Republic of Cyprus: A Right to (Gender) Equality?

Andreas Hadjigeorgiou[1]

Abstract

The right to equality is a tool, which enables citizens to seek change within their legal system from the bottom-up. Using this right, to prompt constitutional review of legislative provisions and governmental practices, opens up an invaluable dialogue between citizens, government and the court. This dialogue may, in turn, lead to the invalidation of such provisions and practices, replacing them with new more equal versions. As such, the right to equality has historically been pivotal to the restructuring of gender relations within society. Within the Republic of Cyprus, though, while the legislator continuously differentiates his treatment according to gender, a precedent of the Supreme Court, formulated in the case of Dias United (1996), has barred this right from activating. This has granted the legislator the ability to 'legally' infringe upon constitutionally guaranteed rights and perpetuate a patriarchal social structure; leading to arbitrary results.

Keywords: Right to equality, art. 28, gender equality, *Dias United*, case of *Vrountou v Cyprus*

Introduction: Gender and the Right to Equality

In the structuring of gender social relations, equality has been set as the goal.[2] However, gender equality has not always been the position that humans strived for. The history of law and societies teach us that the division of social positions, and the structure of power relations, were deeply affected by the concept of gender. From its genesis, law and society made a strong division between genders – and almost always awarded political power, and the strongest social positions, to only one gender. The trend was, of course, patriarchal;[3] although there have been some notable matriarchal communities.[4]

---

[1] Andreas Hadjigeorgiou, PhD candidate in Law, University of Antwerp; PhD candidate in Philosophy University of Groningen.

[2] Gender equality has been set as the 5th goal in the UN sustainable development goals, see https://www.un.org/sustainabledevelopment/gender-equality/ (last accessed July 2020).

[3] Henry Summer Maine, *Ancient Law: Its Connection With The Early History Of Society And Its Relation To Modern Ideas* (London: John Murray, 1861).

[4] Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Keagan Paul, 1926).

From this perspective, gender equality in a timeless manner is not a concept which describes, the structure of human societies or their political views. Rather gender equality is an ideal which summarises a recent political direction that societies internationally decided they should follow in the course of their growth. That is where we should locate the concept of gender equality: in the self-conscious efforts of humans, as political beings, to guide the change and the evolution of their societies into better versions of themselves.

Furthermore, this change/evolution does not happen in a vacuum, and unrestrained; it is however facilitated through, and controlled by, law. As such, law is not merely an organised system which actualises, reflects and stabilises the political ideals of each society, it is also a primary engine which facilitates change within the practices of each community.[5] For this reason, law provides tools[6] (frequently in the form of rights) which are meant to empower citizens to seek change within their community, by invalidating certain of its practices and, in extension, nudging the legislator to create new practices, and updating the social structure.

Such tools are usually negating in nature. While they are meant to represent future aspiring plans and social arrangements, these are never fully spelled out, and the guiding function of these tools remains limited. Instead, these tools become more adapt in invalidating (or negating) current practices and social arrangements as outdated, while allowing discretion (usually) to the legislator(s) to decide which new practices/arrangements shall take their place.

In the efforts to achieve greater gender equality, perhaps the most critical legal tool is found in the right to equality (also often styled as protection from/prohibition of discrimination[7] or a right to non-discrimination[8]). In the same vein, while the right to equality represents some ideal future structure or ordering that society should follow, this is done in a vague and uncertain manner. What is required exact-

[5] For a view of law being an engine for change in society see Maine (no 2).

[6] For a theory of rights as tools used to facilitate change organically from the bottom up see most notably Friedrich Hayek, *Law, Legislation and Liberty: A New Statement of The Liberal Principles Of Justice And Political Economy* (Chicago: University of Chicago Press, 1973-79).

[7] See, for example, Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953), CETS No. 5, 213 UNTS 221.

[8] See, for example, Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges Prosecutors and Lawyers* (2003) available at https://www.ohchr.org/Documents/Publications/training9Titleen.pdf (last accessed 23 September 2020) at chapter 13.

ly by the concept of equality (or protection from discrimination) is highly debated, and not abundantly clear.[9]

From this perspective, this right is more successful in empowering citizens to initiate review of the constitutionality of current practices. While, what 'equality' exactly requires is not clear, the constitutional review of practice(s) can be complex; the right functions best in these limited domains where specific practises are put under examination.[10] If successful, then the right invalidates the practice and initiates a process of replacing the practice with a new one. Each invalidation and replacement count as a step forward in meeting the obligations set by this right to a higher degree.

This overall spirit is enshrined most accurately in the wording of Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms: 'Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of nondiscrimination does not prevent States parties from taking measures in order to promote full and effective equality…'.[11]

Naturally, article 1 of Protocol no. 12 addresses the general prohibition of discrimination. This article builds upon the article 14 of the convention by reaffirming its content and adding an extending second paragraph. The concept of gender (or sex) is of course included in paragraph 1, however the content of paragraph 2 will have a significant role to play in the forthcoming discussion. Both paragraph 1 and 2 of article 1 of Protocol no. 12 run as follows:

[9] For an interesting overview of the theoretical/philosophical debates that surround the concept of equality see the introductory discussions in Ronald Dworkin, *Sovereign Virtue – The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2002).

