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Meeting the highest international standards, *The Cyprus Review* aims to widely disseminate its content and engage in an international dialogue on Cyprological issues. We are interested in topics pertinent to Cyprus and covering Social Sciences in the widest possible interpretation of the term, primarily in the fields of Anthropology, Demography, Economics, Education, European Integration, Geography, History, International Relations, Law, Linguistics, Philosophy, Politics, Psychology, Public Administration and Sociology. Manuscripts submitted for publication should be original and should not be under consideration elsewhere.

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Articles should range between 6000-12000 words, including notes and references.

- Documents should be in A4 format, double-spaced and in 12 pt typeface such as Arial or Times New Roman.
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- As manuscripts are sent out anonymously for editorial evaluation and peer review, the author's name should appear on a separate covering page. The author's full academic address and a brief biographical paragraph (approximately 60-100 words) detailing current affiliation and areas of research interest and recent publications should also be included.
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  Subheading I. **Left-Aligned, Title Case, Bold**
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- Please use footnote references. A full reference list (called References) of Primary and Secondary source material should appear at the end of the article. Reference lists should be alphabetised according to surname. Books, articles and chapters should adhere to the following format:

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Multi-author volumes:
As footnote: [1]C. Foley and W. I. Scobie, *The Struggle for Cyprus*, (Starpod, CA: Hoover International Press, 1975).
In References: Foley, C. and Scobie, W.I. (1975) *The Struggle for Cyprus*. Starpod, CA: Hoover Institution Press.

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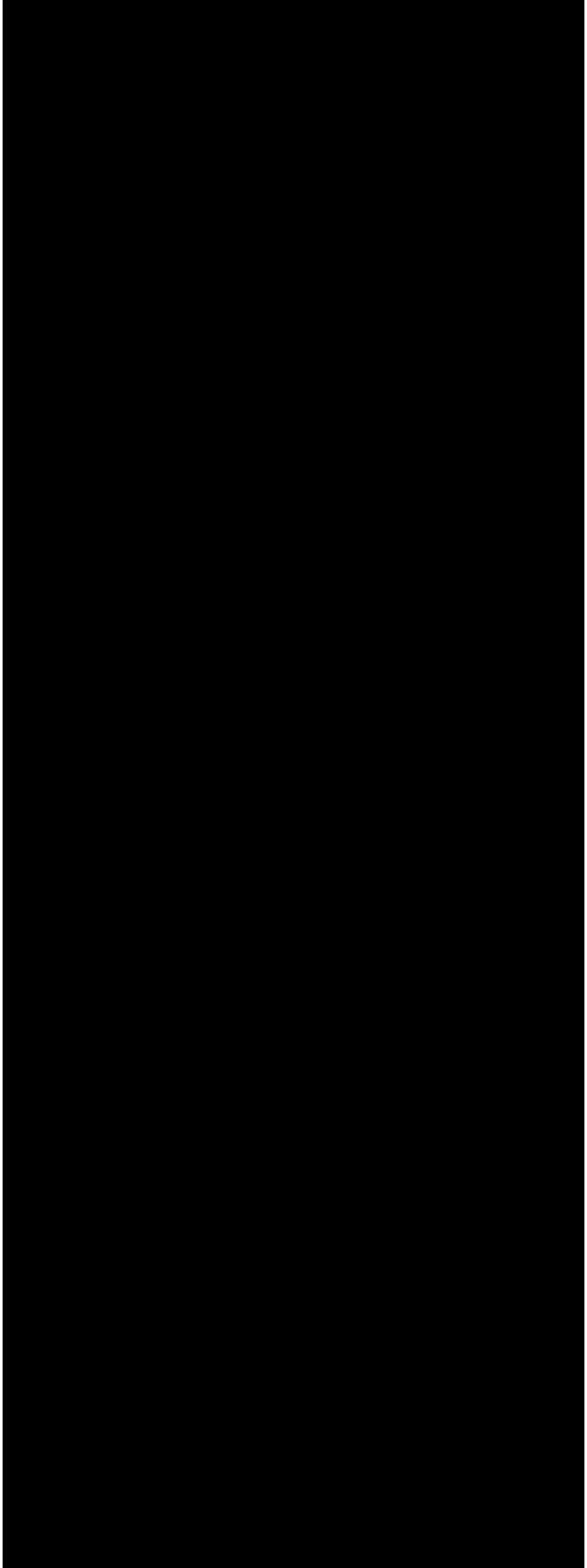
- Book Reviews are normally 2000 words maximum in length.
- Each author will receive a complimentary copy of the issue in which their paper appears in addition to a pdf of their contribution to use for additional reprints.



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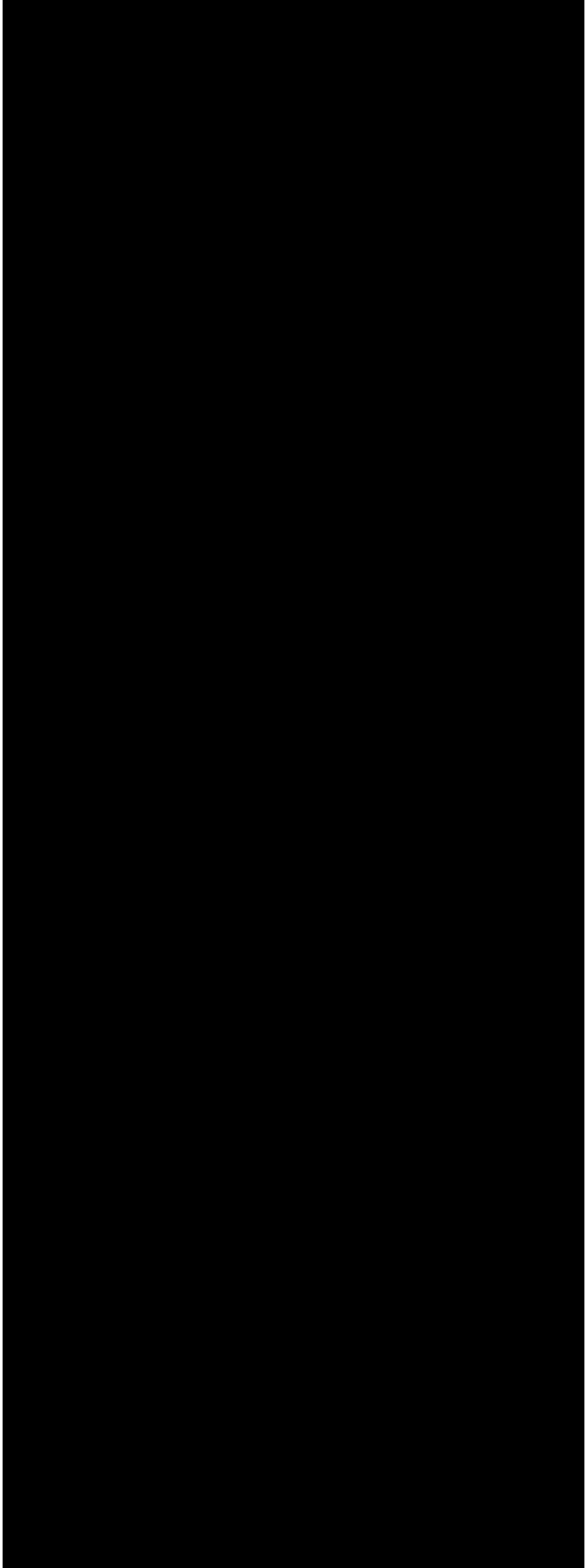

LETTER FROM THE EDITOR-IN-CHIEF

Dear Readers

Welcome to the first issue for 2018. It is my pleasure and great privilege to be heading the Editorial Team of this Journal as we approach the third decade of its life. It is also of course with great pleasure that I witness that, albeit its long history, *The Cyprus Review* has proved to be adaptable to the changing international academic environment in the new digital era. Having focused on the restructuring of the Journal and steering it towards a new direction in the past two years, I am now in a position to announce a return to our traditional biannual publication cycle. This means that this issue will be followed by a fall 2018 issue later this year.

I am delighted to welcome a new Assistant Editor to the team: Maria Hadjiathanasiou. Maria is a historian, whose research addresses imperial and colonial history, cultural history, insurgency studies and propaganda media. This issue contains an article authored by Maria, which explores the British colonial government's early steps in cultural propaganda in Cyprus, through an examination of Cyprus' participation in the British Empire Exhibitions.

This issue features, for the first time since its restructuring, a Guest-Edited Section. This is entitled *Current Trends in Education*, a seminal topic in Cyprus today. My appreciation for this section goes out to its Guest Editor, Prof. Panayiotis Angelides, Dean of Education at the University of Nicosia. In his short editorial note, which precedes the Section, you will find more details on the Guest-Edited Section's rationale and the articles therein.

Given that this is our Journal's 30th volume, there are more articles than is usually the case in a typical issue of *The Cyprus Review*; we have allowed for a bigger volume this year as a way of celebrating our 'pearl' anniversary. Turning to a systematic overview of the contents of this issue, it is evident that, apart from the book reviews, this embraces a diverse selection of stimulating articles, which implement in practice the expansion of our Journal's major scientific objective, namely multidisciplinarity.

Tsakiris analyses the challenges facing EU's energy security in the natural gas sector since 2013, arguing that the new gas discoveries of the Eastern Mediterranean could transform the region to a new source of simultaneous supply and transit diversification for the EU. In this context, the paper analyses the gas policies of Cyprus (as well as those of Egypt and Israel) in order to illustrate their net export capacities while highlighting the evolution of EU energy policy-making vis-à-vis the Eastern Mediterranean since 2014. This is followed by an article by Kontos and Bitsis, which examines the case of the Republic of Cyprus' quest for exploring natural gas reserves in its Exclusive Economic Zone amidst Turkey's threats and mobilisation of naval military means, under the lens of coercion and deterrence theory, in an attempt to evaluate the effectiveness of the use of threats by Turkey towards the Republic of Cyprus.

Adamides' article examines how states that face an overarching existential threat may be at a

disadvantage when developing their National Security Strategies, as they may tend to formulate them around a single source of threat, thus missing out on other potential threats that may be important for a National Security Strategy. In his article, Papaioakeim examines the rise of the Republic of Cyprus' defence diplomacy. He argues that a series of different dynamics and regional changes led to the gradual development of the Republic's defence diplomacy from 2004 onwards. He sustains that small states can exercise defence diplomacy initiatives at a satisfactory level and in the limit of their capabilities.

Papastylianos' article focuses on the Cypriot doctrine of necessity – which has been enshrined in the Supreme Court's *Ibrahim* judgment – within the context of emergency discourse, and explores how a unique emergency shaped a peculiar type of emergency law. This is followed by Konstantinidis' examination of the principle of horizontal effect of fundamental rights as this has been applied in Cypriot case law, with the landmark case of *Yiallouros* as a main point of reference.

Stratilatis investigates the avoidance of constitutional imposition and democratic constituent power in divided, conflict-ridden societies. He argues that, the invocation of the constituent power of 'We the People' in such societies entails important risks, and one should take recourse to its rhetorical use only upon prudential, consequentialist considerations, which should include the potential possible exclusionary effects of the nationalist version of constituent power.

Emilianides analyses the current review system of the Supreme Court of Cyprus and identifies the existing challenges facing the appeal process in the Cypriot judicial system. There is little doubt, he argues, that the right to appeal is substantial for the proper functioning of justice; yet the current system does not effectively apply a fully-fledged right to appeal. On the contrary, the Supreme Court restricts itself to the determination of legal points and the consideration on whether the decision of the trial court was within the wider limits of the exercise of its discretion.

Stamatoudi examines Cypriot copyright law. More specifically, she investigates the case law of the Court of Justice of the European Union and draws conclusions as to how this affects copyright originality. She concludes that Cypriot copyright law has to be amended to meet the requirements of EU copyright law. This is followed by Plevri's paper, which focuses on Cypriot mediation legislation and the actual practice of mediation in Cyprus. She points to the emergence of problems and gaps in Cypriot mediation legislation, and makes proposals for reform, as a way of improving the legislation and of promoting mediation in practice. Turning to the field of employment law, Dimarellis and Ioannou examine the principle of equal treatment between women and men in the Cypriot and Greek legal order. Statistical data and deeper analysis point to a pathogenesis in the labour markets, which are strongly characterised by imbalances in family and professional life, social stereotypes and occupational segregation.

Argyriou investigates the imperialistic foundations of British colonial rule in Cyprus, suggesting that it was only as late as the beginning of the 1950s that Britain made efforts to promote colonial prosperity and thus Cyprus was condemned to backwardness. Finally, in his article, Kentas makes a

critical assessment of the Cyprus Protocol Annexed to the UK's Withdrawal Agreement, arguing that the Protocol echoes some major elements of a metacolonial realm in Cyprus.

Our spring 2018 issue implements in practice the expansion, in the last two years, of our Journal's major scientific objective, namely refocusing our coverage towards a more multidisciplinary approach. The inclusion of articles that come from different disciplinary (social, political, economic, legal, historical) and methodological approaches (archival research, formal theory, philosophy, quantitative, qualitative, mixed-methods) has as an ultimate aim to encourage dialogue with and between our authors.

I am confident that with my revamped team of qualified and motivated editors, including a tireless copy-editor working behind the scenes, we will stay true to our mission: to continue to provide an outlet for systematic, multidisciplinary, analytical research in a Cyprological context.

Christina Ioannou
Editor-in-Chief

Contributors

Constantinos Adamides is an Assistant Professor of International Relations at the University of Nicosia, focusing on security studies. He also serves as the director of the Univerity's Diplomatic Academy. Dr Adamides frequently works with the Ministries of Defense and Foreign Affairs, as well as the National Guard. Furthermore, he was also appointed by President Anastasiades as a Member of the first Geostrategic Council of the Republic of Cyprus (2014-2018), contributing to the development of reports and analysing issues pertinent to geopolitical developments. He holds a PhD in Political Science and International Studies, an MA in Diplomacy and International Relations and an MBA in Finance.

Panayiotis Angelides is a Professor and the Dean of the School of Education at the University of Nicosia, Cyprus. Previously he served as an elementary school teacher. His research interests are focused on finding links between inclusive education, teacher development and school improvement. A particular feature of this research is to develop collaborative approaches that have a direct and immediate impact on teachers' practice. His latest book is entitled *Pedagogies of inclusion* (Diadrasi, 2019).

Sophia Argyriou holds a PhD from the Department of Political Science and History of Panteion University. The title of her PhD thesis is 'The national movement of the Greek Cypriots during the last period of British colonial rule 1945-1960'. She studied English Language and Literature at the University of Athens and has been a teacher in public schools since 1993. In 2015, she was appointed by the Greek Ministry of Education as a member of the committee for the study guides of history school books. Her main research interests focus on the history of Cyprus and on the study of nationalism, colonialism and imperialism.

George Bitsis is an Officer of the Greek Army (Captain) and a Phd candidate at the University of Nicosia, Department of Politics and Governance. His research interests revolve around IR Theory and Strategic Studies, with special focus on issues related to the Eastern Mediterranean, such as Greek-Turkish Relations and the Cyprus Issue. He has a Master's degree in Strategic Studies, from the University of Macedonia, Thessaloniki.

Konstantinos Dimarellis has a PhD degree in Labour Law from the Aristotle University of Thessaloniki. He has been a Lecturer since 2015 at the University of Nicosia and has been a guest lecturer at the Universities of Stirling (Scotland)

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Achilles C. Emilianides is Professor of Law and Dean of the School of Law of the University of Nicosia, as well as a practicing advocate. He is the Editor-in-Chief of the *Cyprus and European Law Review* and the Chair of the Royal Commonwealth Society Cyprus Branch. Major recent book publications include: *An Introduction to the Bibliography of Cypriot Law* (2017), *Labour Law in Cyprus* (2016), *The Republic of Cyprus and the Doctrine of Necessity* (2016), *Elements of Greek and Cypriot Law on Religion* (2016), *Cypriot Succession Law*(2015), *Media Law in Cyprus* (2015), and *Private International Law in Cyprus* (2015).

Maria Evagorou is an Associate Professor at the University of Nicosia. Her research focuses on exploring and enhancing students' and pre-service teachers' argumentation especially in socio-scientific issues. She has participated in a number of EU funded projects. She was the local PI for the Engage Project (FP7) focusing on responsible research and innovation, and is currently the local PI for DIALLS (Horizon 2020) aiming to promote dialogue and argumentation. Before returning to Cyprus, Maria worked at King's College London as a researcher at the Center for Informal Learning and Schools (CILS) and as a Lecturer at King's College London.

Maria Hadjiathanasiou works as a Research Associate and an Adjunct Lecturer at the University of Nicosia and a Visiting Lecturer at the University of Cyprus. She received her PhD from the University of Bristol, UK. She wrote her thesis on propaganda and the Cyprus Anti-Colonial Revolt, 1955-1959. Her current research interests include imperial studies, colonial insurgencies and decolonisation, propaganda and the media, cultural policy and cultural diplomacy.

Christina Hajisoteriou is an Assistant Professor of Intercultural Education at the University of Nicosia in Cyprus. She was awarded a first class honours BA in Primary Education by the School of Primary Education of the National and Kapodistrian University of Athens in Greece. In 2006, she received her MPhil in Educational Research from the University of Cambridge in the UK. In 2009, she received her PhD in Education concentrating in the field of Intercultural Education also from the University of Cambridge. Her research focuses on intercultural education and its intersection with Europeanisation and globalisation.

Christina Ioannou is Associate Dean of the School of Law of the University of Nicosia and Associate Professor of European Politics and Labour Law. She holds a PhD and MA from the University of Manchester and a BSc from the University of Warwick. Her areas of specialisation include labour law, European integration, Europeanisation and social policy. Her latest publications include articles in international peer reviewed journals, book chapters and the book monograph *Labour Law in Cyprus*, which is published as part of the International Encyclopaedia of Laws Series (Kluwer Law International: Hague, 2016).

Theodosis Karageorgakis is specialized in the field of educational technology. He currently works as an IT Consultant of QLS as well as an IT expert at Vassalou Learning Center in Heraklion, Crete. He has also written articles that have been published by various publishers like eLearning Industry and ELT News, as well as his personal website, *educraft.tech*. Theodosis holds a Bachelor's degree in Applied Informatics and Multimedia and a Master's in Educational Technology from the University of Nicosia.

Giorgos Kentas holds a PhD from Vrije Universiteit, Brussels. He is an Associate Professor and now Visiting Faculty at the Department of Politics and Governance, School of Law, University of Nicosia. He is the coordinator of the Master's Programme in Public Administration. His research focuses on the theory and practice of politics and governance.

Petros Konstantinidis is a practicing advocate. He holds a Bachelor's of Law (LLB) from the University of Athens, a postgraduate degree (LLM) in European Law and Integration from the University of Leicester and a postgraduate degree (LLM) in Human Rights and Social Justice from the University of Nicosia. He is a PhD candidate in Law and a Adjunct Lecturer at the University of Nicosia. He is the author of the book *The Horizontal Effect of Fundamental Rights in the Cypriot Legal Order* (Hippasus Publishing, 2016). His research interests are focused on constitutional

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Michalis Kontos is an Assistant Professor at the Department of Politics and Governance, School of Law, University of Nicosia. His research interests are international relations and strategic studies, with special focus on great power politics. He has also published on international politics, European integration, Eastern Mediterranean and Cyprus politics. He served as a member of the Geostrategic Council of the Republic of Cyprus (2014-2018). He is a board member of the Cyprus Center for European and International Affairs, University of Nicosia. He represents all participating Cypriot universites on the Coordinating Committee of the Black Sea and Eastern Mediterranean Academic Network (BSEMAN).

Stergios Mitas is a Lecturer in Legal Philosophy and Methodology at the School of Law, University of Nicosia. He authored the monograph *Solidarity as a Fundamental Legal Principle*, ed. Sakis Karagiorgas Foundation [Scientific Library Series, Athens, 2016], as well as many journal articles in the fields of legal philosophy, political philosophy and constitutional law.

Lefkios Neophytou has a Bachelor's in Educational Sciences (1999), an MA in Educational Administration and Curriculum Development (2004), and a PhD in Curriculum and Instruction (2009). He is an Adjunct Faculty member at the University of Nicosia. His research focuses on curriculum development and curriculum theory, instructional methodology and teacher training.

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Marinos Papaioakeim is a PhD candidate in Diplomacy and International Relations at the Department of Social and Political Sciences of the University of Cyprus, and Project Coordinator/Research Fellow at the Diplomatic Academy of the University of Nicosia. His PhD thesis examines the Defence/Military Diplomacy in Protracted Conflicts: The Case of Cyprus. His main research interests include defence and

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Elena Papanastasiou is Associate Dean of the School of Education, University of Nicosia. She received her PhD in Measurement and Quantitative Methods from Michigan State University and an Honors BSc in Elementary and Kindergarten Education from The Pennsylvania State University. Dr Papanastasiou has also held academic positions at the University of Kansas and the University of Cyprus. She currently serves as the General Assembly representative of Cyprus in the International Association for the Evaluation of Educational Achievement (IEA), while in 2014 she was elected to the Standing Committee of the IEA. In 2018 she was awarded the status of Fellow of the Association of Educational Assessment-Europe.

Christos Papastylianos is Assistant Professor of Public Law at the University of Nicosia School of Law. His main academic and research interests focus on Greek and Cypriot constitutional history, nationality, citizenship, rights of foreigners and constitutional aspects of the European Union. He is the author of a monograph entitled *Conditions and limits regarding the evolution of EU towards a distinct constitutional order* (Sakkoulas Editions, 2008). He recently co-authored with Achilleas C. Emilianides and Costas Stratilatis, a book entitled *Republic of Cyprus and the Doctrine of Necessity* (Sakkoulas Editions, 2016).

Anna Plevri obtained a law degree, an LLM and a PhD from the Law School of Aristotle University, Thessaloniki and an LLM on International Law from the Law Department of the University of Thrace. She is a licensed Attorney-at-Law in both Greece and Cyprus, an accredited Mediator on Civil, Commercial, Family, Workplace Disputes and ODR, a certified Mediator's Trainer and an Arbitrator (MCIArb). She is the author of two books, one on civil procedure and one on arbitration in the energy sector (Sakkoulas Publications, Greece). Since 2014, she has been a Lecturer of Private Law and ADR at the School of Law of the University of Nicosia.

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Stavroula Valiandes is an Adjunct Faculty member at the University of Nicosia. She holds a PhD in Curriculum and Instruction, in which she studied differentiated instruction in mixed-ability classrooms. Originating from her PhD studies, she has a strong interest in teacher-initiated projects dealing with the promotion of effective teaching via differentiated instruction.

Anastasia Yiangou holds a PhD from the University of London. She is a historian of Cyprus under British rule. Her publications focus on the Second World War in Cyprus, on Church-State relations, on the enosis movement and politics under colonial rule. She has taught at the University of Cyprus and the Open University Cyprus.

The Importance of East Mediterranean Gas for EU Energy Security: The Role of Cyprus, Israel and Egypt

Theodoros Tsakiris[1]

Abstract

This paper analyzes the challenges facing EU's energy security in the natural gas sector since 2013. Despite the improvement of the Union's internal policy coordination, interconnectivity and market integration, the EU is becoming increasingly dependent on its existing primary supplier, Russia's Gazprom, while at the same time alternative sources of gas have become less reliable because of their associated political risk. In this regard, Mediterranean supplies were particularly affected by the 2011 Arab Revolutions. The paper argues that the new gas discoveries of the Eastern Mediterranean could transform the region to a new source of simultaneous supply and transit diversification for the EU. In this context the paper analyzes the gas policies of Egypt, Israel and Cyprus to illustrate their net export capacities while highlighting the evolution of EU energy policy making vis-à-vis the Eastern Med since 2014. It concludes with a comparative analysis of the different export options for the evacuation of East Med Gas to the EU.

Keywords: EU energy security, geopolitics of natural gas, East Mediterranean gas

The Status Quo of EU Gas Security: In Dire Need of Supply Diversification

In late 2008, the Directorate-General for Energy and Transport of the European Commission prepared a study that underlined the importance of improved interconnectivity for the future of EU gas import security, which highlighted the *then* current as well as the projected flows of gas exports to the EU for 2009, 2010, 2020 and 2030. The results of the study were incorporated into the EU's 2008 Strategy for TREN (Trans-European Energy Networks),[2] and constituted part of the background paper that scientifically corroborated the Commission's EU Security of Gas Supply Regulation (R.994/2010).[3]

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1 Theodoros Tsakiris is Assistant Professor of Energy Policy and Geopolitics at the School of Business, University of Nicosia.

2 European Commission, Directorate-General for Energy and Transport, *Interconnecting Europe: New Perspectives for Trans-European Energy Networks* (Brussels: Office of the Official Publications of the European Communities, 2008).

3 European Union, *Regulation No 994/2010 of the European Parliament and of the Council of 20 October 2010, concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC*

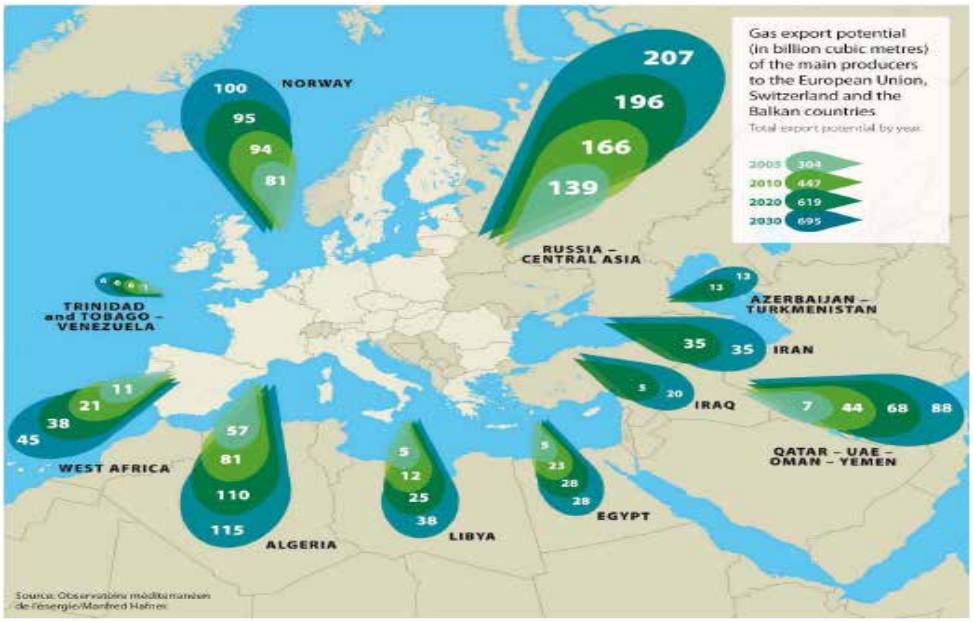


Figure 1: Gas Export Potential to the European Union (EC, 2008, 7)

That regulation was the first serious attempt to organize an EU-wide response to natural gas supply interruptions, like the one the Union faced in the winter of 2008-2009 between Russia and Ukraine. The regulation attempted to forge a unified and comprehensive reaction at the Union level that was based on energy solidarity, improved interconnectivity and the promotion of synchronized prevention and emergency action plans among the various member-states on a regional basis. One of the principal conclusions of R.2010/994 was that, although the EU's net import dependency was set to increase over the medium to long-term due to the projected drop in domestic gas supply, the Union would be able to cope with future risks if it increased its internal interconnectivity, completed the integration of its gas markets and improved the diversification of its import sources and import routes.

It also advocated the building of more LNG (Liquefied Natural Gas) import terminals to accommodate the expected flow of additional LNG imports that were considered to be safer and more flexible from a security point of view than piped gas that had to cross through the terrain of several transit countrie.[4] This conclusion

(Brussels: European Union, 2010), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX: 32010R 0994&from=EN.

4 I. Dreyer and G. Stang, *Energy moves and power shifts: EU foreign policy and global energy security* (Paris: EU Institute for Security Studies, 2014).

is still valid today. In the ten years since the last major EU energy supply crisis, both internal interconnectivity and market integration have improved in the Union boosted by the Commission's EU Energy Union strategy. (Raines and Tomlinson, 2016).[5] New pipelines and LNG terminals were constructed particularly in the Eastern Member States that markedly improved their import diversification. Market integration between Member States ameliorated thanks to the expansion of physical interconnectivity as hub-based gas pricing also expanded across EU markets, helping to decrease the arbitrary indexation of gas sales to crude oil and oil product prices that was imposed onto EU consumers by gas exporters, including Gazprom.[6] What has not improved though is the level of its net import dependency and the associated political risk of this dependency as negative projections of a reduction in future indigenous supply materialized at a quicker pace than originally anticipated.

In the *2014 EU Energy Security Strategy*, the Commission projected an increase in the Union's net import dependency over a period of 20 years from around 62% of demand in 2010 to 65% in 2020 and 72%-73% in 2030.[7] Unfortunately, the collapse of the domestic EU gas supply has been much steeper. According to data processed from the BP Statistical Review of World Energy over the last five years, what was the projected level of Net Import Dependency (NID), the net volume of gas imports, after domestic production is deducted for 2030, was reached in 2016. More importantly the EU's NID continues to expand, as the latest available commercial data for 2017 suggest.[8]

Despite the expansion of US LNG exports to isolated EU markets, most notably in the Baltic region and Poland that have markedly improved their import diversification, the Union's net import dependence on LNG has been decreasing steadily since 2010. LNG imports have dropped as a share of total EU imports, from a high of 22% in 2010 to a low of 15.6%, which is estimated at 48.7 bcm in 2017, according to data compiled by the European Commission, IHS, and BP.[9]

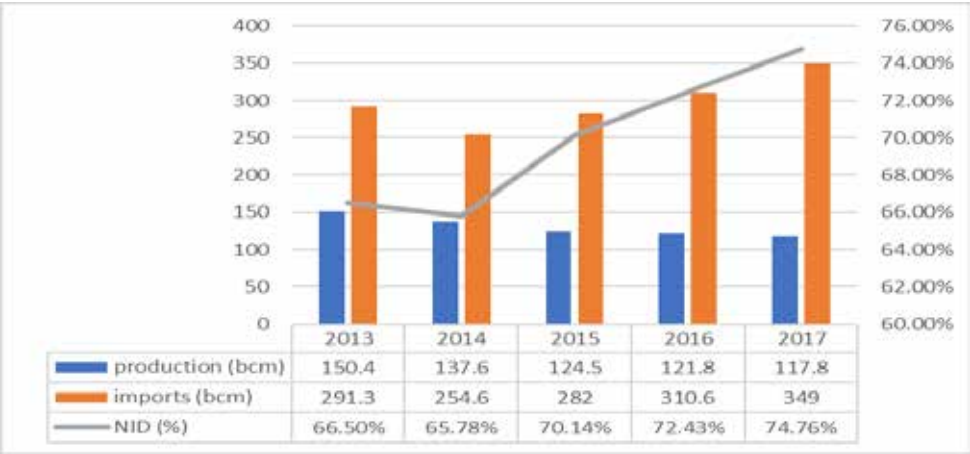
5 T. Raines and S. Tomlinson, *Europe's Energy Union Foreign Policy Implications for Energy Security, Climate and Competitiveness* (London: Chatman House Press 2016).

6 G. Stang, *Securing the Energy Union: Five pillars and five regions* (Paris: EU Institute for Security Studies, 2017).

7 European Commission European Commission, *Commission Staff Document: In-depth study of European Energy Security Accompanying the document Communication from the Commission to the Council and the European Parliament: European energy security strategy*, {COM(2014) 330 final}, (Brussels: Office of the Official Publications of the European Communities, 2014), 13.

8 BP, *BP Statistical Review of World Energy 2017* (London: BP, 2018), 28-29.

9 European Commission, *European energy security strategy*, 47; BP (2018), 28-29, 34.



	2013	2014	2015	2016	2017
production (bcm)	150.4	137.6	124.5	121.8	117.8
imports (bcm)	291.3	254.6	282	310.6	349
NID (%)	66.50%	65.78%	70.14%	72.43%	74.76%

Figure 2: Rise of EU Natural Gas Net Import Dependency (BP 2018, 28-29)

The decrease in LNG imports has increased concerns over the political risk of gas supplies to the Union. LNG is the most flexible source of gas imports since the importer has a far greater portfolio of potential exporters to choose from compared to pipeline gas, which corresponds to 85% of total EU imports. This 85% is essentially controlled by three suppliers: Russia, Norway and Algeria. Moreover, the EU's strategic objective of diversifying from its principal supplier, Russia, and its gas pipeline export monopoly, Gazprom, has been undermined by the fact that Russian gas remains very competitive when compared to newer alternative supplies, and by the construction of viable alternative export routes that directly linked Gazprom with its primary EU markets in Central Europe via the Nord Stream pipeline system that bypasses Ukraine.[10]These bypasses have reduced the cost of transit for Russian gas to traditional EU markets and have eliminated the political risk of that transit through Ukraine. The absence of Nord Stream 1, which was commissioned between 2011-2013, would only have increased the possibility of a major energy supply crisis for the EU, given the two supply/transit interruptions of 2006 and 2009 and the deteriorating relations between Russia and Ukraine, following the annexation of the Crimea and Russia's support for the Donbass secessionist movement after 2014.

Despite the worsening of EU-Russian political relations, the gas trade between the two sides is booming and it is important to note that EU sanctions in 2014 specifically refrained from targeting the Russian gas sector. US and EU sanctions on Russia, imposed in the aftermath of its annexation of the Crimean Peninsula, failed to curb

10 J. Henderson and S. Sharples, *Gazprom in Europe* (Oxford: Oxford Institute for Energy Studies, 2018), 3-21.

Russian oil and gas production, which keeps expanding and reaching record highs every consecutive year since 2014 (Coote, 2018).[11]

The emergence of Germany as the preeminent transit country for Russian gas in the EU has stabilized the existing EU-Russian gas partnership on a long-term basis, but has also created the potential for additional Russian gas exports to the EU, especially after the projected completion of the second Nord Stream pipeline network in late 2019. This potential is already materializing. As indicated by Figure 3, despite EU efforts to diversify from Gazprom, since 2013 Russian gas exports have been steadily increasing in both absolute and relative terms.

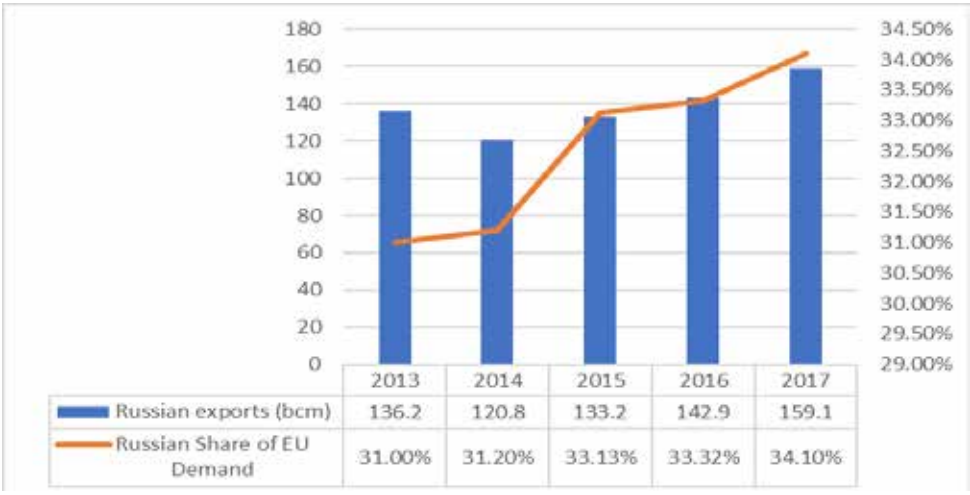


Figure 3: Russian Gas Exports to the EU (BP, 2014-2018)

The significance of Russian exports for EU gas security is further illustrated by the fact that Norwegian, Algerian and Libyan exports combined barely match Gazprom's market share in the EU. As illustrated by Figure 4, Norwegian and Algerian supplies expanded between 2013 and 2017, but at a slower pace compared to Russian exports, adding 17.7 bcm/y to their cumulative supply. Exports from Libya have halved compared to 2010, and Egyptian supplies were all but eliminated.

Russian net exports increased by 23 bcm/y between 2013 and 2017, more than double the 10 bcm/y of Azeri gas the EU expects to import by 2020 from the Southern Gas Corridor route, through the Trans Anatolian (TANAP) and Trans Adriatic (TAP) pipeline systems, which connect Azeri offshore gas reserves in the Caspian Sea to

11 B. Coote, *Impact of Sanctions on Russia's Energy Sector* (Washington D.C.: The Atlantic Council Press, 2018).

Southeastern Italy via Turkey, Greece and Albania. This is a far cry from the initial

	2013	2014	2015	2016	2017
Norwegian Exports (bcm)	103.3	101.7	109.6	109.9	112.4
Algerian Exports (bcm)	33.8	29.4	29.1	42.1	42.4
Libyan Exports (bcm)	6.5	5.2	6.5	4.4	4.4
Cumulative Share of EU Demand	31.84%	33.98%	34.74%	34.06%	34.09%

Figure 4: Norwegian, Algerian and Libyan Gas Exports to the EU (BP, 2014-2018)

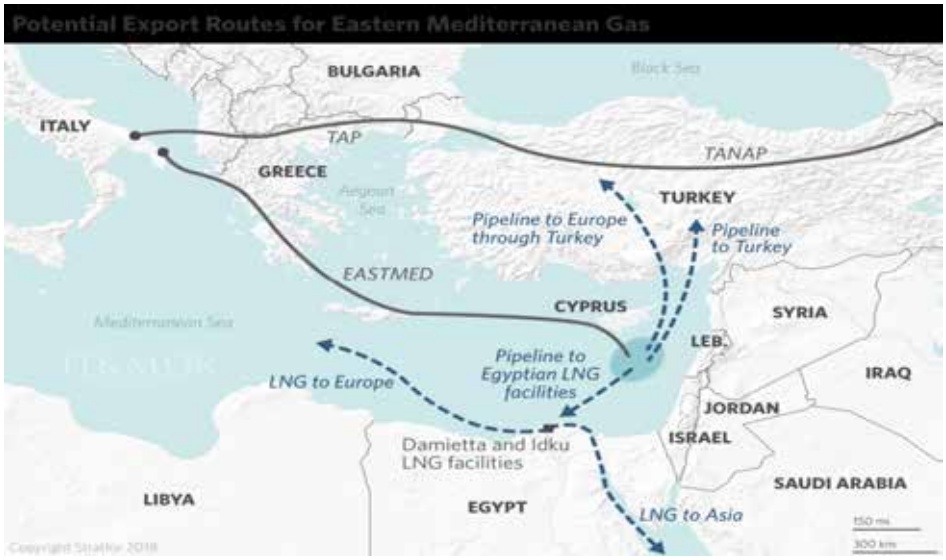
expectations to import more than 30 bcm/y from the region, a scenario which would have required the exportation of Iranian and/or Turkmen gas through Turkey.

Even if Azeri gas were available today, Norwegian, Algerian, Libyan and Azeri exports combined would account for 38.75% of EU demand for 2017. Gazprom alone accounts for 34.1% of net EU consumption. The need for new sources of supply diversification remains as critically important as it was ten years ago, when the 2009 Ukrainian crisis galvanized the EU's efforts to materialize its Southern Gas Corridor Strategy.

This goal was only partially achieved in 2013 through the commitment of around 16 bcm/y of Azeri gas to the TANAP/TAP pipelines, of which only 10 bcm/y will reach EU markets.[12] This achievement, which has its own serious limitations given that China controls Turkmenistan's gas sector and the deterioration of US-Iranian relations, which will seriously limit the availability of non-Azeri gas exports to the Southern Corridor over the next decade,[13] has already been seriously undermined by developments in this decade.

12 D. Koranyi, T*he Southern Corridor: Europe's lifeline?* (Rome: Instituto Affari Internazionali, 2014).

13 S. Pirani, *Let's not exaggerate: Southern Corridor Prospects to 2030* (Oxford: Oxford Institute for Energy Studies, 2018), 11-22.



Map 1: Gas Export Options from the Caspian Sea and the Eastern Med (Gorvett, 2018)[14]

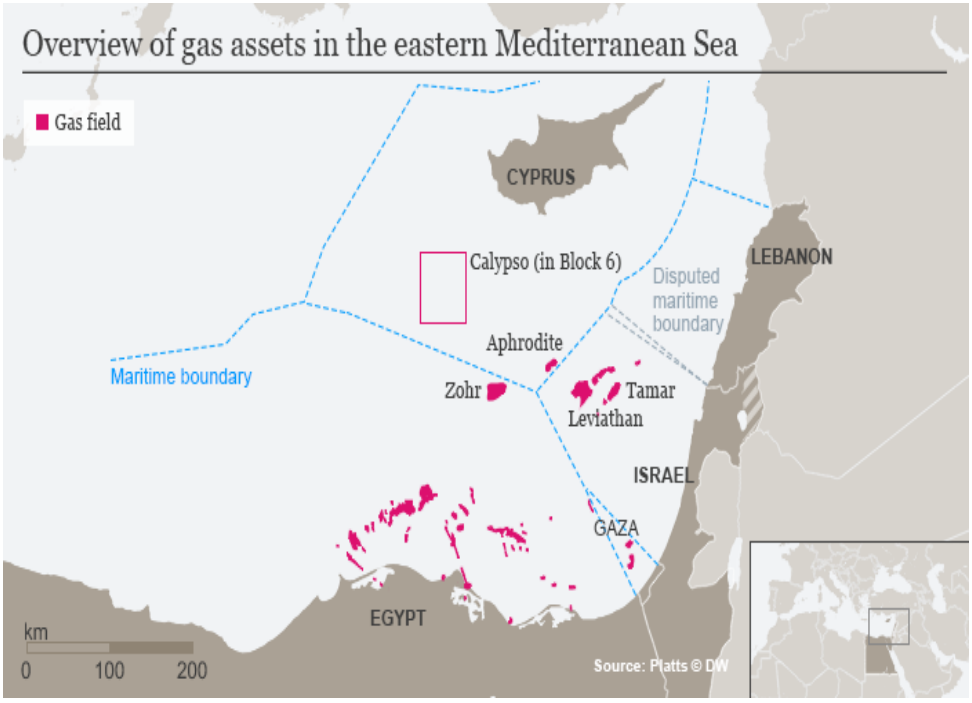
What the EU gained from its diversification efforts, through tapping into Azeri reserves, it lost due to the curtailment of Libyan exports and the loss of Egyptian supplies to the EU, both victims of the region's structural destabilization in the aftermath of the 2011 Arab revolutions.

The discovery of new gas reserves in the Exclusive Economic Zones of Israel, Cyprus and Egypt could transform the region into a new source of supply for the Union, while cementing regional alignments into a more structured framework of cooperation between Cyprus, Greece, Israel and Egypt, which could stand against the rise of revisionist powers in the wider Levant area, including Turkey and Iran. How significant, though, is the region's net export potential, given the importance gas plays in the energy policies of Egypt and Israel? What are the prospects for the introduction of natural gas in the Cypriot energy system and how would that affect the island's export capacity?

14 J. Gorvett, 'Risks Posed by Competing Claims to Eastern Mediterranean Oil and Gas Resource', *Washington Report on Middle East Affairs*, (2018, June/July), 34-35.

The Export Potential of the Eastern Mediterranean and Its Significance for the Region

Contrary to the overemphasis put on Israeli and Cypriot gas discoveries, the Eastern Med is not a new hydrocarbons producer. More than a decade before the Tamar discovery (2008) in the Israeli EEZ, Egypt was already a significant gas producer and the region's principal reserves holder. In 1990, Egypt owned 0.4 trillion cubic meters (tcm) of proven *in situ* natural gas reserves, almost half of Israel's current reserve basis. In 2000, at the time Israel made its first commercial discovery in the now depleted Mari B field, estimated to contain 0.028 tcm, Egypt controlled 1.4 tcm. In 2010, by the time Israel had completed its stream of discoveries, including Tamar (0.318 tcm) and Leviathan (0.5 tcm), Egypt still controlled 2.2 tcm.



Map 2: East Med Gas Proven Reserves (Deutsche Welle)[15]

15 Deutsche Welle, 'Gas, pipeline dreams and gunboat diplomacy in Mediterranean', (2018, April 2), *DW*, available at https://www.dw.com/en/gas-pipeline-dreams-and-gunboat-diplomacy-in-mediterranean/a-43228234.

One year before the revolution that overthrew Mubarak from power, Egypt was producing 61.3 bcm/y and was exporting around 15 bcm/y, of which around one-third was exported to the EU in the form of LNG.[16] Even before the super-giant Zohr discovery (0.84 tcm) in August 2015, Egypt was unquestionably the epicentre of the Eastern Mediterranean in terms of reserves. Between 2010 and 2015, despite a period of unprecedented political turmoil and very low domestic gas prices, Egyptian gas reserves in the offshore Nile Delta kept expanding, thanks to the Atoll and WMDW (West Med Deep Water) discoveries, estimated to contain respectively 0.14 tcm to 0.196 tcm and 0.14 tcm.

In less than two years, between 2014 and 2015, Egypt, as a result of the Zohr, Atoll and WMDW discoveries, added to its proven reserves basis *more than the combined discoveries* of both Cyprus (0.125 bcm) and Israel (0.894). More importantly, there are still many areas of the currently delimitated Egyptian EEZ that have yet to be explored, especially in the deep, offshore areas that are adjacent to the Cypriot EEZ. The political and economic crisis that Egypt has been going through since 2011 has not allowed Cairo to utilize its expanding reserve basis to re-emerge as the region's pivotal exporter, although it is likely that Egypt will once again become a marginal net exporter by the early 2020s.[17] Already since September 2018, Cairo decided to direct 2 bcm/y of gas from Zohr to the Damietta liquefaction plant for exports expected to begin in 2019.[18] This decision signaled the success of Egypt's gas policy that is expected to eliminate all imports in 2019.[19] This success was based on its decision to push forward with the monetization of the Atoll, WMDW and Zohr fields. Zohr began production in December 2017, which was in record time after less than 2½ years after its discovery. As a result, Egyptian domestic output increased by more than 60% in less than two years. According to Egyptian Oil Minister Tarek el Molla,[20] the natural gas sector of Egypt accounts for 15% of the country's GDP. Egypt is already using more natural gas than oil in its energy mix and this is set to expand as the government reduces energy subsidies and progressively deregulates its domestic gas market allowing for more competition.[21] Part of its strategy is to emerge as the region's

16 BP, *BP Statistical Review of World Energy 2011* (London: BP, 2011), 20, 22, and 29.

17 BNP Paris Bank, *Egypt: Bid to become a regional energy hub* (BNP Paris Bank, Economic Research Division, 2017), 23-26.

18 M. Adel, 'Damietta LNG plant exports gas again after six-year suspension', *Daily News Egypt*, (2018, September 4), available at https://dailynewsegypt.com/2018/09/04/damietta-lng-plant-exports-gas-again-after-six-year-suspension.

19 A. Ismail, 'Egypt sets sights on doubling natural gas output by 2020', Reuters, (2017, July 17); A. Ismail, 'Cutting back on Imported Gas', *Al-Ahram Weekly* (2017, May 24).

20 T. El-Molla, 'Natural Gas accounts for 15% of Egypt GDP', *Egypt Oil & Gas Newspaper* (2018, November 28), https://egyptoil-gas.com/news/el-molla-natural-gas-accounts-for-15-of-egypt-gdp.

21 BNP, 'Egypt: Bid to become a regional energy hub', 25-26.

natural gas hub, through the construction of additional connecting infrastructure with Cyprus and Israel for the export of gas from Aphrodite, Tamar and Leviathan to its two LNG liquefaction plants in Idku and Damietta.[22] Israeli gas developers, Noble and Delek, signed the first agreement to that effect in February 2018 with the Egyptian gas trading company Dolphinus for the export of 64 bcm between 2019 and 2030.[23] This contract is estimated to be worth $15 billion. Another agreement between the developers of the Aphrodite field and the operators of the Idku terminal is expected to be completed in the first quarter of 2019. The Cypriot contract is expected to export 120 bcm over a period of 17 years.

If the impact of Zohr was crucial in helping Egypt overcome its economic crisis, the discoveries of Tamar and Leviathan had a revolutionary effect on Israel's economy and its energy security. They not only significantly reduced Israel's electricity costs, but also expanded the country's ability to depend on its domestic energy resources for the first time in its history. In 2011, before Egypt shut down its exports to Israeli through the El Arish-Ashkelon pipeline, Tel Aviv produced less than 10% of its energy consumption.

In 2016, according to data from the International Energy Agency, Israel produced 33% of its final energy consumption and 100% of its expanding natural gas demand. Gas consumption almost quadrupled between 2012 (2.6 bcm) and 2017 (9.9 bcm),[24] and it is expected to increase by more than 2.5 times to 24.8 bcm by 2040, fuelled primarily from the use of natural gas for electricity generation. Israeli gas reserves, all located offshore, are estimated by the Ministry of Energy's latest review in November 2016 at 858.5 bcm, divided between the following fields: Leviathan (500 bcm), Tamar & Tamar Southwest (282 bcm), Shimshon (5 bcm), Karish & Tanin (55 bcm), Dalit (8 bcm), Ishai (7-10 bcm, average of 8.5 bcm).[25]

To this estimate, we need to add the update of the Tamar reserves completed in July 2017, which increased the proven volume of reserves to 318 bcm in the Israeli EEZ to 894.5 bcm.[26] In 2015, Israel used natural gas to generate 50% of its electricity

22 S. MacDonald, 'Here's How Egypt Could Become a Major Gas Exporter', *The National Interest* (2018), available at https://nationalinterest.org/feature/heres-how-egypt-could-become-major-gas-exporter-27056.

23 O. Eran, E. Rettig, and O. Winter, 'The Gas Deal with Egypt: Israel Deepens its Anchor in the Eastern Mediterranean', *Insight* No.1033 (2018, March), available at http://www.inss.org.il/publication/gas-deal-egypt-israel-deepens-anchor-eastern-mediterranean/.

24 BP, *BP Statistical Review of World Energy 2018* (London: BP, 2018), 29.

25 State of Israel, Ministry of Energy, *Israeli Gas Opportunities* (Tel Aviv: Israeli Energy Ministry, 2016), 4, available at http://www.energy-sea.gov.il/English-Site/PublishingImages/Pages/Forms/EditForm/Roadshow_2016_ Presentation% 20GD %20Shaul%20Meridor_ Regulatory%20and%20 Fiscal%20Regim.pdf.

26 H. Koren, 'Tamar partners increase gas field estimate by 13%', *Globes* (2017, July 2).

production, a share expected to rise to 75% by 2030. Electricity is and will remain the primary factor driving natural gas demand in the country.[27] The unprecedented level of energy self-sufficiency these gas discoveries provide Tel Aviv have induced the Israeli government to direct the majority of these reserves to its domestic energy market.

In June 2013, Israel decided to reserve 60% of its proven reserves for domestic consumption while directing the remaining 40% to regional and international markets. This establishes a net export capacity estimated at approximately 360 bcm. Exporting 360 bcm for Israel is a very challenging task, given the absence of international players in its EEZ who could help finance the necessary export infrastructure and the over-concentration of existing reverses in the hands two companies, Noble and the two subsidiaries of the Delek Group (Delek Drilling and Avner), which together control 85% of existing reserves.

Contrary to the cases of Egypt and Cyprus, the current regulatory and investment framework has so far failed to attract major foreign investment, although Tel Aviv decided to auction off 24 of its 69 offshore blocks in its first international licensing tender. Offers for the tender, whose deadline was extended twice in 2017, indicated a lukewarm response on the part of the international oil industry because of the regulatory upheaval Israel that has engulfed itself in after the country's Competition Authority decided to revoke Leviathan's export license in December 2014. The results of the round proved rather disappointing since no major oil company even submitted a proposal for any of the fields offered.

Italy's Edison and Spain's Repsol pulled out from submitting an offer. The only participants were a consortium of four Indian companies, led by state-controlled ONGC, as well as a Greek company, Energean Oil & Gas, which in August 2016 bought the Tanin and Karish fields from Delek Drilling and Avner Oil. In December 2017, Israel's Petroleum Council granted five blocks (12, 21, 22, 23 and 31) to Energean, as well as Block 32 to the Indian consortium.[28] Despite these setbacks, the potential for further discoveries is significant, since currently less than 30% of the Israeli EEZ has been licensed for exploration.

The Ministry of Energy has announced its intention to launch a second licensing round in 2018, although a new licensing round was later postponed to 2019. It is difficult to see, though, how exploration efforts will advance if there is no major

27 State of Israel, Ministry of Energy, *Israeli Gas Opportunities*, 14.

28 State of Israel, Ministry of Energy, *The Petroleum Council Approved the Winning Bids of the First Israeli Offshore Licensing Process*, Israel Ministry of Energy, [Press Release] (2017, November 12), available at http://energy.gov.il/English/AboutTheOffice/SpeakerMessages/Pages/ GxmsMniSpokesman Petroleum Council.aspx.

infusion of capital and expertise from the international oil industry. Israel's gas industry is too introverted and may need to revise some of its regulations that will increase the gas volumes available for export, even from smaller fields such as Karish, Dalit and Tanin.

In the case of Cyprus, after the initial discovery of the Aphrodite field in Block 12 in 2011, which is estimated to contain 112 bcm, the country has been faced with a series of disappointments. In 2014 and 2015, ENI drilled two exploratory wells in Block 9, and in February 2015, Total pulled out of Block 10, while ENI chose to freeze additional exploration in Blocks 2 and 3 until it reviewed its previous geological assessment model. Had it not been for the discovery of Zohr in August 2015, Cyprus' offshore exploration efforts may have ended in failure. It was Zohr's discovery that regalvanized the interest of the major international energy companies.

Total remained in Block 11 and drilled an exploratory well in the Onisiforos target in September 2017. The results were disappointing in that the 11.2 bcm discovery could not be autonomously developed, but they confirmed the existence of hydrocarbon reserves to the north of the Zohr discovery and around the underwater sea mountain of Eratosthenes. In April 2017, the Republic of Cyprus tendered Block 8 to ENI, Block 6 to ENI/Total and Block 10 to a consortium made up from Exxon and Qatar Petroleum, where Exxon holds 80% of the joint venture.

Despite Turkey's claims that the northern part of Blocks 6 and 7 belongs to its continental shelf and its warnings against their tendering to international energy companies, ENI and Total drilled in Block 6 in January 2018. Their drilling led to the discovery of the Kalypso reservoir, which is believed to extend to Block 7. In December 2018, exploration rights over Block 7 are expected to be awarded to the Total/ENI consortium, opening the way for new drilling in 2019 that will ascertain the size and potential extractability of Kalypso. If confirmed it would constitute the second proven gas reserve of the Cypriot EEZ.

In November 2018, Exxon commenced drilling operations in its first (Delphini) of three targets in Block 10. The exploration drilling on Blocks 6, 7 and 10 are expected to confirm or not the existence of a Zohr or Leviathan-size gas field inside Cyprus' EEZ. These results, if positive, will spearhead additional exploration, including the possibility of a fourth licensing round. Although Cyprus appears to be surrounded by gas reserves, it does not use any gas in its energy mix, despite efforts to import gas in LNG form in order to generate electricity that have been ongoing since 2007.

In January 2018, the government secured a €101.5 million EU grant to build an FSRU (Floating Storage and Regasification Unit) close to the port of Vassilikos to import and regasify LNG for electricity generation. The entire infrastructure, which includes buying an LNG carrier that will be retrofitted in order to gasify the LNG,

the pipelines and other docking facilities, is expected to cost more than 500 million.[29] (Kafkarides, 2018)

Import volumes to be contracted are scalable and are estimated to vary between 0.5bcm-1bcm. If such an option materializes, then it can cover the long-term demand of the country for up to 10 to 15 years.[30] This means that all the reserves discovered in the Cypriot EEZ can be dedicated to exports, an option which is viable for neither Israel nor Egypt. So far, only Aphrodite's 121 bcm of proven reserves can be exported: a gas volume equal to merely one-third of the existing Israeli net export capacity.

The Prospective Significance of East Med Gas: The Evolution of EU Strategies

The East Med can provide new sources of gas to the EU, thereby helping the Union meet its strategic objective of limiting its increasing dependence on Gazprom. Yet, the region's prospective significance goes beyond supply diversification. The East Med, 'thanks' to the potential resources of the Cypriot EEZ, could emerge as a new source of indigenous supply that could partly compensate for the rapid decline of domestic EU production in the North Sea.

Furthermore, East Med gas offers simultaneous diversification of import sources *and* import routes regardless of whether it is exported to the EU via LNG or via the East Med Gas Pipelines (EMGP), which could link the region to Italy via Greece. As Turkish-EU strategic interests continue to diverge, and the prospects of a Turkish accession to the EU are minimized, the EU does not want to become overdependent on Turkey for the transit of East Med gas flows, despite the country's existing centrality to the Southern EU Gas Strategy.

The Trans Anatolian pipeline (TANAP) is the principal export option to transport all current and future gas supplies from Azerbaijan and prospectively Turkmenistan, Iran or Northern Iraq to the EU via Greece. If a second TurkStream pipeline is also constructed to export Russian gas to Southeastern EU states via Turkey,[31] then Ankara's importance will further expand, making the need for EU planners to construct a Turkish bypass for East Med gas even more pronounced.The prospective importance of East Med hydrocarbons for the EU initially emerged in the think-tank

29 Y. Kafkarides, 'Cyprus announces €500 million tender for LNG terminal', *Kathimerini Cyprus* (2018, October 5), available at http://knews.kathimerini.com.cy/en/business/cyprus-announces-%E2%82%AC 500-million-tender-for-lng-terminal.

30 C. Stambolis, 'Energy: Have Cyprus LNG plans been derailed', *Financial Mirror* (2018, August 28), http://www.financialmirror.com/blog-details.php?nid=2025.

31 Henderson and Sharples, *Gazprom in Europe*, 21-25.

circuit in Brussels during 2012-2013,[32] but it did not reach the level of official policy-making until mid-2014 when the region was first mentioned in the *EU's Energy Security Strategy (EUESS)* as a potential supplier of natural gas. However, it must be noted that natural gas exports from the Eastern Mediterranean are not a new phenomenon. Between 2005 and 2012, several EU member-states, including Spain, Italy and France, imported Egyptian LNG from the two currently idle LNG liquefaction plants located in Idku and Damietta.

The renewed attention of EU authorities in the region emanated not only from the fact that two new significant gas exporters came to the fore, one of which is a Member State, but also from the need to enhance the Union's external energy policy at a time of renewed tensions with Russia over Ukraine. The EU's Energy Security Strategy proposed a series of external policy measures which centred around the need to improve supply and transit diversification. In this regard, the *EUESS* called for 'the EU to engage in intensified political and trade dialogue with Northern African and Eastern Mediterranean partners, in particular with a view to creating a Mediterranean gas hub in the South of Europe'.[33]

The text fell short from proposing a specific policy action that would commit EU funds to any specific implementation project and did not seem to differentiate between the EU's established Southern Gas Corridor Strategy and the resources of the Eastern Mediterranean. This all changed a year later as a result of the greater emphasis put on the construction of common energy infrastructures that would further ameliorate intra-EU interconnectivity as well facilitate the commercial linkage between EU markets and non-EU energy suppliers.

The Connect Europe Facility (CEF) financial instrument was set up in order to materially support enhanced interconnectivity through the promotion of several Projects of Common Interest (PCI). Simultaneously, at the Commission and Council levels, a more detailed strategy focused on specific areas of interest for the Union's emerging Energy Security Strategy that would serve the overarching strategic priority of supply diversification. The EU's Energy Diplomacy Action Plan (*EU EDAP*), published in July 2015, singled out 'the strategic potential of the Eastern Mediterranean region' as 'a key priority' for the EU's 'diversification of sources, suppliers and routes', where the EU should 'focus its diplomatic support on'.[34] The EU's Energy Diplomacy

32 I. Taranic, 'European energy policies and their relevance to the Eastern Mediterranean', *Energy Cooperation and Security in the Eastern Mediterranean: A seismic shift towards peace or conflict?,* ed. A. Giannakopoulos (Tel Aviv: Tel Aviv University Press, 2016), 109-123.

33 European Commission, *Communication from the Commission to the European Parliament and the European Council: European Energy Security Strategy*, SWD(2014) 330 final}, (Brussels: Office of the Official Publications of the European Communities, 2014, May 28), 16.

34 European Council, *Council conclusions on Energy Diplomacy*, 10995/15, CFSP/PESC 414, (Brussels:

Action Plan clearly distinguished the Eastern Med from the Southern Corridor, indicating that it would prefer an independent development of those reserves.

More importantly, in what could be perceived as an indirect warning to Turkey, which is questioning the right of the Republic of Cyprus (RoC) to explore the waters of its demarcated Exclusive Economic Zone (EEZ), the policy document underlined that the EU's 'Energy partnerships and dialogues…should also ensure that the sovereignty and sovereign rights of the Member States to explore and develop their natural resources are safeguarded'.[35] Two major projects emerged with strong EU backing, under the PCI framework, promising to tap into the region's strategic potential: the high voltage electricity interconnector project, EuroAsia, and the East Med Gas Pipeline (EMGP) project.

EuroAsia aspires to transfer up to 2 GW (gigawatt) of electricity from Israel and Cyprus to Attica in Greece over a distance of 1518km. Although the project may find it difficult to find a market in Greece (or beyond Greece) and could duplicate a project promoted by ADMHE, the Greek Electricity TSO (Transmission System Operator) to connect Attica to Crete, it would significantly enhance the security of electricity supply for the RoC by terminating its energy isolation while progressively connecting it to the EU grid via Greece.

In 2015, Euroasia Interconnector received from the CEF €1.325 million to complete all necessary design, technical implementation and environmental assessment studies, which it finished in late 2016. In April 2017, the project was upgraded to the next level of planning maturity that allowed it to secure €14.5 million from CEF to complete its final FEED (Front End Engineering and Design) study. The study is expected to be completed by 2020, and it will allow the investors to take the FID (Final Investment Decision) that will lead to the construction of the first 1GW underwater cable by 2022. CEF has covered 50% of all associated costs of the project so far.[36]. The second and even more important project is the construction of the ambitious EMGP, which aspires to transport, by 2025, between 10-16 bcm/y of East Med Gas to Greece and then to Italy, which is promoted by the Greek-French-Italian consortium, IGI Poseidon.

In May 2015, the EMGP received €2 million to complete its pre-FEED studies which confirmed the technical and financial viability of the project, although serious challenges remain regarding its eventual implementation.[37] Nevertheless, these

European Council, (2015, July 20), 3.

35 European Council, *Council conclusions on Energy Diplomacy*, 4.

36 European Commission, *Connect Europe Facility*, (2017), available at https://ec.europa.eu/inea/en/connecting-europe-facility/cef-energy/projects-by-country/multi-country/3.10.1-0028-cy-s-m-14.

37 European Commission, *Connect Europe Facility* (2017), https://ec.europa.eu/inea/en/connecting-europe-facility/cef-energy/projects-by-country/multi-country/7.3.1-0025-elcy-s-m-15.

challenges did not discourage the Italian government or the EU's Energy Commissioner, Miguel Arias Cañete, from joining the original promoters of the project in Tel Aviv in April 2017 to sign the first quadrilateral political framework agreement in support of EMGP's implementation.[38] In their joint declaration the energy ministers of Italy, Greece, Cyrus and Israel stressed that they supported 'the establishment of the Eastern Mediterranean as another corridor for gas supplies to Europe', underlining that the project 'represents a strategic priority for exporting into Europe part of the current gas reserves of the Eastern Mediterranean'.[39] Commissioner Cañete, who said that EMGP is eligible for additional financial assistance from the CEF in order to reach its FID level, noted that EMGP 'is an ambitious project, which as the Commission, we clearly support, as it will have a high value in terms of security of supply and diversification targets'.[40] He also added that 'in the next decades, gas flows from the Eastern Mediterranean region will play a vital role in the energy security of the European Union'.[41] In January 2018, in another indication of tangible support for the project from the EU, the European Commission granted another €34.5 million to EMGP developers[42] to complete their FEED study and to cover all licencing and permit expenses for the project in Cyprus and Greece. The signing of an IGA (intergovernmental agreement) between Italy, Greece, Cyprus and Israel is expected in the first quarter of 2019, once the text if finalized. Such an IGA, though, will constitute only the end of the beginning in the project's path towards materialization.

Assessing Alternative Export Options: How Will the EU Benefit the Most and the Quickest?

Although much of the focus of the potential exportation of natural gas from the region has been put on the construction of new LNG facilities in either Cyprus or

38 S. Udasin, 'Israel, European states advance plans for world's largest underwater gas pipeline', *Jerusalem Post* (2017, April 3).

39 Republic of Cyprus, Press and Information Office, 'Joint Declaration of the East Med Pipeline Ministerial Summit in Tel Aviv', Press and Information Office of the Republic of Cyprus (2017, April 3), available at https://www.pio.gov.cy/moi/pio/pio2013.nsf/All/3E481E83C28B5163C22580F7004DD29C? Open Document&L=E.

40 M. Tanchun, 'EU Backs Israel to Italy pipeline to alter East Med energy chessboard', *Hurriyet Daily News,* (2017, April 13), available at http://www.hurriyetdailynews.com/eu-backs-israel-to-italy-pipeline-to-alter-east-med-energy-chessboard aspx?pageID=238&nID=111949&NewsCatID=3962017.

41 IEMED, 'Italy, Greece, Cyprus and Israel agree on implementing a gas pipeline through the Eastern Mediterranean', *Iemed* (2017, April 3), http://www.iemed.org/actualitat/noticies/03-04-italy-greece-cyprus-and-israel-agree-on-implementing-a-gas-pipeline-through-the-eastern-mediterranean.

42 Kelakos, 'The European Commission will fund the technical studies and permitting costs of the East Med with €34,5 million', *Energypress* (2018, January 18), available at https://energypress.gr/news/me-345-ekat-eyro-i-komision-hrimatodotei-tis-tehnikes-meletes-kai-tis-adeiodotiseis-toy-eastmed.

Israel, the option of building a new liquefaction plant in the Eastern Mediterranean had been taken off the table several years ago due to the following reasons:

(a) If one were to add the existing net export capacity of Israel (360 bcm) and Cyprus (120 bcm), there is more than enough gas to theoretically build a new two-train LNG export facility capable of liquefying anywhere between 10-14 bcm/y for global markets. Unfortunately for both Cyprus and Israel, LNG liquefaction plants have become extremely costly to develop, even for the Israelis, who do have enough reserves to build a two-trains LNG export facility, to the detriment of one or more of their regional pipeline export options to be analyzed below.

If Israel's net export capacity is limited by its own domestic regulation, signed in June 2013, to 360 bcm, or 40%, of its existing proven reserves of 900bcm, then it would need to commit at least 10 bcm/y out of the 18 bcm/y it has available for 20 years in order to finance a commercially viable two train LNG facility in Israel. The government there, which has the right to approve all export deals made by companies developing its natural gas reserves, has excluded the possibility of liquefying its gas reserves outside areas of its sovereignty ever since the inter-ministerial Zemach Committee Report of September 2012. By this decision, it has effectively ruled out, since at least 2013, the construction of a joint Israeli-Cypriot LNG facility in Vassilikos that would be partially fed by Israeli gas. Cyprus never had enough gas to self-finance a commercially viable LNG option.

This leaves around 8 bcm/y, of which Leviathan's developers already agreed in September 2016 to sell 3bcm/y from Phase 1 of Leviathan's production to the Jordanian market, which is a deal valued at $10 billion and that has been approved by the Israeli state.[43] The remaining 5 bcm/y are not enough to finance a 10 bcm/y pipeline to Turkey but could be exported to Egypt through a joint Cypriot-Israeli export pipeline that links Aphrodite and Leviathan to the Egyptian grid or its two idle LNG liquefaction terminals in Damietta and/or Idku. *An LNG option for Israel, in short, is commercially detrimental for an offshore pipeline to Turkey, but not to Egypt.*

(b) Existing Israeli developers do not have the necessary financial capacity and technical expertise to shoulder alone the costs of a major LNG export project that could easily surpass the $8 to $10 billion price tag on top of the $4 to 5 billion they need to finance the first phase target of gas production from Leviathan or the additional $5 billion that the development of the second phase of Tamar and Leviathan after 2020 will cost. The cost of the upstream phase alone for Leviathan forced the developers (Noble, Delek and Ratio) to reduce the initial production target of Phase 1 from 21 bcm/y to 16 bcm/y when they submitted revised Field Development Plan (FDP) to

43 S. Udasin, 'Israel to supply gas to Jordan in $10 billion deal', *Jerusalem Post* (2016, September 26).

the Israeli government in February 2016.[44]

By the time the FDP started to be implemented in February 2017, the production target set to be achieved by the end of 2019 had again shrunk to 12 bcm/y because the developers could only mobilize $3.75 billion for its financing. The plan includes the construction of two 120km offshore pipelines connecting the field with the existing Israeli grid in the northern part of the country, which will absorb three-quarters of the entire output with the remaining quarter exported to Jordan.[45]

An LNG option was simply impossible to finance without the participation of a major IOC. No major IOC tried to join the Leviathan consortium since Woodside's attempted purchase of a 30% share ended in failure back in May 2014.[46] If an LNG is off the table, does this mean that the region's entire export potential will be consumed intra-regionally without any exports reaching the EU? Not necessarily. Pipeline options do exist that, in conjunction with existing liquefaction facilities, could monetize the region's proven reserves in ways that could have a significant positive effect on the EU's import diversification strategy as early as 2021.

Theoretically there are three pipeline options allowing Europe to import East Med gas: (i) the East Med Gas Pipeline (EMGP) connecting Israel, Cyprus and Greece to Italy; (ii) a pipeline connecting Israel with Turkey, with a potential extension to Turkey's EU border and from there towards Europe either via TAP or the construction of a new 'Nabucco' pipeline to Hungary and Austria; and, (iii) one or two pipelines connecting Aphrodite, Tamar and Leviathan reserves with Egypt's idle liquefaction plants in Idku and Damietta. From these three options, the third one appears to be the most feasible in the medium-term and it is already being implemented through Israel's export of gas to the Egyptian trader Dolphinus, part of which will be exported to EU markets via the Damietta liquefaction plant as early as 2019.

The East Med Gas Pipeline to Italy via Greece

Although the option of a direct pipeline linkage between the East Med and the EU markets has been revived by the improvement of deep-offshore pipe-laying technology and the signing in April 2017 of a preliminary framework agreement between Israel and the three EU states (RoC, Greece, Italy) championing the project, its implementation

44 OGL Editors, 'Revised plan pushes Leviathan development', *Oil & Gas Journal*, (25 February 2016), available at http://www.ogj.com/articles/2016/02/revised-plan-pushes-leviathan-development.html

45 Noble Energy, 'Noble Energy Sanctions Leviathan Project Offshore Israel', *Globes*, (23 February 2017), available at https://globenewswire.com/news-release/2017/02/23/926886/0/en/Noble-Energy-Sanctions-Leviathan-Project-Offshore-Israel.html.

46 J. Paton, 'Woodside Scraps $2.6 Billion Israeli Gas Deal as Talks Fail', *Bloomberg*, (21 May 2014), available at https://www.bloomberg.com/news/articles/2014-05-20/woodside-scraps-2-6-billion-leviathan-gas-deal-after-talks-fail.

remains debatable. The EMGP, estimated to cost around €7 billion, may be cheaper to build than a twin-train LNG liquefaction plant, but its construction will prove very challenging.

It would be the longest pipeline, crossing over 1900km, ever to operate at depths close to 3000m (Tagliapietra).[47] Due to its length and depth, it needs a minimum booking capacity of 10 bcm/y, although it could be scalable to 20 bcm/y. The pipeline may end in mainland Greece, but Greece is not its principal market; Italy is, and currently there is no pipeline connection between Italy and Greece. Therefore, project developers would need to construct another offshore pipeline across the Ionian Sea to reach Italy and, via Italy, the central EU markets. More importantly, Cyprus does not have additional reserves to commit to the project, whereas Israel, which has additional reserves, understands that a 10 bcm/y commitment to the EMGP will eliminate any chances for exporting gas to Turkey.

Should Israel decide to book 100% of EMGP's initial capacity, an unlikely probability in the absence of new discoveries, it would still be able to export 3 bcm/y to Jordan over 15 years *and* book almost 50% of Egypt's idle liquefaction capacity, estimated at 16.59 bcm/y. In this scenario, Israeli companies could export 2.8 bcm to Idku if Cyprus exports its 7 bcm/y from the Aphrodite field to the big Egyptian LNG terminal. Alternatively, Israel can cover all of Idku's capacity by exporting an additional 147 bcm to Idku over a period of 15 years, between 2025 and 2040 if Cypriot gas is unavailable.

In any case, Noble and Delek will export 5 bcm/y to Damietta via independent gas operators like *Dolphinus*, provided they use *in reverse* the EMG Ashkelon-El Arish pipeline that links Israel and Egypt across the Eastern Med seabed. In September 2018, Delek and Noble bought the EMG and are currently working on reversing its flow. The pipeline has a throughput capacity of 7 bcm, but could be scaled to transport over 10 bcm/y,[48] indicating future plans to increase exports to Egypt.

If Cyprus exports all of its gas reserves to the Idku LNG terminal, it would have no other gas to offer to the EU other than the volumes to be liquefied in Idku, although it cannot control the final destination of these exports. This is not the case for Israel. Even if Israel reserves in 2025 a 15-year contract to cover all of the liquefaction capacity in Idku from Leviathan Phase 2, it will still have around 100 bcm available in 2025 to commit to the construction of the East Med Gas pipeline to the EU.

47 S. Tagliapietra, 'Is the East Med gas pipeline just another EU pipe dream?', Bruegel (10 May 2017), available at http://bruegel.org/2017/05/is-the-eastmed-gas-pipeline-just-another-eu-pipe-dream/.

48 O. Eran, 'Israel's Stake in the Egyptian Natural Gas Pipeline: Strategic and Economic Benefits', *Insight* No.1098, (Tev Aviv: INSS, October 2018), available at http://www.inss.org.il/publication/israels-stake-in-the-egyptian-natural-gas-pipeline-strategic-and-econo mic-benefits/.

These 100 bcm would cover 67% of the pipeline's initial throughput capacity, estimated at 10 bcm/y, for a period of 15 years. If Cypriot gas from Aphrodite does not end up in Idku in 2023, then Nicosia would have no other option but to be export Aphrodite's reserves via the EMGP in 2025, thereby increasing gas availability for the pipeline to 13-14 bcm/y over a 15-year period. This would make the project bankable. For any additional volumes, the EMGP will depend on future gas supplies from the drillings expected in Blocks 10 and 7 of the Cypriot EEZ. Both of these potential sources of supply will not be available before 2024-2025, at the earliest.

The Israeli-Turkish Gas Pipeline

The second option is that of the Leviathan-Ceyhan Gas Pipeline (LCGP), which given its depth (1500-1800m) and length (500-550km) would also need a minimum gas commitment of 10 bcm/y to become financially viable over a period of 15 years. Since Israel would sell 45 bcm to Jordan and 65 bcm to Egypt, a LCGP pipeline, estimated to cost anywhere between $2 and $4 billion,[49] would leave another 110 bcm for the Egyptian LNG plants and Egypt's domestic market, which is enough to cover Idku's liquefaction capacity for 10 years. Such an option is viable provided that no Israeli gas is committed to the EMGP and no Cypriot gas is exported to Idku, although the Egyptian government is unlikely to support it.

This scenario would also entail a complete reversal of Israel's current alliance building policies with Greece and Israel and a return to a pre-Mavi Marmara state of strategic cooperation with Turkey. An 8 bcm/y LCGP would provide around 12% of Turkish demand that is expected, according to the projection of the Turkish Energy Ministry, to reach around 65bcm in 2023 when Leviathan's second production phase is expected to come on stream. Turkey's private gas traders who are lobbing for the project, led by Turcas, may even offer a higher price to Israeli producers compared to Egyptian importers in order to improve the pipeline's commercial attractiveness.

Turkey's domestic market makes economic sense for Israeli exporters; an attempt to transit via Turkey to the EU does not make any economic sense, and that is something which even leading Turkish developers of the LCGP admit. As *Platts* noted in an interview with Batu Aksoy, the CEO of Turcas, the leading developer of the Leviathan-Ceyhan consortium on the Turkish side, 'While previous reports have said that if Israeli gas was brought to Turkey, the bulk of it would be transited on to Europe. In moderate to high growth cases, most of the gas to be imported to Turkey may be for local Turkish consumption.'[50] Israeli exports to Turkey will only

49 H. Cohen, 'Gas execs see Israel-Turkey gas deal by 2017', *Globes* (2016, June 28), available at http://www.globes.co.il/en/ article-gas-execs-see-israel-turkey-gas-deal-by-2017-1001135479.

50 European Gas Daily, (2016, April 21), 2.

benefit Turkey and Delek/Noble and would not serve EU strategic energy objectives. It would only increase Europe's transit dependency on Turkey.

There are those who claim that Israeli and/or Cypriot gas could merely transit to Europe via Turkey via the TANAP/TAP pipeline system, and in the process resolve all regional problems including, inter alia, the Cyprus Question. The proponents of a Turkish transit option for East Med gas[51] (Bryza) fail to take into account the following facts which severely complicate the feasibility of such a project, even if its materialization served both priorities of the EU's energy security strategy:

(a) There is no connection between TANAP and the Ceyhan region. It would need a dedicated pipeline to connect Ceyhan to the main EU-bound export pipeline for Israeli gas to approach EU markets, but this would be the beginning, not the end for the transit of Israeli gas to the EU.

(b) TANAP, with the exception of 5 bcm/y, is fully booked for the transportation of Azeri gas exports from Shah Deniz 2 and from other Azeri fields in the Caspian Sea, which will come on stream by the mid-2020s.

(c) There is no free capacity in TAP for East Med Gas for the same reasons.

(d) There is no pipeline system presently available to carry the gas from the Turkish-EU border to its final EU market destinations.

(e) The irresolution of the Cyprus Question would mean that the construction of the LCGP through the RoC's EEZ would seriously damage the multifaceted cooperation between Israel and the RoC. This cooperation is something that many political forces inside Israel may value more than the commercial interests of Leviathan's developers.

In any case, under current conditions the EU has nothing to gain from increasing its transit gas dependence on Turkey and that is partly why the EU has refrained from expressing any support for a Turkish transit option compared to its very public and very tangible support of the EMGP.

The Egyptian LNG Options

The lack of sufficient resources to build its own LNG plant, the continued irresolution of the Cyprus Problem and the immaturity of the EMGP have left the RoC with essentially one realistically attainable option that did not even exist as late as 2013, Egypt's LNG facilities. Cypriot Energy Minister George Lakkotrypis[52] has also mentioned Egypt's domestic gas market and Jordan as potential export destinations, although both alternatives are highly unlikely since Jordanian demand will be covered

51 M. Bryza, 'Eastern Mediterranean Natural Gas: Potential for Historic Breakthroughs among Israel, Turkey, and Cyprus', *Energy in the Eastern Mediterranean: Promise or Peril?*, eds. D. Koranyi and S. Andoura, (Brussels: Academia Press, 2014), 39-46.

52 S. Henderson, *Jordan's Energy Supply Options: The Prospect of Gas Imports from Israel* (Washington D.C: German Marshall Fund of the United States. 2015), 7.

by Israeli exports[53] and the discovery of Zohr has minimized prospects for direct imports to the Egyptian market by the time Aphrodite or Leviathan Phase 2 may come on stream. Egypt is expected to eliminate its imports as early as 2019.

Prospective Israeli exports may go to Egypt's domestic markets by Tamar Phase 2 or Leviathan Phase 1 *only* if pre-existing pipeline infrastructure is utilized to cut the final cost to the end consumer, as it is happening with the Dolphinous agreement and with Nobel and Delek's purchase of a controlling share in the EMG pipeline. This is not the case for Cypriot reserves, which need a new pipeline connection to be constructed in order to reach their market destination in either Idku or Damietta. Since the Dolpinous sales contract in February 2018 and Cairo's decision to release 2 bcm/y from Zohr's production for liquefaction in Damietta in September 2018 the Damietta option no longer exists for Cypriot gas.

Aphrodite gas can begin production within 36 to 42 months after the signing of a sales contract which can come in early 2019. This means that Cypriot exports can begin no sooner than late 2022. Idku and Damietta are not equally attractive options and require a different supply mix to become viable. The prospective export of Aphrodite's gas, estimated at approximately 7 bcm/y over 15 years, does not suffice to book all of Idku's liquefaction capacity but was more than enough to book the entire capacity at Damietta for 17 years. Damietta is also much closer to Aphrodite, at a distance of 200km, whereas the Idku facility is 400km away from the Cypriot field, thereby doubling the cost of the necessary offshore pipeline to around $1 billion. Cypriot gas could have booked Damietta alone. For Idku an Israeli contribution is necessary.

Cyprus has decided to move for the more difficult option and is committing its entire net export capacity to Idku. Its options are dictated by the fact that Shell, which controls 35% of the liquefaction capacity in Idku, controls an equal share in the consortium that develops the Cypriot field along with Delek and Noble. The developers (Noble, Delek, Shell) have demanded the renegotiation of the 2008 Production Sharing Agreement in order to reverse the original profit distribution shares in favour of the developers, a process that could last several months into 2019. Its successful conclusion, though, is a precondition for any commercial agreement to be reached that would unlock the export potential of Aphrodite.

Once the gas is liquefied Cyprus and its national oil company, CHC (Cyprus Hydrocarbons Company), have no means of directing the gas to the EU. Market prices and the commercial decisions of the companies that will liquefy the gas will play a role in whether the gas ends up in Europe or Asia. These LNG volumes, part of which will be sold to the EU, may represent the first exports of Cypriot gas arriving in

53 Henderson, *Jordan's Energy Supply Options*, 12-14.

EU markets a mere decade after Aphrodite's initial discovery in 2011. Egyptian LNG from Zohr and Israeli LNG from Leviathan Phase 1 will be available for exports from Damietta as early as 2019, although it is not yet clear how much of the 6.4 bcm/y of the Israeli gas sold to Dolphinous will be liquefied in Damietta.

If the Cypriot gas export contract materializes in 2019, then Aphrodite's gas will cover more than 70% of Idku's capacity, liquefying approximately 7 bcm/y by 2023 or 2025. Damietta is expected to come on line much earlier, by 2019, and is estimated to reach its full 6.8 bcm/y capacity by 2020. By 2023, the combined exports from Aphrodite and part of Leviathan Phase 1 will cover the full capacity of Idku, and by 2020, Israeli gas from Tamar and Leviathan Phase 1 will most likely cover all 6.8 bcm of Damietta's LNG liquefaction capacity.

As a result, despite Turkey's best efforts to the contrary, Cypriot and Israeli gas will be able to utilize the entire liquefaction capacity of Egypt in both Idku and Damietta, estimated at 16.59 bcm/y. The Damietta facility is a single-train LNG plant with a 6.8 bcm/y liquefaction capacity. Idku has two LNG-trains each with a 4.896 bcm/y capacity.[54] Historically these facilities commissioned in 2005 reached their peak utilization rate in 2010 with a total liquefaction volume of 9.7 bcm, while 48.6% of that LNG (4.72 bcm) was eventually consumed in the EU, primarily in Spain, which imported 2.62 bcm in 2010.[55] (BP 2011, 29).

If the facilities are indeed booked at capacity and the 2010 patterns are reconfirmed, then the EU may get easily 50% of the combined Damietta/Idku liquefaction capacity amounting to 7,93 bcm/y. These 8 bcm per year amount to 80% of the Southern Gas Corridor exports expected to reach the EU via TANAP/TAP between 2020-2025. Beyond 2023, if new gas is discovered in the Cypriot EEZ, the EMGP may become a more viable export option provided that the current Cold War relationship between Israel and Turkey endures and that EU gas demand continues to grow fueled by a rise in gas-fired electricity generation.

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54 International Gas Union, *World LNG Report-2017*, (Paris: IGU, 2017), 66.

55 BP, *BP Statistical Review of World Energy* 2011 (London: BP, 2011).

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Power Games in the Exclusive Economic Zone of the Republic of Cyprus: The Trouble with Turkey's Coercive Diplomacy

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Abstract

The general aim of this paper is to examine the case of the Republic of Cyprus' quest for exploring natural gas reserves in its Exclusive Economic Zone (EEZ) amidst Turkey's threats and mobilisation of naval military means, under the lens of coercion and deterrence theory. Particularly, the paper aims to evaluate the effectiveness of Turkey's use of threats towards the Republic of Cyprus (RoC), in an effort to force the latter to cancel its programme of exploratory drills in the Eastern Mediterranean. A variable that must be examined in this case is the presence and engagement of international oil and gas companies which the RoC has licensed to explore the Cypriot EEZ, despite Turkey's dispute of Nicosia's authority. In this context, the paper's special objective is to outline the impact of these companies' presence on Turkey's strategy and the RoC's efforts to overcome Turkish revisionism and to accomplish its goals. The main hypothesis is that the engagement of the oil and gas companies suggests an intervening variable that modifies the power distribution in a game where the militarily stronger party (Turkey) attempts to coerce the weaker party (RoC),-which actually lacks sufficient military means,-and thus to impose its will on it as a result of mutual rational power calculations. In the framework of our analysis, we pay particular attention to the concept of 'coercive diplomacy', which has been developed by Alexander George. In order to evaluate Turkey's strategy in the case under examination, we refer to Ankara's ultimatum which led to the cancellation of the deployment of the S-300 system in Cyprus in December 1998 as an example of successful Turkish coercive diplomacy towards the RoC.

Keywords: threat, blackmail, coercion, deterrence, coercive diplomacy, power, power indicators, patient gradualism, 'alarm signals'

Threat and Power Asymmetry

The case under examination in this paper refers to a bilateral dispute which is characterized by two critical elements. The first is the will of one of the two involved parties to stop the other from proceeding with the fulfillment of a specific course of

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objectives by threatening to punish it in case it does not comply. In that case, Turkey argues that the RoC does not enjoy the sovereign right to search for, discover, unearth and exploit energy resources offshore, and that it will react if the RoC chooses to do so, as it argues that, unless this process involves the 'Turkish Republic of Northern Cyprus' ('TRNC') with an equal status, any progress will have a unilateral character. The second is the remarkable degree of power asymmetry between the two involved parties. Being a significant regional power, Turkey enjoys clear-cut military superiority over Cyprus, which is a small state with military means that cannot be compared with Turkey's, either in terms of quantity or in terms of quality. Therefore, it is of paramount importance to shed light on the theoretical connection between threat and power asymmetry, as this will help us to come to conclusions on the future perspectives of this ongoing dispute, with special focus on Turkey's options and actions as the party that attempts to change its opponent's will to exercise its rights and, therefore, to revise the *status quo* offshore Cyprus.

The first question we should answer is 'What kind of strategies can (or does) Turkey implement in this case?' According to Mearsheimer, in his analysis of the 'various strategies that states use to shift the balance of power in their favor or to prevent other states from shifting it against them', war is 'the main strategy states employ to acquire relative power.' However, as he recognises the limits and the obstacles states usually face when choosing to fight a war, he adds that 'blackmail is a more attractive alternative, because it relies on the threat of force, not the actual use of force, to produce results'; therefore, it is 'relatively cost-free'.[3] He defines blackmail as the choice of a state to gain power at its opponent's expense 'without going to war by threatening to use military force against [it]... Coercive threats and intimidation, not the actual use of force, produce the desired outcome.'[4] Despite the fact that Mearsheimer refers to great powers and relations between them, his definition of 'coercive threats' is quite helpful to our analysis. He clarifies that blackmail is the term he prefers to coercion, but he means the same thing: threats to use military force in order 'to alter state behavior'.[5] In relation with the definition of coercion, Ellsberg underlines the following: 'Suppose that I have some means of communicating with you and that I can change your expectations, to some extent, of my behavior. Given all these conditions, I can set out to coerce you: to influence you to choose the action I prefer you to take, by increasing your expectation that if you do not, I will choose some response leading to an outcome still worse for you than compliance.'[6]

3 J. J. Mearsheimer, *The Tragedy of Great Power Politics*. (New York: W. W. Norton, 2001), 138.
4 Ibid., 152.
5 Ibid., 459.
6 D. Ellsberg, 'The Theory and Practice of Blackmail,' *RAND Papers P-3883*, (Santa Monica, CA: Rand Corporation, 1968), 5.

Naturally, the second question is 'What kind of strategies can the RoC implement in order to bypass Turkish reaction to the exercise of its sovereign rights?' The most profound option is deterrence. Like coercion, deterrence is based on threat, on a promise that any harmful action taken by the aggressor will be met with equally (or more) harmful retaliation. It is 'the threatened use of force to dissuade an adversary from undertaking something undesirable.'[7] In other words, it is an attempt to maintain the *status quo* through the threat of use of force.[8] There are several attempts to categorise deterrence, its potential use and its potential outcomes in the related literature. Like coercion, all these attempts include perspective use of military force as the punishment the revisionist state could suffer should it fail to abandon its aggressiveness.

The examination of these concepts reveals a degree of vagueness regarding their actual meaning and whether they refer to different or to the same thing(s). There are different ways to distinguish deterrence from coercion. Some authors pay attention to deterrence's defensive nature,[9] contrary to coercion's offensive motives. Others point out that what differentiates deterrence from other forms of threat is that it attempts to stop a future perspective from happening; therefore, it is only suitable for preventing future developments from taking place, not for managing ongoing ones.[10] In any case, both concepts refer to 'the art of influencing the behavior of others by threats',[11] therefore there is at least some common ground between them, while under given circumstances they could get mixed up, as international disputes and/or conflicts may play out in such a way that the roles of the involved parties may swap and their objectives may change or fluctuate.

The use of threat in international politics as a strategy aiming to modify the behaviour of an opponent is an important topic of discussion in strategic theory. What most scholars in this field suggest is that threat is (or should be) associated with a real capability of achieving a military strike, which would function as a prospective 'ultimate punishment' in case the opponent fails to comply with the threatening party's demands. Especially in cases of power asymmetry between the involved parties, the starting point of this hypothesis is usually a pre-existing assumption that the militarily stronger party may be in a better position to achieve its objectives in a given dispute. Or, to quote Thucydides' classic dictum in the Melian Dialogue: 'the strong do what they can and the weak suffer what they must'.

However, International Relations' theories observe a significant degree of

7 R. Art, *A Grand Strategy for America*, (Ithaca: Cornell University Press, 2003), 5.
8 C. Koliopoulos, *Strategic Thought* [in Greek], (Athens: Piotita, 2008), 21
9 G. Snyder, 'Deterrence and Power,' *The Journal of Conflict Resolution*, Vol. 4, No. 2 (June 1960), 167.
10 A. George, *Forceful Persuasion: Coercive Diplomacy as an Alternative to War*, (Washington, D.C.: United States Institute of Peace, 1991), 5.
11 D. Ellsberg, 'The Theory and Practice of Blackmail', 2.

complexity that undermines the causal nexus connecting the possession of military capabilities with the potential outcomes of a strategy of threats. For example, according to Waltz, 'weak states of the world, having become politically aware and active, have turned world opinion into a serious restraint upon the use of force, whether in nuclear or conventional form.'[12] Waltz goes further than this, arguing that power asymmetry may not be enough for strong states to impose their will upon weaker ones, since 'when great powers are in a stalemate, lesser states acquire an increased freedom of movement. That this phenomenon is now noticeable tells us nothing new about the strength of the weak or the weakness of the strong. Weak states have often found opportunities for maneuver in the interstices of a balance of power.'[13] Others focus on potential variations between the degrees of commitment of the involved parties in an asymmetric relationship. As a consequence of the difference in their motives' volume, the potential outcomes of the dispute may not reflect the power equilibrium at the end of the day.[14]

Another way to approach the issue of power asymmetry and its impact on related policy outcomes is by examining the power indicators of each party involved in a given dispute and looking into their capacity to actually support their possessors' goals. As the experience of great powers has shown several times in the past, not all the means are suitable for achieving any kind of goals. This has been extensively discussed in relation with nuclear weapons, especially with the credibility of nuclear deterrence. According to Kouskouvelis, nuclear weapons may be sufficient enough to facilitate achievements on military and security issues, but this might not be the case on trade negotiations or which state will host the next Olympic Games.[15] In that sense, nuclear powers may not be efficient enough in supporting their demands *vis* à *vis* non-nuclear applicants. When it comes to cases of great powers that fail to achieve their military or diplomatic objectives against inferior opponents, the issue of the competence of power indicators has been extensively discussed after (or during) conflicts with surprising outcomes like the Vietnam War.[16] Taking these into account,

12 K. Waltz, 'International Structure, National Force, and the Balance of World Power,' *Journal of International Affairs*, Vol. 21, No. 2 (1967), 220.

13 Ibid., 222.

14 See B. Womack, *Asymmetry and International Relationships,* (New York: Cambridge University Press, 2016). R. Jervis, 'Deterrence and Perception,' *International Security*, Vol. 7, No. 3, (Winter 1982-1983), 8.

15 I. Kouskouvelis, *Introduction to International Relations Theory* [in Greek](Athens: Piotita, 2005), 144-145.

16 Waltz, 'International Structure, National Force, and the Balance of World Power', 227-228; S. P. Huntington, 'Conventional Deterrence and Conventional Retaliation in Europe,' *International Security*, Vol. 8, No. 3 (Winter 1983-1984), 35-40; W. W. Kaufmann, 'The Requirements of Deterrence,' (Center of International Studies, Princeton University, 1954), 12.

we may conclude that the stronger party may have better chances to capitalize on its power superiority towards the weaker one if the power indicators it can mobilize in a given dispute between them are suitable for the achievement of its goals.

In the following section, we will examine the case in the theoretical context described above and define the involved parties' strategies, their merits and their pitfalls, as well as their chances to achieve their goals.