[10] For a comparative discussion of the successes, and complications involved, in the process of asserting the right to equality to invalidate state practices see Guy Lurie, 'Proportionality and The Right to Equality' (2020) 21 *German Law Journal* 174.

[11] See, Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 2000) available at https://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed 23 September 2020).

> '1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'[12]

As such, paragraph 1 designates the concept of gender (or sex) as grounds upon which discrimination is not permitted, and paragraph 2 makes explicit the fact that public authorities in particular are prohibited from establishing practices, which entail gender discrimination. Concerning the Cypriot legal system, it is worth mentioning that both of these protections, more or less, are enshrined within article 28 of the Cypriot constitution. More specifically, art. 28(2) designates gender (or sex) a ground upon which no discrimination is permitted, while art. 28(1) roughly translates into:

> 'Everyone is equal before the law, the government (or public administration) and justice, and is entitled to the same protection and treatment.'

Furthermore, it should be noted that the right to equality (or the principle of equality as is often styled in Greek) has an added protection and its own article in the administrative law. More specifically, art.38 of the legislation on the General Principles of Administrative Law[13] states:

> '(1) The principle of citizens' equality imposes upon the administration, during the exercise of its discretion, equal or homogenous treatment of all citizens that function under the same or similar circumstances. [...]
>
> (3) The equal treatment of unequal things is equality unacceptable as the unequal treatment of equal things.'

While the concept of gender is admittedly not explicitly mentioned, this article, as well as the whole domain of administrative law, builds upon the already existing provisions of the constitution. From this perspective, formally the right to equality is protected in the Cypriot constitution more or less in the same way as in the European Convention on Human Rights. However, the real question, and the question the present paper shall examine, is: 'how does this right function in practice within

[12] Ibid.

[13] Ο περί Γενικών Αρχών του Διοικητικού Δικαίου Νόμος του 1999 (Ν.158(Ι)/1999).

the Cypriot legal system'? And more particularly: 'How does it contribute, or fails to contribute, in the change or evolution of the Cypriot legal system into a version of itself which attains higher degrees of gender equality'?

As such, section 2 examines a defining, for the right to equality, precedent of the Cypriot Supreme Court: the judgment of *Dias United Publishing Co. Ltd. v. Κυπριακής Δημοκρατίας*, προσφ. αρ. 870/91, 05/12/1996. Section 3 provides an overview of how this precedent affected administrative cases involving gender equality and claims that public authorities differentiated their treatment of citizens upon gender grounds – as well as the reply given by the European Court of Human Rights, in *Case of Vrountou v. Cyprus,*[14] where the *Dias United* standard was challenged. Section 4 closes off with a reassessment and some final thoughts.

The *Dias United* Judgment[15]

At the outset it is important to note that the *Dias United* case does not touch upon matters of gender equality. Rather, this judgment formed a precedent which defined the stance of Cypriot courts whenever cases would arise which relied on the right to equality (art. 28 of the Cypriot constitution). In turn, this precedent affected subsequent cases which addressed matters of gender equality and relied upon art. 28. However, let us take things one step at a time.

The facts of the *Dias United* case are simple. Legislation[16] was passed which criminalised the organisation of lotteries (art.10) while allowing for certain exceptions (art.11). Subsequently, this legislation was amended[17] to include within the exceptions (art.11) 'any lottery organised by and on behalf of the Cyprus Broadcasting Corporation (RIK) for the purposes of its radio or television shows, with the permission of the minister of finance'.

The applicants, Radio Proto (a private station), made a request to the minister of finance for permission to organise lotteries. A reason they cited for this request (as written in the judgment) was in order to combat the financial situation/problem

[14] *Vrountou v Cyprus* App no 33631/06 (ECtHR, 13 October 15).

[15] Part(s) of the forthcoming discussion have already appeared in a shorter, and reformulated through a different context, blog post; see Andreas Hadjigeorgiou, 'The Phenomenon of Arnisidikia in the Precedent of *Dias United* – A Threat To The Cypriot Rule of Law' (*The Rule of Law Monitoring Mechanism,* 14 July 2020) available at https://lawblog.uclancyprus.ac.cy/the-phenomenon-of-arnisidikia-in-the-precedent-of-dias-united-a-threat-to-the-cypriot-rule-of-law/ (last accessed 23 September 2020).

[16] Ο περί Λαχείων Νόμος Κεφ. 74.

[17] Ο περί Λαχείων (Τροποποιητικός) Νόμος του 1986 (Ν.71/86).

that was produced by the continuous unfair competition (or monopoly) by RIK. The minister, in denying the request, noted that the law did not vest him with the authority to grant such a licence. As a result, the applicants filed a case under administrative law, which was taken on to be decided by the supreme court directly.

The applicants (Radio Proto) sought the judicial annulment of the minister's decision not to grant them the licence they requested. Their argument was that his decision, as well as the underpinning legislation, violated the principle of equality (art. 28 of the Cypriot constitution) since it grants selectively/arbitrarily the right to organise lotteries only to RIK and no other station. The counsel for the government (which represented the minister in court), noting RIK's public and non-profit character, claimed that this distinction was justified and thus is not violating any constitutional rights.

It should be noted that this argument clearly provides a valid ground for the court to conclude that since the two subjects (RIK and Radio Proto/the applicants) were not of the same nature and, thus not equal, there is no obligation that the administration (or the law) treats them equally. The court, though, failed to agree with either side, as it altogether refused to assess the constitutionality of the decision, and the law itself. The legal reasoning developed by the court is perplexing. The best one can make of this reasoning is as follows:

1. The claim of the applicants was initiated by their request for a licence to organise lotteries.
2. Any judgment finding that the law (which the decision was based upon) constitutionally violates the principle of equality (art. 28) would have no practical impact towards the fulfilment of the request for such a licence, because:
   a. In order for such a licence to be granted, legislated legal provisions need to be in place.
   b. The verdict that the law (or certain of its provisions) is unconstitutional would invalidate the law (or the relevant provisions), and there would be no legal rules for the government to apply when re-examining the applicants request for such a licence.
   c. Due to the constitutionally structured separation of powers, this absence of legal provision(s) cannot be filled or supplemented with a judicial decision, contrary the legislator's wishes.
3. It is a legal principle that the court only assesses the issue of constitutionality where it is practically relevant to resolving the case at hand.

4. Thus, since the claim of the applicants cannot succeed, assessing the constitutionality, or otherwise, of the law (or certain of its provisions) would be merely of a theoretical or academic nature, with no practical relevance or impact towards the fulfilment of the original request (for a licence to organise lotteries), and the court is thus barred from examining it.

From this perspective, the court concluded:

> 'Thus, since it would not be possible, even if the law was declared unconstitutional, for the case to succeed, we are not permitted [or justified] to prompt constitutional review. Such an endeavour would be academic and not in line with our crystallised precedents, according to which the supreme court reviews the unconstitutionality of a law only where it is necessary for solving the matter under review.' (p.558)

There are many things one could point out and enquire about this judgment and its legal justification. Is the understanding of the separation of powers it purports correct, or did the court fail to understand the place it occupies within this separation? Does this stance of the supreme court correlate with the values enshrined in the ideals of the rule of law? Did the court perhaps fail to understand properly the applicant's claim? Does the court overestimate the vested interest an applicant should have in order to be entitled to seek constitutional review? Or does the court perhaps, underestimate the impact a judicial declaration of a law as unconstitutional will have for an applicant and the society as a whole?

However, while an examination of the legal basis of this judgment is a tempting endeavour,[18] the present paper is more interested to explore its result. That is, analyse the effect it has upon those legal claims that seek to prompt judicial review of the constitutionality of a law by relying on art.28 of the Cypriot constitution, the right to equality, generally. In turn, the next section will focus on how this precedent has affected cases of gender inequality which sought to prove a violation of art.28.

In short, in the *Dias United* judgement the Cypriot supreme court found itself barred, by its own customary rules, principles and precedents, to assess the constitutionality of laws and legal provisions – at least insofar as the right to equality is concerned. Furthermore, in a common law system, such as the Cypriot one, judgments of the supreme court form binding precedents that guide and, to an extent, control the collective decisions and stances of the Cypriot courts. From this per-

[18] This endeavour has, to an extent, been taken on in Hadjigeorgiou (no 14).

spective, the crystallisation of the *Dias United* judgment into a precedent has the effect of blocking Cypriot courts from reviewing the constitutionality of laws and legal provisions generally whenever art.28, the right to equality, is relied upon – at least in the last 20 years.

Let us take an example: *Gonul Ertalu v. Υπουργείου Οικονομικών* 4 Α.Α.Δ. 429 in 2008. The applicants were residents of the Turkish-occupied area of Cyprus and they challenged an administrative decision denying them a college/university grant which were given to those who have their permanent residence in the areas controlled by the Republic of Cyprus. Their claim was that the law which this decision was based upon, was unconstitutional because it violated art.28, the right to equality. This was so because the law allowed eligibility only to those who resided in the areas controlled by the Republic of Cyprus, against those who resided in the areas under Turkish military occupation.

According to their claim, this was unequal treatment, favouring only one portion of the Cypriot population, and thus unconstitutional. The court, though, made an interesting observation. Borrowing from *Birinci v. Δημοκρατίας,* it noted that this was due to the fact that only the former group pays taxes, and this grant was given to families in lieu of tax returns/deductions. Admittedly, this observation gave strong grounds to the court, both in *Gonual Ertalu* and in *Birinci*, which enabled it the possibility to conclude that this differentiated treatment was justified and thus, constitutional.

Nevertheless, the court did not proceed to assess the issue of constitutionally; instead, it cited *Dias United* and declared that 'in light of this precedent the case cannot succeed'. The same scenario repeated in *Gonul Ertalu v. Υπουργείου Οικονομικών* 3 Α.Α.Δ in 2011 with the same applicants. The same resulted in *Κωνσταντίνου κ.ά. v. Κυπριακής Δημοκρατίας* (2007) 3 Α.Α.Δ. 267, where a violation of art.28 was alleged due to the differentiated retirement age that was set for employees in the public sector according to the date they completed their 61st year of birth. The court cited *Dias United* and declared that 'in light of this precedent the case cannot succeed'.