The Case of the Cypriot EEZ: A Timeline of the RoC's Activity and Turkey's Response

The efforts of the RoC to explore its EEZ in search of offshore natural gas reserves started in 2011. The RoC is a party to the United Nations Convention on the Law of the Sea (UNCLOS) and, under the Exclusive Economic Zone Law 64 (I) of 2004 (as amended in 2014), implements the provisions of UNCLOS in relation with the declaration of its EEZ and its delimitation in case it overlaps with the EEZs of other countries.[17] In this context, the agreement signed in 2008 with Noble Energy, an American, Houston-based oil and gas company, as well as the agreement with Israel on the delimitation of the two countries' EEZs in 2010,[18] provided the legal framework for the necessary predrilling exploratory activities in Block 12 of the Cypriot EEZ (which lies adjacent to the Israeli EEZ).[19] In September 2011, Noble Energy started the first drilling operation in the Eastern Mediterranean under the authorisation of the RoC, which resulted in the discovery of a moderate natural gas reserve in a position called Aphrodite. Turkey (a non-party to UNCLOS) reacted vehemently to the plans of the RoC, which are considered by Ankara as 'unilateral actions', since it considers that 'there is no single authority which in law or in fact is competent to represent jointly the Turkish Cypriots and the Greek Cypriots, consequently Cyprus as a whole', as repeatedly stated in the related Turkish letters submitted to the United Nations.[20] Ankara recognizes only the so called 'Turkish Republic of Northern Cyprus' ('TRNC') in the northern part of the island, which was established in 1983 after the Turkish invasion of July and August 1974 and the *de facto* partition of the island, where it maintains a force of 40,000 troops. However, the 'TRNC enjoys no recognition by any other country except for Turkey itself, while the RoCde facto governed only by the

17 Law 64(I) of 2004, The Exclusive Economic Zone Law, 2004, available at http://www.olc.gov.cy/olc/olc.nsf/all/A0231939301952D1422576C1003014FF/$file/The%20Exclusive%20Economic%20Zone%20Law%202004%202010.pdf?openelement,

18 Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the delimitation of the exclusive economic zone (with annexes). Nicosia, 17 December 2010, available at https://treaties.un.org/doc/Publication/UNTS/Volume%202740/v2740.pdf,.

19 T. Tsakiris, 'Cyprus's Natural Gas Strategy: Geopolitical and Economic Preconditions,' *Mediterranean Quarterly*, Vol. 28, No. 1 (2017), 32.

20 See http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CYP.htm, .

Greek Cypriots since the intercommunal clashes of 1963-64 and essentially controlling only the southern part of the island since the summer of 1974, is internationally recognised.[21] Based on its own interpretation of the state of affairs in Cyprus, Ankara insisted that the RoC had no right to explore for oil and gas (or to authorise companies to do so on its behalf) in the region. On 2 September 2011, while tensions over Noble Energy's drilling preparations were escalating, Turkey's Minister for European Affairs, Egemen Bağış, was asked by Today's Zaman whether Turkey was considering to send its fleet to prevent the drilling from going ahead, and he replied as follows: 'This is what we have the navy for. We have trained our marines for this; we have equipped the navy for this. All options are on the table; anything can be done.'[22] Mr. Recep Tayyip Erdoğan (then Prime Minister) also made similar statements prior to the beginning of the drilling operation, while Ankara tried to dissuade Noble Energy from proceeding with its cooperation with the RoC.[23]

Despite prior statements, Turkey did not retaliate with any tangible measures against the launching of the drilling operation, while the Turkish navy discreetly monitored the works. As it is seen in the related statements, Turkish leaders refrained from making explicit threats against either the RoC or Noble Energy. Instead, they preferred to issue some vague warnings, without reference to specific penalties in case the interested parties did not comply. Instead of reacting with military means, Turkey and the 'TRNC' proceeded with fully aligned movements designed to dispute the RoC's sovereignty and underline the 'unilateral' character of its actions. A few days after the launching of Noble Energy's first drilling, they agreed to authorise Turkey's state-owned Türkiye Petrolleri Anonim Ortaklığı (Turkish Petroleum Corporation, TPAO) to proceed with explorations off the coast of Cyprus, after signing a 'continental shelf delimitation agreement'.[24] Based on this 'agreement', they claim sovereign rights over a significant part of the RoC's EEZ, specifically (entire or parts of) blocks 1, 4, 5, 6, and 7 as part of the Turkish continental shelf, and blocks 1, 2, 3, 8, 9, 12 as part of the 'TRNC's' continental shelf.[25] Furthermore, Turkish vessels started exploratory activities around Cyprus, in many cases within the Cypriot EEZ and accompanied by

21 See UN Security Council Resolutions 186/1964, 541/1983 and 550/1984.

22 ERPIC, 'Turkey Threatens Cyprus over Offshore Drilling,' *Energy Brief*, (ERPIC.org, 2011, September 3), available at https://erpic.org/wp-content/uploads/2017/02/2011-09-03-turkey-threatens-cyprus-over-offshore-drilling.pdf,.

23 M. Theodoulou, 'Turkey rattles sabres over Cypriot natural gas drilling,' *The National* (2011, September 9), available at https://www.thenational.ae/world/mena/turkey-rattles-sabres-over-cypriot-natural-gas-drilling-1.376835.

24 J. Peixe, 'Turkey Signs Oil Agreement with Turkish Republic of North Cyprus,' *Oil Price.com*, 25 September 2011, available at https://oilprice.com/Latest-Energy-News/World-News/Turkey-Signs-Oil-Agreement-With-Turkish-Republic-Of-North-Cyprus.html.

25 Tsakiris, 'Cyprus's Natural Gas Strategy', 41.

warships.

Despite the tensions caused as a result of Turkish reactions to the drilling activity in the Cypriot EEZ in the course of the years that followed, until February 2018, Turkish response to the subsequent exploratory drilling operations did not reveal any indications of serious military escalation. In this context, exploratory drilling operations, executed by Italian-owned ENI in Block 9 (partially adjacent to the Israeli EEZ) in September 2014 and January 2015, were not intercepted in any way by Turkish military forces, neither did any serious military activity take place. The same could be said for French Total's operation in Block 10, in February 2015. Some developments observed in the aftermath of these operations, i.e. the dispatch of Turkish seismographic vessel RV Barbaros Hayreddin Paşa accompanied by warships in the Cypriot EEZ (which interrupted the Cyprus Problem talks as the Greek Cypriot leader, President Nicos Anastasiades, pulled out in October 2014 in protest of these infringements[26]) could be interpreted as tit-for-tat replies.

In August 2015, ENI announced the discovery of a massive gas field in the Egyptian EEZ, named Zohr, the largest ever found in the Mediterranean, and only six kilometers away from Cyprus' Block 11.[27] The RoC and Egypt had signed a framework agreement on straddling hydrocarbon reserves in December 2013, which was triggered following the Zohr discovery.[28] This development revitalised the interest of oil and gas companies for the Cypriot blocks, which waned after the disappointing results of the exploratory drillings in blocks 9 and 10 (the latter was abandoned by Total after consultation with the Cypriot government). After the RoC initiated a new licensing round in February 2016, blocks 6, 8 and 10 were assigned to consortiums comprising of a total number of seven companies. After this development, ENI and Total deepened their involvement in the Cypriot EEZ, while the entry of the US giant Exxon Mobil increased US interests in the Eastern Mediterranean and, particularly, in Cyprus. At the same time, the tripartite partnerships of the RoC and Greece, with Israel and Egypt respectively, which gained impetus at a time when the new US administration, under Donald Trump, was working for to reinforce US relations with Tel Aviv and Cairo, were signifying an unprecedented geopolitical conjuncture

26 E. Hazou, 'Drilling for Cyprus gas, a timeline,' *Cyprus Mail* (27 June 2016), available at https://cyprus-mail.com/2016/06/27/special-report-drilling-cyprus-gas-timeline/, .

27 ENI, 'Eni discovers a supergiant gas field in the Egyptian offshore, the largest ever found in the Mediterranean Sea,' *Eni.com* (30 August 2015), available at https://www.eni.com/en_IT/media/2015/08/eni-discovers-a-supergiant-gas-field-in-the-egyptian-offshore-the-largest-ever-found-in-the-mediterranean-sea.

28 S. Evripidou, 'Cyprus and Egypt sign unitisation deal on the joint exploitation,' *Cyprus Mail* (13 December 2013), available at https://cyprus-mail.com/2013/12/13/cyprus-and-egypt-sign-unitisation-deal-on-the-joint-exploitation/.

that boosted the role of Cyprus in the region.[29] In February 2018, ENI announced a 'promising gas discovery' in Block 6 that 'confirms the extension of the "Zohr like" play in the Cyprus Exclusive Economic Zone.'[30] What makes this development interesting to our research objectives is that a part of Block 6, which is adjacent to the Egyptian EEZ according to the delimitation agreement between Egypt and the RoC,[31] is considered by Turkey as lying within the Turkish continental shelf. For that reason, the spokesman of the Turkish Ministry of Foreign Affairs, Tanju Bilgiç, made a statement in August 2016, after the block was licensed by the RoC, warning the interested companies that any activity without Turkey's authorisation would not be possible.[32] However, the drilling operation was successfully accomplished without any interception.

After the 'first shock' in September 2011, Turkey's strategy was profoundly modified through a tactical turn towards actions designed to question the RoC's sovereign rights over its EEZ instead of a more conflict-prone strategy of military threats. This turn was established after Ankara announced, in March 2017, its intention to proceed with its own exploratory drilling operations in maritime areas it considered as part of its continental shelf in the Eastern Mediterranean, which in some cases coincide with the Cypriot declared and delimited EEZ.[33] Furthermore, during that period, Turkey occasionally issued navigational warnings, reserving areas within the Cypriot EEZ, thus defying the RoC's authorities. Last but not least, Turkey intensified its efforts to deter the companies involved in exploratory works under RoC's authorisation from proceeding with their plans in the Cypriot EEZ.[34] However, the Turkish strategy seemed to shift again towards military coercion when, in February

29 A. Mekel, 'Birth of a Geopolitical Bloc: The Israel-Greece-Cyprus Axis," *Haaretz* (31 January 2016). available at https://www.haaretz.com/israel-news/.premium-birth-of-a-geopolitical-bloc-the-israel-greece-cyprus-axis-1.5397833; A. Samir, 'Egypt, Greece, Cyprus: Model for successful international cooperation,' *Egypt Today* (2017, November 21), available at http://www.egypttoday.com/Article/2/33551/Egypt-Greece-Cyprus-Model-for-successful-international-cooperation.

30 ENI, 'Eni announces a gas discovery Offshore Cyprus,' *Eni.com*, (8 February 2018), available at https://www.eni.com/en_IT/media/2018/02/eni-announces-a-gas-discovery-offshore-cyprus .

31 Agreement between the Republic of Cyprus and the Arab Republic of Egypt on the Delimitation of the Exclusive Economic Zone, (2003, February 17), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/EGY-CYP2003EZ.pdf..

32 E. Andreou, 'Turkey warns foreign firms over interest in Block 6,' *Cyprus Mail* (2016 August 2), available at http://cyprus-mail.com/2016/08/02/turkey-warns-foreign-firms-interest-block-6/,

33 O. Kutlu, 'Turkey to seismic explore in Med., Black Sea,' Anadolu Agency (2017, March 9), available at https://www.aa.com.tr/en/economy/turkey-to-seismic-explore-in-med-black-sea-minister/767151.

34 Tsakiris, Cyprus's Natural Gas Strategy, 46; N. Prakas, 'Turkey warns companies not to explore in Cyprus' block 6,' Sigmalive (2016, August 2), available at http://www.sigmalive.com/en/news/energy/147518/turkey-warns-companies-not-to-explore-in-cyprus-block-6.

2018, Turkish military ships obstructed ENI's drill ship Saipem 12000 from executing an exploratory drill in Block 3 of the Cypriot EEZ.[35] This development followed ENI's announcement of discovery in Block 6, and it was the first (and only one until now) serious incident of military activity of this kind since the beginning of the Cypriot exploratory programme. From a geographical point of view, and compared to blocks 12, 9, 11 and 6, Block 3 is closer to Turkey, adjacent to the Lebanese EEZ and considered by Turkey and the 'TRNC' as lying within the 'Turkish Cypriot' continental shelf. It's worth noting that the Lebanese parliament has not ratified the delimitation agreement between Lebanon and the RoC (signed in 2007).

More recently, in view of Exxon Mobil's exploratory drilling in Block 10, which ultimately started in November 2018 without any problems, Turkey announced that its first drilling in the Eastern Mediterranean was only a matter of time, while Turkish leaders continued to issue warnings against the RoC. Turkish Foreign Minister, Mevlüt Çavuşoğlu, stated in September 2018: 'Turkey has warned the Greek Cypriots [as he called the RoC] from the onset not to take such irresponsible steps. If they still believe they have nothing to lose they are mistaken.'[36] The Turkish drilling operation started a few days before Exxon Mobil's works, in October 2018.[37]

Patient Gradualism and Alarm Signals

Having in mind the theoretical discourse on the use of threat and aiming to put Turkey's attempts to reverse the RoC's drilling programme into context, we conclude that Turkey's activity cannot be categorised as plain military coercion, neither does the RoC seem to exercise deliberate deterrence. First of all, Turkey's strategy does not include a clear-cut threat to use military force in retaliation for a specific action, while the RoC does not respond to Turkish warnings and tit-for-tat activity, neither does it have the means to meet potential actual use of military force by Turkey. Instead, Ankara only implies that military force could be an option, among other ones and under unspecified circumstances. Turkey's only serious military infringement of Cyprus's offshore drilling works, namely the disruption of ENI's scheduled operation in Block 3, could be seen as a choice for limited use of military force, aiming to convey a message to the implicated parties. However, the fact that it happened in this specific

35 M. Kambas, 'Standoff in high seas as Cyprus says Turkey blocks gas drill ship,' Reuters (2018, February 11), available at https://www.reuters.com/article/us-cyprus-natgas-turkey-ship/standoff-in-high-seas-as-cyprus-says-turkey-blocks-gas-drill-ship-idUSKBN1FV0X5.

36 G. Psyllides, 'Cavusoglu: Greek Cypriots act as if Cyprus belongs to them,' *Cyprus Mail* (2018, September 1), available at http://cyprus-mail.com/2018/09/01/cavusoglu-greek-cypriots-act-as-if-cyprus-belongs-to-them..

37 M. Xuequan, 'Turkey starts first deep drilling in Mediterranean Sea,' *Xinhua News* (2018, October 30), available at http://www.xinhuanet.com/english/2018-10/31/c_137570181.htm,.

block, with the geographic characteristics described above, where Italian ENI had the operational responsibility, while the operations of French Total and US Noble Energy and Exxon Mobil started without any interruptions (even in Block 6 where Turkey claims sovereign rights), should be highlighted as indicative of Turkey's tactical options and limitations. Apparently, Turkey has chosen to take non-military measures to dispute the legitimacy of the RoC's offshore activity, instead of military ones that would forcibly impose Ankara's will. Last but not least, Ankara attempts to persuade the foreign companies that their drilling operations, under RoC's authorisation, will be more costly than beneficial.

Taking these into account, we argue that Turkey's strategy, especially after September 2011, and its failure to deter the RoC from launching its exploratory programme can be considered as a sort of coercive diplomacy. Alexander George defines coercive diplomacy as

> 'efforts to persuade an opponent to stop and/or undo an action he is already embarked upon.[…] Coercive diplomacy does indeed offer an alternative to reliance on military action. It seeks to *persuade* an opponent to cease his aggression rather than bludgeon him into stopping. In contrast to the blunt use of force to repel an adversary, coercive diplomacy emphasizes the use of threats to punish the adversary if he does not comply with what is demanded of him. If force is used in coercive diplomacy, it consists of an exemplary use of quite limited force to persuade the opponent to back down. By 'exemplary', I mean the use of just enough force of an appropriate kind to demonstrate resolution to protect one's interests and to establish the credibility of one's determination to use more force if necessary. The strategy of coercive diplomacy, however, does not require use of exemplary actions. The crisis may be satisfactorily resolved without an exemplary use of force; or the strategy of coercive diplomacy may be abandoned in favour of full-scale military operations without a preliminary use of exemplary force. In employing coercive diplomacy, which may already include non-military sanctions, one gives the adversary an opportunity to stop or back off before one resorts to military operations.[38] After all, mere use of military threats, as Jervis observes, may 'prove particularly troublesome, since if they fail, they can drive the threatening party onto a path it may not actually want to follow'.[39]

When it comes to the variants of coercive diplomacy, George explains that a 'policy maker should decide (1) what to demand of the opponent; (2) whether and how to create a sense of urgency for compliance with the demand; (3) whether and what kind of punishment to threaten for noncompliance; and (4) whether to rely solely

38 George, *Forceful Persuasuion*, 5-6.

39 R. Jervis, 'Getting to Yes With Iran: The Challenges of Coercive Diplomacy,' *Foreign Affairs*, Vol. 92, No. 1 (January/February 2013), 107.

on the threat of punishment or also to offer conditional inducements of a positive character to secure acceptance of the demand."[40] Therefore, taking into account these components, especially the first three, a strategy of coercive diplomacy could take the form of the following variants: (1) a full-fledged ultimatum that would involve a demand on the opponent, a time limit or a sense of urgency for compliance with the demand, and a threat of punishment in case the opponent fails to comply; (2) a tacit ultimatum, which does not involve a specific threat of punishment but a message which is composed of a combination of military preparation and stern warning; (3) a 'try-and-see' approach, which includes a demand with no time limit or strong urgency, but only a limited coercive threat or action, followed by a re-assessment of the situation according to the opponent's reaction to the threat, which will define whether there will be a next step; and (4) a 'gradual turning of the screw', where the 'threat to step up pressure gradually is conveyed at the outset and is carried out incrementally'. Again, there is no time urgency, but instead a threat of 'a gradual, incremental increase in coercive pressure' rather than a threat to escalate militarily if there is no compliance.[41]

When it comes to our case study, Turkey apparently avoids a full-fledged ultimatum. That was the situation, for example, in 1996-1998, when Turkey clearly threatened to use military force if the RoC received the S-300 surface-to-air missiles, which it had ordered from Russia. It is worth noting that, Turkey's coercive diplomacy was successful then, as the Cypriot government, in coordination with Greece and due to considerable international pressure, decided to comply and send the S-300 system to Crete, instead of its initially scheduled deployment in Cyprus.[42] In the case we examine in this paper, the model of tacit ultimatum is more applicable as there is no specific threat of punishment. At the same time, we cannot say that there are military preparations either, but only selective mobilization of limited naval forces. It seems that this looks more like a combination of a 'try-and-see' approach and 'gradual turning of the screw'. Turkey takes a patient and gradual approach, which mainly involves non-military means, while it sometimes tries to 'keep the opponent awake' by increasing the military volume of its activity. By selectively mobilising its navy, like it did in Block 3, it aims to send alarm signals periodically in order to remind Nicosia and the foreign oil and gas companies of its resoluteness to stop the RoC from exploring its EEZ and, especially, from exploiting the discovered natural gas reserves. At the same time, there are no strong indications that military escalation is among Turkey's

40 George, *Forceful Persuasuion,* 8.

41 Ibid.

42 M. Kontos and A. Karyos, 'The Threat of Use of Military Force Under Unequal Power Relations: The Crisis of the S300 Missile System in Cyprus, 1996-1998' [in Greek], *Political History of the Republic of Cyprus after 1974*, (2018) organized by the University of Nicosia, School of Law, 12-13 October 2018.

options, at least not among its primary ones and not at this stage.

A Structured Evaluation of Turkey's Strategy and Its Perspective Efficiency

As the case under examination is ongoing, we cannot safely evaluate the actual efficiency of Turkey's strategy. However, we can proceed with some assumptions about its potential efficiency by testing its applicability with the seven conditions that, according to George, 'favor (although they do not guarantee) effective coercive diplomacy':[43] clarity of objective, strength of motivation, asymmetry of motivation, sense of urgency, adequate domestic and international support, opponent's fear of unacceptable escalation, and clarity concerning the precise terms of settlement of the crisis. In order to have a measure for comparison, we will use Turkey's ultimatum which led to the cancellation of the deployment of the S-300 system in Cyprus as an example of successful Turkish coercive diplomacy towards the RoC.

Clarity of objective. In the last few years, under the Justice and Development Party's rule, Ankara has promoted an ambitious foreign policy agenda which aims to increase Turkey's regional influence or, at best, to render Turkey a regional hegemon in the broader Middle East.[44] The main power indicator that Ankara tries to exploit to this end has been its soft power, namely its capacity to influence Arab groups and populations which espouse similar religious doctrines. By adopting the profile of a religious leader with trans-border appeal, President Erdoğan chose to clash with Western 'civilization' in order to promote an alternative Islamic paradigm. In this framework, a new set of interactions emerged, which critically affected Turkey's relations with several actors like the United States, the EU and Israel, as well as with other Muslim states like Iran, Syria and Egypt.

In the context of its regional aspirations, Turkey's special objective in the situation under examination is to stop the RoC from fulfilling its offshore energy aspirations. In relation with energy matters, Ankara's broader (strategic) objective is to become a regional energy leader and/or a regional energy hub.[45] The RoC's programme would jeopardise Turkey's regional aspirations, especially if the RoC managed to become a regional energy player in defiance of Turkey's own interpretation of the state of affairs on the island and generally in the Eastern Mediterranean. At first sight, the actual (special) objective of Turkey's coercive diplomacy seems to be simple and clear. However, the process of exploiting natural gas reserves is a long-lasting one, comprised

43 George, *Forceful Persuasuion*, 76-81.

44 M. Kontos, 'Hegemony and Balance of Power in the Middle East,' *Eastern Mediterranean Geopolitical Review*, Vol. 2 (2016), 25.

45 J. Richert, 'Is Turkey's Energy Leadership Over Before it Began?' (Sabancı University Istanbul Policy Center; Stiftung Mercator Initiative, 2015). G. Windrow, 'Realization of Turkey's Energy Aspirations Pipe Dreams or Real Projects?' Brookings, *Turkey Project Policy Paper*, Number 4 (2014).

of many stages. The RoC has already achieved some progress, especially as regards the Aphrodite reserve in Block 12, in which the exploratory stage has been completed and the RoC has already signed an agreement with Egypt for the construction of a pipeline that will transport natural gas to an Egyptian liquefaction plant and from there to the markets.[46] As the project does not have a 'once-off' character, Turkey's objective needs to be adjustable and divisible. The problem is that this flexibility undermines the clarity of the objective and, consequently, the clarity of the messages conveyed to the opponents. In other words, how far Turkey is willing to go in retaliation to which specific actions of the RoC, under which circumstances and at which stage of the process is rather unclear. Contrary to the S-300 case, where the objective was much clearer: the anti-missile system should not be deployed in Cyprus. In that case, the clarity and the 'once-off' character of the stake was a catalyst for the successful application of the threat.

Strength of motivation. Considering Ankara's aforementioned special and strategic objectives in the preventing Cyprus from exploring for and exploiting natural gas, we can say that Turkey has a strong motive to stop the RoC from proceeding with its drilling programme. However, the risk of Cyprus discovering and monetising natural gas reserves is far from being existential for Turkey, while the fact that the exploitation process is long-lasting and the objectives are adjustable may weaken the original motive and/or create secondary ones. Furthermore, Turkey and the 'TRNC' are trying to connect Cyprus' offshore energy quest with negotiations on the Cyprus Problem. If they manage to put the hydrocarbons issue on the table, they could achieve significant bargaining payoffs, even if the RoC manages to complete the exploratory programme and starts making money from the natural gas. On the other hand, the stakes are higher for the RoC, as even moderate natural gas findings may have considerable impact on the tiny Cypriot economy, while a potential cancellation of the programme would be extremely detrimental for the country's international credibility, as contracts with prestigious companies and agreements with friendly countries would have to be defaulted. Therefore, Nicosia may estimate that it is worth taking the risk and move forward, especially inasmuch as Turkey's military threat fades or loses its credibility. Furthermore, it also seems that the interested companies' motivation remains strong even after the interception of Saipem 12000 in February 2018. This may be explained by the encouraging indications about the potential for significant natural gas findings in the Cypriot EEZ.

Asymmetry of motivation. As George observes, 'coercive diplomacy is more likely to be successful if the side employing it is more highly motivated by what is at stake in the

46 G. Psyllides, 'Cyprus, Egypt sign gas pipeline agreement,' *Cyprus Mail* (2018, September 19), available at https://cyprus-mail.com/2018/09/19/cyprus-egypt-sign-gas-pipeline-agreement/.

crisis than its opponent'.[47] As we argue above, the RoC seems to have stronger motives to risk suffering Turkey's wrath than Turkey has to lead the crisis to an uncontrollable escalation that would probably dash the RoC's aspirations, but it would also bear significant diplomatic cost. Furthermore, the fact that the actual dispute is playing out in the open sea almost diminishes the sense of danger for the Cypriots, while a potential shift of the crisis to Cypriot soil would probably fail to convey the right message to the oil and gas companies. On the contrary, in the S-300 crisis, although both sides had equally strong motives to achieve their objectives, the RoC could survive without the S-300 system despite the political and psychological consequences of the cancellation, while a potential Turkish military strike against Cyprus could jeopardise the Cypriot economy as tourism would be dramatically affected.

Sense of urgency. It is difficult for Turkey to create a sense of urgency that would put additional pressure on the RoC, as this does not have 'once-off' characteristics. In other words, the Turkish demand does not call for one specific action by the RoC, but for the termination of an ongoing course of actions. Therefore, since Noble energy started the first drilling operation in September 2011 and, subsequently, other companies accomplished several more drillings without succumbing to Ankara's warnings and discovered two natural gas reserves, an effort to create a sense of urgency would be meaningless. On the contrary, with the S-300 missiles, as the scheduled delivery of the Russian system to Cyprus approached, Turkey eventually managed to create a sense of urgency with international impact, which became evident by the concerted pressure exercised by the international community on Nicosia, requesting the cancellation of the missiles' deployment.[48] Specifically, by threatening to attack the S-300 system, Turkey put pressure on the RoC, and Nicosia had to use the remaining time before the system would be delivered to consider alternative scenarios. The fact that Nicosia issued specific proposals aiming to bargain, such as cancelling the deployment of S-300s in return for Turkey's commitment to demilitarise Cyprus,[49] as well as twice postponing the delivery of the Russian missiles,[50] indicated that it felt the pressure caused by the urgency of the matter.

Adequate domestic and international support. Since the issue in question does not affect the lives of Turkish citizens in any tangible way, essential (or lack of sufficient) domestic support is not a crucial factor that could define the efficiency of Turkey's coercive diplomacy. On the contrary, international support is very important for

47 George, *Forceful Persuasion,* 77.

48 C. Taylor, 'West frets over 'crisis countdown in Cyprus,' *Cyprus Mail* (1998, January 21).

49 Phileleftheros, 'Direct agreement with the USA on flights,' [Απ' ευθείας με τις ΗΠΑ συμφωνία για Πτήσεις] *Phileleftheros* (1998, February 9).

50 Phileleftheros, 'The S-300 will be ready for deployment in October,' [Επιχειρησιακά έτοιμοι τον Οκτώβριο οι S-300] *Phileleftheros* (1998, June 10).

both sides and, for that reason, Turkey tried to achieve international legitimacy for its demands, although without success. At the same time the RoC managed to get backing for its offshore exploratory programme by cooperating with (or by getting supporting statements from) significant international and regional players, like the European Commission and the European Council, the United States, Israel, Egypt and, of course, Greece. International support vested Nicosia's actions with international legitimacy that raised the expected cost of Turkey's potential counter-measures. This did not happen in the S-300 case, as we mentioned above: the RoC was urged by many friendly countries, like the United States, France, Germany, the United Kingdom and, at the end of the day, Greece, to cancel the delivery of the Russian missiles. Lack of international legitimacy, despite the fact that Cyprus maintained the right to reinforce its defence capacity, was one of the catalysts for Nicosia's final decision.

Opponent's fear of unacceptable escalation. Coercive diplomacy does not necessarily entail a real intention to use military force, but it has better chances of success if the use of force is on the table. If, according to the opponent's perception, the potential cost of its actions is acceptable, then minimal-cost coercive diplomacy will not have any realistic chances to succeed. In cases of power asymmetry, the weaker party is by definition more vulnerable to the mightier's threats and warnings, therefore its perceptions of the potential cost will be adjusted accordingly. The worst-case scenario for the weaker party would be an uncontrollable escalation of a potential use of force by its opponent, as the latter would probably try to exploit its military supremacy and the former would be forced to retreat. This was Nicosia's main disadvantage in the S-300 case: in the event of military engagement, the possibility of escalation that would bring about unacceptable cost to the RoC could not be ruled out, therefore the decision to cancel the missiles' delivery was a rational choice. In the case under examination, though, since Ankara (for the time being) fails to convey a clear-cut message of potential use of force if its conditions are not respected, military escalation is a rather unlikely scenario. The structure of the case, the roles allocated among the interested parties and the dominating perceptions are such that none of the interested parties would like this to happen.

Clarity concerning the precise terms of settlement of the crisis. As George observes, 'clarity of objectives and demands may not suffice; in addition, it may be necessary in some cases (as, for example, in the Cuban crisis) for the coercing power to formulate rather specific terms regarding the termination of the crisis the two sides have agreed upon and to establish procedures for carrying out these terms and verifying their implementation… The adversary who has succumbed to coercive diplomacy may need specific and reliable assurances that the coercive power will carry out its part of

the termination agreement'.[51] In the EEZ dispute, there are practical obstacles that make an agreement on the terms of settlement extremely difficult. The most serious is Turkey's refusal to recognise the RoC and its insistence on the 'new realities' brought about by the Turkish invasion of Cyprus in 1974 and the self-proclamation of the 'TRNC' in 1983. Turkey considers the RoC as 'defunct'[52] and it systematically avoids the implicit or explicit establishment of any official link with Nicosia. Therefore, an attempt to cooperate with the RoC with a view to achieve a mutually accepted settlement would be inconsistent with the policy of no recognition. Turkey leaves this role to the 'TRNC', as the 'equal partner' of the 'Greek Cypriot Administration' in a future reunified Cyprus. However, the fact that the RoC runs its drilling programme outside the framework of the Cyprus Problem negotiations, as a sovereign right of a state that functions properly despite the *de facto* division of its territory, denies the (internationally unrecognised) 'TRNC' any role in this matter at this stage. For the S-300 issue, the context was fundamentally different, as the course of the events demonstrates that Turkey believed that the RoC would succumb without achieving any gains. This is probably why the Greek Cypriot proposal for an agreement to demilitarise Cyprus in return for the cancellation of the deployment of the missiles to the island was rejected by the other side. Significantly, Turkey rejected any commonly agreed terms of settlement other than its own original demand. Or, to put it in another way, Ankara decided to impose the terms of the settlement in a hegemonic manner.

Conclusion

After analysing our case under the lens of coercion and deterrence theory, we conclude that Turkey's strategy, which aims to interrupt the Cypriot quest for natural gas offshore and to reinforce Ankara's regional aspirations, is not compatible with the model of coercion, which mainly involves military force. At the same time, the RoC does not take any tangible measures (in response to Turkey's efforts to stop the former's drilling programme) which could have been interpreted as a form of deterrence. Instead, Turkey prefers a strategy of coercive diplomacy, aiming not to forcibly impose its will, but to give 'the adversary an opportunity to stop or back off before [Turkey] resorts to military operations'. More specifically, Turkey takes a gradual approach, which involves only exemplary military mobilisation, in an effort to maintain a sense of threat in the opponent's mind that will modify his future choices accordingly.

What makes our case particularly interesting is the fact that Turkey's clear-cut

51 George, 'Forceful Persuasion', 80-81.

52 T. Tzionis, 'The "defunct Republic of Cyprus" (according to Turkey) in the present phase of the Cyprus Problem,' (Nicosia: The Cyprus Center for European and International Affairs, Eastern Mediterranean Policy Note No. 13, 2017, January 10), available at http://www.emgr.unic.ac.cy/wp-content/uploads/EMPN_13.pdf..

military advantage over the RoC has not played a critical role in this dispute, at least not for the time being. The main reason for this seems to be the presence of multinational oil and gas companies, some of them from countries with high diplomatic and military status and international impact. The fact that Turkey chose to intercept a pre-scheduled activity in Block 3, which is geographically positioned close to Turkey and is licensed to Italian ENI, while it refrained from any forcible measures in cases where French or US-based companies where involved (including Block 6 where Turkey claims sovereign rights), suggest an indication of the validity of this hypothesis. We may argue that Ankara's options are affected by a sense of self-deterrence, which takes the form of 'an unwillingness to take necessary initiatives as a result of a self-induced fear of the consequences.'[53] These potential consequences, of course, would not be military but diplomatic.

Our structured evaluation of Turkey's strategy indicates that, for the time being and at this stage of the dispute, it is unlikely that Ankara's objectives will be fulfilled, taking into account the limitations described above, which are related to the efficiency of Turkey's power indicators and the structure of the case under examination. However, the process to finally exploit natural gas findings is long-lasting, and therefore, the stakes do not have 'once-off' characteristics. In that sense, it is possible that the motives and the available options of the parties involved may be restructured in the future in such a way that the current balance may be modified. The possibility of a win-win-situation later on cannot be ruled out, and neither can a critical escalation of tensions, maybe in the form of Turkish drillings in the Cypriot EEZ, or even through an increase of military tensions. Potential future natural gas findings (or failure to meet the original expectations), actions related with the exploitation of the reserves, as well as developments regarding the talks for a solution to the Cyprus Problem, are some potential modifying factors. In any case, our conclusions will remain valid in a broader context, in relation to the options of small states to achieve goals that are opposed by more powerful states, and when specific balance configurations are in place.

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The Challenges of Formulating National Security Strategies (NSS) in the Presence of Overarching Existential Threats

Constantinos Adamides[1]

Abstract

The overall objective of the paper is to examine how states that face an overarching (perceived) existential threat may be at a disadvantage when developing their National Security Strategies (NSS). The main hypothesis is that states facing an overarching threat tend to focus almost exclusively on that and may subsequently ignore or under-estimate other potential great threats, while at the same time they may miss out on opportunities to enhance their domestic, and even regional, security and geopolitical standing. A secondary hypothesis aims to test whether these myopic situations develop due to the sociopolitical expectations for a single-issue NSS focus. Furthermore, being an EU Member State may potentially exacerbate a false sense of both insecurity (from the overarching threat) and security (from other potential threats). This raises questions on i) whether the EU is in a position to understand the localized security perceptions and thus provide the necessary support to mitigate those fears, and ii) whether it can act as a security provider, not only in real terms (point i), but also by re-orienting the Member States' view of security and threats.

Keywords: National Security Strategies (NSS), existential threats, EU Member States, overarching threats, security

Introduction

Formulating National Security Strategies (NSS) is almost never a straightforward task, free of major theoretical or empirical complexities, even in cases where there is a single overarching and very dominant existential threat. In such cases, the focus of the NSS is usually unquestionable; it revolves around the source of the overarching threat (OT). This paper explores on one hand the potential challenges of formulating a comprehensive NSS in states dominated by a single OT, and on the other it questions the potential true functionality or purpose of the NSS in such environments.

The paper is separated into three major sections. The first explains the importance of overarching threats in contributing to the formation of unique mentalities

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and culture, which in turn become themselves obstacles to the development of comprehensive NSSs. The second part focuses on the potential impact on an NSS, and more specifically how the latter may be either too focused on a single issue – i.e. the overarching threat – or very 'thin' when it comes to the other potential threats that fall outside the realm of the OT. The third part focuses on the role of the EU as a potential security provider whose actions or inactions shape the national security paths of a state under an overarching threat. The paper draws empirical data from the case of Cyprus and more specifically from the Republic of Cyprus and, to a much lesser degree, Georgia. It must be noted on the outset that the Republic of Cyprus has been working on an official National Security Strategy document, but it is not yet, to my knowledge, complete, or indeed public. Thus, in the case of Cyprus (as opposed to that of Georgia), the reference to a NSS does not necessarily refer to an actual written document, but rather to National Security Strategy as part of the country's security culture, mentality and practices.

Overarching Threats (OTs)

Overarching threats are defined as existential threats, which, if they materialize, will have an extremely high negative impact on the state and on society. Such threats are not necessarily limited to a single referent object such as the physical security of the people in a state, or the political survival of a government. In line with the Copenhagen School of thought, existential threats could extend into other areas using a logic of a more widened and 'sociologized' analysis of security.[2] Thus, existential threats could also be based in the political, economic, societal and environmental sectors. Wæver[3] points out that 'a discussion of security is a discussion of threat' meaning that security becomes 'what actors make of it'.[4] It is precisely this intersubjective sociological approach to security that allows for the development of a widened security agenda with multiple sectors and numerous potential referent objects that could be under existential threat. Indeed, since its conception, securitization theory has been used to study security-related issues and processes in several areas including terrorism.[5]

2 S. Guzzini, 'Securitization as a causal mechanism', *Security Dialogue*, Vol. 42, No. 5 (2011), 329-341.

3 O. Wæver, 'Politics, security, theory', *Security Dialogue*, Vol. 42, Nos. 4-5 (2011), 472-473.

4 B. Buzan, et al., *Security: A New Framework for Analysis* (London: Lynne Rienner Publishers, 1997).

5 See B. Buzan (2006) on terrorism; D. Bigo, 'Secuity and Immigration: Toward a Critique of the Government of Unease', *Alternatives*, Vol. 27, Special Issue, (2002), D. Bigo 'From Foreigners to "Abnormal Aliens"', in *International Migration and Security: Opportunities and Challenges*, eds. E. Guild and J. Van Selm (Abingdon: Routledge 2005), and M. Alexseev, 'Societal security, the security dilemma, and extreme anti-migrant hostility in Russia', *Journal of Peace Research*, Vol. 48, No. 4 (2011) on immigration; R. Floyd, 'Human security and the Copenhagen School's securitization approach: Conceptualizing human security as a securitization move', *Human Security Journal*, Vol. 5, Winter,

That said, most overarching threats focus on the survival of the state, which subsequently means that more than one 'sector' or referent objects are directly or indirectly affected by the OT. For instance, a military invasion does not only pose an existential threat to the people and the state, but inevitably to the economy, the societal structures and potentially the environment. Frequently, OT are also persistent, in the sense that they are not usually a 'one-time incident', but rather the outcome of medium or even long-term actions or adversarial relationships, as is the case, for instance, of states or communities that are the recipients of negative actions or threats from neighbouring rivals.

Expectedly, OTs have a significant impact on the perceptions and security cultures of the societies facing the threat, and the impact should be expected to be even greater in cases where the perceived probability of the threat materializing is higher due to historical and contemporary incidences related to the threats. Unsurprisingly, OTs with significant impact are found in protracted or persistent conflicts; that is, enduring – usually dyadic – rivalries engaged in conflict over an extended period.[6] In such cases, more often than not the same source of threat is imbedded in the society's routines and remains unchallenged by the majority of the population.[7] For the Palestinians the source of threat would be Israel, for Georgians, Russia, for South Korean, North Korea, and for (Greek) Cypriots, Turkey, just to name a few.

It is worth noting that the use of violence, acceptable as it may be as a tool in such environments, is not a necessary ingredient to observe an enduring rivalry. North and South Korea – in the post Korean war period – is such an example.[8] However, intense or frequent violent acts not only enhance the chance for conflicts to remain unresolved,

(2007), on human security; E. Wishnick, 'Dilemmas of securitization and health risk management in the People's Republic of China: The cases of SARS and avian influenza'. *Health Policy and Planning*, Vol. 25, No. 6 (2010) on the environment; L. Hansen, 'The Little Mermaid's silent security dilemma and the absence of gender in the Copenhagen School', *Millenium: Journal of International Studies*, Vol. 29, No. 2 (2000) on women's rights.

6 E. Azar, 'The Theory of Protracted Social Conflict and the Challenge of Transforming Conflict Situations', in *Conflict and the Breakdown of International Systems*, ed. D. A. Zinnes (Denver, CO: University of Colorado, 1983); K. Boulding, 'Conflict and Defense: A General Theory', (New Jersey: Princeton University Press, 1989); G. Friedman, 'Conceptualizing Protracted Conflict and Protracted Conflict Management', in *The Understanding and Management of Global Violence: New Approaches To Theory and Research on Protracted Conflict*, ed. H. Starr (New York, NY: St. Martin's Press, 1999).

7 C. Adamides, 'Negative perceptions of foreign actors: an integral part of conflict perpetuating routines', *Great Power Politics in Cyprus: Foreign Interventions and Domestic Perceptions*, eds. M. Kontos, N. Panayiotides, H. Alexandrou, and S. C. Theodoulou (Newcastle: Cambridge Scholars Publishing, 2014).

8 P. F. Diehl and G. Goertz, *War and peace in international rivalry* (Ann Arbor, Michigan: University of Michigan Press, 2000).

but also contribute to the internalization of the overarching threats. Violence also allows for the development of stronger links between negative past experiences and potential future threats, even when there is no strong evidence that a current or future perceived threat is likely to materialize. In other words, individuals and states may frequently evaluate future threats – and similarly future security providers – based on their past experiences and not necessarily based on current developments or on other security-related indicators. In other words, threats are usually linked to the 'enemy other' and not necessarily due to the presence of violence (or active conflict) as it is frequently assumed.[9] This is not surprising, especially in protracted conflicts, as security-related discourses tend to resonate for a long time, frequently for generations, and remain resilient in the collective memory of the communities. Indeed, as Horowitz notes, in ethnic conflicts, antipathies towards 'the other' are so strong that they can 'survive even the powerful solvent of modernization' and contribute to the perpetuation of ethnic antagonisms.[10] Official and non-official positions contribute to the perpetuation of the relevant security discourses, frequently creating an insurmountable obstacle for political elite who cannot ignore the public sentiments, even if politically it would be more beneficial for the country to do so. Similarly, education has a major role to play both in terms of peacebuilding and the perpetuation or even exacerbation of the conflict. Taking a potentially negative role of educators to the extreme, Sommers[11] notes that 'many who conduct modern wars are expert at using educational settings to indoctrinate and control children'. Indeed, the internalized security-related perceptions are too strong, too resilient and too 'visible' (in opinion polls) to be ignored.

What is argued in this paper is that in the presence of overarching existential threats – especially in the military sector – states and people tend to focus entirely on that, frequently ignoring other potential threats. Considering the actual or potential impact of an OT, this should not be seen as either irrational or as unexpected, especially if the OT has a high probability of materializing. Interestingly however, this 'over focus' on a single issue may also exist in cases where the probability of threat materializing is relatively low. In the latter case, this is predictable irrationality, at least in the eyes of outsiders. It is certainly predictable behaviour to focus on potentially big threats; however, it can be perceived as irrational to ignore, or under-focus, on much more probable threats. It is likely that outsiders will be the only actors to see this irrationality, as locals, due to the internalized perceptions they hold vis-à-vis the OT, are unlikely to consider such

9 L. Kriesberg, *Constructive Conflicts: From Escalation to Resolution* (Oxford: Rowman & Littlefield Publishers, 1998).

10 L. D. Horowitz, *Ethnic Groups in Conflict* (Berkley: University of California Press, 1985), 97-98.

11 M. Sommers, *Children, education and war: reaching Education for All (EFA) objectives in countries affected by conflict*. Conflict Prevention and Reconstructing Unit. Working Papers. Paper 1. June 2002. Social and Development (Washington, D.C.: World Bank, 2002).

behaviour as anything but expected and legitimate. Indeed, in environments where there is an OT, it is very likely to observe group-think mentality, which would only perpetuate the internalized positions, as well the recycling of knowledge with few opportunities to 'think outside the box', or rather 'outside the OT'.

Can or Should Overarching Threats Be Excluded from a National Security Strategy?

Is it even possible in protracted conflict environments for an NSS *not* to focus on the OT? The answer is a resounding 'no'. Any national security strategy that does not focus on the most existential threat of the state will essentially be completely meaningless as it will lack legitimization in the eyes of the locals, and most likely the non-locals. Lack of legitimization will essentially render any NSS pointless at best, and at worse, it will create a backlash for the government that drafted it. Indeed, ignoring the OT would be nothing less than political suicide, as OTs are central to society, routinized, and more often than not, *unchallenged domestically*.[12] The centrality of the threat means that society, the political elite, the media and the public, are constantly preoccupied with the threat and the political developments that are linked to it. The centrality of the issue is not only evident from the focus it receives in the press and the political discourses, but also in education material and societal activities. OTs are also routinized in the sense that the same discourses, that are usually presented as zero-sum positions, tend to appear repeatedly in official and non-official positions. Lastly, they are unchallenged in the sense that the threat (and source of threat) is so deeply securitized that its presence and importance are unlikely to be challenged in any convincing way by political elite, media or the public.

While the aforementioned conditions may make it impossible for governments not to 'over-focus' on the OT, it does not mean that the focus is not justified. On the contrary, it is as justified as it is expected. What is being discussed here is the possibility that the focus on the OT comes at the expense of focusing on other potential threats. A National Security Strategy aims not only to define and outline the threats a state is facing, but also to explore the options on how to deal with them. Thus a NSS should help determine the strategic security objectives of a state and subsequently the necessary means to achieve them. With this in mind, the paper does not question whether an OT should be part of the NSS – it should – but rather the potential opportunity cost, namely the inability or unwillingness to focus on other (potentially much more probable) threats. This opportunity cost is not necessarily in reference to

12 C. Adamides, 'A comfortable and routine conflict', in *Resolving Cyprus: New approaches to conflict resolution*, ed. J. Ker Lindsay (I.B. Tauris, 2015).

the actual NSS paper – that may or may not focus on all kinds of threats – but also on the means and resources allocated to achieve the objectives outlined in the NSS. In other words, this potential neglect due to a potential over-focus on an OT should be seen in practical, societal and cultural terms.

Specifically, on paper, no decent NSS would ignore other potential threats such as cyber warfare, environmental threats, etc. Thus, it should be considered a given that an NSS would, on paper, pay attention to all different kinds of threats. In reality, however, to what extend would such a comprehensive NSS influence the practical aspect that deals with threats? The assumption is that the NSS should be shaping the path for a state's security focus. This paper argues that in the presence of an OT, it is the OT and the associated security culture that will determine the security orientation of the state and not an NSS. Furthermore, the paper questions the sincerity of the NSS vis-à-vis the actual actions taken to deal with non-OTs outlined in the NSS. For instance, how many resources and time are actually allocated to threats other than the ones that are linked to the OT? Simply put, to what extent can a theoretically comprehensive NSS actually change the security culture of a state that is faced with an OT? Similarly, should we expect that the strategic approach towards the OT will be altered in any significant way because of the development of an NSS? This paper argues that it is unlikely that an NSS would influence, in practice, the security orientation of the state in any direction other than the OT, while at the same time it is unlikely that it would influence the practices followed for dealing with the OT as they are already well-formed, institutionalized and not easily alterable. Equally important is the question on whether society actually cares enough about any other kind of threats to the degree that it would demand a change of focus for the national security. Lastly, it is questionable whether in an OT culture society and the government mechanisms are actually capable of either initiating or handling such a change.