The *Dias United* 'loophole' entails that virtually any to date applicant lacked a necessary vested interested that would enable the courts to prompt constitutional review of a law (or certain of its provisions) in relation to art.28. Such a declaratory decision, on the unconstitutionality of a law, would become the first in a chain of events which would eventually create the circumstances for the original request to be

decided upon on constitutional provisions. While it would momentarily leave no legal provision(s) for the re-examination of the applicants' request for a licence, the government's lack of response would violate a constitutional obligation to examine and respond to any requests under law within a certain timeframe. Thereafter, for every day the government fails to respond, was in violation of constitutional obligations, something which incurs costs, if the applicant resorts to the administrative court.

From there, legal, moral, and political pressure are inevitably exerted upon the legislature to act and produce a new law, or new provisions, which will abide by the constitution, or at least they could be re-assessed by the court. In this way, this right becomes an invaluable tool which constitutes citizens as active participants in the evolution of their civilization, by empowering them to seek a more equally structured society and place their current governmental practices under critical review. A tool that the *Dias United* precedent blocks from activating.

Furthermore, the inability of Cypriot courts to enter into a constitutional examination of a law, by hearing both sides (that of the citizens and that of the government), prevents a critical public debate from taking place. Citizens have no possibility nor place to be heard. What's more, by not succeeding to allow this debate to unfold and by failing to critically and in a justified manner, choose a side, courts prevent the right to equality from crystalising a form, and a content capable of, not only neutralising practices, but also guiding us in their creation.

After all, the courts' decisions on which practices count, and which do not, as a violation of art. 28, ultimately work together to create publicly visible standards, which work together with this right. As such, the right to equality, when coupled together with an interconnected collection of judicial decisions which examine the substance of the claims made, can guide society in a way that the right on its own, as is formally enshrined in the constitution, cannot. Furthermore, the courts' decisions surrounding the right to equality give it a more public expression that can be scrutinised by the people.

Lastly, this refusal to assess constitutionality –this *arnisidikia*–[19] inevitably grants the legislator immunity from a rule of constitutional law and enables the government to infringe upon constitutional rights while at the same time acting according to the law, and in this sense legally – after all there is a judicially established presumption that laws are constitutional until declared otherwise by a court (see

[19] Ibid.

The Board for the Registration of Architects and Civil Engineers v. Christodoulos Kyriakides, (1966) 3 C.L.R. 640).

Furthermore, the public and systematic manner through which the courts announce their inability to examine such claims communicates a clear message to the Cypriot legislator: 'feel free to disregard art.28 of the Constitution'. It should come as no surprise that the legislator listened, and this came to affect greatly the treatment genders received in the Republic of Cyprus.

Dias United and Gender Equality in the Republic of Cyprus

The *Dias United* precedent in effect neutralises art.28, the right to equality, from activating – in this sense, it is a trump card, a loophole. According to the Supreme Court's rationalisation, applicants lack a vested interest, necessary to enable the court to prompt a constitutional review. This precedent, in turn, came to predetermine the course of certain clusters of cases, which sought to prove unequal treatment of genders. While the *Dias United* precedent does not only affect cases of gender equality, the cases that involve gender have an interesting twist.

In most of the cases we have already examined, before the court found itself unable to prompt constitutional review by citing the *Dias* precedent, it noted certain factors that could have given it valid grounds to conclude where there was no violation of art.28. In *Gonul Ertalu* and *Birinci*, for example, the court noted how the college/university grant in question was given to citizens in lieu of tax deductions/returns. Since the applicants, residents of the Turkish-occupied area of Cyprus, do not pay taxes to the Republic of Cyprus, nor do they reside in areas controlled by it, the differentiated treatment could be justified.

In the *Dias United* judgment itself, the public character of the RIK station, in contrast to the privately owned Radio Proto station, which applied for the same licence, could have in the same way provided valid grounds for the court to conclude that the unequal treatment was justified upon this differentiation of their nature. However, as we will shortly see, in the cases that involve unequal treatment of genders the court either failed to note any factors that could justify this differentiation, or it provided reasons to believe that if it had entered into a constitutional review of the law, it would have found a violation of art.28.

The cases we shall examine fall in three thematic categories. The first category of cases revolve around the criteria under which widows and widowers are allowed survivor's pensions. In the second cluster, cases challenge the attribution of certain

benefits to the children (during the Turkish invasion) of Cypriot displaced males, in contrast to the children of their female counterparts. While the third category entails cases which seek to scrutinise the reduced military service which children of Cypriot fathers and foreign mothers receive, against children of Cypriot mothers and foreign fathers.

Survivor's Pension

The first cluster of cases – *Κώστας Λοϊζου ν Κυπριακής Δημοκρατίας*[20] and *Λοϊζος Λοϊζίδης ν Κυπριακής Δημοκρατίας*[21] both in 2004, sought judicial review of the constitutionality of the legal provisions which set the criteria under which male and female citizens receive survivor's pension.[22] The challenged administrative decisions denied both applicants survivor's pensions because they did not fulfil the criteria. Their claim was that this decision violated the principle of equality because the law was based upon different criteria provided for widows and widowers – a discrimination based upon gender.