The Republic of Cyprus and the Turkish Overarching Threat

While it is beyond the scope of the paper to provide a literature review of the Cyprus problem, it is still essential to briefly outline some key variables of the conflict that will contribute to the theoretical premises presented above. The five-decade long Cyprus Problem is one of the most contemporary protracted ethnic conflicts, with abundant literature on the subject and with conflicting views on what has caused it, on who is to be blamed for its perpetuation and on the structure of the 'final settlement'. The conflict is viewed as ethno-national,[13] with disputes between Greek and Turkish Cypriots, as an

13 Y. Papadakis, et al., 'Modernity, History and Conflict in Divided Cyprus: An Oveview', in *Divided Cyprus: Modernity, History and an Island in Conflict*, eds Y. Papadakis, N. Peristianis, G. Welz (Indianapolis:

issue of incompatible subject positions,[14] as the outcome of regional and superpower interests and interferences,[15] or as a combination of any of the above. Irrespective of the position one holds on the causation of the conflict and its perpetuation, what is certain is that the problem remains very central to Cypriot society.[16] Precisely because the problem is so central, most foreign policy decisions – of the Republic of Cyprus – are almost always linked to improving security against the Turkish OT. Perhaps the most indicative example is the RoC accession to the EU, which, as the former Minister of Foreign Affairs Ioannis Kasoulides noted, 'is the greatest guarantee for our existence'.[17] This is a position held by essentially all Greek Cypriot political elite, which clearly indicates on one hand the existential fear deriving from the Turkish OT, and on the other the fact that security from the OT is far more important than anything else, such as economic prosperity. That said, it should be expected that in the presence of extraordinary developments, such as the unprecedented (for Cyprus) financial crisis in 2013, the governmental and public focus will temporary shift to those issues. However, once the major (temporary) crisis is over, the focus is expected to return back to the 'ethnic problem' and the associated threats.

The behaviour and positions of international actors are key for Greek Cypriots and how much they can be trusted or not depends almost solely on their position on the Cyprus Problem. Despite the fact that the RoC asks for more international involvement, more often than not, Greek Cypriots perceive the international community as biased and as a potential threat, rather than as a force for settlement, while they frequently have a misplaced perception on what the role of international actors are or should be vis-à-vis the problem.[18]

Cyprus is also a complex double minority environment where both Greek and Turkish Cypriots feel, and could be, considered minorities. The Turkish Cypriots constitute approximately 20% of the island's population and they are, therefore, a minority in Cyprus. However, if the two so-called motherlands, Greece and Turkey, are considered, then Greek Cypriots become the minority. The close ties with and

Indiana University, 2006).

14 T. Diez, 'Last exit to paradise? The European Union, the Cyprus conflict and the problematic "catalytic effect"', in *The European Union and the Cyprus Conflict: Modern conflict, postmodern union*, ed. Thomas Diez (Manchester: Manchester University Press, 2002).

15 C. Hitchens, *Cyprus* (New York: Quartet Books, 1984).

16 Adamides, 'Negative perceptions of foreign actors'.

17 A. Arsalidou, 'EU participation the greatest guarantee for our own existence, Foreign Minister tells CAN', *Cyprus News Agency* (2017, May 9), available at http://media.cna.org.cy/WebNews-en.aspx?a=ed7bbaa5f24946258625cbc2b79fb426.

18 Adamides, 'Negative perceptions of foreign actors'; C. Adamides and M. Kontos, 'Greek Cypriots Perception of the UN', in *Cyprus Roadmap for Peace: A Critical Interrogation of the Conflict*, eds Michael Michael and Vural Yucel (Northampton MA: Edwar Elgar Publishing, 2018).

partial dependence of the two communities on their respective motherlands (especially between Turkish Cypriots and Turkey), coupled with the historical and frequently violent intercommunal and interstate relations, have rendered Cyprus vulnerable to external influences[19] and have contributed to the development of a climate of deeply securitized relations between the two sides. Despite the deep distrust between the two and the illiberal environment, there is a non-hurting stalemate; indeed, and the conflict remains comfortable.[20]

Irrespective of the absence of major violent incidences for over four decades, the fact that Turkey maintains tens of thousands of troops north of the Green Line, while concurrently continues to occupy 37% of the island, makes the neighbouring country the unquestionable and unchallenged overarching threat for Greek Cypriots. Thus, for decades there are deeply internalized negative perceptions and conflict-perpetuating routines that all revolve around the Turkish OT.[21] The Turkish OT is associated with future proposed settlement plans and is heavily linked to the violent past, but also to the ongoing Turkish regional relations and actions, many of which are completely unrelated to Cyprus, but are still seen as 'indicators' of Turkey's potential future behaviour. The Greek Cypriot perceived threat is not necessarily openly linked to future aggression – at least not on land[22] – but rather to the security dimension in case of a settlement and to any relative advantages that Turkey may gain at the expense of the RoC. In other words, the conflict is perceived in zero-sum terms and any positive development for Turkey is usually perceived as a negative development for the RoC and as a potential threat. Ultimately, the perceived threat is that Turkey could achieve its goals in Cyprus, which would be anything from full control of the island, to indirect control through the Turkish Cypriots, to a more permanent and 'legitimate' (to the extent this is possible) dichotomization of the island, to the complete change of the sociocultural and demographic character of the island. Thus, the Turkish presence is seen as an overarching threat in the military, political, societal and economic sectors.

19 O. P. Richmond, 'The multiple dimensions of international peacemaking: UN and EU involvement in the Cyprus conflict', in *The European Union and the Cyprus Conflict*, ed. T. Diez (Manchester: Manchester University Press, 2002).

20 C. Adamides and M. C. Constantinou, 'Comfortable Conflict and (il)liberal peace in Cyprus', in *Hybrid Forms of Peace: From the 'Everyday' to Post-liberalism*, eds O. P. Richmond and A. Mitchell (Basingstoke: Palgrave-MacMillan, 2012).

21 Adamides, 'A comfortable and routine conflict'.

22 Since the discovery of hydrocarbons in the Cypriot Exclusive Economic Zone (EEZ), Turkey frequently sends warships in the Cypriot EEZ in an attempt to stop the exploration and exploitation of the Cypriot natural gas. The most indicative example was in February 2018 when Turkey sent five warships to literally block the Italian Saipem 12000 drilling ship (hired by the Italian ENI), forcing it eventually to cancel, for the time being, the planned drill in the Cypriot EEZ.

Evidence of Greek Cypriot Threat/Security Perceptions

The political elite discourse, as expected, focuses on the need for a conflict to problem, which as Greek Cypriot elites constantly note is one of invasion and occupation,[23] thus clearly and consistently anchoring the issue to a single source: Turkey. Equally clear is the fact that the use of terms 'invasion' and 'occupation' have a very significant impact on the security perceptions of the people. These perceptions are frequently reflected in opinion polls focusing either on the prospects of settlement or on issues of security. One such indicative survey, conducted by the bi-communal Center for Sustainable Peace and Democratic Development (SEED) in 2017, clearly demonstrates how the Turkish OT is so dominating, that any potential settlement scenario that involves Turkish guarantees (for intervention) and/or Turkish military presence on the island creates a bigger insecurity for Greek Cypriots than the current status quo. In other words, the status quo, which is essentially the aforementioned illiberal, but comfortable conflict, provides a sense of security, as Cypriots seemed to have learned to live with their conflict-based routines and any change – including a settlement – would actually lead to more insecurity, if the OT is not completely eradicated from the proposed framework. Unfortunately, for both sides, the zero-sum environment that exists in Cyprus makes the eradication of the mutually exclusive OTs practically impossible, as Greek Cypriots cannot seem to accept anything that involves the Turkish military in the settlement, while the Turkish Cypriots do not seem to accept anything that does not involve the Turkish military or the Turkish right to intervene.

The survey presented six different scenarios regarding the Treaty of Guarantee (ToG) to both Greek and Turkish Cypriots. The ToG is one of the most, if not the most, difficult parts of the problem to resolve, not only because it is an overarching threat, but also because it is not entirely up to Cypriots to reach an agreement, as Turkey (and to a lesser degree Greece and the UK) must also agree to the terms. As can be seen in Figure 1 (next page), all six proposed scenarios related to the ToG and a potential settlement, actually create more insecurity for Greek Cypriots than security. This is particularly interesting, considering that the first one proposes the

23 Greek Cypriot political elite maintain the same position vis-à-vis the Cyprus Problem, namely that it is a problem of 'invasion and illegal occupation', in all local and international fora. One of the most recent examples was by President Anastasiades at a European Parliament debate on 12 December 2018, where he noted that '[…] the Cyprus question basically remains a problem of foreign invasion and occupation and violation of human rights and fundamental freedoms'. Source: European Parliament 'Debate on the Future of Europe: Opening Statement by Nicos Anastasiades, President of the Republic of Cyprus', (2018, December 12), available at https://multimedia.europarl.europa.eu/en/debate-with-nicos-anastasiades-president-of-the-republic-of-cyprus-on-the-future-of-europe-opening-statement-by-nicos-anastasiades-president-of-the-republic-of-cyprus-1015_I164946-V_rv.

cancellation of the ToG after some 'reasonable progress' has been achieved, namely the successful implementation of important parts of the agreement, such as successful power-sharing and major absence of violence. While we do not have a definitive answer on why this feeling exists, there are a few reasonable educated guesses. The first is that Greek Cypriots do not believe there can be 'reasonable progress', which, subsequently would also mean that the ToG will not be cancelled. They may also believe that 'reasonable progress' can easily be disputed by the Turkish side for the benefit of maintaining the ToG. A more conspiratorial possibility along the latter scenario is based on the notion that a major violent incident may be the outcome of a provocative act in order to justify the continuation of the ToG; we have seen wars start on pretexts and falsified or false information, so this should not be entirely in the sphere of science fiction. On the other side of the spectrum, of course, there may also be Greek Cypriots who do not trust right-wing (Greek Cypriot) elements in society, who may indeed engage in violent incidences. Either way the outcome will be the same. Alternatively, Greek Cypriots may simply not trust that Turkey would hold its end of the deal and that it would cancel the ToG even if there is 'significant progress'. Irrespective of the potential explanation, these kinds of responses clearly demonstrate the importance Greek Cypriots place on the overarching threat. Needless to say, all other options, which are considered to be worse than the first one, created even more insecurity than the status quo.

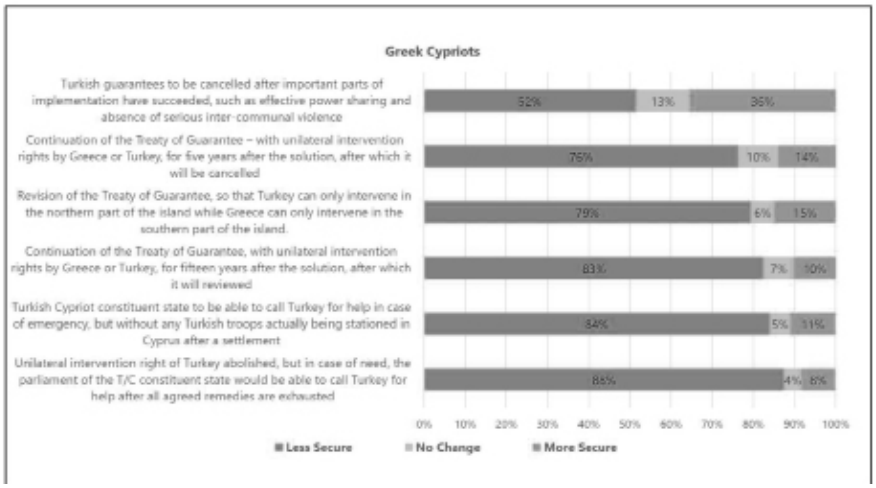

Figure 1: Scenarios - Greek Cypriot sense of security (Source: SEED, 2017)

Figure 2 shows the Turkish Cypriot responses to the same scenarios. The least problematic option for Greek Cypriots – the one described above – is the most problematic for Turkish Cypriots, clearly demonstrating the zero-sum positions on the specific issue, but also the deep distrust between the two sides.

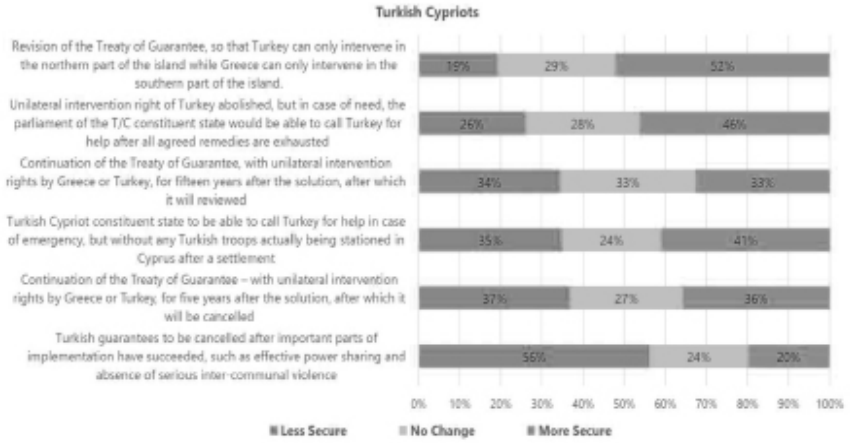

Figure 2: Scenarios - Turkish Cypriot sense of security (Source: SEED, 2017)

Cyprus is not Unique: The Case of Georgia

Georgia is another indicative example of how a single overarching threat dominates security perceptions. While it is beyond the scope of this paper to engage in a detail analysis of the Georgian case study, a brief mention will help demonstrate how OTs have a significant influence on NSSs, while it will also help differentiate the level of impact from between more and less 'active' conflicts. Equally important is the fact that Georgia does have a written (public) National Security Concept, which contributes to providing more concrete evidence between the link of OT and NSSs.

As expected, for Georgians, the single OT is the Russian Federation. The violent incidences of the recent past clearly created a dominant security concern that is heavily linked to a single source of threat: Russia. As shown in Figure 3 (next page), in a national survey conducted in March 2018, the top three national security threats for Georgia are linked to Russia. Unsurprisingly, the top spot is occupied by the prospect of further Russian military aggression, followed by the occupation of Abhkazia and South Ossetia, followed by terrorism, which too is also linked to Russia. All in all, more than 50% of all security concerns are linked to Russia.

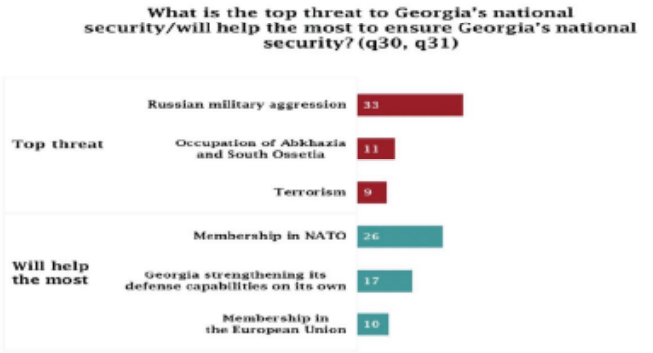

Figure 3: Top threat for Georgia's national security and who can help

The perceived way to reduce this form of insecurity is, predictably, military improvements and a closer link to NATO, which is the optimum option. Interestingly, EU membership, much like the case of Cyprus, is also considered to be a good solution as it is presumably believed that Russia would be less likely to act aggressively against an EU member state. This is interesting, because, as argued in more detail in later sections, there is no clear indication that the EU can be a 'solid' security provider, at least not vis-à-vis 'hard' security; on the contrary, it could potentially create a false sense of security.

While the survey results only reflect the public's opinion, the Georgian National Security Concept (GNSC) reflects the official positions and concerns. A content analysis of the 28-page long GNSC reveals that the word 'Russia' appears 85 times; every single time the reference is either directly or indirectly negative for the country's security. Out of the 85 references, 64 were unique (i.e., not in the same sentence or paragraph), and 39 of those 64 times were linked to hard security concerns with expressions such as 'military aggression', 'occupation', 'breach of sovereignty' and 'terrorism'. Another 11 times Russia was linked to political threats while the rest were linked to societal, economic and even environmental threats. In sum, there was not a single issue – ranging from sovereignty to political stability to the environment and to the economy – in the Georgian national security concept that did not include Russia as a source of threat.

Dealing with the OT Impact

While it is inevitable that the NSSs of countries like Cyprus and Georgia will inevitably focus on the overarching threat, the actual OT impact is not universal; on the contrary, the kind and degree of impact depends primarily on two factors, namely on how 'active' and probable the threat is perceived to be, and secondly on the ultimate political goal of each state vis-à-vis the OT. The case of Georgia for instance is an example of a relatively active threat given that it is a much 'warmer' and violent conflict, and ultimately the Georgian authorities' goal is much more direct, aiming at highlighting the Russian threat without any consideration for potential political backlash or consideration for political correctness. The case of Cyprus is an example where it is expected that the OT will still be dominating – especially on official documents – albeit potentially indirectly, given the nature of the status quo as a 'frozen conflict'. Cyprus' goal is, obviously, to highlight on one hand the threat, but on the other to also gain the moral and political high ground, and towards this end it has tread much more carefully. Inevitably, in the case of Cyprus much concern is given on ongoing negotiations, on potential political backlash, but also on the actual possibility for further military aggression (which in the case of Cyprus it seems to be much smaller compared to that of Georgia).

In cases like Cyprus, political correctness is essential in order to avoid any potential international political backlash that would hurt the negotiations' front, while being part of the EU, it becomes rather important to focus on specific security concerns that are echoed by the EU Member States. This opens the door for the development of a more comprehensive NSS where there is not a single focus point – the OT – as is the case for instance in Georgia; on the contrary, the focus is on multiple potential threats, ranging from cyber warfare to environmental risks. While on the surface an approach where a state focuses less on the OT and more on all potential threats appears to be the proper way to proceed for the development of an NSS, in practice there are numerous questions regarding the actual impact the latter would have in the security orientation of the state. Specifically, there are questions of legitimacy in the eyes of the people and other (international) actors, as well as doubts on the actual practical impact in terms of concrete actions followed to deal with the theoretically comprehensive NSS.

Public Legitimacy and the Issue of Allocated Resources

Legitimacy, in liberal democracies, is perceived to be one of the most essential conditions for the smooth governance of a state or region by the governing authorities. As Tyler notes, if authorities are deemed to be illegitimate, 'social regulation is more

difficult and costly'.[24] In other cases, the legitimacy of a political action or suggestion is achieved through referenda, leaving essentially the final approval to the people. This was the case when Scandinavian countries asked their populations if they would like to join (or not) the European Union.[25] In other cases, legitimacy may be subtler and manifested through the absence of major reactions by the political opposition or the public. This section aims to examine how an NSS must enjoy public legitimacy in the sense that the public must consider it as a correctly focused approach to the state's security.

While there is not yet an official, public Cypriot NSS document to examine in detail, any official security-related documents that attempt to outline the security threats of the state in a comprehensive manner as described above, may be to some extent illegitimate in the eyes of the people. While any state will attempt to provide a 'correct' or 'proper' document that focuses on all potential threats and much less on the OT, the public would expect exactly the opposite. Similarly, the state must determine whether the security-related threats that are outlined in official documents, such as an NSS, deserve the respective resources to deal with them. In countries like Cyprus, it is very clear that the vast majority of security-linked resources and routines are tailored towards the OT – Turkey – with the national guard being the prime example. As a result, what we expect to observe is a security strategy that dictates a focus on multiple (contemporary) threats, and on the other a resource allocation that focuses by and large on a single established threat. Thus, the strategy may in essence have little, if any, use to actually formulating a new security orientation. This is not surprising given that individuals in conflict environments are used to conflict perpetuating routines, and frequently actually contribute to their perpetuation as it helps them maintain their ontological security.[26] Such routines also include the defense mechanisms that are perceived as necessary to defend against the OT. Any changes to such established security structures would be considered as a disruption to the existing routines, and, as Mitzen[27] notes, disruptions create anxiety and are likely to be opposed, even at the expense of a more productive and efficient resource allocation, which would provide a more comprehensive security environment.

24 T.R. Tyler, 'A psychological perspective on the legitimacy of institutions and authorities', in *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice and Intergroup Relations*, eds. J. T Jost and B. Major (Cambridge: Cambridge University Press, 2001), 416.

25 See for instance J. D. and A. S. Storsved, 'Legitimacy through referendum? The nearly successful domino-strategy of the EU-referendums in Austria, Finland, Sweden and Norway'. *West European Politics*, Vol. 18, No. 4, (1995).

26 J. Mitzen, (2006) 'Ontological Security in World Politics: State Identity and the Security Dilemma'. *European Journal of International Relations*, Vol. 12, No. 3 (2006).

27 Ibid.

There is yet another important variable that could raise legitimacy questions, namely the absence of potential threats from states that otherwise offer political and economic safety. Specifically, overreliance on any single state for military, economic or political support should not be considered a sound security strategy, yet it is frequently deemed as necessary, either because it is the only possible option or for lack of possible alternatives. Therefore, there is an issue when the political realities on the ground force a state to rely too much on a single country, to the point that the over-reliance is a potential threat, which, however, cannot easily be portrayed as one in any official document or discourse. Even more specifically, it is not a secret that the Republic of Cyprus heavily relies on Russia's support and, indeed, Russia has consistently supported Cyprus in the UN Security Council and elsewhere. Therefore, there is little doubt that Russia is one of the closest partners of Cyprus. Similarly, it is not a secret that there is quite a heavy reliance on Russian capital both in the financial/accounting/legal industry as well as in the field of real estate. Under other circumstances this economic over-reliance should be an issue of concern, yet it should not be expected to appear as such, as the help towards the OT is considered to be of much greater importance than anything else.

With the above in mind, the presence of an OT in environments such as Cyprus may lead to the development of national security strategies that 'tick all the right boxes', but in reality are of little use in the actual security strategy of the country, or have an actual impact in reorienting the state's security mentality and processes.

The next sections focus on the European Union as a potential security provider and as a variable for contributing to the security strategy of Cyprus.

The EU Factor: A Sense of Security for the RoC

It is generally accepted that the primary factor for the Republic of Cyprus joining the EU is to strengthen its security vis-à-vis its overarching threat and, more generally, to further internationalize the conflict and concurrently to enhance its negotiation power.[28] There were no illusions that the EU would militarily protect Cyprus in case of further Turkish aggression, or that it would militarily force Turkey out of Cyprus, yet there was a widespread feeling that Turkey would not act aggressively against an EU member state and, perhaps more importantly, that the RoC's relative political power would be significantly bigger as an EU member. A side effect of EU membership is that the RoC, despite its close relations to Russia, has become much more West-oriented after its accession in 2004. Thus, a secondary goal is the RoC's aspiration to have a much more important security role for the EU given that it is the EU Member

28 See n.16 for the aforementioned statement by former Minister of Foreign Affairs, Ioannis Kasoulides

State closest to the turbulent Middle East: a state that also has very good relations with the Arab states, Iran, and Israel.

While the two goals can indeed be quite complementary, the geopolitical realities and complexities of the specific regional security complex of the Eastern Mediterranean highlight the limitations of the EU as a security provider. The most indicative example is the February 2018 Turkish naval blockade in the Cypriot Exclusive Economic Zone. Despite the strong EU warnings towards Turkey, it was very clear that the EU was neither willing nor capable of taking further actions against Turkey for the sake of enhancing the Cypriot security. Thus, the EU's image as a security provider for Cyprus is at best a vague one, in the sense that the EU is the first – and perhaps most important – actor the RoC reaches to once there is a security threat, but at the same time it is evident that there are very clear limitations to how much security the EU can offer in the presence of 'hard' geopolitically driven security issues. It is worth nothing that some Greek Cypriot political elites explicitly supported the idea of invoking Article 42.7 of the TEU, which provides for the collective defense of a member state in case it is attacked. However, Article 42.7 was never evoked, not least because the blockade was not a clear cut case of an attack, but also because it was unclear how the EU would actually respond to such a request. The absence of a clear picture of the potential EU reaction and the level of support for such hard security issues is indicative of the EU's limitations to act as a regional security provider.

The 'EU as a security provider' is yet another essential variable in an NSS of an EU Member State, even though the credibility of the specific security provider is questioned. The EU's inability to act as a solid security provider, coupled with the fact that Cyprus is not – and most likely will not become – a NATO member, the RoC has turned to other solutions through bilateral agreements and enhanced interstate relations with countries like France, Israel and, of course, Russia.

However, bilateral approaches can be particularly complex if one of the security providers is also a potential threat for other EU states, as is the case of Russia. This automatically means that Cyprus has to tread very carefully between the West/EU and Russia. As mentioned, the issue is further complicated when there are also deep economic and societal ties that extend beyond the issue of security.

Figures 4 and 5 show the views of Greek and Turkish Cypriots respectively regarding their preferences for potential security providers (guarantor states). As expected, Russia is the primary choice for Greek Cypriots, but the least favourable option for Turkish Cypriots. France is equally important for Greek Cypriots given the close military and political relations between France and the RoC.

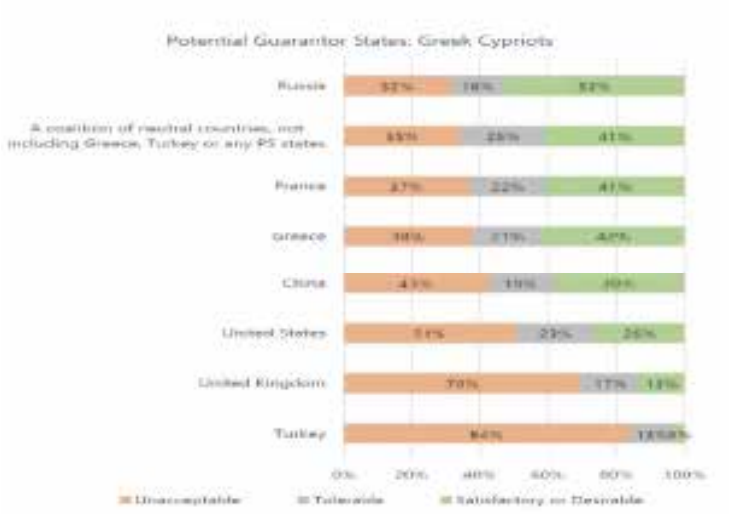

Figure 4: Security providers (potential guarantor states) for Greek Cypriots (SEED 2017)

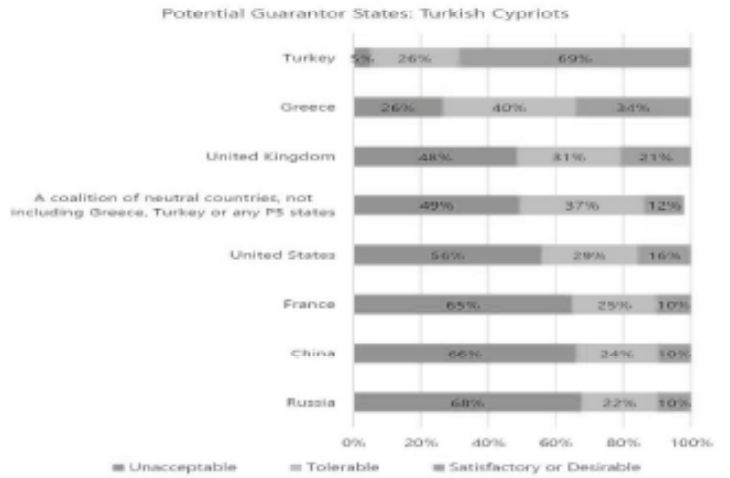

Figure 5: Security providers (potential guarantor states) for Turkish Cypriots (SEED 2017)

Solidarity Threat Perceptions

As already mentioned, any self-respecting NSS is expected to include the 'trending' threats, especially if the latter are important for one's partners; one such case is the threat of terrorism. Europeans perceive, unsurprisingly, terrorism to be a major threat.

While this might be a justifiable fear for some EU states, there is no real reason why Cypriots would feel particularly threatened; and yet they are. The 2017 Eurobarometer (Figure 6) shows that Cypriots are the most concerned individuals in the EU regarding the challenge terrorism poses on the internal security of the EU. The results for other threats are very similar – the number in the parenthesis shows the rank of Cyprus in the specific opinion poll: organized crime (2nd), natural and man-made disaster (2nd), cyber-crime (1st), EU's external borders (3rd).

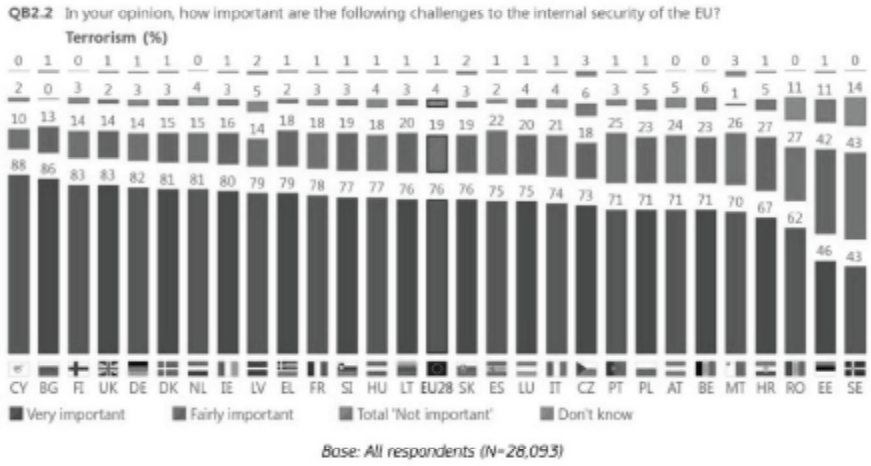

Figure 6: Terrorism as a challenge to EU security (Eurobarometer 2017)

Given the aforementioned data, it would not be unfair if one assumed that Cyprus is a particularly dangerous place, suffering from terrorist attacks and other crimes or threats that disrupt societal routines. One would be wrong if he or she made such an assumption.

Figure 7 shows all the terrorist attacks in Cyprus from 2013 onwards. All were non-mainstream attacks, as they did not have any form of political or religious motivation and were not aimed towards the public at large; they were mostly tailored towards 'resolving' private disagreements. As can also be seen from the figure, there were zero fatalities or injuries. Thus, it is questionable why Cypriots are so concerned about terrorism (or the other aforementioned issues).

EVENT ID	DATE	COUNTRY	CITY	PERPETRATOR GROUP	FATALITIES	INJURED	TARGET TYPE	REGION	ATTACK TYPE
201612120053	2016-12-12	Cyprus	Ergya	Unknown	0	0	Government (General)	Western Europe	Assassination
201602210030	2016-02-21	Cyprus	Deryia	Unknown	0	0	Religious Figures/Institutions	Western Europe	Facility/Infrastructure Attack
201503080076	2015-03-08	Cyprus	Paphos	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201503050030	2015-03-05	Cyprus	Paphos	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201502040109	2015-02-04	Cyprus	Astromeritis	Unknown	0	0	Police	Western Europe	Bombing/Explosion
201412150057	2014-12-15	Cyprus	Paphos	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201408040067	2014-08-04	Cyprus	Larnaca	Unknown	0	0	Police	Western Europe	Bombing/Explosion
201406300006	2014-06-30	Cyprus	Limassol	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201404070091	2014-04-07	Cyprus	Lympia	Unknown	0	0	Unknown	Western Europe	Bombing/Explosion
201403110005	2014-03-04	Libya	As Sidr	Cyrenaica Self-Defense Force	0	0	Maritime,Maritime	Middle East & North Africa	Hijacking
201401060030	2014-01-06	Cyprus	Limassol	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201311250035	2013-11-25	Cyprus	Ypsonas	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201311140034	2013-11-14	Cyprus	Larnaca	Unknown	0	0	Business	Western Europe	Bombing/Explosion
201310250037	2013-10-25	Cyprus	Nicosia	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201310220004	2013-10-22	Cyprus	Nicosia	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201310170028	2013-10-17	Cyprus	Nicosia	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201307150020	2013-07-15	Cyprus	Limassol	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201307150024	2013-07-15	Cyprus	Limassol	Unknown	0	0	Private Citizens & Property	Western Europe	Bombing/Explosion
201305290020	2013-05-29	Cyprus	Kissonerga	Unknown	0	0	Government (General)	Western Europe	Bombing/Explosion
201303280010	2013-03-28	Greece	Volos	Unknown	0	0	Business	Western Europe	Facility/Infrastructure Attack

Figure 7: Terrorist Attacks in Cyprus (Global Terrorism Database)

The data do not show why Cypriots are so concerned. A working hypothesis is that the above-average Cypriot concern may be related to how Cypriots are accustomed to always think in terms of security and threats because of the ever-present overarching threat (even though the specific threats are not linked to Turkey). Simply stated, threats are part of the Cypriots' routines.

Cypriots seem to also believe that not enough is done to handle the threats. The hypothesis that 'not enough is done' to deal with security threats is not irrational; indeed, in Cyprus politics it is a constant struggle among the elite to demonstrate which one is the most capable of dealing with the overarching (and other) threats.[29] Thus, there also seems to be a built-in mentality that the threats are not sufficiently dealt with. Witness to this hypothesis is the Cypriots' response to the question of whether the government/law enforcement is doing enough to fight terrorism. Cyprus scores below average, even though, as shown in Figure 7, in the past five years there were no major terrorist attacks that resulted to any injuries or deaths. Thus, there is

29 C. Adamides, *Securitization and Desecuritization Processes in Protracted Conflicts: The Case of Cyprus* (Palgrave Macmillan, forthcoming).

little reason for Cypriots to believe that the law enforcement is not doing enough towards terrorism-related security; yet, it seems that the 'default' response that 'not enough is done to deal with the threat' dominates the society.

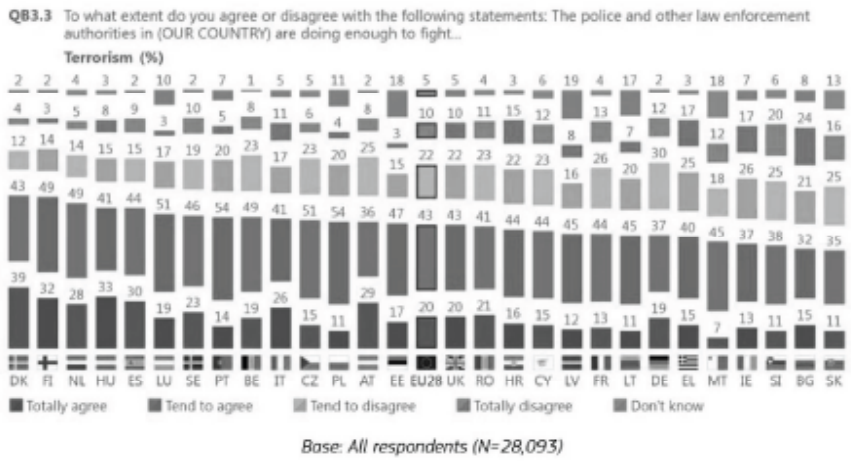

Figure 8: 'Not doing enough' (Eurobarometer 2017)

The fact that the EU is not perceived to be a reliable or capable security provider could partially be attributed to structural limitations; it was not, after all, designed to be a hard security provider. That said, there seems to be more willingness for a more regional and global role, as frequently advocated by EU officials and as noted in the EU Global Strategy. Indeed, the emergence of more security-oriented developments, such as the Permanent Structured Cooperation (PESCO), directly and indirectly indicates that the EU wishes to have a much more important and autonomous security role. A role that many member and non-member states – such as Cyprus and Georgia respectively – consider to be of particular importance for their own security, especially vis-à-vis an overarching and existential threat.

The EU has the willingness to carry more weight in the international arena, but it lacks the geopolitical thinking and culture. It needs to re-educate itself on how to think geopolitically, and overarching threats and crises can be a blessing in disguise for the EU in its effort to establish itself as a major regional and global player. While such threats may highlight the EU's limitations and lead to rifts within the Union, they also pose as an opportunity to demonstrate that the EU can 'talk the talk and walk the walk'. At the same time however, the same opportunities, if not handled appropriately, could easily solidify the perceived EU limitations.

The aforementioned incident with the naval blockade in the Cypriot EEZ is a clear opportunity that could easily backfire. Essentially the crisis emerged when a candidate

state, Turkey, stopped militarily a Member State, Cyprus, from pursuing its national interests in its own EEZ – but disputed by Turkey – area. Following the incident, the President of the European Commission, Jean-Claude Juncker, stated that he was 'strictly against the behavior of Turkey',[30] while in written responses

> 'the EU has repeatedly stressed the sovereign rights of EU Member States, which include, inter alia, entering into bilateral agreements and exploring and exploiting their natural resources in accordance with the EU acquis and international law, including the United Nations Convention on the Law of the Sea. The EU continues to stress the need to respect the sovereignty of Member States over their territorial sea and airspace.'[31]

While such responses are useful and are utilized by Cyprus political elite to demonstrate the EU's support, in reality they have not changed the developments on the ground. In the specific case, the Italian company was forced to leave and postpone (or cancel?) its drilling activities. Inevitably, Cypriots, as well as others who observe the developments, acknowledge the political and 'theoretical' EU support, but also focus on the EU's inability to convince a candidate state that such behaviour is unacceptable. Thus, the EU's inability to act in a more determined way is in sharp contrast with the locals' need for concrete actions against an overarching threat. It is likely that other states will question the EU's proclaimed goal of becoming a global security player if the EU cannot influence a potential 'family member' from hurting the interests of an existing 'family member'. How can the EU be trusted to have a role in much more turbulent and complex regions such as the Middle East when it cannot handle the problems in its own backyard? Moving 'from vision to action', as the EU HR/VP Federica Mogherini noted,[32] entails more concrete actions and perhaps a much better understanding on how it can offer security solutions to overarching threats first for its member states and then for the regional states, before aspiring to be a global player.

Despite the abovementioned challenges, the importance of the EU is not, and should not, be discounted despite the former's limitations, as the security environment for countries like Cyprus would most likely have been much worse had it not been an EU member state. It is indeed central to the Cypriot national security strategy, but ultimately there is always the risk of creating a false sense of security that could

30 R.-J. Bartunek, 'EU's Junker criticizes Turkey over ship incident', Reuters (2018, February 14), available at https://www.reuters.com/article/us-cyprus-natgas-turkey-eu/eus-juncker-criticizes-turkey-over-ship-incident-idUSKCN1FY1OG.

31 European Parliament, 'Parliamentary Questions, Answers given to Mr Hahn on behalf of the Commission', http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-006622&language=EN.

32 European Union, 'A Global Strategy to Promote Citizens' Interests', available at http://europa.eu/globalstrategy/en/global-strategy-foreign-and-security-policy-european-union.

potentially lead to more national insecurity. For instance, the assumption that Turkey would not engage in further military actions was disproved with the 2018 events in the EEZ. Thus, building an NSS based on the security provided by the state's EU membership may be useful and logical, but at the same time it is also relatively risky given the aforementioned EU's limitations.

Conclusion

It must not be surprising that a state facing an overarching threat will formulate its security strategies around a single source of threat. This is frequently politically necessary for the decision-makers as it is what will guarantee public legitimacy and political capital. However, this 'over-focus' on a single issue, as necessary as it may be, may lead to an insufficient NSS in terms of breadth – i.e. focus on other potential threats not necessarily related to the OT – or in terms of the quality of the state security structure – for instance, insufficient training for non-OT related threats, problematic resource allocation to handle other threats, etc.

The case of Cyprus, and despite the absence of an actual (public) NSS document (as of the time of writing) provides a good case study of how an OT can influence the NSS mentality and approaches of the decision-makers and public alike. Furthermore, the specific case also allows us to focus on the limitations of the EU as a potential security provider, which could have, theoretically, contributed to the formation of more comprehensive security strategies that would satisfy both the national, the regional and the EU's security needs.

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The Rise of the Republic of Cyprus' Defence Diplomacy in Its Neighbourhood

Marinos Papaioakeim[1]

Abstract

Despite the fact that Cyprus is a small state in the international system, with all that this entails in the exercise of diplomatic practice, the Republic of Cyprus (RoC), particularly in the last ten years, has taken several initiatives for activities that fall in the realm of defence diplomacy. The overall objective of this article is to examine the bilateral defence diplomacy initiatives of the RoC with its neighbouring states in the Eastern Mediterranean, such as Israel, Egypt, Jordan and Lebanon in the period 2010 - 2017.

Keywords: defence diplomacy, Republic of Cyprus, Eastern Mediterranean, bilateral relations

Introduction

There is a widespread perception that defence diplomacy, which in general terms means the use of defence actors for diplomatic purposes, is a practice that is exercised almost exclusively by large and powerful states, since they are the nations with the wherewithal to achieve that. Winger[2] indicatively notes that 'every major global power, such as the United States, France, China, and the United Kingdom, has adopted defence diplomacy'. At the same time, Muthanna has stressed that 'the United States, Britain, France, China, Australia, India and the NATO countries could be considered as leaders in defense diplomacy'.[3] However, in recent years, there has been an increasing trend by small states to deploy defence diplomacy initiatives in a more consistent and organised manner in order to impact and interact in the international system for their benefit.

This paper investigates the rise of the bilateral defence diplomacy efforts of a small state, that of the Republic of Cyprus (RoC), between 2010 and 2017 in its near neighbourhood.[4] In the last decade, the RoC has embarked on several defence

1 Marinos Papaioakeim is a Research Fellow at the Diplomatic Academy, University of Nicosia..

2 G. Winger, 'The Velvet Gauntlet: A Theory of Defence Diplomacy', in *What do I do?,* eds Lisiak A. and Smolenski N., Vienna: IWM Junior Visiting Fellows' Conferences, Vol. 33 (2014), 2.

3 Brig. K. A. Muthanna, 'Military Diplomacy', *Perspectives*, Vol. 5, No. 1 (2011), 8

4 The RoC has also initiated some multilateral (and particularly trilateral) defence diplomacy initiatives and its neighbouring states (Cyprus - Greece - Israel, Cyprus - Greece - Egypt), however, the analysis of these initiatives falls outside the scope of this paper.

diplomacy endeavours within this framework in order to develop defence relations with neighbouring states, such as Israel, Egypt, Jordan and Lebanon. Of course, these defence diplomacy initiatives of the Republic have been urged by a series of different dynamics and regional changes that have led to the gradual development of the RoC's defence diplomacy from 2004. This article is separated into three main sections. The first section describes briefly the basic theoretical tenets of the main concept of the paper – that of defence diplomacy. The second part illustrates, in a nutshell, some basic elements regarding the rise of RoC defence diplomacy in the last decade. The third section analyses in detail the basic bilateral defence diplomacy initiatives of the RoC in the Eastern Mediterranean as they have been deployed in approximately the last decade.

Defence Diplomacy: Basic Theoretical Tenets

The end of the Cold War marked many fundamental changes in the field of security in several ways. One was the gradual expansion of the tasks of defence/military actors, from fighting and preparing to fight other countries to undertaking a new set of completely different tasks.[5] These new functions have included, among others, the involvement of defence/military actors in diplomatic related activities, a role that was first pioneered in Europe. The United Kingdom (UK) Strategic Defence Review, by way of describing this augmented duty of its military personnel and operational units in backing their government's diplomatic efforts, decided to christen this practice *Defence Diplomacy*.[6] UK proponents described this defence diplomacy as 'the varied activities undertaken by the Ministry of Defence (MOD) to dispel hostility, build and maintain trust, and assist in the development of democratically accountable armed forces, thereby making a significant contribution to conflict prevention and resolution'.[7]

The world of academia has taken a keen interest in the British Ministry of Defence's acknowledgement of the potential of defence diplomacy.[8] A number of

5 F. Vreÿ, and N. Michelle, 'Employing armed forces: the rise of more constructive and ethical secondary roles', *Politeia*, Vol. 28, No. 3 (2009), 24.

6 Defence diplomacy activities and practices can be identified before the 1990s, in a different context. However in the contemporary era, defence diplomacy is situated within a much more intricate framework that is arranged and synchronized in a much more complex way.

7 Ministry of Defence (UK) *Strategic Defence Review Modern Forces For The Modern World*, (Whitehall, London, 1998), 22.

8 Regarding Defence Diplomacy, see: R. Bitzinger, 'US Defence Diplomacy towards Southeast Asia', in *From 'Boots' to 'Brogues': The Rise of Defence Diplomacy in Southeast Asia*, eds S. Bhubhindar and T. Seng (Singapore: S. Rajaratnam School of International Studies, 2011); J. E. Cheyre, 'Defence Diplomacy', in *The Oxford Handbook of Modern Diplomacy,* eds A. Cooper, J. Heine, and R. Thakur, (Oxford: Oxford University Press, 2013); Geneva Center for the Democratic Control of Armed

academics have involved themselves with research into defence diplomacy since 1998, and have proffered a wealth of definitions of the practice.[9] While a variety of explanations of the term 'defence diplomacy' have been suggested, for the purposes of this paper, which has a state-centric approach to defence diplomacy (since it examines a state's defence diplomacy), the definition provided by Winger is employed, according to which defence diplomacy is: 'the peaceful use of the defense institutions of one country to co-opt the government institutions of another country in order to achieve a preferred outcome'.[10]

Defence diplomacy can be said to be an overarching expression that illustrates a breadth of initiatives and actions which are diplomatic in purposes and are conducted by military and defence actors. Cottey and Forster's[11] seminal research identified and summarized the activities of defence diplomacy as follows: bilateral and multilateral contacts between senior and military defence officials; the appointment of defence attachés to foreign countries; bilateral defence cooperation agreements; training of foreign military and civilian defence personnel; provision of expertise and advice on the democratic control of armed forces, defence management and technical areas; contacts and exchanges between military personnel and units, and ship visits; placement of military or civilian personnel in partner countries' defence ministries or armed forces; deployment of training teams; provision of military equipment and other material aid; bilateral or multilateral military exercises for training purposes. The above list is not exhaustive, since there are a lot of studies that identify and analyse specific activities of defence diplomacy, adding to or ignoring some of the above. It is also stressed that in order to claim that a state exercises defence diplomacy, it does not mean that it has to exercise all of the above activities.

Defence Diplomacy by the Republic of Cyprus

Before examining the RoC's defence diplomacy initiatives in its neighbourhood, it is

Forces (DECAF) Defence Attaches, DECAF Backgrounder (2007); E. P. Heather, 'Defence Diplomacy in the Arctic: the search and rescue agreement as a confidence builder', C*anadian Foreign Policy Journal,* Vol. 18, No. 2, (2012); Ministry of Defence (UK) Defence Diplomacy Paper, (London: Ministry of Defence, 2000); A. Cottey and A. Forster, R*eshaping defence diplomacy: New roles for military cooperation and assistance*. Adelphi Paper 365, (London: Oxford University Press, 2004); Ministerio De Defensa Espana (Spain), *Defence Diplomacy Plan*, (Ministerio De Defensa Espana, 2012); Muthanna, 'Military Diplomacy'; Ministry of Defence (UK) *Strategic Defence Review Modern Forces For The Modern World,* (London: Ministry of Defence); Winger, 'The Velvet Gauntlet'.

9 There is also the term 'military diplomacy'; however, in this paper, only the term 'defence diplomacy' is used, since it is more inclusive.

10 Winger, 'The Velvet Gauntlet', 14.

11 Cottey and Forster, *Reshaping defence diplomacy*, 7.

considered necessary to discuss some basic elements of the overall defence diplomacy efforts of the Republic. Because of political considerations and economic realities, in recent times, the budget for the defence of the Republic has contracted significantly: from €345.4 m. in 2010 to €318.9 m. in 2015 (a reduction of 7.7%).[12] Nevertheless, beyond the limitations and constraints, there have been a number of defence diplomacy initiatives that the RoC has instigated, on both bilateral and multilateral bases. The previous decades, the RoC was not been overly keen on the idea of defence diplomacy, particularly as its long-standing conflict with Turkey was the prime focus of the defence establishment of the country. This approach, however, was gradually changed approximately over the last decade, since the advantages of defence diplomacy from both military and political points of view began to be viewed more favourably.