According to the admittedly gender-differentiated legislative provisions[23] in question (which remained the same until August 2019), survivor's pension is paid to:

> '(1) Widow, who, at the time of her husband's death, was residing with him or she was maintained exclusively or primarily by him, is entitled to survivor's pension [...]
>
> (2) Widower, who, at the time of his wife's death, was declared permanently incapacitated to self-support himself and was maintained exclusively or primarily by her, is entitled to survivor's pension [...]'[24].

A mere glimpse at this article reveals a clear differentiation in the way husbands and wives (in a heterosexual marriage)[25] are treated by the Cypriot legal system in the event of their spouse's death. Further, married women are put in a much more privileged and protected position. Married men on the other hand are left with very little protection and security. While women qualify merely by having resided with

[20] 4 Α.Α.Δ. 717, ημερ. 13/11/2004.

[21] Υποθ. Αρ. 559/2002, ημερ. 5/3/2004.

[22] Survivor's pension is the pension paid by the state to the legal spouse of a deceased citizen who paid insurance contributions.

[23] See art. 39 του περί Κοινωνικών Ασφαλίσεων Νόμου του 1980, (Ν. 41/80) όπως τροποποιήθηκε.

[24] The rest of the criteria, (α) and (β), are the same for both widows and widowers.

[25] From the wording of the provisions homosexual couples are excluded from a survivor's pension altogether.

their husband during his death or having been maintained by him; men have to have been declared incapacitated to support themselves and maintained by their wife.

From this perspective, men qualify only if they were severely dependent upon their wives; but women qualify merely by residing with their husbands. The lawyer representing the government argued that this distinction was justified, without violating constitutional rights, because it was based upon the different social positions men and women occupy within society. The court replied: 'I don't believe that today, in the 21st century, the argument that distinctions within the law based solely upon gender could easily be justified for social reasons'. This is a critical sign that the court remained unconvinced by this argument, and that it adheres to a greater level of gender equality than the one the government proposes.

This argument definitely provided a valid ground enabling the court to annul the decision and declare the law (or its provisions) unconstitutional. Nevertheless, while it seemed for a second that the court was willing to prompt an open discussion about gender equality and the social standards that should be fitted under art.28, the court refused to once more altogether constitutionality asses . It was quick to cite that *Dias United*, in light of this precedent in the case, cannot succeed, while without providing any further legal reasoning or explanation.

These judgments are a critical blow towards movements of gender equality in Cyprus and this practice systematically disfavours the male gender. Belgium, for example, which originally reserved the right for survivor's pension to only widows, in 1984 changed its provisions to also include widowers.[26] While Cyprus came to replace the aforementioned legislation with a new one,[27] this gender-motivated differentiation remained the same. It was only in August 2019[28] that a new provision was created which extended the same criteria to widows and widowers. This change seems to be a recognition by the legislator of the illegality of their previous unequal treatment.

Nevertheless, the criteria that applied only to widows, apply also to widowers only insofar as their wife died after 1 January, 2018. This means that there is a number of widowers still alive today that are denied equal treatment. In reality, there are still a number of cases within this cluster pending at the administrative

[26] See https://ec.europa.eu/social/main.jsp?catId=1102&langId=en&intPageId=4421 (last accessed July 2020).

[27] See Ο περί Κοινωνικών Ασφαλίσεων Νόμου του 2010 (Ν.59(Ι)/2010).

[28] See Ο περί Κοινωνικών Ασφαλίσεων (Τροποποιητικός) Νόμος του 2019.

and supreme court. As such, the fight for gender equality in the practice of awarding survivor's pensions is still ongoing despite the momentary win of August 2019.

Refugee Cards

The second cluster of cases – *Ευαγγελία Τσιάκκα κ.α. ν Κυπριακής Δημοκρατίας*[29] in 2007, *Άννα Γιαγκώζη ν Κυπριακής Δημοκρατίας*[30] in 2006 and the infamous case of *Μαρία Βρούντου ν. Κυπριακής Δημοκρατίας*[31] in 2006 – challenged the constitutionality of an administrative decision which denied their application for a refugee card. According to the Cypriot legal system, those who were displaced from the Northern to the Southern part of the Republic of Cyprus, during or after the Turkish invasion of 1974, are referred to as refugees. The relevant legal provisions[32] that the administrative decision was based upon, stated that:

'The children whose father is displaced are considered to have their permanent residence in the occupied areas and, as such, for the purposes of this law, are recognised as displaced from the same place their father was resident.'

The applicants, in all cases were displaced mother and her daughter who claimed that this provision violates art.28 since it recognises (or awards) displaced status to the children of displaced fathers but not displaced mothers. This is, of course, a differentiated treatment motivated solely by gender. Why should displaced fathers be entitled to claim recognition of the displaced status of their children and not displaced mothers? It should be noted that being recognised as displaced enables one to request a refugee card which entitles the holder to a number of schemes, such as financial aid, scholarships, free education, medical treatment, housing assistance, and help in the form of clothing and footwear.