The defence diplomacy policy of the RoC was enhanced by a series of regional circumstances, dynamics and events. The 2004 entry of Cyprus into the European Union was, without doubt, a new beginning for its defence relations, and this formed a foundation for Cyprus' evolving policy of defence diplomacy, as for the first time, the defence establishment of the RoC was able to make itself heard on the international stage. The platform that the EU has provided has enabled the RoC to cultivate a momentum towards more extroversion and internationalism in its defence establishment. Additionally, belonging to the EU has encouraged Cyprus to bolster relations with its European associates, on both a bilateral and a multilateral basis.

One of the main reasons that Cyprus developed its defence diplomacy was the discovery of hydrocarbons in the country's Exclusive Economic Zone (EEZ). This fact has resulted in common bonds and synergies being forged with their immediate neighbours in the areas of energy, and subsequently in defence. Another dimension resulting from the discovery of hydrocarbons has been the rise of challenges in security for all the neighboring states concerned. To confront these issues, most of the Eastern Mediterranean states have initiated defence partnerships – bilateral or multilateral – between each other. It could be said, in reality, that defence diplomacy between nation-state neighbours resulted from cooperation in the area of energy.

An additional, important impetus to the boost of the RoC's defence relations was Turkey's fragile relationships with regional states (2010-2017). The policy of Davutoğlu of 'zero problems' with Turkey's neighbours' was not so successful mainly after 2010, as events and Turkey's policies began to adversely affect the relations with nearly all of its adjacent nations. The strained relations between the Turkish leadership and its neighbours had the opposite effect on Cypriot foreign policy, particularly defence

12 A. Aristotelous, *The Military Forces in Cyprus 2017*, Cyprus Centre for Strategic Studies, (2017). Available at http://strategy-cy.com/ccss/index.php/el/surveys-gr/item/331-oi-stratiotikes-dynameis-stin-kypro-2017-the-military-forces-in-cyprus-2017.

diplomacy, which began to thrive as the RoC took advantage of Turkey's problems and bolstered its links with its neighbouring states.

The RoC's Bilateral Defence Diplomacy Initiatives in Its Neighbourhood

This section will feature an examination of the RoC's bilateral initiatives in defence diplomacy with its Eastern Mediterranean neighbours during the period 2010 through 2017. This policy is best described by the volume of bilateral cooperation relations with Israel, Egypt, Lebanon and Jordan.[13]

Israel

Israel and the RoC are enjoying a new and flourishing partnership in recent years, despite the fact that relations have not always been good. During the latter decades of the twentieth century, especially in the 1980s and 1990s, the RoC had voiced misgivings over Israel's close defence alliance with Turkey, while Nicosia prioritized its relationships with the Arab states of the region. However, from 2009, those relations between the two countries were set on a different basis. One of the main reasons for this turn was the disintegration of Israel's relationship with Turkey, because of various events,[14] together with the turmoil thrown up by the Arab Spring. Having cooperated strategically with Turkey in previous times, Israel had to face major issues as their relationship with Turkey deteriorated. Tensions between the two nations led to Israel looking to make new friends in the area in order to avoid regional isolation, and this became the foundation for a new accord between Cyprus and Israel. As Cyprus was the single non-hostile nation with which it shared air and sea boundaries, the case for cooperation with Cyprus was attractive to Israel.

Without a doubt, the discovery of hydrocarbons in both states was another reason that enhanced the rapprochement of Israel and Cyprus. The possibility of mutually beneficial official cooperation between Cyprus and Israel became apparent for the first time in December 2010, when the two countries signed a delimitation agreement on their EEZs. Cyprus President Dimitris Christofias visited Israel in March 2011 for the first-ever official visit by a Cypriot head of state.[15] In November of the same year, Israeli President Shimon Peres paid an official visit to Cyprus, where four agreements

13 It must be stressed that the RoC traditionally maintained extremely close defence relations with Greece since the establishment of the Republic, however, as this is a special case it will be analysed in a different paper.

14 About the Turkish - Israel Relations see: O. Bengio, *The Turkish-Israeli Relationship Changing Ties of Middle Eastern Outsiders* (New York, Palgrave Macmillan, 2004).

15 Embassy of the Republic of Cyprus in Tel Aviv, available at http://www.mfa.gov.cy/mfa/embassies/embassy_telaviv.nsf/DMLbilateral_gr/DMLbilateral_gr?OpenDocument.

were signed between the two countries on research and development, renewable energy, archeology and telecommunications.[16] During the visit, the Israeli President stated that the RoC is 'an important strategic partner for Israel', and expressed his hopes that 'the strategic relations between our countries will strengthen and the cooperation deepen'.[17] In February 2012, Netanyahu visited Cyprus, the first visit of an Israeli Prime Minister in history.[18]

The field of defence had not seen any particular collaboration in recent times between the two states. The RoC had bought a small amount of Israeli military hardware in the mid-1990s, but generally, the two sides were unwilling to cooperate much more. However, the rapprochement between Cyprus and Israel at the political level has led to the gradual expansion of initiatives and contacts in the defence sector, mainly after 2009, where the two defence ministries explored the possibility of working together. In January 2012, the official kick-start of the their defence relations was initiated, as the RoC Minister of Defense, Demetris Eliades, visited Israel, the first defence minister from Cyprus to do so. In February 2012, Israeli Prime Minister Benjamin Netanyahu visited Cyprus for the first time, whereupon it was agreed that Israel could use Cyprus' airspace and territorial waters if it needed to conduct search and rescue operations.[19] In December 2012, a bilateral cooperation programme for 2013 was signed. Within the frame of this programme, in April 2013, a joint exercise was conducted within and outside the territorial waters of the RoC.[20]

In May 2013, RoC Minister of Defence Photis Photiou paid an official visit to Israel. During the visit, Israeli Minister of Defence Moshe Ya'alon stressed the importance of the strategic relationship between Israel and the RoC, and explained 'Israel's intention to improve the preparedness of its navy in the Mediterranean to protect the gas facilities.'[21] In February 2014, for the first time a joint military exercise was conducted between the RoC and Israel, called *Onisilos-Gideon*, off the RoC's

16 F. Toli, 'Israel's Peres to Visit Cyprus', *Greek Reporter.com*, 2 November 2011, available at https://greece.greekreporter.com/2011/11/02/israels-peres-to-visit-cyprus/.

17 Israel Ministry of Foreign Affairs, 'President Peres Meets with Cypriot President Anastasiades', [Press Release], May 7, 2013, available at http://mfa.gov.il/MFA/PressRoom/2013/Pages/Peres-meets-Cypriot-President-Anastasiades.aspx.

18 The Economist, 'Israel and Cyprus - Getting Friendly', *The Economist* (2012, February 18), available at *http://www.economist.com/blogs/newsbook/2012/02/israel-and-cyprus.*.

19 A. Stergiou, 'Greece, Cyprus and Israel Change the Military Balance in the Mediterranean', Geopolitical Intelligence Service (2013, December 4), available at https://www.gisreportsonline.com/greece-cyprus-and-israel-change-the-military-balance-in-the-mediterranean,politics,644.html.

20 E. Benari, 'Israel and Cyprus to Hold Joint Military Exercise', Israeli Frontline (10 April 2013), available at *http://www.israelifrontline.com/2013/04/israel-and-cyprus-to-hold-join.html.*

21 Arutz Shevi, 'Israel and Cyprus to Improve Military Cooperation', *Israel International News* (n.d.), available at http://www. israelnationalnews.com/News/Flash.aspx/267521#.VQ6hgY7kfTN.

southern coast, involving the Israeli air force.[22] Photiou declared in a press conference: 'The relations between Cyprus and Israel are entering a new phase. I am confident that the strategic dialogue that began several months ago will benefit both countries and will continue in all areas, including energy security'.[23] In May 2014, five Israeli navy ships visited and participated in the multinational exercise *Argonaut 2014*.[24] In August of the same year, the new Cypriot Minister of Defence Christoforos Fokaides paid an official visit to Israel. Fokaides agreed at his conference with Israeli Defence Minister Moshe Ya'alon to create a joint committee to assist in implementing an upgrade of defensive collaboration between the two countries.[25] In February 2016, Moshe Ya`alon made the first official visit to Cyprus, during which he and Fokaides signed a Status of Forces agreement (SOFA).[26] Speaking after the meeting, the Israeli Minister said: 'The relationships between our defence establishments, as well as between our armed forces and intelligence agencies, are long-standing, productive and important. My visit here today demonstrates a strong relationship.'[27]

During 2017, the Cypriot Minister of Defence visited Israel three times, where the appointment of a Cypriot defence attaché to Israel was announced.[28] The attaché took his office in September of that year. Moreover, during 2017, many joint military exercises were conducted. In March the military exercise *Onisilos-Gideon*[29] was held, and in June the military exercises of *Iason 1* for training in air force activities and *Kinyras – Saoul* for the training of ground forces were conducted.[30] In December, the joint

22 Ministry of Defence (RoC), 'The Armed Forces of the Republic of Cyprus and the State of Israel hold a joint exercise named "Onisilos-Gideon"', [Press Release] (2014, February 11), available at http://www.mod.gov.cy/mod/mod.nsf/All/FF3E4C24E329CBC9C2257D9E002A91F6?OpenDocument.

23 K. Turner, 'Cyprus and Israel Mount Joint Military Exercise', *Cyprus Mail*, (2014, November 1), available at *http://cyprus-mail.com/2014/01/11/cyprus-israel-mount-joint-military-exercise.*

24 Ministry of Defence (RoC) Joint Rescue Coordination Center, 'Multinational Exercise "ARGONAUT 2014', [Press Release] (2014, May 19), available at http://www.mod.gov.cy/mod/CJRCC.nsf/All/CA73F1C8296FCDE0C2257CDD00457921?OpenDocument.

25 J. Christou, 'Defence Minister Concludes Israel Visit', *Cyprus Mail* (2015, August 5), available at http://cyprus-mail.com/2015/08/04/defence-minister-concludes-israel-visit/.

26 The agreement defines the rights and obligations of each country's military personnel during joint activities.

27 Ministry of Defence (RoC), 'First official visit by the Israeli Minister of Defense to Cyprus. An Agreement on the Status of Forces was signed' [in Greek], [Press Release] (2016, February 24), available at http://www.mod.gov.cy/mod/mod.nsf/All/FDA813524FCCE376C2257F630041F07E?OpenDocument,.

28 Ministry of Defence (RoC), 'Visit by the Minister of Defense to Israel as part of a series of visits to the Eastern Mediterranean [in Greek], [Press Release] (2017, May 14), available at http://www.mod.gov.cy/mod/mod.nsf/All/9D90086B1F0F111BC2258121002313F8?OpenDocument.

29 Ministry of Defence (RoC), 'The "Onisilos-Gideon" exercise was successfully completed' [in Greek], [Press Release] (2017, March 22) available at http://www.mod.gov.cy/mod/mod.nsf/All/C7DB27407F52D0C3C22580EC00227304?OpenDocument.

30 Ministry of Defence (RoC), 'The exercises "IASON 1/2017" and "KINYRAS-SAUL 2017"' were

military exercises *Iason 2, Nikoklis-David* and *Onisilos-Gideon* were held with the ground and airborne units and personnel of the Cypriot and Israeli armed forces.[31]

Broadly translated, our findings indicate that from 2010, the bilateral relations between the RoC and Israel have entered a new and flourishing period at the defence level. In particular, from 2012 to 2017, many high-level visits have taken place, such as between the ministers of defence, high ranking officials and delegations of the two ministries. Also, many defence agreements have been signed in which Cyprus and Israel have conducted several joint military and search and rescue exercises. All the above confirm that in five years, the RoC, via gradual defence diplomacy efforts, established high-level relations with Israel.

Arab Republic of Egypt

The diplomatic political relations between the RoC and Egypt were very good since the establishment of the Republic, mainly due to the two states' participation in the Non-Aligned Movement.[32] A serious incident in the late 1970s resulted in a break in their diplomatic relations for several years,[33] however, diplomatic relations of the two states has been restored gradually. Initially, a significant event was the two states' agreement on the delimitation of their EEZ in 2003.[34] The discovery of hydrocarbons in the Cyprus EEZ was an additional event which opened up new opportunities for the two states to cooperate in the energy sector. More specifically, Nicosia and Cairo signed an agreement for the construction of an underwater pipeline to export natural gas to Egypt. The pipeline will transport natural gas from the 'Aphrodite' field to a liquefaction plant in the town of Encu in Egypt. The aim of the agreement is to ensure the timely and safe development, construction and operation of the underwater

successfully completed [in Greek], [Press Release] (2017, June 14), available at http://www.mod.gov.cy/mod/mod.nsf/All/D0788D0CE04FEC14C2258141001BF52E?OpenDocument..

31 Ministry of Defence (RoC), 'Military Exercises Iason, Nikoklis-David and Onisilos-Gideon' [in Greek], [Press Release] (2017, December 3-14), available at http://www.mod.gov.cy/mod/mod.nsf/All/D0788D0CE04FEC14C2258141001BF52E?OpenDocument.

32 The Non-Aligned Movement (NAM) is a group of states that are not formally aligned with or against any major power bloc. As of 2012, the movement has 120 members. See Non-Aligned Movement: http://csstc.org/.

33 Egyptian Special Forces invaded Larnaca International Airport on February 10, 1978 to try to end a hijacking. Prior to that, two terrorists had murdered well-known Egyptian editor Youssef Sehai, and then took a number of Arabs hostages who had been at a Nicosia conference. While Cypriot military were attempting to negotiate, the Egyptian forces made an unauthorised assault, which resulted in a gun battle between Egyptian and Cypriot soldiers, ending with the death or injury of over 20 Egyptian soldiers.

34 Ministry of Foreign Affairs (RoC), 'Exclusive Economic Zone and Continental Shelf', [Press Release] (2016, October 19), available at: http://www.mfa.gov.cy/mfa/mfa2016.nsf/mfa86_en/mfa86_en?OpenDocument.

pipeline, said the Cypriot Minister of Energy Yiorgos Lakkotrypis. He also said, 'It constitutes one more critical step for our country towards the effective exploitation of undersea wealth in the Cypriot EEZ to benefit all Cypriots,' the Cypriot minister said. 'Ultimately, through re-exporting gas from Aphrodite in the form of LNG, the pipeline will enable the transport of the first quantities of natural gas from the eastern Mediterranean to the EU.'.[35]

An additional event which seems important for the rapprochement between Cyprus and Egypt was that Egypt severed its diplomatic relations with Turkey in 2013. Turkey's and Egypt's worsening relations since Mohammad Morsi, the Muslim Brotherhood leader, was deposed in 2013 was illustrated by the fact that each country recalled their ambassadors from the other's capitals in November of that year. These diplomatic casualties occurred following Turkish Prime Minister Erdoğan's announcement that he 'will never respect those who come to power through military coups.' Erdoğan's regime was sympathetic to the Muslim Brotherhood in Egypt and made efforts to reinstate Morsi as president, but the military regime that took over in Egypt stated that Erdoğan was guilty of 'attempting to influence public opinion against Egyptian interests, and supporting meetings of organizations that seek to create instability in the country.'[36] The divergence of Turkish and the new military-backed government in Egypt undoubtedly was one of the main factors that brought Cairo closer to Nicosia.

The establishment of excellent political relations between the two states has led to the gradual development of relations in the defence field. The primary motivations behind this cooperation have been on the one hand the common perceptions in energy-related interests and on the other hand the shared insights regarding Turkey as a security threat. The two states' defence relations have gradually developed since 2014. Initially, they cooperated in search and rescue matters, such as a joint exercise that was held off the coast of Larnaca in May 2015, and was attended by staff of the Egyptian Naval Academy of Alexandria. From 2015, defence relations intensified between the two countries, with the two defence ministers making regular visits and signing several agreements on defence-related issues. On November 2015, Egyptian Minister of Defense General Sedki Sobhi paid an official visit to Cyprus, which was the first visit by a defence minister of Egypt. During the visit, he and Cypriot Defence Minister Fokaides signed a Memorandum of Understanding in Defense and Military Cooperation between the two countries.[37] In response, Minister Fokaides also visited

35 G. Psyllides, 'Cyprus, Egypt sign gas pipeline agreement'. *Cyprus Mail* (2018, September 19), available at https://cyprus-mail.com/2018/09/19/cyprus-egypt-sign-gas-pipeline-agreement/.

36 U.S. Policy and the Strategic Relationship of Greece, Cyprus, and Israel: Power Shifts in the Eastern Mediterranean.

37 Ministry of Defence (RoC), 'First official visit by the Egyptian Minister of Defense to Cyprus − A Memorandum of Military and Defense Cooperation signed' [in Greek],

Cairo on February 2016, the first visit by a Cypriot Defence Minister to Egypt. During the visit, a bilateral military cooperation programme for 2016 was signed.[38]

In October 2016, Egypt participated for the first time with observers in the multinational exercise *Nemesis*,[39] while in April 2017, Fokaides officially visited Egypt for the third time. During the meeting, the RoC announced that they would post a defence attaché at the embassy in Cairo from October 2017.[40] In August 2017, a military delegation from Egypt's Ministry of Defence paid a three-day visit to Cyprus and signed with Nicosia a bilateral programme for the implementation of military and maritime cooperation in search and rescue missions for 2017-2018.[41] In December 2017 a Memorandum of Cooperation on Aeronautical Search and Rescue was signed during Defence Minister Sobhy's official visit to Cyprus.[42] Beyond signing defence/military agreements and exchanging official visits between the two ministries of defence, cooperation is identified in other cases, such as exchanges in military personnel for educational purposes.[43] Moreover, through the Memorandum of Understanding between the RoC and Egypt, the two states have held many joint exercises in search and rescue.[44]

The new regional conditions, as were described above, favoured the gradual development of closer defence relations between Nicosia and Cairo, since the two

[Press Release] (2015, November 3), available at: *http://www.mod.gov.cy/mod/mod.nsf/All/4A122751EA7BC502C2257EF2004AD506?OpenDocument.*

38 Ministry of Defence (RoC), 'First official visit by the Cypriot Minister of Defense to Egypt' [in Greek], [Press Release] (2016, February 28) available at *http://www.mod.gov.cy/mod/mod.nsf/All/9F18BE51CF1750E9C2257F670057625F?OpenDocument.*

39 Ministry of Defence (RoC), 'Multinational Exercise Nemesis- 2016' [in Greek], [Press Release] (2016, October 12), available at: http://www.mod.gov.cy/mod/mod.nsf/All/0C3AE7527544D3F8C225804A004F877B?OpenDocument.

40 Ministry of Defence (RoC), 'Minister of Defence meets with President El Sisi in Egypt to establish Permanent Co-ordinating Committee on Defense Issues' [in Greek], [Press Release] (2017, April 12), available at http://www.mod.gov.cy/mod/mod.nsf/All/F9546D3081EE3471C225810000570A92?OpenDocument.

41 Gold News, 'Cyprus and Egypt Sign Program for Implementing Their Military Cooperation', Gold News (2017, August 25), available at http://www.goldnews.com.cy/en/energy/cyprus-and-egypt-sign-program-for-implementing-their-military-cooperation.

42 Ministry of Defence (RoC), 'Egyptian Defense Minister's Official Visit - Signing of Memorandum on Aeronautical Research-Rescue' [in Greek], [Press Release] (2017, December 12), available at http://www.mod.gov.cy/mod/mod.nsf/All/A50D0190A151E393C22581F400456D5F?OpenDocument.

43 Ministry of Defence (RoC), 'Delegation from the Egyptian training ship "SHALATIN" visits the JRCC Larnaca, [Press Release] (2017, December 21), available at http://www.mod.gov.cy/mod/CJRCC.nsf/All/DF992A2DE7B5E347C22581FD004717ED?OpenDocument.

44 Ministry of Defence (RoC), 'International Exercise Search and Rescue CYPEGYP - 02/17" [in Greek], [Press Release] (2017, December 22), available at http://www.mod.gov.cy/mod/mod.nsf/All/C1F7F8ED0F953E02C2258204001FB48F?OpenDocument.

states had major motivations to develop theses relations. On the one hand, for Cyprus, the development of defence relations with a state which has over a million square kilometres of territory, 2450 kilometres of coastline of which roughly 900 kilometres are on the Mediterranean Sea, and a population of 84 million, was a great achievement.[45] In addition, Egypt is recognised as a major power in the Arab world, countering Turkish ambitions to be a dominant force in the worldwide Muslim fraternity. It is also recognised that Egyptian armed forces are highly respected within Egypt, and many senior soldiers enter politics when they leave the armed forces. On the other hand, it was important for Egypt to establish relations with Cyprus because, beyond the fact that the latter supports Egypt's positions in various international forums, and mainly in the European Parliament, Cyprus was regarded as a non-hostile, non-competitive state and the safest choice as a hub for the exportation of Egyptian gas to Europe.

Lebanon

The RoC has traditionally maintained very good diplomatic relations with Lebanon; however, beyond their close relations, they have not cooperated much on matters of defence. Only in the last decade have the two states initiated closer defence relations, brought on by two major events. In 2006, during the military conflict in Lebanon between Hezbollah paramilitary forces and the Israel Defence Forces, the RoC contributed to the evacuation of Lebanese refugees. The Government of the RoC granted access to its resources and infrastructure in order to facilitate safe passage from Lebanon. Cyprus also became the hub for delivering humanitarian aid to Lebanon. A second turning point was the 2007 agreement that the two countries signed regarding the maritime delimitation of their EEZs.

Following these landmark events, cooperation developed between the countries, thereby improving relations in the field of defence. Initially, in January 2008, the RoC's Ministry of Foreign Affairs negotiated an agreement between Cyprus and Lebanon on aeronautical and maritime search and rescue.[46] The two ministries of defence then made initial contacts in 2011. In September 2012, the Minister of Defence of the RoC, Dimitris Eliades, paid an official visit to Lebanon, which was the first visit by a Cypriot Minister of Defence.[47] The next year, another visit was paid by the Cypriot Minister

45 CIA World Factbook, available at https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html.

46 Ministry of Foreign Affairs (RoC), 'Cyprus and Lebanon sign an agreement on Aeronautical and Maritime Search and Rescue', [Press Release] (2008, January 16), available at http://www.mfa.gov.cy/mfa/mfa2016.nsf/All/412081E0FA216C46C2257FA000458A4D?OpenDocument.

47 Ministry of Defence (RoC), 'Official Visit by the Minister of Defense to Lebanon and Talks with the Leadership of the Country' [in Greek], [Press Release] (2012, September 21), available at http://www.mod.gov.cy/mod/mod.nsf/All/13D67786AACEEF55C2257D9E002A90CD?OpenDocument..

of Defence, whereby a Memorandum of Understanding on Defence and Military Cooperation was signed.[48] Official visits of the Ministers of Defence and other high ranking officials continued and intensified in the following years, mainly during 2016 and 2017. During a visit by the Cypriot Minister of Defence to Lebanon in October 2017, a decision was made on the formation of a joint committee for the development of defence relations between the two countries.[49]

The RoC MoD offered several search and rescue training exercises to Lebanese armed forces. The RoC also promised to help Lebanon build a search-and-rescue center to respond to emergencies off its coastline.[50] Moreover, the Lebanese army participated in the annual multinational exercise *Argonaut* in 2013 with ships, and from 2014 until 2017 with observers. The RoC also provided military materials to the Lebanese Government. From 2015 until 2017, Cyprus provided ammunition worth over €20 million, the last tranche of which was delivered in October 2016.[51]

Hashemite Kingdom of Jordan

Bilateral relations commenced between the Hashemite Kingdom of Jordan and the RoC in early 1962. Cyprus' first embassy was opened in Amman in December 2009, while the Hashemite Kingdom of Jordan's embassy opened in Nicosia in August 2016. In the interests of bilateral cooperation, many reciprocal official visits have taken place.

The two defence ministries had no contact in the period 2014-2017. Following a series of negotiations between the two ministries, Cyprus and Jordan signed a Memorandum of Understanding on Defence and Military issues during an official visit by Defence Minister Fokaides in Jordan in May 2017.[52] The RoC Ministry of Defence also provided equipment, in the framework of Jordan's international initiative, known

48 Cyprus Investment Counsel, 'Lebanon - Cyprus', Cynvestco.com (2016, August), available at http://cynvestco.com/wp/2016/08/21/lebanon-cyprus/.

49 Ministry of Defence (RoC), 'Official visit by the Minister of Defense Christoforos Fokaidis in Lebanon' [in Greek], [Press Release] (2017, October 30), available at http://www.mod.gov.cy/mod/mod.nsf/All/933BB90296A53CA5C22581C9005548B8?OpenDocument.

50 Cyprus Mail, 'Beirut and Nicosia to deepen cooperation, new ambassador says', *Cyprus Mail* (2017, December 30), available at: http://cyprus-mail.com/2017/12/30/beirut-nicosia-deepen-cooperation-new-ambassador-says/; The Associated Press, 'Cyprus to help Lebanon build Mediterranean Sea rescue center', *Defence News* (2017, November 30), available at https://www.defensenews.com/naval/2017/11/30/cyprus-to-help-lebanon-build-mediterranean-sea-rescue-center/.

51 Ministry of Defence (RoC), 'Know-how and ... "Zastava" from Cyprus to Lebanon' [in Greek], [Press Release] (2017, October 30), available at: http://www.philenews.com/eidiseis/politiki/article/447991/technogosia-kai-zastaba-apo-kypro-pros-libano.

52 Ministry of Defence (RoC), 'Cyprus-Jordan had signed a Military Memorandum of Understanding' [in Greek], [Press Release] (2017, May 23), available at http://www.mod.gov.cy/mod/mod.nsf/All/17D60BDAACF36E9BC2258129003FA5C4?OpenDocument.

as *Aqaba Process*,[53] to counter terrorism.[54] In November 2017, Jordanian Lieutenant General Mahmoud Fraihat paid an official visit to Cyprus for the signing of a Bilateral Military Cooperation Programme.[55] The Minister of Defence of the RoC pointed out that: 'The signature of a Bilateral Military Cooperation Programme puts in practice practical actions, so that this cooperation can become even more fruitful to the mutual benefit of our countries in various areas, such as joint exercises, training and other joint programmes dealing with common threats'.[56] The RoC has also accredited a defence attaché at its diplomatic mission in Jordan, who is stationed in Cairo.[57]

Conclusion

Despite the fact that Cyprus is a small state in the international system, with all this entails in the exercise of its diplomatic practice, a series of different dynamics and regional changes led the Cypriot governments, independently of their political orientation, to aggressively pursue defence collaborations during the last decade. This policy was even more obvious in the RoC's bilateral defence diplomacy initiatives with its neighbouring states, such as Israel, Egypt, Jordan and Lebanon. In view of the volume and the quality of different parameters (e.g., signatures of agreements, regular high-level visits, common military drills, etc.), the RoC, via a gradual and systematic defence diplomacy policy has developed close defence relations and partnerships with its neighbouring states. It is noted, however, that the quality and quantity of the defence relations the RoC has formed with its neighbouring states differ in each case. There is no doubt that the deepening of defence relations with Israel and Egypt is a priority for Cyprus' defence diplomacy for obvious reasons. In addition, beyond the fact that the RoC has developed close relations with its neighbouring states in the defence field, it must be stressed that these defence partnerships should not be confused with military

53 The Aqaba Meetings are part of a series of international meetings launched by Jordan in 2015 to bolster security and military cooperation, coordination and exchange of expertise among regional and international partners to counter terrorism and its threat to global peace and security within a holistic approach.

54 Ministry of Defence (RoC), 'Official visit by the Head of Jordanian Armed Forces' [in Greek], [Press Release] (2017, November 30), available at http://www.mod.gov.cy/mod/mod.nsf/All/45A7A94086E45DACC22581E90020F8A8?OpenDocument.

55 Ministry of Defence (RoC), 'Official visit by the Jordanian Lieutenant General Mahmoud A. Fraihat to Cyprus' [in Greek], [Press Release] (2017, December 1), available at http://www.mod.gov.cy/mod/mod.nsf/All/3CDE6B2E65DAAE88C22581E9004659C7?OpenDocument.

56 Cyprus Daily, 'Cyprus and Jordan sign bilateral military cooperation programme', *Cyprus Times* (2017, December 1), available at http://english.cyprustimes.com/2017/12/03/cyprus-jordan-sign-bilateral-military-cooperation-programme/.

57 Cyprus News Agency, 'Cyprus Defence Minister meets Egyptian President, *CNA.org.cy* (2017, April 12), available at http://www.cna.org.cy/webnews-en.aspx?a=b202944eba10483aafff99bf04b54609.

alliances, which, of course, are something very different.

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The Cypriot Doctrine of Necessity within the Context of Emergency Discourse: How a Unique Emergency Shaped a Peculiar Type of Emergency Law

Christos Papastylianos[1]

Abstract

The doctrine of necessity, which has been enshrined in the Supreme Court's Ibrahim judgment, emerged as a response to an emergency. Yet, the nature of the emergency has determined the basic characteristics of the doctrine of necessity, which makes it a unique case within the context of emergency law. The doctrine of necessity occurred through a constitutional crisis, which was created by the main political and institutional actors' strategically oriented activity regarding the application of the Cypriot Constitution during 1960-1963. The crisis lead nearly to the collapse of the state and resulted in the complete incapacity of key state organs to operate. Thus, confronting necessity demanded not for an abrogation from the Constitution in order to increase the effectiveness of the institutions, as in a typical case of emergency, but in order to create the conditions which are necessary for them to operate at a primary stage. This differentiation determines the degree of similarity between the doctrine of necessity and the dominant paradigm of emergency law, which conceives emergency as a reason for derogation from the rule of law and the core principles of constitutionalism, even temporarily.

Keywords: constitutional crisis, constitutionalism, doctrine of necessity, emergency law, rights, rule of law, Supreme Court

The Doctrine of Necessity: Preliminary Remarks

The doctrine of necessity in Cyprus was initially linked to the inability of the Cypriot State to function in line with the organizational structure, the bi-communal system, which was established under the 1960 Constitution of Cyprus. It is characteristic of the Constitution of Cyprus that no reference is made in it to the concept of people. The citizens of Cyprus are not part of the Cypriot people but members of two separate communities (Greek and Turkish), membership in which is based on specific criteria, such as origin, language, cultural traditions and religion. It should be pointed out that citizens who do not belong to one of the two communities based on the

1 Christos Papastylianos is Assistant Professor of Public Law in the School of Law, University of Nicosia. The first part of the article, 'The Doctrine of Necessity: Preliminary Remarks', is based on my contribution to a book co-authored with A. Emilianides and C. Stratilatis, on the Doctrine of Necessity [see fn42], entitled 'The Fundamental Rights of Turkish-Cypriots and the Doctrine of Necessity: Sovereignty and Territoriality as Presuppositions for the Exercise of Rights'.

above criteria are called upon to choose what community they would like to belong to.[2] This dual structure was also followed in establishing the bodies performing executive powers (the President of the Republic comes from the Greek community, the Vice-President of the Republic comes from the Turkish community), their powers being distinguished into powers exercised conjointly and powers exercised separately by each of them (see Articles 47-49 of the Constitution). As regards the Council of Ministers, its composition is based on a specific ratio of ministers from both communities (7:3). This dual structure is also apparent in the legislative function, as Greek Cypriot MPs are elected only by members of the Greek community and Turkish Cypriot MPs are elected only by members of the Turkish community. The Constitution contains similar provisions about the make-up of other key state bodies, such as the Supreme and Constitutional Courts, the staffing of the Attorney-General of the Republic, the Auditor-General, the Governor of the Central Bank and their assistants. In all cases it is provided that the assistants must belong to a community other than that of the head of a body. A quantitative distribution also exists in the composition of the public sector (7:3).

Nonetheless, although establishing cooperation between the two political communities, the Constitution contains no safeguards in the event the system is unable to function due to the two communities refusing to work together.[3] These conditions create the context in which the law of necessity was relied upon and applied in Cyprus, and our examination of the doctrine of necessity must be linked to these conditions. Failure to apply provisions of the Constitution to the bi-communal structure, paired with the inelastic application of other provisions to bi-communal structure, led initially to a complete paralysis in the functioning of key areas of the Cypriot State.[4] The inefficiencies patent in the organizational governance system adopted under the Constitution of Cyprus finally led to a 'constitutional crisis', with Turkish Cypriots leaving from all posts they held in the government and the House of Representatives, and the Presidents of the Constitutional and Supreme Courts, who

2 See Article 2(1) and (2) of the Constitution of Cyprus.

3 See A. Emilianides, *Beyond the Constitution of Cyprus*, in Greek (Athens: Sakkoulas Publications, 2006), 38. It should also be noted that where constitutional arrangements operated efficiently in states with deep ethnic, religious or linguistic divisions, this was because the constitutions of those states left a number of critical issues open to future regulation or provided for flexible conflict resolution mechanisms on the legislative level or on the level of other bodies which functioned free of commitments of a constitutional nature. On this issue, see . Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2011), 30-51.

4 Constitutional provisions on the creation of two separate municipalities in the five largest cities, the establishment of a Cypriot army and the quota concerning recruitment in public sector were not immediately applied. On the other hand, the strategically oriented provisions that the two communities required separate majorities for passing tax laws lead to an inability to pass such laws.

did not belong to either of the two communities, resigning.[5] This development caused certain state bodies to become fully unable to operate in line with the provisions of the Constitution. This was the context within which the Supreme Court relied on and applied the doctrine of necessity for the first time.[6] From the outset, the doctrine of necessity, as it shows up in Supreme Court case law, has two dimensions. The first is about the factual background of its reliance, namely the complete inability of specific state bodies to function. The second is about the consequences of that inability in terms of the existence or absence of a Cypriot State in the form of a constituted state, a state ordered by and through its constitution.[7] In applying the doctrine of necessity, the Supreme Court attempts to go beyond the Constitution, with a view to maintaining constitutional order. Reliance on the doctrine of necessity here differs from the inability of existing state bodies to respond to an emergency exercising their powers under the Constitution. For Cyprus, state bodies were unable to function due to the two communities' lack of cooperation, which was the implied prerequisite for the efficient operation of the provisions on the organizational part of Cyprus' Constitution. This prerequisite was not a legally binding rule according to the constitutional framework; however, its absence had specific legal consequences in that the Cypriot State could not exist as a constituted state, whose coherence required state bodies to function as envisaged in the Constitution. Therefore, in Cyprus, necessity [the contingency] is caused by the complete inability of state bodies to carry out their duties rather than because carrying out duties under the Constitution is deemed inadequate for addressing contingencies.[8]

Therefore, the Court's reasoning in relying on and applying the law of necessity is not founded on Article 183 of the Constitution of Cyprus on responding to an emergency but on Article 179, according to which the Constitution is the supreme law of the Republic of Cyprus.[9] Justice Triantafyllides, who wrote the respective

5 They came from neutral countries (Germany, Canada).

6 In *Attorney-General of the Republic* v. *Mustafa Ibrahim* [1964] CLR 195. This case was about the constitutionality of Law 33/1964, which merged the two supreme courts in Cyprus (Constitutional and Supreme Courts, whose functions were established in the Constitution of Cyprus) into one court.

7 See C. Kombos, *The Doctrine of Necessity in Constitutional Law*, (Athens: Sakkoulas Publications, 2015), 175; P. Polyviou, *The Case of Ibrahim, the Doctrine of Necessity and the Republic of Cyprus*, (Nicosia: Chryssafinis & Polyviou Publications, 2015), 35-45. About the constitutive function of the Constitution, see S. Holmes, *Passions and Constraints*, *On the Theory of Liberal Democracy* (University of Chicago Press, 1995), 163; E. A. Young, 'The Constitution Outside the Constitution', *Yale Law Journal* Vol. 117, No. 3 (2007), 417-422, F. Michelman, 'Constitutional Authorship, in *Constitutionalism:Philosophical Foundations*, ed. L. Alexander (Cambridge, Cambridge University Press, 2001), 64-65.

8 A major part of the reasoning of Judge Triantafyllides is based on this assumption.

9 See Kombos, *The Doctrine*, 166-168, Polyviou, *The Case Of Ibrahim*, 48-51. It should be pointed out that the declaration of a state of emergency required the involvement of the Vice President, who came from the Turkish Cypriot community and no longer performed his functions (Polyviou, *The Case of*

opinion, argued that the supremacy of a constitution is derived from the fact that it is founded on the will of the people, which had not happened in Cyprus. The Constitution of Cyprus is an 'imposed' constitution, as it was prepared by an *ad hoc* committee of experts on constitutional law: Professor Themistoklis Tsatsos, from Greece; Nihat Erim, from Turkey; and from the two Cypriot communities. The final text of the Constitution was signed by Sir Hugh Foot, the last Governor of the colony of Cyprus, Mr Georgios Christopoulos, the Consul General of Greece, Mr Turrel, the Consul General of Turkey, Archbishop Makarios and Dr Küçük, being both elected President and Vice President of the Republic, respectively, and it entered into force on 16 August 1960. In addition, the extremely cumbersome constitutional amendment process undermined from the outset the possibility of the citizens making changes to the Constitution. Therefore, the 'constitutional engineering' of Cyprus' Constitution[10] effectively weakened the Constitutions' substantive and symbolic nature as the supreme law of the state.[11]

In addition, the primacy of a constitution within any constitutional order is founded on the citizenry adopting it. The supremacy of an imposed constitution is limited because its adoption process did not involve the people, which is a condition for establishing their will as the utmost foundation of the validity of a constitution. That is, the main condition for a constitution to be considered the supreme law of a state is missing. In applying the relevant constitutional provision, it should not be overlooked that Article 179(2) imposes upon authorities exercising administrative functions or executive power the obligation to refrain from acting in a way repugnant to or inconsistent with the Constitution. Performance of this obligation should be verified by the judge while reviewing the constitutionality of laws. Applying this provision rigidly without due consideration of these factors would indeed cause the State to collapse, as it would be impossible for certain essential state institutions to function in the name of the formal constitution.

However, according to Judge Triantafyllides, given that accepting the view that a constitution both establishes and contributes to the collapse of the state is a legal

Ibrahim. 56). Also, the state of emergency, envisaged in Article 183 of the Constitution of Cyprus, is about the adoption of measures to combat political violence. That is, it could be applied only to aspects of the emergency in Cyprus during 1963-1964, as a result of the action of paramilitary units that left victims on both sides. It is, however, extremely doubtful whether the withdrawal of Turkish Cypriot officers from state bodies constitutes an act of political violence.

10 'Constitutional engineering' means mechanisms that prevent the manipulation of the constitution by way of incentives intended to limit the self-motivation of actors and to attain desirable constitutional behavior with a view to the smooth functioning of the state. About constitutional engineering, see·G. Sartori, *Comparative Constitutional Engineering* (New York University Press, 1997), 195-203. Although he does not use the term 'constitutional engineering', Jon Elster puts forwards some useful observations in his *Securities against Misrule* (Cambridge University Press, 2013), 15-98.

11 See *Ibrahim,* 222.

paradox and a performative contradiction,[12] the doctrine of necessity needs to be applied insofar as it is necessary for Cyprus to continue to function as a state under a constitution.[13] The necessity of maintaining the state acquires, in Judge Triantafyllides' reasoning, characteristics of a meta-rule for the interpretation of the individual constitutional provisions which are relevant to the system of governance.[14] In the reasoning of the judgment on the *Ibrahim* case, at least according to the view expressed by Judge Triantafyllides, the doctrine of necessity is based on an approach which distinguishes the concept of the constitution as the means of constituting a state from the idea that it limits the exercise of state power.[15]

In the case at hand, the issue that arose in Cyprus could not be addressed by mere reference to constitutional provisions and their purpose, as their efficient operation required a given, which turned out to be a requirement, that is the uninterrupted cooperation of the two communities. It is an extralegal given which affects both the formal constitution and the so-called material constitution.[16] After *Ibrahim*, the doctrine of necessity is recognized by the Supreme Court as a new source of law in the constitutional order of Cyprus. This allows departure from specific constitutional rules, with a view to saving constitutional order per se and ensuring the continuous functioning of the state institutions of Cyprus.

12 The term 'performative contradiction' means that the propositional content of a speech act contradicts the presuppositions of asserting it. An example would be a judgment handed down by a Greek court whose operative part would indicate that, although rule X is not in line with the Constitution, it, however, is applied in the case at hand, although Article 93(4) of the Constitution of Greece provides that courts shall be bound not to apply a statute whose content is contrary to the Constitution. On the concept of performative contradiction, see R. Alexy, *The Argument From Injustice: A Reply to Legal Positivism*, (Oxford University Press, 2010), 35.

13 See *Ibrahim,* 234.

14 For the existence of such a meta-rule, which can be founded on the provisions of the Constitution of the United States on the Oath or Affirmation of the President (Article II), which provides that the President of the United States must to the best of his ability preserve, protect and defend the Constitution of the United States, and for references to the practices of President Abraham Lincoln during the Civil War, see M. Stokes Paulsen, 'The Constitution of Necessity', *Notre Dame Law Review* Vol. 79, No. 4 (2004), 1257-1298. In particular, with regard to the divergence from constitutional legality with a view to preserving it, see S. Mattie, 'Prerogative and the Rule of Law in John Locke and the Lincoln Presidency', *The Review of Politics* Vol. 67, No. 1 (2005), 77-111.

15 About this distinction see L. C. Feldman, 'Lockean Prerogative: Productive Tensions', in *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*, eds. C. Fatovic and B. Kleinerman (Oxford University Press, 2013), 80.

16 Namely the set of principles and rules which, irrespective of whether they are reflected in the formal constitution, constitute at a given time in history the actual source of validity and interpretation of the Constitution, according to the definition given by Professor Manitakis, see A. Manitakis, *Greek Constitutional Law* I, [in Greek] Sakkoulas Publications, 2004) 56. On the concept of material constitution, see also M. Goldoni, 'The Material Constitution', *Modern Law Review*, Vol 81 No 4,2018, 567-597. In essence, the material constitution of Cyprus in 1963 indicates the full inability of the organizational part of the formal constitution to operate.

Currently, the doctrine of necessity forms an integral part of the discourse of the state institutions of Cyprus in certain fields.[17] It should also be noted that the function performed by the doctrine of necessity as a new source of law and meta-rule for the interpretation of the Constitution places Cyprus among those cases where the law of necessity is not considered an extra-legal given by the community of users of law, but on the contrary a part of the existing constitutional order.[18]

Doctrine of Neccesity: Emergency and Constitutional Crises

A critical parameter which should be looked at is whether the doctrine of necessity, as formulated in the judgment on the *Ibrahim* case, falls within cases classified as emergency. Just like any emergency law, the doctrine of necessity is an exception to the rule; that is, it departs from the applicable constitution. However, an exception to the rule does not imply that any situation which leads to a departure from applicable constitutional rules has the same impact on the validity of constitutional rules, in particular rules which are considred to be essential components of constitutionalism and the rule of law.

In principle, reliance upon and the application of the law of emergency in the *Ibrahim* judgment is the result of a constitutional crisis. Constitutional crisis is a situation where state bodies disagree on a proper way for performing their duties. However, this disagreement concerns the institutional capacity of those involved and affects the way in which they perceive how they should perform their duties. Namely, it is a disagreement which involves not only different interpretations of the meaning of a constitutional provision, but, mostly, different interpretations of its purpose, and such different interpretations have a decisive impact on how state bodies should perform their duties. The disagreement touches upon issues connected with and directly affecting the constitutional design of the organization of a state. A constitutional crisis also has a factual background. In order to have a constitutional crisis, the disagreement must affect the functioning of state bodies. There is no constitutional crisis if state

17 See Emilianides, *Beyond*, 137-143, Kombos, *The Doctrine,* 179-207. This remark does not mean that the bodies of the Cypriot State can rely upon and apply the doctrine of necessity as they see fit. The doctrine of necessity is part of the material constitution (see footnote no. 16 on the concept of material constitution) and, therefore, the bodies of the Cypriot State can rely upon and apply it only within the limits established in case law for the doctrine of necessity; review of these limits is verified by the courts. The doctrine of necessity is not a supra-constitutional rule, rather to the contrary it is part of the Cypriot constitutional order, see Emilianides, *Beyond*, 131.

18 As regards the distinction between approaches which consider 'necessity' part of the constitutional order (mainly characterized by the fact that they consider necessity a source of law and an interpretative meta-rule) and approaches which consider 'necessity' an extralegal given, see O. Gross and F. N. Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, (Cambridge University Press, 2006), 47 and K. L Scheppele, 'Legal and Extralegal Emergencies', in *The Oxford Handbook of Law and Politics*, eds. K. E. Whittington, R. D. Kelemen, and G.A. Caldeira, (Oxford University Press, 2008), 165-187.

bodies are not affected and continue to function uninterruptedly, despite differences in interpretation. After all, disagreement is a component of political life in modern democracies. For a constitutional crisis to exist, disagreement must cause upset, hence making it impossible to apply the constitution.[19]

A line, however, must be drawn between an emergency and a constitutional crisis, as the two concepts are not identical. It is possible to have an emergency without a constitutional crisis, the opposite being equally true. An emergency may lead to a constitutional crisis if state bodies disagree in terms of the urgency and intensity of the situation, as well as in terms of the constitutional limits of a response to this necessity. If they do agree, then the emergency does not lead to a constitutional crisis. On the other hand, a constitutional crisis is not necessarily the result of an emergency, such as if a state body acts contrary to the explicit provisions of the Constitution, which does not envisage an efficient mechanism for complying with constitutional precepts.[20] In this case, the crisis is not caused by the need for an immediate response to a practice which runs counter to the Constitution. In this practice, the timing of the response is not the critical element causing the constitutional crisis. Thus, there is a constitutional crisis but not an emergency.

However, just because a constitutional crisis is not identical to an emergency does not mean that these two phenomena are totally unlinked. Levinson and Balkin made distinctions between the various forms of constitutional crises. The first type of constitutional crisis is where institutional actors publicly state their intention not to apply the guarantees afforded by the constitution because a situation needs to be responded to as an emergency and faithfully complying with the constitution would result in an inefficient response. For such a situation to be considered a constitutional crisis, it must be impossible for the governance system to function as provided for in the constitution. Relying on the necessity to depart from the Constitution and employing processes not envisaged in it must be the result of failing to resolve disagreements by applying processes the Constitution provides or the result of the actors' belief that in a given case the Constitution is unable to maintain the political actors' disagreements within the bounds laid down in its provisions.[21]

A second type of constitutional crisis is when a conflict between political actors is not hindered by the Constitution because their actions are not beyond but within the constitutional limits . In this case, the Constitution is the problem and not the solution.[22] The third type of constitutional crisis involves situations where political

19 See S. Levinson and J.M. Balkin, 'Constitutional Crises', in *Pennsylvania Law Review*, Vol. 157, No. 3 (2009), 714-717.
20 Ibid., 717-718.
21 Ibid., 721-728.
22 Ibid., 737.

actors disagree about Constitutional precepts, which leads to both sides accusing the other of violating the Constitution. Certainly, a simple political disagreement would not fall under this category. The means that conflicting parties use to resolve their disagreement are crucial for determining whether a type three crisis exists or not. To have a type three constitutional crisis means to move outside the boundaries established by the constitution for publicly expressing political disagreements. Each party believes that the other party is taking steps not aligned with the Constitution for the purpose of defeating it, and therefore, each relies on this argument to justify arbitrary actions.[23]

In Cyprus, a type two constitutional crisis led to a type three crisis and ended up with a type one crisis with the *Ibrahim* judgment. To be exact, these crises were not successive, as they happened between 1960 and 1963, and they sometimes occurred simultaneously; simply, the importance and intensity of each type of constitutional crisis varied during this period. The 1960 Constitution of Cyprus envisaged a bi-communal system of governance, where both communities would share power on absolutely equal terms, regardless of their size. The 1960 Constitution of Cyprus contains 31 articles establishing that it is impossible to make a decision or complete a process without both communities' consent. Sixteen of these provisions give veto power to officers from each community, and the remaining require members of both communities to be involved in decision-making or to complete a process. These provisions apply to the composition of almost all state bodies. Therefore, it is possible for government institutions to be unable to make decisions or complete processes, because they do not have the consent of both communities and there is no provision for overriding the veto.

Veto power and qualified majority voting are mechanisms which ensure that the principle of separation of powers may act as a system of checks and balances to prevent one entity from having excessive power over the others. Against this background, the principle of separation of powers not only refers to the distinct domain of each branch but is also to a mechanism for preventing each from misusing their powers.[24] However, mechanisms of checks and balances, in particular the possibility that agents from one power can veto agents from the other two powers, are intended to set limits on the principle of majority and not to neutralize it. They are aimed at preventing impulsive majorities from making decisions and not at causing the principle of majority to become inactive.[25] For this reason, vetoing cannot, in the end, totally prevent a decision from being made which is based on the principle of majority, even

23 Ibid., 739-740.

24 See A. Kavanagh, 'The Constitutional Separation of Powers', in *Philosophical Foundations of Constitutional Law,* eds D. Dyzenhaus and M. Thorburn (Oxford: Oxford University Press, 2016), 233-234.

25 See J. Elster*, Ulysses Unbound* (Cambridge University Press, 2000), 131, 137.

if a qualified majority is needed to curb a veto.

The veto power in the Constitution of Cyprus does not fall within the logic of checks and balances, because it prevents majorities from making decisions on issues which are of vital interest to both communities. In addition, the presidential system of governance, which favours zero-sum logic more than parliamentary governance does, is enshrined in the Constitution of Cyprus.[26] In the Constitution of Cyprus, this logic is enhanced by giving both the President and Vice President the veto without there being any mechanism to resolve the impasses that mutual vetoing could lead to. This resulted in that mechanism, which was intended to limit the consequences of the two communities disagreeing, causing intensified disagreements, as the Constitution of Cyprus offers no way to make not cooperating seem less attractive than working together.[27]

Furthermore, the Constitution of Cyprus does not envisage an effective mechanism to resolve disputes between state bodies, and the constitutional court cannot be used for such purpose. It has jurisdiction to judge whether the actions of state bodies are within the limits set by the Constitution; however, it cannot guide state bodies on how to perform their duties if they remain within the constitutional limits. Given that the Constitution itself allows vetoing on specific matters but does not establish mechanisms for resolving the impasses that vetoing could lead to, and that it does not foresee any consequences in the event that the two communities refuse to cooperate when they are required to make decisions or to complete processes, should the constitutional court find this practice to be contrary to the Constitution, it would be outside the limits of its jurisdiction to try to settle the issue. Elster correctly observed that a 'constitution should be a framework for action not an instrument of action'.[28] Although this practice of non-cooperation is a form of strategic action, it could only entail political sanctions and it would not be possible to be verified in court.

It should also be pointed out that the Constitution of Cyprus lacks mechanisms which would make it easier to express dissatisfaction with uncooperative actors on a political level. The system of governance is a presidential system,[29] with a fixed term

26 See J. Linz, 'Presidential or Parliamentary Democracy: Does it make a Difference?', in *The Failure of Presidential Democracy*, eds J. Linz and A.Valenzuela (Baltimore: John Hopkins University Press, 1994), 18.

27 On the issue of mechanisms which make the lack of cooperation unattractive, as a factor for the successful implication of consiociational models of government, see G.Tsebelis, 'Elite Interaction and Constitution Building in Consociational Democracies', in *Journal of Theoretical Politics* Vol. 2, No. 1 (1990), 22.

28 See J.Elster, *Ulysses*, 101.

29 However, Vice Presidential powers in Cyprus do not correspond to those envisaged in a presidential governance system. P. Polyviou quotes De Smith on the Constitution of Cyprus in referring to a vice presidential system, in P. Polyviou, *Cyprus on the Edge: A Study on Constitutional Survival* (Nicosia: Cryssafis and Polyviou Publications, 2013), 16.

of office for the President and Vice President, and it is not possible for Parliament to disapprove of them. In addition, under the Constitution of Cyprus, the President and the Vice President can remove ministers, but only those coming from their respective communities. Therefore, ministers are not loyal to a single state but to their communities, represented by the President and the Vice President. This allocation of power intensified the rigidity of the institutional actors.[30] Also, the design of the Constitution of Cyprus does not allow people to 'exit' their communities as a form of putting pressure on political elites to rethink their positions. The only way for a person to leave a community is by exiting from one of the two communities altogether.[31] Therefore, the Constitutions' design does not prevent a type two constitutional crisis but rather creates the conditions for it. The inability of state bodies representing the two communities to cooperate is founded on the belief that their stance is aligned with their constitutional duties. That is, a failure to cooperate, which is a condition for the operation of the Constitution, is due to the fact that the actors did not violate the rules of the Constitution but rather acted in line with them.[32]

There were three main issues where the inability of the two communities to cooperate brings about this belief: the creation of separate municipalities for Turkish Cypriots; the creation of an army; and, the composition of the public service which is based on the Constitution's quantitative distribution of the population [70-30]. Three fundamental articles of the Constitution [Articles 173(1), 129, and 78(2)] were

30 According to Lijphart, the consociational form of governance must be accompanied by means to mitigate actors' rigidity to enable the governance system to be functional. These mechanisms also include avoiding the presidential system as a form of governance, as it intensifies the problems generated by the absence of a mechanism for solving impasses, See A. Lijphart, 'Constitutional Design for Divided Societies', *Journal of Democracy*, Vol. 15, No. 2 (2004), 96-109. According to Lijphart, it was the absence of properly designed institutions that caused the systems of governance in Cyprus and Lebanon to become non-functional and not the adoption of the principles of the consociational model, ibid. 99.

31 The possibility to 'exit' can, under certain circumstances, provide incentives for cooperation and can contribute to constitutional stability. However, in order to be efficient in a constitutional order, such as that of Cyprus, it should be possible for persons disagreeing with the choices of the community to leave it to exert pressure on the representatives of the community in state bodies and to express dissatisfaction with their choices. A similar option, however, was not possible under the structure of the Constitution of Cyprus. On the role of the possibility of exit as a mechanism contributing to the efficiency of the Constitution and, therefore, to constitutional stability, see A.D. Lowenberg and B.T.Yu, 'Efficient Constitution Formation and Maintenance: The role of "Exit", in *Constitutional Political Economy*, Vol. 3, No. 51 (1992), 51-72. Another parameter, pointed out in relevant literature regarding the possibility of 'exit' to provide an incentive for conflicting sides to cooperate and to not mutually annihilate the other, is that the 'exit' is efficient when the design of the constitution allows minorities to make decisions relevant to their members, thus affecting state policies, and not when it allows them to control all state functions, that is, when it is impossible to make a decision or implement a policy without their consent, see H.Gerken, 'Exit, Voice and Disloyalty', in *Duke Law Journal*, Vol. 62, No. 7 (2013), 1361.

32 See Levinson and Balkin, 'Constitutional Crises', 737.

not applied from the outset, because their application could be possible only if the two communities were to cooperate. Although desirable, this cooperation was not a binding rule according to the Constitution. Non-application was due solely to the way in which the representatives of the two communities perceived the performance of their constitutional duties.

However, it was not long before this practice led to a type three constitutional crisis, which is when each side argues that its opponents have violated the constitution, and the conflict between the two sides goes beyond the disagreement resolution limits set by the constitution. In order to prevail over the other side, each side is willing to employ means which, instead of expressing political disagreement, are intended to annihilate opponents. In Cyprus, the two communities were unable to implement the constitutional precept of observing the quantitative distribution in the public service composition [70-30] and disagreed in terms of the interpretation of the relevant provision and the reasons for not applying it. Greek Cypriots stressed that adhering to the constitutional precept was subject to the condition that 'This quantitative distribution shall be applied, so far as this will be practically possible' [Article 123(2) of the Constitution], and Turkish Cypriots insisted on its immediate application even if there were problems related to the efficient functioning of the public services (that is, they went around the condition set out in Article 123(2) of the Constitution). Reacting to the non-observance of the quantitative distribution condition in the recruitment of public servants, Turkish Cypriots refused to vote for a number of tax laws, whose adoption required, pursuant to the Constitution [Article 78(2)], a separate majority for both communities. This brought the implementation of this constitutional provision to a standstill and, therefore, there was no common tax legislation and tax collection mechanisms applicable to the entire territory.[33] Because the two sides disagreed about the application of a constitutional provision for the composition of the public service, and they each accused the other of unconstitutional practices, they could not cooperate on the adoption of tax laws, although this was a practice which cannot be literally considered to contravene the Constitution.

The second case where a constitutional provision became inactive when the two communities did not cooperate was over the composition of the army [Article 129 of the Constitution]. This provision did not envisage the way in which the army would be

33 The resolution of the matter came from the separate adoption of tax laws by the two communities in line with Article 87(1)(f) of the Constitution, which provides that each communal chamber may impose personal taxes and fees on members of their respective community in order to provide for their respective needs. According to the judgment of the Constitutional Court, ‹In the matter of article 144 of the Constitution and in the matter of a reference by the district court of Famagusta in criminal case no. 972/62 entitled, in the matter of tax collection law no.31of 1962 and Hji Kyriakos and Sons Ltd of Famagusta, [Case no 298/62› these laws were found to be in line with the Constitution. See S. Soulioti, *Fettered Independence*: Cyprus, 1878-1964, Vol 1, (Minnesota University Press, 2006), 157-159.

created, but only its composition [2,000 men, 60% Greek Cypriots and 40% Turkish Cypriots]. However, there was disagreement from the outset on the organisation of the army, namely whether it would be a single army or it would consist of separate parts based on ethnic origin. In August 1961, the Council of Ministers decided by majority [7 Greek Cypriots for and 3 Turkish Cypriots against] that the army would be a single one. The Vice President disagreed and finally vetoed it, as he had the option to do under Article 50(1)(b)(i), causing the army not to be created.[34]

The third matter on which the two communities had disagreed and which caused a constitutional crisis with both type one and a type three characteristics was about the creation of separate municipalities for Turkish Cypriots. Under Article 173 of the Constitution, separate municipalities were to be created for Turkish Cypriots in the five largest cities, provided that the decision would be reviewed by the President and the Vice President of the Republic within four years of the date the Constitution was ratified. However, Article 78(2) of the Constitution required a separate majority for the adoption of laws relating to the creation of municipalities, whereas the transitional provisions of Article 188 established that laws on municipalities that preexisted the Constitution would end on 15 February 1961. In the end, the validity of the laws was extended to 31 December 1962. However, Turkish Cypriot MPs made a second attempt to extend the validity of the laws for an extra year, but Greek Cypriot MPs voted against it. As a result, no decision was made because Article 78(2) of the Constitution required separate majorities. Greek Cypriot MPs refused to vote for the respective proposed legislation, and based their arguments on their interpretation of Article 173(1), in particular as to whether the wording of the provision established that the composition of the separate municipalities was mandatory or optional. Turkish Cypriot MPs, on the other hand, proposed legislation to extend the validity of the previous laws, referring to the need to reach a solution which would not undermine constitutional order.[35]

Then, on 2 January 1963, the Council of Ministers, with a 7-3 majority, issued a decree which attempted to extend the legal status of the communities in the municipalities, with a view to side-stepping the constitutional provision, since the provision referred to municipalities and not to communities. As could have been expected, the Vice President exercised the right of return and veto vested in him under Article 57(2) of the Constitution. At the same time, the Turkish Communal Chamber passed a law to create separate municipalities in the five largest cities, pursuant to Article 87(1)(g) of the Constitution. That law was signed by the Vice President in breach of Articles 78(2) and 47(2) of the Constitution, pursuant to which that law should have been passed by separate majorities and published in the Official Gazette

34 Ibid., 169.
35 Ibid., 180.

of the Republic jointly with the President.[36] Four recourses to the Constitutional Court followed regarding the validity of the decree and the law, and the Constitutional Court found that both the decree and the law ran counter to the Constitution. In these cases the Court ruled for unconstitutionality with a 2-1 majority, with the judges from both communities supporting the views of their respective community on the constitutionality of the laws in question.[37]

The issue of separate municipalities is typical in the way in which constitutional design can undermine the effective operation of a constitution. Many constitutions contain clauses entrusting the legislature to regulate matters which usually are regulated by the constitution. Such a strategy is adopted because, when a constitution is being designed, there is the likelihood that 'passions' can make it impossible to decide on a specific matter.[38] The option to entrust the regulation of a matter to the legislature is intended to give the parties involved an opportunity to make future decisions with a cool head. However, this option could prove efficient only when there are no factors that could prevent actors involved in the legislative process from behaving strategically. Otherwise, as experience in Cyprus has shown, this option is bound to remain inactive and is likely to give rise to a constitutional crisis, equivalent to that which the constitution designers had wanted to avoid by adopting that clause.

The Constitutional Court's judgments on the separate municipalities failed to create the conditions for an understanding between the two communities. On the

36 Article 87(1)(g) provides that the Turkish Communal Chamber may legislate on matters where subsidiary laws relate to municipalities or communities. Namely, the activation of the process envisaged in Article 87(1)(g) requires a prior legislative framework for municipalities in line with Articles 78(2) and 173 of the Constitution

37 A unanimous judgment on unconstitutionality was made only with regard to the publication of the law by the Vice President and not jointly by the President and the Vise President. 'In the matter of article 139 of the Constitution. The House of Representatives, and the Turkish Communal Chamber and/or the Executive Committee of the Turkish Communal Chamber, case no 12/1963›. However, that judgment also examined whether the Turkish Communal Chamber was competent to pass a law to create separate municipalities. In that case, the Turkish Cypriot judge held a minority view, arguing that the Turkish Communal Chamber had acted in line with the Constitution. On the same day, the Constitutional Court ruled on the constitutionality of the law, enacted by the Greek majority in the Parliament, which extended the legal framework concerning communities to municipalities, and the court held that the laws were unconstitutional, with the Greek Cypriot judge dissenting on the grounds of the doctrine of necessity, see footnote no. 19, Polyviou *The Case of Ibrahim,* 26-28, S. Soulioti*, Fettered Independence*, 193. The stance adopted by the judges from the two communities demonstrates that the existence of a third neutral judge does not in and of itself suffice to prevent an ethnic polarization within the context of constitutional adjudication. See Choudhry and R. Stacey, 'Independent or Dependent? Constitutional Courts in Divided Societies', in C. Harvey and A. Swartz, *Rights in Divided Societies* (Oxford: Hart Publishing, 2012), 102. It is worth pointing out that before these cases were heard, the Constitutional Court would usually have issued unanimous judgments.

38 See R. Dixon and T. Ginsburg, 'Deciding not to Decide: Deferral in Constitutional Design', *International Journal of Constitutional Law*, Vol. 9, No. 3-4 (2011), 638.

contrary, it widened the divide between the two communities and had the collateral effect of the president of the Constitutional Court resigning, hence causing the court to be unable to function. In November 1963, President Makarios proposed a set of 13 amendments to the Constitution, whose adoption would change the structure of the governance system significantly, as most of its consociational elements would have been eliminated. The Turkish Cypriot Vice President Fazil Küçük refused to discuss the proposed amendments,[39] and Turkey, being one of the guarantor forces, threatened to take action should Greek Cypriots unilaterally adopted the amendments. In the meantime, riots broke out in December 1963, with hundreds of victims from both sides, and, in the final ten days of December 1963, Turkish Cypriot officers left all state bodies. Next, in January 1964, the Turkish Cypriots [Vice-President and MPs] declared that they did not recognize the legitimacy of the Cypriot government, and many Turkish Cypriots employed in the public service and the police stopped going to work.[40] By that time the situation showed all the characteristics of a type three constitutional crisis.

The fact that Turkish Cypriot officers had abandoned their offices and public servants, their posts, was not an act of civil disobedience. Acts of civil disobedience aim to change the terms of inclusion in a political community and do not call the existence of the civil community into question. Civil disobedience means doubting the application of the law without, however, questioning the fidelity to law, in particular in the Constitution, into question. Those who commit acts of civil disobedience desire to change policies by showing, through a specific application of the Constitution, that they are incompatible with the Constitution.[41] Every constitution depends on the existence of political community whose members believe that they act jointly for the fulfilment of common goals Even if tacit, this belief is reflected in every constitution. Questioning the meaning of joint action when it comes to implementing common goals, and thus upsetting this condition, opens a up a prospect for exercising a secondary constituent power that raises doubts about all fundamental and non-revisable elements of a constitution, albeit exercised by actors who already are part of the constituted powers under the existing constitution. In this case, the existing constitution cannot give a solution; political actors need to negotiate to redefine what could be the the meaning of joint action under the constitution.[42]

39 The Turkish Vice President Küçük mentioned in his reply that Greek Cypriots had failed to that date to apply the provisions of the Constitution which favoured Turkish Cypriots.

40 See Soulioti, *Fettered*, 316-384.

41 See H. Gerken, 'Exit, Voice and Disloyalty', 1374, on J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) 363-365.

42 See H. Lindahl, 'Constituent Power and the Constitution', in *Philosophical Foundations of Constitutional Law,* (Oxford University Press, 2016), 157-159. In Cyprus, the 13 proposed amendments to the Constitution could be taken as an attempt to exercise secondary constituent power, as 9 out of the 13

When Turkish Cypriots withdrew from the government institutions and the parliament, and the two neutral presidents of the Constitutional and Supreme Courts resigned,[43] the executive, legislative and judicial powers could not function in line with the provisions of the Constitution of Cyprus. In this context, Law 33/1964 was passed, which provided that the two supreme courts (the Supreme Court and the Constitutional Court) would merge into a new Supreme Court. The law was passed by the majority of Greek Cypriots MPs.[44] The new Supreme Court no longer included a neutral president but had five members (three Greek Cypriots and two Turkish Cypriots, who were judges representing the two communities in the two merged courts).[45] Law 33/1964 is a direct departure from the provisions of the Constitution which established the two aforementioned courts with different jurisdictions. The Attorney-General of the Republic justified this move, invoking the urgency in which an efficiently functioning judicial system was needed.[46]

However, it was not the first time that the appeal to the necessity of emergency measures was invoked. In 1961, President Makarios ordered tax collection authorities to continue collecting taxes despite the absence of tax laws which, under the Constitution, had to be passed by 31 December 1960 [Article 188(2)] to replace previous colonial-era laws. In his address on this matter, the President spoke about the principle *salus populi suprema lex esto*. Thus, necessity becomes apparent in the constitutional discourse of the state bodies, as a principle which needs to be considered when applying the Constitution. Also, when the Council of Ministers issued its decree in which it attempted to apply the legislation on communities to municipalities, it invoked the doctrine of necessity. When it examined the case of separate municipalities, the Constitutional Court dismissed the argument that the doctrine of necessity could allow a departure from constitutional legality.[47] However, in that case, the minority view was held by the Greek Cypriot judge who expressed the opinion that reliance upon the doctrine of necessity can make it possible to tolerate deviations in terms of the application of

amendments concerned non-revisable provisions of the Constitution. See A. Emilianides, *The Doctrine of Necessity, 50 years After: 'Reflections on the Cypriot zeroth law*', in A. Emilianides, C. Papastylianos, and C. Stratilatis, *The Republic of Cyprus and the Doctrine of Necessity* (Athens: Sakkoulas Publications, 2016), 101. Also, throughout 1963-1964, the two communities held negotiations on amending the Constitution.

43 Canadian Judge Wilson, President of the Supreme Court, resigned in May 1964.

44 The law was adopted by the single majority of the Greek Cypriot MPs since the internal organization of the Courts does not require a double majority, according to the constitution. It should be noted also that in the preamble of the law, there was a direct reference to the necessity as justification for the enactment of the law, see Polyviou, *The Case of Ibrahim*, 37.

45 The Greek and Turkish Cypriot judges who already served on the previous Constitutional and Supreme Courts.

46 See Polyviou, *The Case of Ibrahim,* 27.

47 See Emilianides, *The Doctrine of Neccesity,* 99-100, about the reliance of the state bodies on necessity before 1964 as a reason to defer from the Constitution.

specific provisions for as long as the necessity lasts.[48]

The new Supreme Court was called upon to review the constitutionality of Law 33/1964 in the *Ibrahim*[49] case. The court ruled that, although Law 33/64 departed from the Constitution,[50] it could, however, be justified and could enter into force under the doctrine of necessity. Based on the principles of '*salus popul suprema lex esto'* and *'necessitas non habet legem'* the Court held that article 179 of the Constitution which states thet the Constitution is the Supreme law should be interpreted as being an obstacle to the self desctruction of the state due to the rigid and strategic oriented application of the Constitution by key institutional actors. According to the reasoning of the judgment, the doctrine of necessity allows a departure from provisions of the Constitution which provide that the composition of certain state institutions should be on a bi-communal basis, if failure to depart from those rules makes it impossible for these bodies to perform their functions; that is, it becomes impossible for the State to function. The doctrine of necessity allows the government to depart from the process envisaged in the Constitution, when it is necessary for key state institutions, which are requireed for the state's existence, to continue their operation. This departure relates only to the legislative process, is allowed only for the duration of specific circumstances making it impossible for state bodies to function and is tolerated only insofar as it is not a disproportionate means for pursuing the purpose intended (functioning of the state bodies).[51]

As early as 1961, reliance upon the law of necessity, either in the form of *salus populi suprema lex esto* or in the form of the doctrine of necessity, is an evidence that a type one constitutional crisis occurs. Type one constitutional crisis is when political actors, in particular those with an institutional role, declare their intention to depart from the application of the constitution with a view to preserving social order and responding to the risk facing social order.[52] In Cyprus, almost one year from when the Constitution went into effect, the prospect of departing from the Constitution

48 See n.38 above about these judgments and the minority view of the Greek Cypriot judge.

49 The *Ibrahim* case involves examining an appeal lodged in a criminal case. From the outset, the counsel to the defendant relied on the applicable Constitution to call into question the legitimacy of the composition of the court.

50 In addition to the merger of the two supreme courts envisaged in the 1960 Constitution and the change of their composition, Law 33/64 was neither published and signed by both the President and the Vice-President, nor published in Turkish as required by the Constitution [Articles 47(1)(e), 52, 3(1) and (2) of the Constitution].

51 See Polyviou, *The Case of Ibrahim*, 48, Kombos, *The Doctrine of Necessity,* 151-173. Due to the application of the proportionality test, the jurisprudence of the Supreme Court has not up to now ruled that the doctrine of necessity can justify any deviations from the rules which strictly specify under which conditions administrative bodies can issue administrative acts. On this issue, see Emilianides, *The Doctrine of Necessity*, 124-131.

52 See Levinson and Balkin, 'Constitutional Crises', 721.

appeared in the public discourse of institutional actors with a view to responding to the situation created by the diverging opinions of the two communities on the application of the Constitution. Next, this stance became the justification for the legislator's choices and the reasoning of court judgments. Therefore, a constitutional crisis with the characteristics of type one constitutional crisis was already present from the first year the Constitution of Cyprus was adopted.

It follows from the analysis set forth above that all forms of constitutional crises are inherent in the Constitution of Cyprus. Also, the appearance of the various types of constitutional crises is not linked over time. The engineering of the Constitution of Cyprus is the basic cause for constant occurance of all three types, and most appear simultaneously. However, based on the distinction of three types of constitutional crises and their link to necessity, only the first type of crisis would cause reliance upon the application of the principles of the doctrine of necessity. Only when an institutional crisis is motivated by a situation where departing from constitutional legality is considered by institutional actors a necessary condition for the survival of the State is the crisis linked to the application of emergency law. It should, however, be noted that the doctrine of necessity, at least in the way it appears in the reasoning of the *Ibrahim* judgment, differs in various aspects from the forms of the law of emergency envisaged in modern constitutions.

Doctrine of Necessity and Emergency Law

A key element for classifying a situation as an emergency is that the government cannot address it through the usual means it has for exercising power[53] by performing the functions envisaged in the Constitution for state bodies. For this reason, applying emergency law underpins the possibility that state bodies will depart from the usual functions in response to an emergency. The law of necessity allows the government to depart from adhering to either the separation of powers or the laws which guide how state bodies' functions should be performed to afford protection of citizens' fundamental rights.[54]

In Cyprus, however, the necessity was brought about because the bi-communal structure meant that no key state body could function after Turkish Cypriots officers had left their posts. The key characteristics of the emergency in Cyprus [the necessity], that is the factual background of the case, also caused the form of the doctrine of necessity to differ from other forms of emergency law. The critical issue in 1964 was

53 See J. Ferejohn and P. Pasquino, 'The law of the exception: A typology of emergency powers', *ICON*, Vol, 2, No. 2 (2004), 226.

54 See for instance D. Dyzenhaus, 'States of Emergency', in *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld and A. Sajo (Oxford: Oxford University Press, 2012), 446-451; O. Gross, 'Constitutions and Emergency Regimes', in *Comparative Constitutional Law*, eds T. Ginsburg and R. Dixon (Cheltenham: Edward Elgar, 2011), 340-342.

not whether the principles of the rule of law and constitutionalism had detracted from state bodies being able to efficiently respond to an emergency inefficient, but rather that the bodies entrusted under the Constitution to observe the principles of constitutionalism and the rule of law were unable to function. The response to the emergency [necessity] in Cyprus does not require departing from the rule of law and constitutionalism in order to be efficient; quite the contrary, it requires taking steps to ensure the state can continue to function.[55] The doctrine of necessity formulated in the *Ibrahim* case is not about departing from the principles of the rule of law and constitutionalism but from the content of the process, which is necessary for the efficient application of these principles.[56]

These specific characteristics become obvious in the judgement's reasoning. The doctrine of necessity as it has been enshrined in *Ibrahim* does not, in principle, affect the separation of powers. On the contrary, whenever an attempt was made in subsequent cases to justify a departure from the principle of separation of powers, the Supreme Court held that such a deviation cannot be accepted under the doctrine of necessity formulated in the *Ibrahim* judgment.[57] That is, the doctrine of necessity is not the basis for strengthening the powers of the executive branch at the expense of the legislative branch, as is the case in the states of emergency envisaged in modern constitutions.[58] Also, the doctrine of necessity, as was initially conceived in the Constitution of Cyprus, does not represent a reason to limit the fundamental rights of the citizens beyond those reasons listed in it.

The Supreme Court was reluctant to admit the doctrine of necessity as a reason for limiting the rights of individuals exactly because the underlining reasoning of the

55 One of the most important elements in Judge Triantafyllides' reasoning is about the constitutional duty of state institutions to perform their functions and to exercise their powers to the extent that this is possible, even if they cannot perform such functions or exercise such powers to the full extent provided for in the constitution. It is an approach which does not treat constitutionalism as a mere limit to state power [negative constitutionalism] but as a set of principles which define the relationship between the constitution and the state which creates the organizational structure necessary for the constitution to operate as a limit, that is the institutions which make it possible to implement the principles are included in the negative version of constitutionalism. This second aspect of constitutionalism brings out its positive dimension. See N.W. Barber, 'Constitutionalism: Negative and Positive', *Dublin University Law Journal*, Vol. 38, No. 2 (2015), 249-264. On the importance of a positive perception of constitutionalism see also S. Holmes, *Passions and Constraint*: *On the Theory of Liberal Democracy* (University of Chicago Press, 1995), 161-169, and S. Levinson, 'Reflections on What Constitutes "a Constitution": The importance of "Constitutions of Settlement" and the Potential Irrelevance of Herculean Lawyering', in *Philosophical Foundations*, 75-95.

56 See P. Polyviou, *The Case of Ibrahim*, 68.

57 See A. Emilianides, *The Doctrine of Necessity*, 115-124. See also *President of the Republic v. House of Representatives* [1985] 3 CLR 1429, *President of the Republic v. House of Representatives* [1985], 3CLR 2202, *President of the Republic v. House of Representatives* [1985] 3 CLR 2281.

58 See W. Scheuerman, 'Presidentialism and Emergency Government', in *Emergencies and the Limits of Legality,* ed. V. Ramraj,(Cambridge: Cambridge University Press 2009), 258-286.

Court's judgment in the *Ibrahim* case was the need for specific state bodies to function in order to protect rights.[59] Finally, following many years of vacillation, the Supreme Court conceded that the doctrine of necessity may serve as the basis for restricting rights enshrined in the Constitution.[60] However, this admission does not fit perfectly with the logic of emergency law, according to which, derogation of certain individual rights is necessary for state bodies to be able to perform their functions in a fashion which allows them to efficiently respond to an emergency.[61] A main characteristic of emergency law is that a derogation from rights is permitted, albeit temporarily, and such derogation operates as an internal restriction to rights, namely a restriction which initially determines whether in a certain situation a right holder may or not raise a prima facie claim founded on the right he/she holds. Internal restriction is a restriction which places actions outside the scope of protection afforded by the right, because they do not fall under the generic term, which is the object of the protection afforded by a right.[62] Thus, right holders are unable to raise prima facie claims concerning the the implementation of constitutional provisions for the protection of their rights.

In Cyprus, it was only in certain cases with regard to property rights that restrictions were placed based on the doctrine of necessity, which could be taken to be within the logic of internal restrictions imposed when the derogation from rights is activated under emergency law. In these cases, according to Supreme Court case law, the doctrine of necessity justifies the non-application of certain provisions of the Constitution due to an insurmountable social need [Turkish invasion and occupation of 37% of the territory of the Republic of Cyprus since July 1974]. In these cases, the doctrine of necessity operates as an internal restriction by allowing the derogation from the application of the respective constitutional provisions, just like an emergency declaration causes the application of rights to be deferred for a certain time. Such a case is when property is requisitioned for military purposes. Although Article 23(8) of the Constitution provides for compensation to be paid and a maximum requisition period of three years, the Supreme Court held that, under the doctrine of necessity,

59 C. Kombos, *The Doctrine of Necessity,* 218. The court examined the issue of the doctrine of necessity as a sourse for restrictions on rights for the first time, in *Constadinos Chimonides and Evantia Maglis* [1967] 1CLR 125. The majority of the Court held that the doctrine of necessity could not be a source for restrictions upon rights other than those provided by the Constitution. In *Apostolides v Republic* [1982] 3CLR 928 the Court held that there are implied restrictions on rights beyond those provided by the constitutional text, but still it was reluctant to recognise as a source of those restrictions the doctrine of necessity, instead the Court relied on the police powers of the state.

60 In *Aloupas and another v. National Bank of Greece* [1983] 1 CLR 55.

61 Only in cases involving the right of property does the doctrine of necessity fit into this logic. See below.

62 For a distinction between internal and external restrictions on rights, see S. Gardbaum, 'The Structure and Scope of Constitutional Rights', in *Comparative Constitutional Law*, eds. T. Ginsburg and R. Dixon, 387-388.

derogations may be justified from the rule set out in that Article.[63] This is different from when restrictions envisaged in the Constitution were imposed but the Constitutional process was not followed in passing the respective law due to Turkish Cypriots withdrawing from state bodies. Therefore, in such cases the doctrine of necessity does not introduce any restrictions in addition to those envisaged in the Constitution, as the relevant constitutional provision provides that restrictions may be imposed by law. The doctrine of necessity only justifies departing from the law adoption process envisaged in the Constitution.[64]

In other cases, the doctrine of necessity in Cyprus operated as an external restriction on rights. An external restriction is about whether public interest can justify putting aside claims of an individual right. However, under external restrictions, prima facie claims that can be based on a right do not become inactive, because they are simply restricted under certain conditions that can be verified by the court.[65] A typical example in which necessity acts as an external restriction on rights is the *Aloupas* case where, for the first time, the law of necessity was recognized as the basis for restrictions that could be imposed on rights.[66] In that case, the crucial legal issue was whether and to what extent protecting the right of an individual could affect the conflicting right of another individual. Both individuals may raise prima facie claims based on their respective rights, and the judge must resolve the case by weighing both claims without considering one of the two prima facie claims as inactive. The judicial review of internal and external restrictions focuses on different issues depending on

63 In these cases, according to Supreme Court case law, the doctrine of necessity justifies the non-application of certain provisions of the Constitution due to an insurmountable social need (Turkish invasion and occupation of 37% of the territory of the Republic of Cyprus). In these cases, the Doctrine of Necessity operates as an internal restriction, by suspending the application of the respective constitutional provisions, just like the application of emergency law causes the application of rights to be suspended. These are cases involving the requisition of property for military purposes. Although Article 23(8) of the Constitution provides for compensation to be paid and a maximum requisition period of three years, the Supreme Court held that under Doctrine of Necessity derogations may be justified from the rule set out in that Article. See, *Omiros Aristides and Others v. The Rebublic* [1983] 3CLR 1507 on the non-payment of compensation for requisition and *Andrian Holding Ltd v. Republic of Cyprus* [1999] 3 CLR 828 on exceeding the maximum requisition period. Similarly, the management of property abandoned by Turkish Cypriots by the Guardian of Turkish Cypriot Properties is too a form of property confiscation in addition to those envisaged in the Constitution of Cyprus tolerated under the Doctrine of Necessity, see *Panagiotis Kitsis v. Attorney-General of the Republic*, 1 ΑΑΔ 1077, [2001].

64 See *Antonakis Solomonides Ltd v. Attorney-General of the Republic*, Civil Appeal, 11303 [2003] 1 CLR 1275, on restrictions that may be imposed on property of Turkish Cypriot religious institutions, which under the Constitution of Cyprus (Article 23(10) may be imposed only by decision of the Turkish Communal Chamber.

65 For a definition of external restriction see Gardbaum, *The Structure and Scope*, 387-388.

66 See footnote 60. In this case, the constitutionality of Articles 3 and 4 of Law 24/79 was examined. These Articles suspended the right of a creditor to recover his debt from a debtor whose property had been affected by the invasion and occupation.

the restriction involved. In the former case, the crucial matter is whether a specific action is protected by a fundamental right. In the latter, it is examined whether an action, which, in principle, falls within the scope of protection afforded by a right, can be justifiably restricted for reasons that have to do with the public interest.[67] Where emergency law operates as an internal restriction, judicial review is mostly about whether the steps taken are lawful, that is whether they fit into cases for which the law envisages the derogation from a right and not whether that law *per se* is aligned with the Constitution.[68] When faced with an emergency which operates as an internal restriction, courts mostly follow two courses of action: (a) they examine whether an action is or is not prohibited due to necessity; and (b) they examine the actions of authorities from an institutional point of view, that is whether the processes envisaged were observed and not whether the processes *per se* infringe any rights.[69] Declaring an

67 See Gardbaum, *The Structure and Scope,* 389.

68 This observation does not imply that an emergency situation, acting as an internal restriction, is not subject to judicial review. In principle, an emergency operates as an internal restriction on rights only where the Constitution envisages the suspension of certain rights at a time an emergency is declared, and concerns only the rights whose application is suspended for the duration of the emergency. In this case, judicial review is about whether the steps taken to respond to the emergency correspond to those envisaged in the law. A typical example is the case *Ex Parte Endo* 323 U.S. 283 (1944), where it was found that US citizens of Japanese origin could not be detained because a decree existed which established that they could only be removed from their place of residence . Also, the courts can verify if the steps are taken by the competent body or not [See *Ex parte Merryman*, 17 Cas.144 (1861)] or even whether the conditions for declaring a country in a state of emergency were met. In the latter case, however, if the conditions for declaring an emergency were not satisfied, the steps taken to restrict rights should be considered as external restrictions. Yet, as the jurisprudence on the *War against Terrorism* indicates even if there is no declaration of an emergency courts tend to consider emergencies as an internal restrictions on rights. A typical example is the case *A v. Secretary of State for the Home Department* (2004), where the Court held that evidence acquired through cruel treatment could excluded by courts only on the condition that can be proved beyond any doubt that they were acquired directly under torture. Also in the cases that were reviewed by the US Supreme Court as to the applicability of Habeas Corpus, the critical issues that were examined by the Court were whether (a) detainees have prisoner status, (b) the territory on which they are detained is considered territory under US control, and (c) they come from countries at war with the US. Thus they were not examined strictly on grounds concerning the justifiability of the restrictions which were imposed on rights due to the emergency, but on grounds related to whether or not each individual case fits the criteria which justify their status as persons who are entitled to less protection due to the emergency. See S. Humphreys, 'Normalcy: On the Rule of Law and Authority in Giorgio Agamben and Aristotle', *Cambridge Review of International Affairs,* Vol. 19, No. 2 (2006), 346; and Scheppele, 'Legal and Extralegal Emergencies', 176-177.

69 For the first kind of judicial review, see D. Cole, 'Judging the next Emergency: Judicial Review and Individual Rights in Times of Crisis', *Michigan Law Review*, Vol. 101, No. 8 (2003), 2572-2573. For the second form of judicial review, see S. Issacharoff and R. Pildes, 'Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during War Time', in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. M. Tushnet (Durham, NC: Duke University Press, 2005), 161-197.

emergency, where such a declaration is envisaged,[70] causes the temporary suspension of specific constitutional provisions. The crucial legal issue in these cases is not whether the suspension restricts a right, but whether it can be founded on applicable constitutional provisions on emergency.[71] Consequently, states of emergency create a gap between rights and legality.[72] The action of state bodies is subject to a legality check by the courts, but it is not also reviewed strictly on the grounds of human rights law.[73]

On the other hand, where emergency law operates as an external restriction on a right, judicial review is about whether the content of it is in line with the Constitution. In order to review the legality of measures, the court also reviews the contents of the measures to ensure they are aligned with all constitutional provisions.[74] In Cyprus, the first time the court recognized that the doctrine of necessity can restrict rights, it was recognized in the form of an external restriction, although subsequently, the doctrine of necessity operated also as an internal restriction, as has already been mentioned above. But only in the cases that the doctrine of necessity has the form of an internal restriction, can we agree that the doctrine of necessity operates within the paradigm of emergency law, namely as a restriction on rights which takes the form of the suspension of rights.[75] These two forms of restriction [internal–external] coexist in the Supreme Court case law in regard to the doctrine of necessity, as the foundation of restrictions on rights. So far, however, the first form concerns only the right of property.

In addition, in Cyprus, the doctrine of necessity has a third dimension in connection with rights. This dimension highlights its apparent differences from other forms of emergency law. In some cases, the doctrine of necessity served as the basis for extending rights and not restricting them. There are two examples in which this

70 Declaring an emergency is not provided as a means for confronting emergency in all constitutions. See O. Gross, *Constitutions and Emergency Regimes*, 336.

71 In constitutions which provide that the courts can review the declaration of an emergency regime, ibid 342. Such a review is also possible under the art 15 of the *ECHR*. The importance of such review is not underestimated since it allows the Courts to judge on whether or not a case can act as an internal restriction upon human rights. Yet, it does not alter the condition that any case that is considered as emergency according to the relevant provisions is an internal restriction upon rights which can be confronted not through a balancing process which can accept only restrictions on rights and not their full derogation even for a limited time.

72 T. Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism', *Modern Law Review*, Vol. 68, No. 2 (2005), 559.

73 See D. Dyzenhaus, 'Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?', *Cardozo Law Review*, Vol. 27 (2006), 2030-2037, Sheppele, 'Legal and Extralegal', 176-177.

74 The distinction between internal and external restrictions on rights and the limits they put on the judicial review of the legislator's options is not considered in approaches which uncritically treat the steps taken during a financial crisis as a form of emergency law, that is, as an internal restriction on rights, when these are steps which fit into the logic of external restrictions.

75 See footnote n.63.

happened. The first case is about the right of Turkish Cypriots to marry, which is enshrined in Article 22 of the Constitution for all citizens of Cyprus. However, exercising this right requires a law to be passed which, pursuant to Article 87(1)(c) of the Constitution, the Turkish Cypriot Communal Chamber had to vote on for their community, but the Chamber had ceased to exist after 1963.[76] The second case is about the right to vote of Turkish Cypriots who remained in free areas of the island and could not exercise that right because they needed to be registered in separate electoral lists of their community [Article 63 of the Constitution], which no longer existed as of 1974. In the latter case, the party concerned appealed to the Supreme Court, relying on the fact that, under the doctrine of necessity, departing from the application of the relevant constitutional provisions should have been permitted to enable them to exercise their rights. The Supreme Court dismissed the appeal, arguing that the judiciary cannot substitute for the legislature, the only branch competent to vote for a law relying on the doctrine of necessity.[77] The parties concerned appealed to the ECHR, which found that, in both cases, the position of the Cypriot authorities was in violation of rights enshrined in the ECHR.[78] Then, Parliament relied on the doctrine of necessity to pass two laws[79] that came to fill the legal gap which prevented Turkish Cypriots from exercising the rights concerned (the right to marry and the right to vote). The application of the doctrine of necessity in these cases is a logical extension of the conditions underpinning the doctrine in the *Ibrahim* judgment. According to these conditions, the doctrine of necessity supplements and does not compete with the rule of law and constitutionalism.

The principles of the doctrine of necessity, as they were initially formulated in the *Ibrahim* judgment and clarified in subsequent judgments, highlight the doctrine's dimension as a supplement to the rule of law and constitutionalism. Its foundation on the need for state bodies to function is based on an assumption related to the importance of law in the rule of law, even if this assumption was not expressly stated. The existence of the rule of law requires first the existence of a state functioning in accordance with the law. Therefore, if the bodies in charge of adopting and implementing laws do not function, as what happened in Cyprus, the condition for

76 In these cases, enacting the Constitution implementation law is a constituent for the exercise of the right, because if the law did not exist it would be impossible to determine the key elements of the concept protected by the right, that is, should the legislature not define marriage, it would not be possible for the Constitution to protect marriage, as the holder of the right would not be able to have an effect on the legal reality and make use of the possibilities to act on the rights held. On the importance of Constitution implementation laws see R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2001), 123.

77 See *Aziz v. Republic of Cyprus* [2001] 3 CLR 501.

78 See *Selim v. Cyprus*, 16.07.2002, [friendly settlement] and *Aziz v. Cyprus,* 22.07.2004.

79 Laws 46 (1) 2002 and 2(1) 2006, respectively.

the existence of the rule of law is missing. This dimension [the relationship between the rule of law and law as means for social cohabitation has been showcased in several other cases outside Cyprus. The most well known is the case of Manitoba Language Rights Reference[80] in which the Supreme Court of Canada was called upon to rule on the validity of the laws of the Province of Manitoba, which had been published only in English despite express provision being made in the constitution of the Province that they should be published in both English and French. The court held that, although having published the laws only in English ran counter to a provision in the Constitution of the Province of Manitoba, the laws would remain in force until their translation into French, because otherwise, if they were to be repealed, chaos would reign. According to the court, that case involved a conflict of two different facets of the rule of law. The first one was about the obligation of the state bodies to function in accordance with the law, which they had failed to perform by failing to publish the laws in French. The second one was about the nature of the law as a constituent of social co-existence in a state organized based on law. The judgiciary cannot ignore this second dimension when called upon to decide on a matter linked to the first dimension, as the existence of the first is conditional on the second.[81] There is certainly a difference between the Manitoba case and that of Cyprus. In the Manitoba case the judiciary relied upon and applied the doctrine of necessity, whereas the legislature did this in Cyprus. Yet, there is a common underlying reasoning in both cases; that is, the principle of effectiveness, which requires that the constitution and the state constituted by the constitution should be able to operate successfully in order to fulfil the fundamental values of the constitutional order.[82]

A second category of cases where necessity was determined by the law's primary importance as an instrument for regulating social relations and formed the basis to defer from the Constitution are cases where the US Supreme Court was called upon to rule on the validity of laws passed in States which declared their secession leading to the

80 *Reference re Language Rights under the Manitoba act 1870 [1985] 19 DLR 1.* There is a similar case within the context of the doctrine of necessity in Cyprus, in which the Supreme Court held that the doctrine of necessity can justify the non-implementation of the transitional provision of the Cypriot Constitution [art 189] which provided that the use of English language in judicial proceedings will end five years after the enactment of the Constitution until the translation of every law is completed. See, *Koumi v. Korttari and Another* [1983] 1CLR 856.

81 See P. W. Hogg, 'Necessity in a Constitutional Crisis', *Monash University Law Review*, Vol. 15, Nos. 3 & 4 (1989), 257.

82 On the issue of effectiveness as a presupposition for the operation of the Constitution and the state and how this issue affects the reasoning of the courts when judging about necessity, see, N. W. Barber and A. Vermuele, 'The Exceptional Role of Courts in the Constitutional Order', *Notre Dame Law Review,* Vol. 92, No. 2 (2017), 854. However, effectiveness should not be equated to stability. As Barber and Vermuele indicate, North Korea is a stable, but not a constitutional state in substantial terms. Effectiveness aims to preserve the essential aspects of constitutionalism and the rule of law and not override them, ibid., 855.

US Civil War.[83] In recognizing the validity of laws regulating social coexistence but not of laws on the organization of the state (secession and joining in the Confederacy of states which seceded from the Union), the court based its reasoning on the distinction between the law as an element necessary for the organization of a state and as an element necessary to regulate social relations. This second dimension is separate from the first one and is reviewed independently by the judge as a factor the judge takes into account when reviewing a matter related to the first dimension (legality of actions taken by a state administration which lacks legitimacy under the Constitution of the US). However, in this case, too, which the *Ibrahim* case referred to as precedent of the application of the doctrine of necessity, there is a key difference in the reasoning of the two courts. What is crucial in the reasoning of the US Supreme Court on the validity of laws regulating social coexistence is the distinction between government and state. According to the judgment, during the Civil War, the State of Texas remained part of the Union although it was impossible to consider its government lawful under the US Constitution.[84] On the contrary, one of the key arguments made in the reasoning of the *Ibrahim* judgment was that despite the withdrawal of Turkish Cypriots, the government of Cyprus was the lawful government of the country.[85]

Another parameter that needs to be pointed out when analysing the doctrine of necessity is the distinction between states of emergency intended to preserve legality at a primary level (aiming at preserving the fundamental values of a constitutional order) and states of emergency intended to establish legality [to create the conditions which are necessary for the existence of such constitutional order].[86] This distinction is linked directly to the type of emergency situation, whose intensity and urgency

83 *Texas v. White*, 74 U.S. (7 Wall) 700, 1868.

84 See G. Ruthergerlen, 'The Rule of Law in Reconstruction: A Review of *Secession on Trial: The Treason Prosecution of Jefferson Davis,* by Cynthia Nicolleti', *Virginia Law Review*, Vol. 103 (2017), 84.