Neither the court, nor the counsel for the democracy, could provide one credible argument to suggest that this differentiation could be justified. On the contrary, in the first instance judgment of *Άννα Γιαγκώζη*[33] the court noted that on a theoretical level there can be no doubt that there should be equal treatment between the children of female and male displaced persons. In the *Μαρία Βρούντου* case, on the other hand, the supreme court, in its judgment notes how the counsel for the

[29] 4 Α.Α.Δ. 869.
[30] 3 Α.Α.Δ. 85.
[31] 3 Α.Α.Δ. 78.
[32] See art.119 περί Αρχείου Πληθυσμού Νόμου (Ν. 141(Ι)/2002) και Τροποποιήσεων.
[33] 4 Α.Α.Δ. 405.

democracy agreed that this differentiated treatment entails unfair discrimination against the applicants.

Nevertheless, in all these cases the court followed the same drill; it cited *Dias* and concluded that 'in light of this precedent the case cannot succeed'. The court though did take notice of the fact that if it were to enlarge the scope of this entitlement to include also children of female displaced applicants then this would inevitably create an increase in the budget of the State – since the granting of a refugee card, as noted above, entails certain economic benefits. From there it observed that, according to the constitution, not even the parliament has the power to propose on its own an increase of the state budget, let alone the supreme court.

This is to an extent a credible argument and it is a characteristic of the Cypriot legal system that deserves more research. However, as already mentioned, the applicants in these cases did not request that the court accepts their original applications for whatever benefit. Rather, they merely asked the court to annul the decisions for their applications because the findings, and the laws they were based on, violate constitutional rights.

Nevertheless, *Μαρία Βρούντου* did not accept this result and, unlike all other applicants in the cases we have examined, she submitted this judgment to the European Court of Human Right (ECHR) for review. This was the first, and only time the *Dias United* precedent was put under review by a non-Cypriot court. The side of the government, as recorded in the *Case of Vrountou v. Cyprus* (Application no. 33631/06, 13/10/15), sought to justify this differentiated treatment of genders with the following story – which deserves to be quoted at full length:

> 'The economic effects of displacement were far more acute for the children of male displaced persons who would bear the responsibility for their children's upbringing and education, and for providing them with financial assistance in their adult lives. On the other hand, the children of female displaced persons would not be financially dependent on their mothers: when those women married, their children would be provided for by their non-displaced father who had not suffered the financial effects of displacement. Moreover, it had been necessary for the State to give priority to persons most in need, taking into account the availability of funds for catering for the variety of needs of those affected by the Turkish invasion.'

This is a textbook example of a patriarchal justification for differentiated gender treatment; however, it is shocking to see the government of a European State

providing such justifications in the 21st century. In this story the children of male displaced persons, as well as the displaced male population itself, require more help, than their female counterpart, because the men, as the breadwinners of every family, are more disadvantaged. On the contrary, female displaced persons, as well as their children, can easily escape the negative results by marrying someone to take care of them.

Men on the other hand need more support because they will be the supporters of their families. Under no circumstances, does the government think it appropriate to empower displaced mothers to begin their own life anew and escape the consequences of the invasion, and subsequent military occupation, through their own efforts – without having to necessarily rely on a male spouse for survival. The ECHR's reply to these arguments was swift:

> '[...] this is precisely the kind of reference to "traditions, general assumptions or prevailing social attitudes" which provides insufficient justification for a difference in treatment on grounds of sex because it derives entirely from the man's primordial role and woman's secondary role in the family. [...] even if that reflected the general nature of economic life in rural Cyprus in 1974, it did not justify regarding all displaced men as breadwinners and all displaced women as incapable of fulfilling that role once displaced from the Northern to the Southern part of the Republic. Nor could it justify subsequently depriving the children of displaced women of the benefits to which the children of displaced men were entitled. This is particularly so when many of the benefits that the children of displaced men were entitled, including housing assistance, were without any reference to a means test. [...] There is accordingly no objective and reasonable justification for this difference in treatment.'

The ECHR accordingly found a violation of art. 14 (prohibition of discrimination/ right to equality) taken in conjunction with Article 1 of Protocol No.1 (protection of property). Coming to the *Dias United* precedent, though, the ECHR had something further to say:

> '[In the present case the Cypriot Supreme Court] found itself unable to consider the merits of the applicant's discrimination claim and thus unable to grant her appropriate relief. The Court readily understands the supreme court's concern to ensure proper respect for the separation of powers under the constitution of Cyprus and it is not the court's place to question the supreme court's interpretation and application of that principle. However, the consequence of

> the supreme court's approach was that, in so far as the applicant's convention complaints were concerned, recourse to the supreme court was not an effective remedy for her. Since the government have not submitted that any other effective remedy existed in Cyprus at the material time to allow the applicant to challenge the discriminatory nature of the refugee card scheme, it follows that there has been a violation of Article 13 of the Convention.'

From this perspective, the court rightly found a violation of art. 13 – that is, the right to an effective remedy. After all, the refusal put forwardby the Cypriot courts, through the *Dias United* precedent, denies applicants even the possibility of a legal remedy as they fail to enter into a constitutional examination altogether. This might seem like it should be the 'happy ending' of the story, but this is not quite true. While the ECHR found a violation of art. 13, it did not go far enough.