85 See, *Ibrahim,* 234-236. See also Security Council Resolution no. 18/64, which recognised that there is a lawful government in Cyprus. On this point see, Emilianides*, The Doctine,* 113-114, Polyviou, *The Case*, 170-171. The international community's recognition of a government as a lawful one has implications on the external sovereignty of the state, the state is recognized as sovereign according to the rules of international law. Yet such recognition has certain implications with regard to the internal sovereignty of the state, since the recognition of a government as lawful involves a judgment on the ability of the holder of the internal sovereignty to exercise his/her authority efficiently and according to the law. On the issue of the relationship between the 'quality' of internal sovereignty and external sovereignty in International Relations, see L. Corrias, 'Guises of Sovereignty: "Rogue States" and Democratic States in the International Legal Order', in, *Deviance in International Relations, 'Rogue States' and International Security,* eds. W. Wagner, W. Werner and M. Onderco (Basingstoke: Palgrave Macmillan, 2012), 44-47, and J.R Krowford, *The Creation of States in International Law*, 2nd ed. (Oxford: Oxford University Press, 2007), 37-93.

86 On this distinction See, V. Ramraj, 2010, 'The Emergency Powers Paradox', in *Emergency Powers in Asia: Exploring the Limits of Legality,* eds V. Ramraj and K.Thiruvengadam (Cambridge: Cambridge University Press, 2010), 23.

depend on the degree of maturity of a constitutional order. The consequences of the inability of the two communities in Belgium to reach an understanding about critical issues differ from those of the respective situation in 1960 Cyprus, in as far as what constitutes an emergency. Where the key institutions implementing the principles of the rule of law are weak or do not function due to political violence, restoring their function by taking emergency measures also restores legality even if the adoption of such measures departs from legality which the existing Constitution provides for. Where a state of emergency is aimed at preserving or restoring legality, the principle of legality dictates the preservation of the procedural rules for declaring emergency and the adoption of the measures it leads to. However, when the institutions necessary to preserve or restore legality are initially absent or inactive, the emergency can justify measures to create the conditions necessary for establishing the institutional framework which is essential for the implementation of legality, namely measures which might mean derogations from legality in terms of compliance with the content of the rules of the existing constitution, especially when such rules are completely inactive.

In Cyprus the emergency which resulted from the withdrawal of the Turkish Cypriot officials from their posts does not fully correspond to any of the above mentioned cases. To be accurate it is a situation which included elements from both cases. In Cyprus, the emergency did not demand the establishment of a constitutional order from the very beginning, as there was one albeit a dysfunctional one, and there were also institutions which are necessary for the state to govern and for the rule of law, even during the colonial era. There was also a culture for settling differences through the implementation of law. Thus that emergency was not similar to a situation in which legality has to be established ex nihilo. On the other hand, those institutions that were unable to function had to be re-established in order to preserve legality. Nevertheless, the preservation of the constitutional order through the implementation of the doctrine of necessity did not equally affect all parts of the Constitution and did not imply derogation from the whole constitution. Separation of powers, as a model of checks and balances, had not been affected, and neither had the protection of rights, in a way similar to the traditional form of emergency law as was already mentioned above. The only part of the constitution which had been considerably affected through the derogation from the precise content of the relevant constitutional provisions, in fact altered totally, is the consociational bi-communal structure of governance.

Concluding Remarks

The doctrine of emergency arose within the context of a completely dysfunctional constitution which had only an indirect legitimacy. The strategically oriented action of the key actors in the political arena, who were also the key institutional actors in the Cypriot constitutional order, lead to the collapse of the fragile consensus upon which the Cypriot constitution has been established. Thus, the doctrine of necessity is based upon the principle *salus populi suprema lex esto*, since the emergency, which the Republic of Cyprus had to confront, threatened the very existence of the state, even more than the kind of emergencies for which contemporary constitutions provide for a proclamation of emergency. The doctrine of necessity also is tantamount to derogation from the constitution. Certain provisions of the Cypriot Constitution are deferred due to the doctrine of necessity, as long as the emergency exists. These are the common elements that the doctrine of necessity shares with the dominant paradigm of emergency law.

However, there are important differences in relation to the dominant paradigm which make clear the importance of context as far as the implementation of legal concepts is concerned. In Cyprus the confrontation of the emergency did not demand derogation from the rule of law and the principles of constitutionalism. On the contrary, the source of the emergency in Cyprus was the inability of the institutions, which are necessary for the implementation of the fundamental values of constitutional order, to operate. The doctrine of necessity, as it has been enshrined in *Ibrahim*, is complementary and not competitive to the rule of law and constitutionalism. Under the doctrine of necessity, the separation of powers is still an operative principle of a system of governance based on checks and balances. Furthermore, the doctrine of necessity does not derogate from rights protection, analogous to the derogation which is established under the emergency law context. In fact, through the application of the doctrine of necessity, Cypriot citizens who reside to the areas controlled by the Republic of Cyprus are entitled to the same level of protection of their rights on the basis of their citizenship and not on their ethnic origin. Citizenship, through the implementation of the doctrine of necessity, acquired an inclusive dimension, while the common trend in the context of emergency law is quite the contrary, since emergency laws tend to allow derogation from protecting citizens' rights on the basis of their origin.[87]

Yet, the doctrine of necessity touches upon the bi-communal and consociational elements of the Cypriot Constitution. According to the doctrine of necessity, the composition of state organs cannot affect their operation up to the point that the

87 On this issue see the case *A v. Secretary of State for the Home Department* (2004), supra footnote no 68, and the Judgment of the ECtHR on the case *A and others v U.K*, 19.02.2009 par 184-186.

strict adherence to composition rules causes the inability of an institution to exercise its competences. Thus, deferment of the relevant provisions (about the composition of state organs) can be justified through the doctrine of necessity. However, the degree of deferment which is acceptable under the doctrine of necessity is dependent upon the urgency of the issue which causes the emergency and the gravity of the derogation from the relevant constitutional provisions; derogation is related to the literal meaning and the underlying reasoning of the provision. In *Ibrahim* it has been explicitly stated that measures which are taken in order to confront the necessity should be proportionate to the gravity of the situation which caused the necessity.[88] If the necessity comes from the inability of state bodies to operate, then the measures taken in the name of necessity should restore the operational ability of the organ by allowing the least derogation necessary from the relevant provision. Derogation can be justified only to the extent that it leaves intact as much of the content of the provision as possible.[89] Thus, there is a difference when derogation means that an organ can operate without its full composition, as the Constitution provides, and when derogation permits the total alteration of the composition of a state organ. In the former case, the bi-communal composition of the institution is suspended for the duration of the emergency. In the latter case, the rule concerning the composition of the organ is altered. Nevertheless, the Supreme Court does not follow this balancing method strictly. In fact, the Supreme Court has implemented this method only with regard to cases referring to elected state positions and not to appointed positions.[90] In the latter case, through the implementation of the doctrine of necessity, the Court justified the appointment of Greek Cypriots to offices which should be covered by Turkish Cypriots, according to the Constitution.[91] However, it is doubtful whether such implementation of the doctrine of necessity is within the context of *Ibrahim* and the parameters which frame it.[92]

In conclusion, we should bear in mind that court judgments may introduce changes to the constitution in order to prevent the constitutional order from collapsing. These

88 On the issue of the application of proportionality principle in the emergency law context see, V. Ramraj, *The Emergency Powers*, 50-52.

89 In fact the legislator was very careful while drafting the law 33/64 since the composition of the newly created court respects the bicommunal structure of the institution. Law 33/64 deviates from the relevant constitutional provisions since it merges the two supreme courts to one and sets aside the inclusion of neutral judges as heads of the court, yet, it is quite close to the underlying reasoning of the relevant provisions which aimed to establish a structure that is close to the other key organs of the state.

90 On this issue and the relevant jurisprudence of the Supreme Court see, A. Emilinides, *Beyond*, 139-142, and A. Emilianides, *Constitutional Law in Cyprus*, Kluwer, (2013), 45.

91 See Re Georgiou [1983] 2CLR 1, in which the Court ruled that a Greek Cypriot can be appointed to the post of Deputy Attorney General despite the relevant constitutional provision, which clearly stated that the Deputy should come from the Turkish Cypriot community.

92 Contra Emilianides, *Beyond*, 140 and Emilianides, *Constitutional Law,* 45.

kinds of judgments create conditions which may allow a new political consensus to emerge, by resetting the framework within which the main actors can still act inside the law,[93] however, judgments are unable to create the political consensus on their own.

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93 On this point see. N.W. Barber and A. Vermuele, 'Courts', 850-853.

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

Petros Konstantinidis[1]

Abstract

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

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

Introduction

The term horizontal effect[2] is mainly understood as the impact that fundamental and/or constitutional rights have on private relationships. The historical *ratio* of having constitutional rights, ever since the rise of constitutionalism, was the protection of the individual citizen from the arbitrary and authoritative behaviour of the state, namely a relationship between authority and the governed (vertical relationship). Later, with the dominance of the capitalist model of development of liberal societies in the post-industrial era, violations of fundamental rights – not only by the state but by other, non-governmental bodies with power, such as private bodies – became identifiable. The standard, formal equality between private bodies assumed in the sphere of private law is negated by the fact that private bodies are often found in superior positions against each other, presuming potential violations of private rights. Such examples are clearly

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

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

Based on the above, in mainland Europe of the mid-50s and mainly in Germany, the theory of horizontal effect was conceived, aiming at maximising the protection of the individual.[5] Several different views as to the way, the form and the extent of the impact of constitutional rights on private relationships were posed in the context of the doctrine above, in jurisprudence as well as in theory. The main forms of horizontal effect which dominated were those of direct and indirect effects. Nipperdey,[6] a German labour lawyer and ex-president of the German Federal Labour Court, was a major expresser of the direct effect. On a first level, he referred to the equal pay for equal work between men and women.[7] According to the German theorist, constitutional rights in direct effect ('unmittelbarer *drittwirkung*') affect private relationships in unmediated ways, without inserting other rules of law so as to produce direct legal consequences, let alone on its own, such as the annulment of legal transactions or even the obligation to compensate for unlawful acts, in this way providing for new causes of action. On the other hand, by the concept of the indirect effect ('mittelbarer *drittwirkung*'), some other scholars tried to mitigate any negative consequences[8] of an uncritical, direct form and thought that the fundamental rights affect private relationships in indirect ways, through indeterminate terms of private law (e.g. good faith, good customs, principles of morality), or, through an interpretation of private law rules which is

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

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

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

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

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

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

consistent with the constitution.[9] In this way, the fundamental rights in the form of constitutional values and principles are shared throughout and enrich the arrangement of private law. The whole issue does not limit itself to the aforementioned direct or indirect distinction. There exist in theory (e.g., Alexy[10] and his 'three-stage model of horizontal effect') or in case law (e.g. the doctrine of the 'State Action' according to the U.S. Supreme Court[11]) other approaches or conceptions, as well.[12]

In the Cypriot legal order of early 21st century, Cypriot case law engaged purely with the application of constitutional rights in settling private disputes. Therefore, in the landmark case of *Yiallouros,*[13] the Supreme Court considered with the concept of horizontal effect for the first time, recognising it as a principle of jurisprudence, even though no explicit reference to a particular term is made.[14] In the above case, the Supreme Court, after finding that the illegal recording of the employee's telephone conversations by the employer consisted of an infringement of the constitutional right to private life[15] and communication,[16] directly appealed to the provisions of the constitution to find the relevant act unlawful and to rule for the equivalent damages. In the context of this study, I will try to analyse Cypriot courts' application of the theory of horizontal effect of fundamental rights, as well as the consequences of the aforementioned application. For this reason, this article begins with a brief reference to the landmark Supreme Court Judgement in the case of *Yiallouros* and the conclusions that can be drawn from the said judgement. Following, I set out the questions arising from the way in which the case law handled the issue in subsequent

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

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

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

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

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

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

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

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

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

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

Before having purely dealt with the doctrine of horizontal effect and private relationships, Cypriot case law did progressively set the basis for introducing the said doctrine. Specifically, in the case of *Police v. Georgiades*,[17] the Supreme Court recognised the universal validity (*erga omnes*) of fundamental rights, namely that these shall be protected from any form of infringement. Even though the above-mentioned judgement concerned the relationships between the sate (as prosecutor) and an individual citizen (as the prosecuted), the Court did not miss the chance to demonstrate the universal character of fundamental rights, drawing upon sources beyond the constitution, such as the ECHR as well as the Universal Declaration of Human Rights. It is notable that even on a theoretical level, the position that fundamental rights have a horizontal effect on Cypriot private law[18] was expressed.

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

The Court's Judgement

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

17 [1983] 2 CLR 33.

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

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

recognised the need to protect fundamental rights. Furthermore, the Court, appealing to the Court and particularly to Article 35[20] for the safeguard and proper application of fundamental rights, decided that their infringement gives their bearer a cause of action. In this context, the judge also mentioned the indefeasible human rights as individual rights. Consequentially, he found for the plaintiff, awarding him general damages of a punitive and aggravating character.[21] As for the type as well as the level of the damages awarded, the Court said that despite the fact no material damage to the plaintiff was proven, by examining the kind and means of infringement of his constitutional rights, i.e. the purpose and duration of the infringement, it realised the victim had sustained humiliation. For this reason, the Court awarded 5,000 Cypriot Pounds (approximately €8500) as a just compensation.

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

For the purposes of the present study, only the first section of the Court's judgement is interesting. Following a combination of interpretations of Articles 35 and 30, par.1[22] of the Constitution, the Court held that the infringement of rights and the restitution of this infringement by means of proper domestic remedies belong 'by nature in the sphere of judicial proceedings', in this way providing to the jurisdiction of civil matters the remedies of compensation aiming at restitution of vulnerable rights, reparation of harm caused, as well as prohibitory or mandatory injunctions. According to the judgement, delivery of justice is the appropriate field for the effective protection of constitutional rights. Yet, prior to reaching its decision, the Court engaged in interesting reasoning concerning the fundamental rights set in the second part of the Cypriot Constitution. In this way, the Court, as in the case of *Georgiades* (above), reaffirmed the universal character of individual rights and freedoms. This makes them valid *erga omnes*. Of importance is also the Court's statement that constitutional rights do not identify with and are not determined by reference to an individual's civil

20 'The legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of this Part.' (free translation from original): «Αι νομοθετικαί, εκτελεστικαί και δικαστικαί αρχαί της Δημοκρατίας υποχρεούνται να διασφαλίζωσι την αποτελεσματικήν εφαρμογήν των διατάξεων του παρόντος μέρους, εκάστη εντός των ορίων της αρμοδιότητος αυτής».

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

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

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

Moreover, the Court, in its judgement, adopted the reasoning behind Article 13[23] of the ECHR in relation to the provision of effective remedy in the case of violations of rights protected by it. Specifically, the abovementioned Article gives the individual the right of an effective remedy before a national authority when rights protected under Convention are violated. The case-law of the ECtHR interpreted the said Article as a guarantee of providing effective remedy to each individual alleging a violation of their rights which are safeguarded by the Convention.[24]

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

Moreover, the Supreme Court invoked case law by the Supreme Court of the United States and the House of Lords. Particularly, in the case of *Arthur*[26] the Judicial Committee of the House of Lords examined the matter of negligence of a lawyer against their client and the latter claimed for remedies due to the former's behaviour. In this case the Court decided that there must be a specific remedy due to the lawyer's negligence. The Supreme Court of the United States kept the same line of thought by setting the principle that a breach of fundamental rights safeguarded by the Constitution gives rise to a cause of action[27] outright. Therefore, in both judgements, a cause of action had been recognised in case of breach of fundamental rights, and, as a result, a right to claim for a remedy existed where there was liability deriving from a wrongdoing. Based on the above, the Supreme Court rejected the appellant's allegation relating to the inability of the direct invocation of constitutional rights to be the ground of the claim of the action. Hence, the Court dismissed the appeal and upheld the judgement issued by the court of first instance.

The Findings in the Case of Yiallouros

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regardless of the abovementioned approaches, through Yiallouros, not only was

34 334 U.S. 1 (1948).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even if the abovementioned judgement was characterized as a legal landmark[46] in the project to protect fundamental rights, questions were left open as to the future application of horizontal effect, and particularly if the choice of the direct effect is not just in that specific case but the *a priori* solution for future disputes. The case of *Yiallouros* left unanswered questions as to the potential dangers of direct effect, especially regarding contractual freedom, and has generally failed to clarify the consequences that might be effected upon private autonomy. This was shown by the Supreme Court judgements which followed, where a hesitation or avoidance of opening up or expanding upon the issue is evident. In particular, in the cases of *Nikolas*[47] and *Montanios,*[48] the invocation of constitutional rights in the context of private relations arose once more, this time in the sensitive context of contractual relationships. In *Nikolas* the applicant was a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

It is now well established in the contemporary legal civilization that constitutional rights and more generally fundamental rights have gained a universal character affecting all areas of law. Now, constitutional provisions are not confined in a regulatory role but they develop a new dynamic, by which fundamental rights are a web of principles and values[60] enriching legislation and producing values by which social relationships are governed. Thus, the rule of law is no longer defined as a simple, typical and procedural sum of rules hierarchically ordered, aiming at the limitation of state authority, the establishment of individual rights and legal security but as a sum of principles and values of ethical-political content, directing and inspiring state actions

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

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

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

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

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

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

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

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

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

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

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

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

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Avoidance of Constitutional Imposition and Democratic Constituent Power in Divided, Conflict-Ridden Societies

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Abstract

The aim of this essay is to present and then to critically discuss some arguments that have cast serious doubt on whether the conception of democratic constituent power is appropriate for, and should be invoked in, divided, conflict-ridden societies to avoid or fend off, among others, the prospect of a constitutional imposition. The author's main argument is that the conception of democratic constituent power in such cases can be a matrix of normative (and potentially legalized) principles and standards, which do not preclude the intervention of external powers as such, but frame the demand for self-restraint as regards the forms, the aims, the intensity and the extent of such intervention. The invocation of the constituent power of 'We the People' in divided societies entails important risks, and one should take recourse to its rhetorical use only upon prudential, consequentialist considerations, which should include the possible exclusionary effects of the nationalist version of constituent power. Nevertheless, the prudential calculus can also indicate that such invocation may become useful as a reference point for a forward-looking learning (and potentially therapeutic) process, which will not aspire to simply obliterate the past and its original sins. Ultimately, everything depends on the context and on the virtues of the people and of their leaders.

Keywords: democratic constituent power, internationalized *pouvoir constituant*, constitutional imposition, external intervention in constitution-making, forward-looking learning process, divided societies, conflict-ridden societies

Introduction

The commonsensical dichotomy between imposed constitutions, on the one hand, and constitutions which are adopted through an autochthonous and democratically autonomous constitution-making process, on the other hand, could be challenged on various grounds, first empirical-historical ones. Constitutions which were allegedly imposed under conditions of military occupation, such as the postwar Japanese *Nihonkoku Kenpō*, were not in fact (totally) lacking in domestic input and in public

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support.[2] On the other hand, largely autochthonous constitution-making processes are abused in the hands of charismatic leaders claiming to embody the popular will so that the representativeness and/or the effectiveness of constitution-making assemblies is seriously distorted and democratic autonomy, as a matter of popular participation in consultation and drafting processes, is – sometimes fatally – compromised.[3] Furthermore, the various diffusion mechanisms of 'transnational constitutionalism'[4] minimize the stakes of autochthony in constitution-making, and they create an intermediate category of 'transnational constitutions', blurring again the distinction between imposition and autonomous-autochthonous endorsement.[5] Another version of such blurring is brought up by Richard Albert under the generic title 'heteronomous constitutions imposed with consent', pointing to the case of the Canadian Constitution whose amendment, before its patriation in 1982, remained in the hands of the UK Parliament after the invitation of Canadian political actors in early 1930s.[6] Although at least some of these empirical challenges could find an answer,[7] they generally indicate

2 For Kenpō see, inter alia, D. Law, 'The Myth of the Imposed Constitution',), *Social and Political Foundations of Constitutions*, eds D. Galligan and M. Versteeg (Cambridge University Press, 2013) 239-268, drawing from a variety of sources. A clearer example is the (West) German Grundgesetz; see U. Preuss, 'Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization', *New York Law School Law Review* Vol. 51 (2006/07), 467. Also, the 2005 Constitution of Iraq could be taken as a combination of instances of imposition with some (seriously limited) instances of autonomous endorsement; see P. Dann and Z. Al-Ali, 'The Internationalized Pouvoir Constituant–Constitution-Making Under External Influence in Iraq, Sudan and East Timor', *Max Planck Yearbook of United Nations Law*, ed. A. von Bogdany and R. Wolfrum, Vol. 10 (2006), 423-463 (classifying constitution-making in Iraq under the category of partial external influence).

3 See D. Landau, 'Abusive Constitutionalism', *University of California, Davis, Law Review* Vol. 47 (2013-2014), 189; idem, 'Constitution-Making Gone Wrong', *Alabama Law Review* Vol. 64, No. 5, (2012-2013) 923; W. Partlett, 'The Dangers of Popular Constitution-Making', *Brooklyn Journal of International Law* Vol. 38, No. 1 (2012), 193.

4 See for them, among much else, B. Goderis and M. Versteeg, 'Transnational Constitutionalism: A Conceptual Framework', in *Galligan and Versteeg* (n.3), 103-133.

5 See F. Schauer, 'On the Migration of Constitutional Ideas', *Connecticut Law Review* Vol. 37 (2005), 907.

6 See R. Albert, 'Imposed Constitutions with Consent?', *Boston College Law School Legal Studies Research Paper* No. 434, 3 February 2017, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911180>, 3-7.

7 For instance, we could argue that the category of imposed constitutions remains empirically relevant in view of cases such as the Bosnia-Herzegovina (BiH) Constitution, which was drafted through proximity talks and which was enacted behind closed doors in Dayton without the participation of the 'constituent peoples' to which its preamble refers (but see J. O'Brien, 'The Dayton Constitution of Bosnia and Herzegovina', in *Framing the State in Times of Transition: Case Studies in Constitution Making,* ed. L. Miller (Washington, D.C.: United States Institute of Peace Press 2010), 332-349, at 345, noticing that the BiH was approved by the legislatures of the two constituent entities) or in view of dictatorial constitutions, which are internally imposed in a Bonapartist fashion leaving little, if any, space for their rejection by the peoples concerned (see e.g. A. Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press, 2016), 224-225, referring to the 1982 Constitution

the presence of grey zones in between the poles of imposition and autochthonous / democratically autonomous constitution-making.

A second route to cast doubt on the aforementioned dichotomy would be to challenge its normative-theoretical grounds in a direct and generalized way. For instance, Hans Agné argued that 'the *very sense* in which a political order can be democratically founded already presupposes an involvement of people beyond their own boundaries'.[8] This is so, first, because a democratically legitimate people is one 'recognized as such by, or justified in the views of, even those who will not play the role of citizens in the state about to be constituted'.[9] Besides, 'the founding of states is democratically legitimate if *it produces as much autonomy as possible to as many people as possible*'.[10] Therefore, 'the concept of purely internal constituent powers is not valid even as ideal to be approximated',[11] and foreign intervention in constitution-making is legitimate whenever a particular state 'constrains the autonomy of people inside *or outside* its own boundaries',[12] on condition that the actions of the intervening state serves 'the purpose of furthering autonomy for as many as possible, rather than for some other purpose'.[13] Another version of a direct and generalized confrontation with the conception of purely internal constituent power is the one advocated by Chaihark Hahm and Sung Ho Kim.[14] These scholars stressed the constitutive role of interaction with external actors in the formation of peoplehood, and they argued that we should take the presence of such actors not only as 'permissible but … even [as] a logical necessity'.[15]

In this essay I shall not tackle this line of thought, but I shall address the more nuanced and context-sensitive approach of Zoran Oklopcic. In a series of articles published recently,[16] Oklopcic has highlighted the role of external constituent powers

of Turkey and to the 1980 Pinochet Constitution). As regards the argument from 'transnational constitutionalism', we could refer to studies which elevate the role of domestic views and interests in the specification of constitution-making choices; see e.g. M. Tushnet, 'Some Skepticism About Normative Constitutional Advice', *William and Mary Law Review* Vol. 49 (2008) 1473; L. Epstein and J. Knight, 'Constitutional borrowing and nonborrowing', I*nternational Journal of Constitutional Law* Vol. 1, No. 2 (2003), 196.

8 H. Agné, 'Democratic founding: We the people and the others' *International Journal of Constitutional Law* Vol. 10, No. 3 (2012), 836, 837 (my emphasis).

9 Ibid., 843.

10 Ibid., 844.

11 Ibid., 854.

12 Ibid., 845 (my emphasis).

13 Ibid. (omitting clarifying comments in the footnotes).

14 *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge University Press 2015), esp. ch. 1.

15 Ibid., 65.

16 See mainly Z. Oklopcic, 'Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers,

in the context of ethnically divided and conflict prone societies which are situated in the periphery of constitutional thought. In an earlier article, which focused on the re-constitution of post-Yugoslav political space, Oklopcic pointed out that the establishment of the constitutional orders in Bosnia and Herzegovina (BiH), Kosovo and Montenegro was not the work of the relevant peoples acting as bearers of a sovereign constituent will, but 'external actors, through the use of political power and interpretation of legal norms created the possibility for populations captured within these orders to be recognized as "the peoples"'.[17] In BiH and Kosovo, this had to do with the territorial aspects of polity-formation, while in the case of Montenegro the influence of external powers was related with the determination of the composition of the people and with the specification of the majority threshold that was required for the declaration of independence through the relevant referendum. In view of these developments, Oklopcic called us 'not only to pluralize the unitary concept of constituent power and divorce it from the idea of "the people"', but also to 'recognize the existence of constituent powers on both sides of an often tentative political divide between the "inside" and the "outside" of an emergent constitutional order'.[18]

In a later article, Oklopcic suggested again that the vocabulary of popular constituent power should be dismissed 'in the context of diverse but territorially concentrated polarized societies, most of which are multiethnic states', such as Ukraine, Syria and BiH,[19] because in this context it will have nationalist repercussions

and the Formation of Constitutional Orders in the Balkans', *Constellations* Vol. 19 No. 1 (2012), 81 (henceforth: 'Constitutional (Re)Vision'); 'Three arenas of struggle: A contextual approach to the constituent power of "the people"', *Global Constitutionalism* Vol. 3, No. 2 (2014), 200 (henceforth: 'Three arenas'); 'Populus Interruptus: Self-Determination, The Independence of Kosovo, and the Vocabulary of Peoplehood', *Leiden Journal of International Law* Vol. 22 (2009), 677. See also Z. Oklopcic, 'The Territorial Challenge: From Constitutional Patriotism to Unencumbered Agonism in Bosnia and Herzegovina', *German Law Journal* Vol. 13 (2012), 23 (henceforth: 'The Territorial Challenge'); 'The Idea of Early-Conflict Constitution-Making: The Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes', *German Law Journal* Vol. 16, No. 3 (2015), 658 (henceforth: 'The Conflict in Ukraine'); 'Provincialising Constitutional Pluralism', *Transnational Legal Theory* Vol. 5, No. (3) (2014), 331 (henceforth: 'Provincialising'). To be noted that very recently Oklopcic has published a book (*Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press, 2018)) in which he presented us with an impressive meta-theoretical account of 'constituent imagination', i.e. one which traces and criticizes the modes of our thinking and theorizing constituent power, the people, self-determination and other relevant concepts, both on the plane of academic discourses and in the terrains of political practice. It would be impossible to expound, much less to engage with, the contents of this book in the present article. In any case, the arguments of this essay are not affected by this book for the most part. For the remaining part (which has mostly to do with the question of whether we should abandon the concept of constituent power altogether for reasons that do not concern the interests of this study), I reserve my thoughts for another study.

17 'Constitutional (Re)Vision', 82.

18 Ibid., 90.

19 'Three arenas', 232.

and exclusionary effects, leading either to 'a highly-elevated risk of protracted political bloodshed, or simple failure of the social agenda to take hold'.[20] However, in the same article Oklopcic analyzed in depth and finally defended the significance of the vocabulary of popular constituent power, appropriately modified, in the context of democratic struggles taking place 'in relatively homogenous states where the likelihood of civil war is relatively low' (Venezuela, Greece and England were mentioned in this respect).[21] According to Oklopcic, in these latter contexts, the 'normative benefits and implicit rhetorical "invitations"' of the vocabulary of popular constituent power with regard to 'the overthrow of an undemocratic regime' cannot be substituted by invoking '"the rule of law" or, say, 'peace, order and good government"'.[22] Even worse, '[w]ithout constituent power of the people, the vocabulary of the rule of law may become a ruse that cloaks the exercise of hegemony externally, or internally'.[23]

In the first section I shall expound in an analytical way the main components of Oklopcic's approach to the issue of internal and external co-constituent powers.[24] Then, I shall argue that, in the terrain of divided and conflict prone societies to which this approach points, the conception of democratic constituent power can still be pertinent insofar as it frames a set of normative standards which help us distinguish between legitimate and illegitimate forms of 'internationalized *pouvoir constituant*' and which ultimately fend off the prospect of an (externally and/or internally) imposed constitution. In the last section I shall provide a synthetic response to some challenges which concern the utility of the conception of democratic constituent power in ethnically divided societies that have undergone some form of internationalized *pouvoir constituant*.

The reader must have already understood that I do not intend to address directly the exceptional case of Cyprus from the perspective of the imposed constitutionalism debate. In my view, this would deserve a separate study, of which the present one would be only the introduction. The demanding reader then will wonder why this study takes part in a special issue dedicated to the case of Cyprus. A preliminary answer the following:

Cyprus has always been a divided, conflict-prone society in many different ways and forms throughout its.[25] And it is still a divided island, notwithstanding the

20 Ibid., 222.
21 Ibid., 232.
22 Ibid., 232.
23 Ibid., 226.
24 My analysis will focus on the arguments presented in 'Constitutional (Re)Vision' and in 'Three arenas', but I shall also take into account some other aspects of Oklopcic's wider project, as appearing in the other articles referred to in n.18.
25 See e.g., Y. Papadakis, N. Peristianis, and G. Welz, *Divided Cyprus: Modernity, History, and an Island in Conflict* (Bloomington, IN: Indiana University Press 2006).

considerable transformations[26] and the considerable but unfruitful so far efforts of the first- and of the third-interested parties, aided by the good offices of the UN Secretary-General as representative of the international community, to conclude a process of reunification. The Republic of Cyprus is also a polity with a constitution that has been considered imposed.[27] The imposition passed through a process of internationalized *pouvoir constituant*, albeit a very exceptional one, something which international law scholars have not failed to see, putting the case of Cyprus next to that of the BiH.[28] The important differences between the two cases, which cannot be analyzed here, do not affect the arguments in this essay. Thus, it is sufficient to suggest that, when the analysis or an argument refers to, or implies cases such as, the BiH, the reader should also think of Cyprus.

Contextualizing Constituent Power (Zoran Oklopcic)

The starting point of Oklopcic's argument is related with the notorious 'paradox of constitutionalism'[29] which accompanies the conception of democratic constituent power; that is, the problem of the pre-constitutional identification and formation of 'the people' which is supposed to be the bearer of constituent power and which is thus postulated in advance as the agent of its own future constitutional and political-institutional potency.[30] As Oklopcic rightly observes, this pervasive *aporia* 'is not

26 See e.g., N. Trimikliniotis and U. Bozkurt, *Beyond a Divided Cyprus: A State and Society in Transformation* (NY, NY: Palgrave MacMillan 2012).

27 C. Tornaritis, *Cyprus and its Constitutional and Other Legal Problems* (2nd ed. 1980), 43, 54-56; P. Polyviou, *Cyprus: Conflict and Negotiation 1960 – 1980* (London: Duckworth, 1980), 13-15. See also A. Emilianides, *Constitutional Law in Cyprus* (The Hague: Kluwer Law International, 2013), 17: 'the constitutional structure of Cyprus was essentially decided without the participation of the people of Cyprus. Consequently, the people of Cyprus considered that the constitution had been imposed on them' (my emphasis).

28 See N. Maziau, 'L'internationalisation du pouvoir constituant. Essai de typologie: Le point de vue heterodoxe du constitutionnaliste', *Revue Générale de Droit International Public* (2002-03), 549; G. Cahin (2014) 'Limitation du pouvoir constituant: le point de vue de l'internationaliste', *Civitas Europa*, Vol. 32, No. 1 (2014), 55.

29 See M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007); and Oklopcic's review in *International Journal of Constitutional Law,* Vol. 6, No. 2 (2008), 358.

30 As Hans Lindahl ('Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change', *Constellations* Vol. 22, No. 2 (2015), 163, 168) has put it: 'Whoever seizes the initiative to speak on behalf of a putative "we," projecting a collective image that allows a manifold of individuals to identify themselves as the members of a group oriented to realizing a certain normative point under law, is the constituent power of a legal order. But this initial act of identification and empowerment only works as a constituent act if its addressees retroactively identify themselves as the members of the collective by exercising the practical possibilities made available to them by ACA [i.e., authoritative collective action]. Hence, an act succeeds as the exercise of constituent power only if, retrospectively, it appears to be the act of a constituted power'.

constrained to the issue of constituting institutions, but stretches back to the very beginning of a polity in its totality, including the territorial aspect of a constitutional order'.[31] Constitutional theory often underestimates this aspect, which invites us to pay greater attention not only to the relevant norms and principles of international law, but also to the critical role of external constituent actors in the processes through which the apportionment of the space of constitutional politics takes place.[32] Acknowledging this role may help us see that the link between the idea of constituent power and its supposedly popular subject is not as strong as it appears to be, and that the bearer of constituent power can in fact be plural. Besides, a mere pluralization of internal constituent powers, appropriate as it might be for multiethnic states in which the internal boundaries of sub-state national units are not contested and are not dependent upon the action of external powers (e.g. Scotland), would not do for cases, such as BiH, in which external powers were highly influential upon the development and the outcome of a dispute over the territorial ground and the political space of competing ethnicities.[33] In view of these latter cases, constitutional theory should revise its foundational imagery by accepting that the 'assemblage of political powers who participate in polity formation' can be 'both from within and from without of fragile, and always tentative political boundaries'.[34]

Another crucial point of Oklopcic's argumentation concerns the conception of democratic constituent power itself. Oklopcic recognizes that several recent theoretical approaches managed to distance themselves from the Schmittian decisionist formula of a homogenous sovereign will, and they brought to the fore a set of normative promises (inclusiveness, participation, pluralism) which are valuable for democratic struggles against oppressive regimes and/or struggles aiming at social and economic emancipation.[35] However, apart from the fact that these approaches tend to overlook the territorial aspect of constitutional politics, they still have to face the thorny issue

31 'The Territorial Challenge', 28.

32 'Constitutional (Re)Vision', 86-87. In his later article on the conflict in Ukraine, Oklopcic discussed at length theories of territorial rights, and he argued that this discussion provides us with a new way to address the 'paradox of constitutionalism', taking it not as 'a genuine puzzle' but as 'a symptom of the suppression of [the societal and disciplinary] anxieties' which 'prevent us from openly debating the pace, degree, and extent of the recalibration of the aggregates of constituent attachments' ('The Conflict in Ukraine', 679).

33 See 'Constitutional (Re)Vision', 90, referring to the views of S. Tierney, '"We the Peoples": Constituent Power and Constitutionalism in Plurinational States', in M. Loughlin and N. Walker (n. 30), 229-245; 'Three arenas', 222.

34 'Constitutional (Re)Vision', 82.

35 See e.g., 'Constitutional (Re)Vision', 88-89, referring to A. Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' *Constellations* ,Vol. 12, No. 2 (2005), 223; 'Three arenas', 214 ff., referring to J. Colón-Ríos, Weak Constitutionalism: Democratic legitimacy and the question of constituent power (Abingdon, UK: Routledge, 2012); and to C. Douzinas, *Philosophy and Resistance in the Crisis: Greece and the Future of Europe* (Cambridge: Polity Press, 2013).

which is pointed out by the paradox of constitutionalism; that is, the fact that the invocation of the popular will by the ones who move to overthrow an allegedly undemocratic regime can be affirmed only retrospectively.[36] Oklopcic believes that, despite this problem,[37] the vocabulary of popular constituent power may still have 'salutary political effects', 'catalyzing participation, political inclusion and the quick stabilization of the nascent political order, with its rhetorical potential to persuade the security apparatus to switch sides'.[38] Nevertheless, he notices that, even in the arenas of democratic struggles, the theoretical construction of popular constituent power is based not on a logical necessity or on an ontological explanation, but on a 'tacit consequentialist calculus' which upholds 'a globally valid trade-off' between the aforementioned benefits and the 'perils of increased solipsistic vehemence on the part of those who claim to fight in the people's name'.[39]

When it comes to constitution-making in the arenas of national struggles taking place in ethnically divided societies, the underlying prudential calculus of constitutional theory may lean towards a different conclusion as regards the use of the vocabulary of democratic constituent power. Here the invocation of a constituent 'we the people' is 'part of a nationalist ideal' whose 'point is not inclusion, but rather self-exclusion from the larger polity and often, other-exclusion from nationalists' own, exclusionary project'.[40] In this terrain, it is also crucial to consider another major component of Oklopcic's project, the distinction between instances of constitutional politics in the core (such as Scotland, Quebec and Catalonia) and in the periphery (such as Bolivia, BiH and Ukraine) of the international political order.[41] Despite their differences, a common element of the former instances is that no external intervention is invited or expected, as it might be the case with the periphery instances.[42] Furthermore, in the core instances, the demands for territorial reconfiguration could ultimately (and ironically) be read again in terms of the classic Sieyèsian conception of 'a political desire to live together in a polity' on behalf of associates who share a common national vision.[43] Such a desire is often absent or weak, and anyway all but unanimous, in what concerns the populations that are captured within the periphery cases of national struggles. Besides, in these latter cases, the (whichever) elements of a social, economic and/or political agenda cannot be combined with–in fact, they will often be damaged by–the invocation of a constituent 'we the people'. The latter will always be counterfeited by

36 'Three arenas', 209-210.
37 Which becomes inflammatory in the cases of 'abusive constitutionalism'; see our references in n. 4
38 'Three arenas', 212.
39 Ibid.
40 Ibid., 218.
41 Ibid., 222.
42 Ibid.
43 Ibid., 220.

the voices of ethnic minorities, and then by other minorities within the minorities, vindicating the redemption of their own national aspirations, undermining thus the viability of the wider political, institutional and constitutional project.

To be noticed that Oklopcic rejects the prospect of constitutional patriotism as a matter of a political doctrine that would be appropriate for enhancing constitutional faith in deeply divided societies as the one in BiH.[44] For Oklopcic, this doctrine 'cannot compellingly respond to the problem of arbitrary delineation of territory',[45] and, in any case, its invocation 'can serve the hegemonic purposes of any political elite that has a delineated territory as its basis of power'.[46] In practice, constitutional patriotism may easily mesh with civic nationalism,[47] and it can have inflammatory effects, since it can be abused by a state's ethnic majority, while, on the other hand, it can also be invoked by the politicians who represent sub-state national units.[48] The proposed alternative, 'unencumbered agonism', acknowledges (but it does not celebrate, as certain versions of agonistic democracy do) 'the inescapable feature of ongoing political struggle to constitute and re-constitute political communities'.[49] Being aware of the 'larger context of geo-political struggle', unencumbered agonism does not strike out from the outset 'under-articulated political desires for greater autonomy, even secession'.[50] The willingness to engage with such desires does not afford them an entitlement, but 'it legitimizes a radical *aspiration*, and indicates the direction in which political negotiations should be moving'.[51]

In fact, unencumbered agonism shares in constitutional patriotism's desire to 'make affect safe for democracy'. But it does so not by concocting an affective and intellectual attachment to a constitution, or by imploring citizens to be 'reasonable', but rather by *airing* those radical desires and subjecting them to prudential yardsticks of viability and mitigation of violence. In such a way, those radicals will not, as Honig complains in the case of constitutional patriotism, be minoritized into silence and aggression, but will be given a genuine opportunity to 'discharge' their resentment.[52]

In any case, coupled or not by constitutional patriotism, the conception of

44 See 'The Territorial Challenge'.
45 Ibid., 24.
46 Ibid., 25.
47 Ibid., 41.
48 Ibid., 42-43.
49 Ibid., 44.
50 Ibid., 46.
51 Ibid., 48.
52 Ibid. (omitting references and clarifying comments in the footnotes). In his later article on the conflict in Ukraine, Oklopcic made the case for 'a constitutional duty to negotiate federalization in a good faith' ('The Conflict in Ukraine', 681-684); cf. Z. Oklopcic, 'The Migrating Spirit of the Secession Reference in Southeastern Europe', *Canadian Journal of Law and Jurisprudence* Vol. 24, No. 2 (2011), 347.

democratic constituent power is prone to bracket the territorial aspects of constitution-making, and in doing so, it underestimates the role of external powers and the porous nature of the boundaries which separate them from internal constituent powers. Oklopcic's call for a 'fine-tuning of the radars of constitutional theory'[53] with this important feature of polity-formation presupposes a reversal in our usual way of constitutional theorizing. Instead of first being committed to particular 'normative desiderata' (here the ones that are inherent in the conception of democratic constituent power; i.e., inclusiveness, solidarity, participation, self-legislation etc.), and then attempting to graft these desiderata onto our 'foundational imagery' (here the one which concerns constitution-making), we could 'redescrib[e] the imagery first, and worr[y] about what happens to normative desiderata, later'.[54]

As Oklopcic's insistence on the significance of the vocabulary of popular constituent power in the context of democratic struggles shows, this reversal does not amount to abandoning our normative conceptions to the mercy of historical contingencies. Nor is it simply the case, on the other hand, that we should distance ourselves 'from the quasi-universal, essentially Western preoccupation with the idea of the constituent power of the people'.[55] The contextualizing move is an invitation for a '*provincialized* constitutional theory'; i.e., one which will address the experiences of those 'who have been betrayed by the concept' of constituent power, 'either because of their position within the global power matrix', or because of their encounter with 'constituent power's unsavoury "side effects"'.[56]

Oklopcic's call for a provincialized constitutional theory does not concern only the use of the vocabulary of democratic constituent power. In another article,[57] Oklopcic promoted the idea of a provincialization of constitutional pluralism, a theoretical approach which was originally developed for the case of EU and which could also become pertinent for the zones of nationalist conflicts in the (semi-)periphery of the international order, albeit not without a series of important adaptations. First, Oklopcic's provincialised version of constitutional pluralism does not take for granted loyalty to its existing federal incarnations, and it embraces the 'pluralism of radically divergent or disruptive constitutional visions – nationalist or other – as an ineradicable and legitimate feature of constitutional politics'; thus, 'provincialised constitutional pluralism must live with an ever-present possibility of "federal treachery"'.[58] Second, provincialised constitutional pluralism must allow for the recursive proliferation not

53 'Constitutional (Re)Vision', 97.
54 'Constitutional (Re)Vision', 93.
55 'Three arenas', 233.
56 'Three arenas', 232-233.
57 'Provincialising'.
58 Ibid., 350.

only of the first-order national aspirations which challenge the existing constitutional arrangement, but also of second- and even third-order national aspirations; i.e., ones which are nested within the political communities that raise first-order aspirations– thus, '[t]hose who claim that a current constitutional arrangement is just a political marriage of convenience will think twice before leaving if they know that would have to accede to a similar arrangement in "their" polity'.[59] Third, the provincialised constitutional pluralism points towards a 'self-ironic ethos' on the part of those who raise radical demands; that is, it calls them to see 'the relative and tentative quality of their own categorical claim to ultimate political authority'.[60] Last but not least, there is also a call addressed to the external constituent powers which became part of the relevant political landscape: All pluralist demands must find their way into the political agendas and the decision-making processes of these external powers– something which in the case of BiH, for example, 'would require the participation of Bosniaks, Serbs and Croats in the selection of EU representatives, in which case the representatives of the constituent nations would enjoy a veto on the appointment of the High Representative'.[61]

But what about the theoretical status of the possibility of having external co-constituent powers intervening in the first place? According to Oklopcic, adaptation to this strong possibility nowadays does not amount to postulating 'an ontological condition of people-formation. We *can* imagine an act of self-constitution à la Sieyès, where symmetrical desires culminate in a new polity, *without* external constituent powers'.[62] However, this could be the case mainly with 'an isolated, small political community', and if constitutional theory wishes to address 'present-day, territorial political communities' and 'the phenomena that bring about their profound reconstitution such as external military interventions, economic impositions, prolonged constitutional presence in the form of "international territorial administrations"', then it should not underestimate the possibility of external co-constituent powers.[63] Again it seems that it is more a matter of a prudential re-configuration of our foundational normative conceptions, and not a quest for a radical paradigm change or, on the other hand, an issue of a mere application of traditional normative conceptions to exceptional empirical realities.

59 Ibid., 356.
60 Ibid., 358.
61 Ibid., 361.
62 'Three arenas', 223. The same has been observed by M. Tushnet, 'Democratic founding: We the people and the others–A reply to Hans Agné', *International Journal of Constitutional Law* Vol. 10, No. 3 (2012), 862, 863. But see Oklopcic, 'The Conflict in Ukraine', 685-686, where he takes the involvement of external constituent powers as 'ontically inevitable', not clarifying whether this observation is restricted to conflict settings with a geopolitical interest or it is more generally valid.
63 'Three arenas', 223. In fact, Oklopcic believes that, '[g]iven the power differentials between great powers and the often-weaker polities in the process of reconstitution', even non-intervention 'should be seen as a form of constituent commission' (ibid. 223-224).

Legitimate and Illegitimate Internationalized *Pouvoir Constituant* – But for Whom?

We should take seriously Oklopcic's contextualizing move and the concomitant call for a reversal in the modes of our constitutional theorizing. Nevertheless, in doing so, we may notice that the terrains of constitution-making in divided and conflict-prone societies contain some other elements, which may invite back the conception of democratic constituent power, appropriately contextualized, but also globally appreciated. One of these elements is the aspiration to avoid external and/or internal co-constituent powers imposing a constitution.[64] To argue for the inclusion of the voices of the pertinent peoples in the agendas of external powers which have to do with the ongoing constitutional operation of the relevant polities is, indeed, very important. However, before this, one might also focus on the constitution-making process itself, and he/she might raise concerns related with the legitimacy of external intervention already at this stage.

International law scholars who are particularly interested in the involvement of external powers in polity-formation have used the term 'internationalized *pouvoir constituant*' to indicate instances in which 'international actors were not only instrumental in bringing about a new constitution from a factual point of view but in which international law played an important role in governing the process of constitution-making'.[65] Such instances are classified into three sub-categories, according to the degree of external influence.[66] The paradigmatic case of *total influence* is that of BiH, in which the presence of the constituent people(s) in the constitution-making process was at best nominal.[67] On the other hand, we may speak of *marginal influence* when domestic actors seek voluntarily the support of foreign or international agents, keeping nonetheless control over the CM process, so that 'the national *pouvoir constituant* [...] is not restrained'–the constitution-making processes in South-Africa and in post-1989 East and Central Europe could be relevant examples here.[68] The intermediate sub-category of *partial influence* comprises cases in which the constitution-making process 'is to a certain degree directed by external forces in a procedural and/or a substantial way, while the ultimate power of drafting and adopting remains in domestic hands',

64 Oklopcic had recognized the centrality of this problem already in his review of M. Loughlin and N. Walker (n.26), *International Journal of Constitutional Law* Vol. 6, No. 2 (2008), 358, 359.