More specifically, it did not note how that effective remedy should come from the courts regardless of any formal legislative change in the Cypriot legal system. While concerns for the separation of powers are valid, they cannot continue to assert this precedent, and they cannot continue to deny exercising their power, and obligation, to guard the constitution and constitutionally review (wherever necessary) laws. As such, despite a momentary loss in the *Vrountou* case, the *Dias United* precedent continues to live on. Which brings us to the last cluster of cases.

Reduced Military Service

The third cluster of cases – *Μιχάλης Ιωάννου ν Υπουργείου Άμυνας της Κυπριακής Δημοκρατίας*[34] in 2008 and the more recent *Καλακούτης ν. Κυπριακή Δημοκρατία*[35] in 2019 – challenged the reduced military service that children of Cypriot mothers and foreign fathers are legislative[36] entitled, unlike the children of Cypriot fathers and foreign mothers. It should be noted that reduced military service was six months, while the normal length is 25 months is a substantial difference.

The court failed again to note any facts or arguments that could justify this differential treatment between the two groups. On the contrary, as expected, the court cited *Dias United*, followed by 'in light of this precedent the case cannot succeed'. However, what is of particular interest is that the *Καλακούτης* judgment was issued after the conviction by the ECHR in the *Vrountou* case. That is, the supreme court

[34] 4 Α.Α.Δ. 597.

[35] Αναθεωρητική Έφεση 151/2013, ημερ. 10/12/2019

[36] See Ο περί Εθνικής Φρουράς Νόμος.

has continued to assert this precedent even after Cyprus was found to be in violation of art. 13 of the convention, the right to an effective remedy.

Of course, the applicant's lawyer did mention the ECHR conviction and generally the *Vrountou* case, citing them as a reason to prompt the supreme court to diverge from its settled customary practices. In a confusing turn of events, the supreme court noted that it fails to see a relation between the *Vrountou* and the *Καλακούτης* cases. According to the court's view the former dealt with refugee cards, while the latter with reduced military service.

While the supreme court did in length quote the passage by the ECHR judgment (quoted above) which concludes that there was a violation of art. 13 – it quickly concluded, that the aforementioned decision (of the ECHR in *Vrountou*) does not affect the correctness of the first instance decision (which relied on the *Dias United* precedent)'. In this way, a tradition that begun with the *Dias United* judgment continues unobstructedly to exist and exert influence in the Cypriot legal system, neutralising the activation of art.28, perpetuating unequal treatment based upon gender, and other unconstitutional distinctions.

Conclusion: Gender Equality in the Republic of Cyprus

Reaching the end of our examination and having collected a considerable number of cases showing administrative practices and the way they perceive structure and regulate gender relations in Cyprus, we can now look back and draw some conclusions out of our analysis. More specifically three concluding questions shall be posed: 1) How are gender relations legally structured in Cyprus and at what level is gender equality showcased? 2) How does art.28 of the constitution, the right to equality (or prohibition of discrimination), contributes (or fails to contribute) to the development of equality in Cypriot gender relations? In addition, does it meaningfully empower citizens to seek change? 3) What can we do to help?

Concerning the first question, we can, to an extent, say something about the level of gender equality in Cyprus by looking at the legal system, the practices it adheres and the way it distributes social benefits. Looking more specifically at the three clusters of cases that we have examined, we can determinately conclude that there is a deep differentiation between the way genders are treated and the social positions they are allocated. More specifically, we have seen how women are portrayed as the weaker gender, unable to support themselves or their children on their own; ultimately, a dependent upon her male partner and in need of support from him.

In turn, men are portrayed as the stronger gender, the bread winners, those who (should) take on the whole weight of the family, by supporting themselves, their wives, and their children. What should be noted is that this kind of patriarchal stereotype does not necessarily always benefit the male gender, even if they are portrayed as more socially integral for the family. On the contrary, this kind of story actually leads to arbitrary distinctions, which may benefit either of the genders, but rarely both of them.

Thus, from the cases we have explored, we have seen how when it comes to a survivor's pension, married women are assumed to be dependent upon, and supported by, their spouse and they qualify merely by living with him at the time of his death. Married men, on the other hand, who are assumed to be the supporters of the family, would have to prove that they were declared by the State as incapacitated and that their spouse was (financially) maintaining them. So, in this practice, men are actually put in the disadvantaged position. Because men are seen to be the stronger gender, and as supporters, they are less likely to receive support from the State for their own needs.

On the other hand, when it comes to the refugee cards, the opposite outcome was promoted. Exactly because displaced females were seen as less likely to utilise property or finances to build something capable of supporting children and a whole family, they were left out from this collection of benefits. The government, as it was argued in the *Vrountou* case, believed that women would escape the effects of being displaced merely by marrying someone to support them and, as such, their children needed less support from the State. Their children would just be supported by, and inherit from, their father.

Displaced males, on the other hand, were portrayed as more disadvantaged by the effects of displacement, since they found themselves without a financial capital capable of supporting their future wives and families. In this way, the children of male displaced persons received a line of benefits that the children of female displaced person did not. From this perspective, we can conclude that the level of gender equality in Cyprus is quite low and, from what the government argued in the *Vrountou* case, the administration of Cyprus does not seem to be aiming for gender equality at all.

This result in part can be attributed to the *Dias United* precedent and the treatment art.28 has been receiving in Cyprus; which brings us to our second question. As was already explicated, societies do not begin with gender equality, they slowly

develop to achieve it every time to a greater degree. Many times, this development is initiated from the bottom-up, starting from the citizens. Legally speaking, this usually happens by asserting the violation of constitutional rights; and, when it comes to gender equality, art.28 the right to equality or prohibition of discrimination is the most crucial tool.

The *Dias* precedent, though, prevents art.28 from activating; and this right has thus failed to contribute to the development of gender equality in Cyprus for at least the last 20 years. In this way, efforts for gender equality in Cyprus have lost one of their most, if not the most important tool at its disposal. Without art.28, there are very few, if any, avenues left within the Cypriot legal system that a victim of gender discrimination could follow. The applicants in the cases we have examined have certainly failed to find another avenue, and most of them, until today, were left without an effective remedy.

Only in the case of *Vrountou* was the applicant compensated, although she had to file a complaint with the ECHR – something that the rest of the applicants did not, unfortunately, do. The fact remains that even after the ECHR conviction, the Supreme Court continues to assert the *Dias* precedent which again leaves us at a dead end. While this conviction is a valid reason for the court to depart from its precedents, the Supreme Court in *Καλακούτης* failed to see a relation between the *Vrountou* conviction and every other case that asserts the *Dias* precedent.

And this brings us to the third and last question: 'what can we do about it?'. Well, legally speaking, there is not much that can be done. Constitutionally guaranteed rights, such as the right to equality, together with the separation of powers[37] are meant to perhaps ensure the only safe and unbiased legal avenue for citizens to seek change in their legal system. The neutralisation of this right, by the *Dias* precedent, in effect blocks this avenue; and the courts are denying an obligation they have *qua* the position they occupy within the separation of powers.[38]

As such, it is the primary obligation of these separated powers, and above all the legislative and judicial branches, to do something about this. The courts should either change their stance by diverging from their precedent, or the legislator should create a change in the structure of the Cypriot legal system. The Cypriot lawyers, though, should continue to fiercely assert art.28 without regard to the *Dias* prec-

[37] This has been examined in Hadjigeorgiou (no 14).

[38] Ibid.

edent – as they do – but they should also take on the responsibility of filing yet another complaint at the ECHR.

The fact that the rationale of this precedent has already been examined and was found to be a violation of art.13 and entails that whichever judgment, which asserts the *Dias* precedent, and taken to the ECHR will necessarily come out victorious, where Cyprus is in a clear breach of judgment. The fact that, till today, the supreme court judgments that have asserted the *Dias* precedent, after the *Vrountou* conviction, have not been submitted for examination at the ECHR is truly unfortunate; however, this might be attributed to the little attention this precedent, and cases of gender equality, have received legally and academically.

From this perspective, while the present examination raises certain red flags around the way genders are treated by the Cypriot legal system, it also identifies a clear problem and a solution. The *Dias United* precedent takes out of the fight the issue of gender equality, the most powerful legal weapon, and citizens are left without an effective remedy to the discriminatory treatment they receive due to their gender. The solution is in itself simple, yet difficult to achieve.

The *Dias United* precedent is a systemic problem of the internal, procedural rules, which enable the supreme court to function and exercise constitutional review. This is a fault, not of society *per se*, but of the Cypriot legal system. A fault, which, nevertheless, creates problems within society and allows problems within society to remain unaddressed. As long as this precedent is allowed to roam freely, uncritiqued and unchallenged, the legislator will continue to treat genders arbitrarily, as she/he sees fit, regardless of whether this entails an equal or differentiated treatment.

References

Maine, H. S., Ancient Law: Its Connection With The Early History Of Society And Its Relation To Modern Ideas (London: John Murray, 1861).

Malinowski, B., Crime and Custom in Savage Society (London: Keagan Paul, 1926).

Hayek. F., Law, Legislation and Liberty: A New Statement of The Liberal Principles Of Justice And Political Economy (Chicago: University of Chicago Press, 1973-79).

Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges Prosecutors and Lawyers (2003) available

at https://www.ohchr.org/Documents/Publications/training9Titleen.pdf (last accessed 23 September 2020).

Dworkin, R., Sovereign Virtue – The Theory and Practice of Equality (Cambridge: Harvard University Press, 2002).

Lurie, G., 'Proportionality and The Right to Equality' (2020) 21 German Law Journal 174.

Hadjigeorgiou, A., 'The Phenomenon of Arnisidikia in the Precedent of Dias United – A Threat To The Cypriot Rule of Law' (The Rule of Law Monitoring Mechanism, 14 July 2020) available at https://lawblog.uclancyprus.ac.cy/the-phenomenon-of-arnisidikia-in-the-precedent-of-dias-united-a-threat-to-the-cypriot-rule-of-law/ (last accessed 23 September 2020).