65 Dann and Al-Ali (n.3) 424. See also M. Riegner, 'The Two Faces of Internationalized pouvoir constituant: Independence and Constitution-Making Under External Influence in Kosovo', *Goettingen Journal of International Law* Vol. 2, No. 3 (2010), 1035, 1038-1040 (distinguishing further between an internal and an external manifestation of 'internationalized *pouvoir constituant*').

66 See Dann and Al-Ali (n.3) 428-430.

67 Ibid., 428-429.

68 Ibid., 429-430.

so that 'control over the constitutional process is shared'[69]– this category includes constitution-making instances as different as East Timor, Iraq, Soudan,[70] and Kosovo.[71]

Facing such variation of external influence upon the constitution-making process, the same international law scholars proposed a series of normative standards to be taken as (hopefully legalized) indicators of legitimate internationalized *pouvoir constituant*. In particular, Riegner, following Dann and Al-Ali,[72] suggested that external powers should be 'as unobtrusive as possible'; that their 'involvement should be transparent and geared towards specific aims, which are legitimate in themselves and do not seek to impose the self-interest of the external actor'; that such aims should include avoidance of 'disproportional factional influence on the process' and 'insistence on inclusiveness'; and that 'a limited, disinterested and clearly focused international involvement is more likely to occur if and when external actors are multi-lateral in nature, because they tend to be less driven by self-interest than individual states'.[73] Similar standards have been suggested by other scholars,[74] by the United Nations,[75] and by other international organizations involved in this field.[76]

These normative standards and the principles undergirding them (popular sovereignty, self-determination)[77] imply the conception of democratic constituent power. Its invocation is not meant here to preclude the intervention of external powers as such, but it frames the demand for self-restraint as regards the forms, the aims, the intensity and the extent of the action of these powers. This demand corresponds to the legitimate aspiration to avoid external and/or internal imposition of the constitution, if not to have a more broadly participatory constitution-making process. This aspiration is generally significant, not only in terms of international law,[78] but also because some

69 Ibid.. 430.
70 Ibid.
71 See Riegner (n.66).
72 See Dann and Al-Ali (n.3) 460-461.
73 Riegner (n.66) 1060-1061.
74 See e.g., J. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, 2012), 257-258.
75 See Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes, April 2009, available at https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf.
76 See e.g., International Institute for Democracy and Electoral Assistance, *Constitution building after conflict: External support to a sovereign process*, Policy Paper, May 2011, available at http://www.idea.int/sites/default/files/publications/constitution-building-after-conflict.pdf; Commonwealth Human Rights Initiative, *Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa: Recommendations to Commonwealth Heads of Government*, 1999, available at http://www.humanrightsinitiative.org/publications/const/constitutionalism_booklet_1999.pdf.
77 See Riegner (n.66), 1060; Cohen (n.75) 253-254.
78 See V. Hart, 'Constitution Making and the Right to Take Part in a Public Affair', in *Framing the State,* 20-54; T. Franck and A. Thiruvengadam, 'Norms of International Law Relating to the Constitution-Making Process', in *Framing the State* 3-19 (discussing the emergence of an international law

sort of local ownership and self-enforcement of the new constitutional settlement would be necessary for the latter's endurance in the long run.[79] I cannot expand upon the general parameters of this issue here.[80] Nor can I discuss the issue of whether and how the conflict-resolution aims and strategies of external intervention in the terrains of internationalized *pouvoir constituant* can be made compatible with the vindication of – at least some elements – democratic autonomy in the relevant constitution-making process, if the prospect of imposition is to be avoided. I take as granted that a version of Andrew Arato's two-stage and post-sovereign constitution-making process[81] would do for this purpose.[82]

What interests me here is to face a series of more fundamental challenges which persist in view of Oklopcic's analysis. Why are delimiting external intervention and preserving elements of democratic autonomy in the constitution-making process at all important when, in the difficult cases of internationalized *pouvoir constituant*, the principal interest of all constituent powers, internal as well as external, would naturally focus on the territorial moment and not on the constitutional-institutional moment of polity-(re)formation? And for whom might avoidance of imposition of the constitution be significant, if relevant at all? In conflict settings as the ones in BiH, Syria or Ukraine, any position regarding the legitimacy of this or the other source or form of external intervention (abstention from any intervention included) would automatically be translated into taking issue with this or the other side of the 'inter-national' contestation–the term 'inter-national' could refer here both to the conflicting ethnicities on the ground and to the competition of external powers in

requirement that constitution-making be participatory). The requirement to avoid the imposition of a constitution finds additional support to the law of belligerent occupation, which does not allow the enforcement of permanent changes in the fundamental institutions of occupied states–this 'conservationist' principle is applicable even in our epoch of 'nation-building' operations; see on this Cohen, *Globalization and Sovereignty,* 222-265.

79 See Preuss 'Perspectives'; Z. Elkins, T. Ginsburg and J. Melton, 'Baghdad, Tokyo, Kabul...: Constitution-Making in Occupied States', *William and Mary Law Review* Vol. 49 (2008), 1139; N. Feldman, 'Imposed Constitutionalism', *Connecticut Law Review* Vol. 37 (2005), 857.

80 The literature on the impact of the constitution-making process upon its outcomes has become vast. For an earlier comprehensive account see T. Ginsburg, Z. Elkins and J. Blount, 'Does the Process of Constitution-Making Matter?', *Annual Review of Law and Social Science* Vol. 5 (2009), 201.

81 See Arato, *Post Sovereign Constitution Making.* According to this model, at a first stage a Round Table or some other forum of consensus-based negotiations generates an 'interim constitution', which regulates the rest of the constitution-making process, preferably under the supervision of a constitutional court. At the second stage, an elected assembly proceeds into the drafting of the final constitution through a process that gives large opportunities for democratic deliberation and citizen participation. The normative-theoretical core of Arato's project is to promote a pluralistic and constitutionalist approach to democratic legitimacy in constitution-making by not allowing any single institutional agent to raise claims to the embodiment of popular will.

82 See in this respect the observations of L. Miller, 'Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future', in *Framing the State*, 601-665, 643.

the geopolitical theatre of the conflict.[83] In these circumstances, the invocation of democratic constituent power would, in the best case, be irrelevant and, in the worst case, damaging, due to the – potentially exclusionary and in any case inflammatory – effects of its nationalist version.

Besides, even if we accept that the appeal to democratic constituent power is appropriate to frame the demand for avoidance of imposition, we should also notice that the agents of the new constitutional order who perceive themselves as the losers of the territorial settlement will most probably exploit this appeal in order to lament the external powers intervening at the 'founding moment'. Such lamentation will undermine faith in the new constitutional order, and it may feed the desire for a new settlement, either one leading to secession or one based on more centralized and thus oppressive institutional-constitutional arrangements.

Why should we not then dispense altogether with the conception of democratic constituent power in what concerns ethnically divided societies that have undergone some form of internationalized *pouvoir constituant*? In the course of the polity-formation process, why should we not focus on fulfilling the aforementioned standards taken as such and not as ingredients of a wider normative project which resurrects the conception of democratic constituent power in an unfavourable terrain? As a matter of the ongoing constitutional operation of the new polity, why should we not steer our efforts into 'the hard work of political negotiations and strategizing that is necessary to achieve a common platform between the goals of democratic, social and national emancipation'[84] without risking to undermine the stability of the new constitutional order by invoking the 'a-constituent' or 'multi-constituent' traumatizing experiences of the past? Does not constitutional-theoretical prudence tell as much?

Some Thoughts on the Conception of Democratic Constituent Power in the Context of Divided and Conflict-Prone Societies

Despite the analytical priority of the territorial moment in the discussion of the paradox of constitutionalism, in practice it would be very difficult to sever it from the constitutional-institutional moment of polity-formation. This is so, at least in the following sense: Any gains or losses concerning the territorial aspirations of the competing parties will entail – or at least, they will be connected by some parties with – stronger or looser consociational arrangements in the institutional order(s) that will be the outcome of the constitution-making process. This can apply even in the case of secession, provided (as is often the case) that ethnic minorities will remain

83 See also in this respect Oklopcic, 'Populus Interruptus', 692-693 (pointing out the role of external powers in 'the distribution of moral praise and opprobrium').

84 Oklopcic, 'Three arenas', 222.

captured within the territory of the other state and that both states will preserve their interest for these minorities. Besides, even if we could structurally separate the territorial moment from the constitutional-institutional moment, we should accept that the former must somehow hint to the necessary self-enforcement dynamics of the latter. The voices of first-interested parties over the territorial dispute must at least be *tabled* and *heard*, notwithstanding the fact that the territorial negotiations could be driven by purposes other than *following* them – most importantly, peacekeeping and conflict-resolution purposes, which under specific circumstances may contradict certain or even all first-interested voices. On the other hand, even if we accept that the constitutional-institutional moment should generally be geared by the views and by the interests of the residents of the new polity, the organizational or other contribution of external powers to the internal constitution-making process will most probably remain indispensable. Without this contribution, a failure of the institutional negotiations would always threaten to un-make any progress in the territorial settlement.

Given the practical inter-connectedness of the territorial with the constitutional-institutional moment of polity-formation, a possible invocation of democratic constituent power by external powers themselves (as ironic as this may sound) could be a reminder that the negotiating table exists primarily – though not exclusively – for the sake of the first-interested parties; that it must include all relevant interests and voices; and that the latter, as agonistic, vital and non-dialogical as they might be, can ultimately be honoured either by sharing in a single – though by necessity pluralistic – constitutional project or by celebrating separatist passions in the form of warring nationalisms. This either/or conditionality leaves open all possibilities, as it should be the case with any constituent project, but it in-forms these possibilities with their rightful meaning at least in the eyes of the international community, if the ears of the (leaders of the) competing national communities remain closed. As regards the interests of the international community, rightfully *and* realistically conceived, the invocation of democratic constituent power highlights the fact that Dayton-style polity-formation processes may only artificially keep all the relevant parties on the table of negotiations, and that the latter will anyway have to produce a sustainable continuum of institutional practices and achievements before the eyes of the first-interested parties, if the polity-formation project is to have any real-world constitutional effect.[85]

Of course, the appeal of external agents to democratic constituent power under such circumstances could be taken as an expression of organized hypocrisy. On the other hand, a mere reference to a normatively neutral constitution-making process,

85 See in this respect the comparison of the BiH and the Kosovo cases in C. Grewe / M. Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared', in A. von Bogdany and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* Vol. 15 (2011), 1-64, 11-16.

taking place somewhere in this chaotic and value-indifferent world, could also sound cynical towards the global democratic need to avoid blatant injustices in the form of an imposed constitution. To take this need seriously means that the constitution-making process must be carefully designed so as to be really inclusive, representative and somehow participatory, notwithstanding the risks that such insistence might entail for the peace-keeping purposes of the polity-formation project as a whole. This notwithstanding conditionality should be voiced in a straightforward manner, and it should be translated into specific international law responsibilities to be fairly distributed among the internal and the external actors of internationalized *pouvoir constituant*.

Let us now take up the stance of the participant in the new constitutional order. Certainly a clean-slate approach as regards the founding moment may facilitate a forward-looking learning process which will be relieved of the nationalist burdens of the past and which will focus on rendering the new constitutional settlement efficient or, at least, enduring in historical time. But how realistic would be to expect that this approach will take hold? As citizens of homogenous societies do, the citizens of divided societies will also be afflicted by the 'authority-authorship syndrome', as Michelman termed it, i.e., the publicly influential tendency to link the authority of the constitution with its original popular endorsement.[86] If this was just a problem of normative-theoretical discourse, one might dispense with the authority-authorship syndrome by constructing 'presentist' accounts of constitutional legitimacy.[87] However, the syndrome will most probably persist in reality,[88] and citizens of divided societies that have undergone some form of internationalized *pouvoir constituant* are even more prone to be affected by its allure, insofar as the founding moment is for them historically close and present in its immediate consequences, while tainted by the involvement of external actors. On the other hand, the authority-authorship syndrome might have particularly grave repercussions here, because the widely perceived absence or compromised character of democratic constituent power at the founding moment will undermine faith in the new constitutional order.

Declaring that the conception of democratic constituent power is here redundant would be one way to deal with the authority-authorship syndrome, and a provincialized constitutional theory might well consider this possibility. However, every involvement with a syndrome bears the risk of repression, even more so

86 F. Michelman, 'Constitutional Authorship', in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998) 64-98, 67.

87 See e.g. C. Zurn, 'The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy', *Legal Theory,* Vol. 16 (2010), 191.

88 Michelman himself accepted that 'referring legitimacy to authorship' is unavoidable, although 'we finally have no rationally defensible reason to do so' (F. Michelman, 'Reply to Ming-Sung Kuo' *International Journal of Constitutional Law,* Vol. 7, No. 4 (2009), 715, 718).

when the syndrome concerns issues of paramount symbolical importance, as the issue of the – autochthonous or not, autonomous or heteronomous – origins of a constitutional polity is. The attempt to contextualize our foundational imagery by putting aside the conception of democratic constituent power may generate the suspicion of exceptionalism from global normative standards, and it may nurture parochialism as a matter of damaging ideological tendencies which anyway plague the societal and political orders of the (semi-)periphery. The suspicion of exceptionalism and the prospect of parochialism cannot be eliminated merely by means of an appeal to the benefits of a forward-looking deliberative constitutional enterprise that will make the first-interested parties reasonable enough to forget or simply not to repeat the mistakes of the past–Oklopcic's confrontation with constitutional patriotism is right in this respect, as in many others. Or to put it differently: If we are to see such a forward-looking constitutional enterprise materialized, not being burdened by the suspicion of exceptionalism, then we should better be prepared for a long, painful, potentially therapeutic but also possibly disruptive encounter with the reasons and with the historical realities which explain the failures of democratic constituent power at the founding moment. Only through such an encounter the participants may then become able to trace and to redeem the positive elements that might sustain the development of a reconstitutive dialogical enterprise in the future.[89] And this enterprise should be channeled through the materialization of the beneficial normative promises (inclusiveness, equality, mutuality, discussion, disagreement etc.) that inhere in the conception of democratic constituent power. An appropriate contextualization of the latter would here include the recognition of the existence of a multiplicity of constituent peoples, which should have an equal share in the process, and a call for focusing on the (consociational and 'post-sovereign') attributes of the latter instead of making appeals to mythical, past or future, popular subjects.

Admittedly, the difficulties in making such a learning process workable are tremendous, and the vocabulary of a homogenous constituent 'we' may always distort it. In any case, in divided societies that have undergone some form of internationalized *pouvoir constituant*, the tradition-building projection of democratic constituent power (what Habermas had once termed as recognition that the participants in a constitutional order 'are "in the same boat" as their forbears')[90] must have an intensely forward-looking character. However, the relevant learning process

89 For two accounts of the dialogical or deliberative perspective in divided societies, see J. Dryzek, 'Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia', *Political Theory* Vol. 33, No. 2 (2005), 218; E. Tupaz, 'A Dialogical-Republican Revival: Respect-Worthy Constitutionalism in Post-Conflict Northern Ireland, South Africa, and Southern Philippines', *The Wayne Law Review* (2008), 1295.

90 J. Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', *Political Theory* Vol. 29 No. 6 (2001), 766, 774-775.

cannot help preserving a dialectical relationship with the failures of the historical past. The conception of democratic constituent power can serve here, first, as a normative counterpoint in order to discern the procedural-institutional aspects of those failures. The same conception can become a signal of 'a renewed awareness of being "stuck together" by the realistic impossibility to extricate oneself from the common constitutional framework'.[91] Of course, the 'either/or' conditionality, which is implicit in such awareness, would generate positive effects only if the formerly conflicting parties finally decide to assume the risks, the compromises and the synergies that are indispensable for constitutional co-existence under the terms of a provincialised constitutional pluralism. Such decision is foundational, but contrary to the Schmittian perception of constituent power, it is also by definition pluralistic, in the sense that it necessarily presupposes the multiplicity and the heterogeneity of constituent actors, ultimately the recognition of (inter-)national 'otherness' as a formative element of a comprehensive constituent will that is articulated through democratic processes and not through momentary and largely mythical and oppressive popular 'acclamations'.

On the other hand, as we saw, Oklopcic's approach to provincialised constitutional pluralism and his preference for unencumbered agonism over constitutional patriotism repel the prospect of repressing the airing of radical political visions, even of ones which revitalize the nationalist and separatist passions of the past, in the context of political struggles which have a (re-)constitutive character. Why should we then be afraid to activate the vocabulary of democratic constituent power, despite the fact that it can be abused to the same effect? To be sure, in contrast to agonism and to pluralism, the idea of constituent power may re-invigorate the oppressive version of a homogenous 'we the people'. However, why should we not take the pains to openly juxtapose this version with the pluralistic and future-oriented version of a multiplicity of constituent peoples, antagonizing each other on an equal footing so as to reach – or fail to reach – a constitutional consensus? The promotion of the case for a pluralistic constitutional identity and the development of a self-ironic ethos, as Oklopcic connects it with a self-reflective stance with regard to radical-secessionist visions, are anyway indispensable for the performance of the institutions of divided and conflict-prone societies. Why would it then be unbearably imprudent to project this identity and this ethos to the issue of (re-)constituting these institutions through an inclusive, representative and participatory, here appropriately consociational but still democratic, constitution-making process? If the constituted powers of a multinational polity can be informed by – or can be finally dissolved through – the processes and the contingencies of agonistic constitutional pluralism, why can not the same approach be tested with regard to the conception of democratic constituent power? And if we

91 Oklopcic, 'The Territorial Challenge', 48.

are, in general, ready to adopt a process-oriented and pluralistic account of the latter, abandoning once and for all the Schmittian decisionist formula of a unified sovereign-constituent will, then why could this account not be further developed, explained and promoted so as to accommodate *both* the consociational pluralism of internal constituent powers *and* the – under specific conditions inescapable, but by normative necessity restrained – involvement of external constituent powers in the context of internationalized *pouvoir constituant*?

In this context, one should certainly be ready to soften the case for constitutional autochthony. But this is not tantamount to abandoning the wager of democratic autonomy. At least this is so if we are still normatively committed to avoiding the prospect of imposed constitutions.

Conclusions

The involvement of external powers in certain constitution-making processes is an inescapable feature of the post-Cold War international order. Traditional, principled distinctions, as the one between imposed constitutions and constitutions that have been adopted through an autochthonous and democratically autonomous constitution-making process, may be too simplistic for the theorization of the complex realities and of the (geo-)political necessities that arise from the historical episodes of internationalized *pouvoir constituant*. However, normative principles still matter. In what concerns the constitution-making process, the principles of self-determination and democratic participation can yield a series of normative requirements (citizen participation, inclusiveness and pluralism in representation etc.),[92] which as a whole point towards the conception of democratic constituent power. The latter frames the demand for self-restraint as regards the forms, the aims and the intensity of external intervention and also the need for a carefully designed constitution-making process which will combine the conflict-resolution and peace-keeping purposes with procedural elements of democratic (and here by necessity consociational) autonomy, so as to fend off the prospect of an external and/or internal imposition of the constitution. Besides, even in cases in which imposition was not avoided at the 'founding moment', the projection of democratic constituent power still indicates the – by historical and democratic fiat always existing, but also tentative and fragile – possibility of a re-foundational new beginning, which should this time be based on the agonistic co-

92 See Hart 'Constitution Making'; Franck and Thiruvengadam 'Norms of International Law'. For the normative-legal combination of self-determination with democratic participation rights in the context of constitution-making, see UN Human Rights Committee, CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7, paras 2 and 6.

operation of the formerly conflicting parties. More generally, in the context of divided societies that have undergone some form of internationalized *pouvoir constituant*, as in all other societies, the conception of democratic constituent power signifies that, even if we do not all share the same (historical and territorial) boat, we share the sea, and it is in our global navigation interests to combat instances of undemocratic piracy, be it in the form of an imposed constitution and/or in the form of a consequent constitutional paralysis.

Constitutional imposition may come in many forms. One of them can be the 'unamendability' of past mistakes. Another, more paradoxically, can be 'solutions' of long-standing disputes, whose consequences may not be controlled so as to be 'amended'. These solutions may even have been adopted by the relevant peoples, for example, through a referendum, on account of necessities or vain hopes, no matter what. But they may also be prone, if not destined, to lead to a paralysis of the 'resolved' state, and thus to a definitive paralysis of the possibility for a (co-)existence of the peoples involved. This may perhaps lead to a new round of paternalistic solutions imposed this time on them, for them, by necessity alone.

The 'either/or' conditionality of any constituent project does not necessarily amount to a blackmail in all cases. It may also be carefully used as a driving force towards brave decisions, based on some form of a prudential calculus. Virtues, prudence and decisiveness to overcome what can be forgiven, and to remember what should be remembered, matter for the people as well as for their leaders. No one may guarantee the success of a solution. Yet many can forecast, sometimes on safe grounds based on solid past experience, a failure. As long as the 'negativists' do not contribute to that failure – Cyprus seems not to have learnt much in this regard, if one considers the selectivity of the memories of the people as well as of their leaders – the prudential calculus will this time have function within the new constitutional order. Sometimes prudence will not be enough. It may need to be supported by narratives, and when those are missing, by inspiring values. Democratic constituent power *may*, upon prudential calculations, be taken as one of such values. Especially when it never made its appearance in a place; and especially when the lamentation for its absence in the past does not obstruct its projection for the future.

Democratic constituent power is not so much a matter of founding moments, as it is an ongoing political project and projection. In the – not so rare but also not so widespread – 'success' stories in this regard, there is no reason for one not to celebrate and invest in this power, instead of instrumentalizing or disparaging it.

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Review Proceedings in the Supreme Court of Cyprus

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Abstract

This paper assesses the current review system of the Supreme Court of Cyprus and identifies existing challenges facing the appeal process in the Cypriot judicial system. It is argued that review procedures are an important public function of the appellate courts and through collective deliberation, the experience of justices, the exercise of review of material already evaluated by the trial court and of more targeted arguments by the advocates, can lead to better safeguards for quality assurance in the administration of justice. The continuous effort to restrict the right to appeal is criticized.

Keywords: civil procedure, right to appeal, review proceedings, stay of execution, legal points

Introduction

The aim of this paper is to analyse the current review system of the Supreme Court of Cyprus and to identify the existing challenges facing the appeal process in the Cypriot judicial system. Articles 135, 163 and 164 of the Constitution and section 17 of the Administration of Justice Law 33/64 explicitly authorize the Supreme Court to exclusively issue procedural rules.[2] The Civil Procedure Rules (CPR), however, were enacted in 1954 prior to Independence, and remain in force pursuant to Article 188 of the Constitution,[3] albeit with amendments enacted by the Supreme Court.[4] In view of the similarities between the CPR and the corresponding Rules that were in force in England prior to the 1960 Independence of Cyprus, Cypriot judges and advocates often refer to authorities which were applicable in England prior to 1960, such as the 1950's editions of the White Book. The White Book, *Bullen & Leake on Precedents of*

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2 *Kosmos Insurance Company Ltd v. Hatzisavva* [2001] 1 CLR 612 [in Greek].

3 *Krashias Shoe Factory Ltd v. Adidas Sportschuhfabriken Adi Dassier KG* [1989] 1 CLR 750 [in Greek], *E. Philippou Ltd v. Litner Hampton Ltd* [1984] 1 CLR 716.

4 See in general C. Satolias, *Judicial Practice* (Nicosia, 2014, in Greek), C. Louca, *Civil Procedure*, v. 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.

Pleadings,[5] as well as other English legal authorities, has proven to be quite influential for the evolution of Cypriot case-law. A substantial number of specific procedural rules have also been enacted with regards to diverse issue, including procedures before specialized courts, such as the Family Courts or the Industrial Dispute Tribunals, procedures before the Administrative Court or the Supreme Court itself, or procedures in specialized applications such as applications for bankruptcy or for contempt of court.

An extensive reform of Order 25 of the CPR, providing for amendments, and of Order 30, providing for Summons of Directions in 2015, which aimed to address delays, proved to be mostly a failure and was heavily opposed by the Cyprus Bar Association. The Ministry of Justice, Supreme Court and the Cyprus Bar Association have all agreed that a substantial reform of the CPR is required. In 2018 a committee under Lord Dyson was appointed in order to consider a revision of the Cypriot CPR and to submit proposals to the Supreme Court.[6] The committee under Lord Dyson shall collaborate with a Rules Committee appointed by the Supreme Court and which comprises two judges of the Supreme Court, a President of the District Court, a Senior District Court Judge, a District Court Judge, three practicing advocates representing the Cyprus Bar Association, an advocate representing the Attorney-General's Office and a Registrar. In its progress report, the committee has made several recommendations.[7]

The power of the Supreme Court to make its own rules of Court in the form of procedural regulations is very wide. Such rules may be used in order to regulate the practice and procedure of the Supreme Court and of any other court established in accordance with the Constitution.[8] They may relate to the regulation of the sittings of the courts and the selection of judges, the prescription of forms and fees in respect of proceedings in the courts and the regulation of costs of, and incidental to, any such proceedings, the prescription and regulation of the composition of the registries of the courts and the powers and duties of officers of the courts, the prescription of time within which any requirement of the Rules of Court is to be complied with, and the prescription of the practice and procedure to be followed by the Supreme Council of Judicature in the exercise of its competence with regard to disciplinary matters relating to judicial officers. Furthermore, the Supreme Court may provide in the Rules of Court for the summary determination of any appeal or other proceedings which appear to the Supreme Court or such other court before which such proceedings are

5 Now in its 18th edition (2017) as part of Sweet & Maxwell's Common Law Library.

6 The progress report is available at http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/C7CA0FB4CAEF03F0C22582B8001DD033/$file/Progress%20Report%2006.06.2018%20(2).pdf

7 See also N. Kyriakides, 'Civil Procedure Reform in Cyprus. Looking to England and beyond' *Oxford University Commonwealth Law Journal,* Vol. 16, No. 2 (2016), 262-291.

8 With the exception of communal courts, which, however, do not function in practice.

pending to be frivolous or vexatious or to have been instituted for the purpose of delaying the course of justice. A procedural regulation, or an amendment in the CPR, unless otherwise provided, has retrospective effect.[9]

The Supreme Court and its Power to Issue Procedural Rules

The Constitution of Cyprus provides for the establishment of a Supreme Constitutional Court and a High Court. In accordance with Article 133 of the Constitution, the Supreme Constitutional Court was to be composed of a Greek Cypriot, a Turkish Cypriot and a neutral judge who would act as the President of the Court, whereas the High Court was to be composed of two Greek Cypriots, a Turkish Cypriot and a neutral judge (not a subject or citizen of the Republic of Cyprus, Greece, Turkey or the United Kingdom and its Colonies) who would act as the President of the Court. However, as already explained, there was a constitutional breakdown in 1963. As a result, the neutral Presidents of the Supreme Constitutional Court and of the High Court decided to leave Cyprus and the courts could not function. Furthermore, the administration of justice, as well as the very existence of the Republic of Cyprus, was in immediate danger.[10]

In view of the aforementioned problems, the House of Representatives enacted the Administration of Justice (Miscellaneous Provisions) Law 33/1964, according to the provisions of which a newly established Supreme Court would exercise the jurisdiction and powers of the Supreme Constitutional Court and the High Court 'until such time as the people of Cyprus may determine such matters'.[11] The remaining five members of the two former highest tribunals of the Republic (three Greek Cypriots and two Turkish Cypriots) would constitute the Supreme Court, with a Turkish Cypriot, Judge Zekia, holding the position of the President of the Court. Law 33/64 was held to be constitutional by virtue of the doctrine of necessity.[12] Ever since 1964, the Supreme Court exercises any jurisdiction which is conferred by the Constitution to the Supreme Constitutional Court and the High Court. The seat of the Supreme Court is in Nicosia. The Supreme Court is currently composed of 13 Greek Cypriot judges, one of whom is appointed as the President of the Court.

The Supreme Court is the highest appellate court in the Republic and has jurisdiction to hear and determine all civil and criminal appeals from any court (with the exception of the Family Courts), as well as all administrative appeals. In civil and criminal appeals the Supreme Court is composed of three judges, unless it is decided

9 *Panayiotis Georghiou Catering Ltd v. Republic* [1996] 3 CLR 323 [in Greek].
10 See, inter alia, *The Attorney-General of the Republic v. Ibrahim* [1964] CLR 195.
11 Preamble of Law 33/64.
12 *Attorney-General v. Ibrahim* [1964] CLR 195. See also *Charalambides and another v. Republic and another, Administrative* App. 99/2016, Judgment of 4 April 2018 [in Greek].

that the case should be reviewed by the Full Bench of the Court. In addition, the Supreme Court exercises its original jurisdiction in cases of maritime law; one single judge may exercise such original jurisdiction. The Supreme Court further has exclusive jurisdiction to adjudicate finally on any election petition with regard to the elections of the President, or of members of the House of Representatives or of any Communal Chamber, to determine any conflict between the original Greek and Turkish texts of the Constitution and to interpret the Constitution in case of ambiguity, to hear and determine recourses filed by virtue of Articles 137–139 and 143 of the Constitution, references for opinion filed by virtue of Articles 141–142 of the Constitution and motions in accordance with Article 147 of the Constitution. It also has the power to grant the prerogative orders of habeas corpus, mandamus, prohibition, quo warranto and certiorari,[13] which have their origin in English common law; the jurisdiction of the Supreme Court to issue the prerogative writs is a significant one, since it enables the Court to review the action of lower courts or organs.

Articles 134 and 154 of the Constitution stipulate that the sittings of the Supreme Court for the hearing of all proceedings shall be public, but the Court may hear any proceedings in the presence only of the parties, if any, and the officers of the Court if it considers that such a course will be in the interest of the orderly conduct of the proceedings or if the security of the Republic or public morals so require. An exception is provided in Article 134 section 2 in that, where a recourse filed before the Supreme Court, while exercising its powers as the Supreme Constitutional Court of the Republic, appears to be *prima facie* frivolous, the Court may, after hearing arguments by or on behalf of the parties concerned, dismiss such recourse without a public hearing if satisfied that such recourse is in fact frivolous. This is also reiterated in rules of procedure enacted by the Supreme Court. In practice the Supreme Court does not often use its powers to dismiss recourses as frivolous without a public hearing.

Article 162 of the Constitution provides that the Supreme Court shall have jurisdiction to punish for any contempt of itself, and any other court of the Republic shall have power to commit any person disobeying a judgment or order of such court to prison until such person complies with such judgment or order and in any event for a period not exceeding 12 months. The power of the Court to punish any person disobeying its judgments or orders has always been regarded as an inherent and significant power of the courts. The notion of contempt is further expanded in Article 44 of the Courts of Justice Law 14/60 where, *inter alia*, acts of disrespect, obstruction

13 P. Artemis, *Prerogative Orders* (Larnaca 2004, in Greek); C. Clerides, 'Prerogative Orders', *Cyprus Law Tribune* Vol. 3 (1994), 297–312 [in Greek]; L. Clerides, 'Prerogative Writs', *Cyprus Law Review* 14 (1986): 2195-2208 [in Greek]; C. Tornaritis, *The Prerogative Orders under the Constitution and the Law of the Republic of Cyprus*, in T. Papadopoulos and G. Ioannides (eds.), *Proceedings of the Second International Cyprological Conference* (Nicosia: Society of Cyprus Studies, 1987), 641–650.

or disturbance of any judicial proceedings, including publications which are capable of prejudicing the fair trial of such proceedings, witness tampering or dismissing an employee for giving evidence in judicial proceedings, are penalized and wrongdoers are liable to imprisonment up to six months.[14]

The Appellate Family Court, provided for in Article 111 section 4 of the Constitution, has jurisdiction to hear and determine all appeals from the Family Courts (section 21 of Law 23/1990) and the Family Courts of Religious Groups (section 25 of Law 87(I)/1994) on family law matters.[15] Appeals are heard by a panel of three Supreme Court judges who are appointed by the Supreme Court as members of the Appellate Family Court for a period of two years. It has been held that the Appellate Family Court is not identical to the Supreme Court, despite the fact it is composed of Supreme Court justices.[16] Consequently, a family law appeal addressed to the Supreme Court of Cyprus may not be considered as a proper one, since the Appellate Family Court is not related to the Supreme Court.[17]

The Supreme Court further exercises a supervisory role over all inferior courts of the Republic. However, whereas the Supreme Court has repeatedly stressed that justice delayed is justice denied and that the timely administration of justice constitutes an element of justice itself,[18] in practice there is a significant delay in the trial of cases. Successive reports of the Supreme Court had made suggestions about amendments so as to address delays.[19] The House of Representatives has adopted the Law Providing for Effective Remedies for Exceeding the Reasonable Time Requirement for the Determination of Civil Rights and Obligations (Law 2(I) 2010). Law 2(I)/10 provides that individuals who consider that their right to determination of civil rights and

14 See in general A. Emilianides, 'Contempt in the Face of the Court and the Right to a Fair Trial', *European Journal of Crime, Criminal Law & Criminal Justice*, Vol. 13 (2005), 401–412, idem, 'Reflections on the Law of Contempt in Light of Recent Cypriot Jurisprudence', *Cyprus Human Rights Law Review*, Vol. 2 (2012), 221–226, K. Ebeku, 'Revisiting the Acquittal of 10 Policemen: Issues of Judicial Independence, Trial by Media and Fair Trial in Cyprus', *European Journal of Crime, Criminal Law & Criminal Justice*, Vol. 18 (2010): 1–42, S. Stavrinides, 'Contempt of Court in Cyprus', *Cyprus Law Tribune*, Vol. 2 (1991): 167–178 [in Greek]. See also *Kyprianou v. Cyprus*, Judgment of 15 Dec. 2005, Loukis Loucaides Advocate [2011] 1 CLR 875 [in Greek].

15 See in detail A. Emilianides, *Family and Succession Law in Cyprus* 2nd ed, (The Hague: Kluwer, 2018).

16 Nicolaou [1991] 1 CLR 1045 [in Greek].

17 *Theodorou v. Theodorou* [1995] 1 CLR 200 [in Greek], *Christodoulou v. Christodoulou* [1996] 1 CLR 1244 [in Greek].

18 *Paporis v. National Bank of Greece* [1986] 1 CLR 578, *Victoros v. Christodoulou* [1992] 1 CLR 512 [in Greek].

19 G. Pikis, *Report of the Committee on the Study of the Function of District and other First Instance Courts* (1999, in Greek), A. Kramvis, E. Papadopoulou and G. Erotocritou, *Report of the Supreme Court on the Functional Needs of Courts and other related issues* (Nicosia: Supreme Court, 2012, in Greek), G. Erotocritou, D. Michaelidou and A. Liatsos, *Report of the Supreme Court on the Functional Needs of Courts and other related issues* (Nicosia: Supreme Court, 2016, in Greek).

obligations within a reasonable time has been violated may file a complaint either when the relevant proceedings have been concluded with a court judgment or while they are still pending. If it is held that there is unreasonable delay, the applicant may have a right to receive compensation for the violation of his rights. In criminal trials unreasonable delay may lead to the quashing of a conviction, if the delay has hindered the fairness of the trial.[20]

The Review Proceedings

Decisions Subject to Appeal

The question of what decisions are subject to appeal has proved to be a highly polarizing one. Section 25 of the Courts of Justice Law 14/60 used to provide that any judgment shall be subject to appeal. However, the majority of the Full Bench of the Supreme Court held in *Harous* that only interlocutory judgments which are decisive or declaratory of the rights of the parties are subject to appeal.[21] On the basis of such distinction, a decision of the Court accepting an application for summary judgment is subject to appeal, whereas a decision rejecting such an application for summary judgment is not subject to appeal since it is not decisive or declaratory for the rights of the plaintiff. Even if no summary judgment has been granted, the plaintiff shall have the opportunity to prove his case and to be given a judgment in his favour when the action shall be finally adjudicated. Accordingly, most types of interlocutory judgments were declared as not being subject to a separate right to appeal. Such interlocutory judgments could be challenged, where appropriate, as part of the appeal filed against the final judgment.

The House of Representatives amended section 25 of Law 14/60 by Law 118(I)/2008. The amended section 25 provided that any interlocutory decision or order of the Court shall be subject to appeal, whether it is decisive or declaratory for the rights of the parties or not. However, this did not last either. Law 109(I)/2017 amended section 25 of Law 14/60 so that it is now provided that the following are subject to appeal: i) any final judgment or order, ii) interim or final prohibitive or mandatory orders or orders appointing a receiver, iii) interlocutory judgments which are absolutely decisive as to their effect for the rights of the parties. A party who has not filed a separate appeal for any interlocutory judgment reserves the right to raise any issues regarding such interlocutory judgment during the appeal against the final decision. It is further provided, pursuant to an amendment effected by Law

20 *Christopoulos v. Police* [2001] 2 CLR 100 [in Greek], *Efstathiou v. Police* [1990] 2 CLR 294 [in Greek].

21 *Harous v. Harous* [2003] 1 CLR 1530, adopting the ratio of *Hasikos and others v. Charalambides* [1990] 1 CLR 389 [in Greek] and holding that the different conclusion of *Price v. Gray* [2002] 1 CLR 424 [in Greek] had been reached per incuriam.

129(I)/2009, that any decision for preliminary reference to the CJEU or that rejects an application for preliminary reference is not subject to appeal. Law 109(I)/2017 effectively reverted to the *Harous* judgment whereby most types of interlocutory judgments are not subject to appeal.[22] There does not seem to be any other justification for this new amendment other than the intention to reduce the number of appeals. It is submitted that this should not on its own constitute a convincing reasoning for such a restriction of the rights of parties to appeal.[23]

Period Within Which to Appeal

Pursuant to Order 35 of the CPR, an appeal against a final judgment may be filed within a period of six weeks, whereas any appeal against an interlocutory order has to be filed within a period of 14 days, unless the trial Court or the Supreme Court have extended the time accordingly. However, where an *ex parte* application has been refused by the trial Court, an appeal should be brought within four days from the date of the refusal of the Court below, or within such extended time as the Court may allow.[24] An appeal against any order, either final or interlocutory, in any matter not being an action, shall be brought within 14 days.[25] In distinguishing between final and interlocutory applications, the Supreme Court has applied the application approach as opposed to the order approach. The crucial factor is therefore not the nature of the order subject to appeal, but the nature of the application that has led to the judgment or order subject to appeal. It is not the nature of the order, but the nature of the application within which the order was issued that is of significance for the purposes of the distinction between final and interlocutory judgments.[26] Pursuant to the above, an order shall be deemed to be a final one if it was issued on the basis of an application that would have disposed the action on its merits, irrespective of who would be the successful party.

Accordingly, the period for filing an appeal for all interlocutory applications is 14 days, irrespective of the effect the order might have. A decision for summary judgment is an interlocutory order despite the fact that an order for summary judgment would dispose the action on its merits, because the application is an interlocutory one and it would not have disposed the action on its merits if the application for summary

22 *Oneworld Ltd* v. *OJSC Bank of Moscow*, Civil App. E50/2018, Judgment of 13 Dec. 2018 [in Greek].

23 See also M. Kyriakides, 'Judicial Decisions of Civil Jurisdiction under Appeal in light of the recent Cypriot Case-Law', *Cyprus and European Law Review*, Vol. 1 (2006): 53-66 [in Greek].

24 *Cyprus Sulphur and Copper Co Ltd and others v. Pararlama Ltd and others* [1990] 1 CLR 1040 [in Greek].

25 *Papachrysostomou v. Sidera* [1992] 1 CLR 379 [in Greek].

26 *Wortham and others v. Tsimon and others* [2001] 1 CLR 1442 [in Greek], *G & Z Engineers Ltd v. Ameron Ltd* [2009] 1 CLR 1106 [in Greek], *Ioannidou v. Charilaos Dikeos and another* [1970] 1 CLR 241, *The Cyprus Asbestos Mines Co Ltd v. Sykopetritis Ltd* [1989] 1 CLR 832, *Spitaliotis and others v. Liberty Life Insurance Ltd* [2002] 1 CLR 1140 [in Greek], *Kotsonia v. Antoniou* [2002] 1 CLR 975 [in Greek].

judgment had been rejected.[27] On the contrary, orders for execution of judgments are not interlocutory since the applications are not made as interlocutory within the action, but as principal applications pursuant to the Civil Procedure Law, Cap. 6.[28] By way of exception to the general rule, if the trial has been split in an appropriate case, then such division of the trial would not affect the nature of the preliminary order issued. Accordingly, if an issue has been preliminarily disposed of, pursuant to Order 27 of the CPR, either party may file the appeal within a period of six weeks. If Order 27 had not applied, then the preliminary issue would have been adjudicated at the trial and the decision would have been a final one, irrespective of who would be the successful party.[29]

With regards to extension of time to file an appeal, it has been held that the finality of litigation is a cardinal rule of public policy, which aims to ensure certainty of legal rights and uphold social order, and accordingly, it should not be disturbed except in the face of cogent reasons which justify departure from the time limits provided in the CPR.[30] The Court should not refuse to exercise its discretion and to extend the time for the purpose of doing justice if the party has shown diligence and has not unnecessarily delayed in submitting the application;[31] the non-availability of the text of the judgment and the need of time to consider whether to appeal are grounds which should favour granting an extension.[32] Failure of the advocate of a party to take the necessary steps in order to submit an appeal within the prescribed period may be considered, depending on the circumstances of the case, not to excuse non-compliance with time provisions for appeal.[33] However, it may justify an extension of time if such failure was not the result of inexcusable negligence or indifference.[34] Whereas the Court may consider whether there is *prima facie* a likelihood of the appeal succeeding, such likelihood is only one of the factors to be taken into account and if there are solid grounds for granting an extension, the probability of success might

27 *Spitaliotis and others v. Liberty Life Insurance Ltd* [2002] 1 CLR 1140 [in Greek], *G & Z Engineers Ltd v. Ameron Ltd* [2009] 1 CLR 1106 [in Greek].

28 *Kitalides v. Bank of Cyprus Ltd and others* [2000] 1 CLR 1759 [in Greek], *Ioakeim v. Cyprus Popular Bank Ltd* [2003] 1 CLR 198 [in Greek], *Charalambous v. Charalambous*, Civil App. 311/2012, Judgment of 15 Jan. 2015 [in Greek].

29 *Wortham and others v. Tsimon and others* [2001] 1 CLR 1442 [in Greek].

30 *Michaelides v. Christou* [1996] 1 CLR 1190 [in Greek], *Athanasiades v. Alexandrou* [1991] 1 CLR 945 [in Greek].

31 *Hjimichael v. Karamichael and others* [1967] 1 CLR 61, *Courtis v. Iasonides* [1972] 1 CLR 56, *Ioannidou v. Dikeos and another* [1970] 1 CLR 241.

32 *The Turkish Co-operative Carob Marketing Society Ltd v. Kiamil and another* [1973] 1 CLR 1, *Kyriakides v. Kyriakides* [1969] 1 CLR 373.

33 *Samanis v. Symillides* [1985] 1 CLR 187, *Charalambous v. Charalambides Dairies Ltd* [1984] 1 CLR 19, *Loizou v. Konteatis* [1968] 1 CLR 291.

34 *Georghiou v. Republic* [1968] 1 CLR 411, *Hoppis v. Panayi* [1993] 1 CLR 140 [in Greek].

not be an important factor.[35] As a matter of practice the applicant should attach to the application, where possible, a statement of the proposed grounds of appeal; however, this shall not be an obstacle in deciding whether an extension of time should be granted.[36]

Notice of Appeal and Cross-Appeal

An appeal is brought by written notice of appeal, which is filed within the appropriate period with the Registrar of the Court appealed from, together with a copy of the judgment or order of which the complaint is made. The appellant may, by his notice, appeal from the whole or any part of any judgment or order, and in the latter case shall specify such part. The notice shall also state all the grounds of appeal and set forth fully the reasons relied upon for the grounds stated. Any ground of appeal should be stated separately as well as its justification.[37] Any notice of appeal may be amended at any time as the Supreme Court may think fit. The notice of appeal determines the *sub judice* issues, and accordingly, the findings of the trial Court may not be challenged or questioned other than with the notice of appeal, or cross-appeal.[38] It is further provided that the parties may not raise on appeal issues which had never been raised before the trial Court.[39]

The notice of appeal shall be served upon all parties directly affected by the appeal, irrespective of whether they appeared in the first instance proceedings or not. The Court may direct notice of the appeal to be served on any other persons, either parties to the action or not, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties.[40] If the respondent contends that the decision of the trial Court should be varied, he should give a written notice of his intention, specifying in what respects he argues that the decision should be varied. Such notice shall set forth fully the respondent's grounds and reasons therefor for seeking to have the decision

35 *The Turkish Co-operative Carob Marketing Society Ltd v. Kiamil and another* [1973] 1 CLR 1.

36 *The Turkish Co-operative Carob Marketing Society Ltd v. Kiamil and another* [1973] 1 CLR 1. *Lanitis Brothers v. The Municipal Corporation of Limassol* [1972] 1 CLR 100.

37 *Loizias v. Loizias & Sons Contracting Building Overseas Ltd and others*, Civil App. 13/2010, Judgment of 17 July 2014 [in Greek].

38 *Demosthenous v. Georgiou* [2000] 1 CLR 1541 [in Greek], *Kakoullou v. Pohouzouri* [1992] 1 CLR 1143 [in Greek].

39 *Nisis v. Republic* [1967] 3 CLR 671, *Attorney-General v. Pentaliotis & Papapetrou Estates Ltd* [1998] 1 CLR 1931 [in Greek], *Zampas v. A.& G. Tsiarkezos Constructions Ltd and another* [1998] 1 CLR 820 [in Greek].

40 *Cyprus Sulphur and Copper Co Ltd and others v. Pararlama Ltd and others* [1990] 1 CLR 1040 [in Greek], *Johnson v. Pole* [1987] 1 CLR 311, *Georghios Tsappis Isorropimene Zootrofe Ltd v. Kaloudes* [1988] 1 CLR 45, *Papastratis v. Petrides* [1979] 1 CLR 231.

varied on appeal and shall be filed with the record of the appeal. The notice should be given within four weeks from the service of the appeal.

Order 35 of the CPR explicitly states that the omission of the respondent to give notice shall not diminish the powers of the Supreme Court to make any judgment or order necessary for the interests of justice, notwithstanding that the notice of appeal may be that only a part of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.[41] However, despite the express powers granted to the Court by Order 35, there has been case-law where the Supreme Court has held that it is not possible to set aside any part of the first instance judgment against which no appeal or cross-appeal has been filed.[42] There is further case-law where the Court has drawn a distinction between the notice for cross-appeal provided in Order 35 and the notion of a 'cross-appeal' which, pursuant to the Court, is not defined in the CPR.[43] It was accordingly held that the cross-appeal should be filed within the same limits as a notice of appeal, which is admittedly rather confusing, since if an appeal is filed on the last day of the 42-day period, there shall simply be no time available to file a cross-appeal.

Procedure

The Appeals (pre-trial stage, skeleton arguments, limitation of the time of oral addresses and summary procedure for dismissing flagrantly unfounded appeals) Procedural Rule 4/1996 provides for a stage of pre-trial. The Supreme Court reserves, however, the right in rare cases to set an appeal for hearing without a pre-trial stage. At the pre-trial stage the Supreme Court may summarily dismiss, on hearing the appellant, any flagrantly unfounded appeals, examines whether the appeal has been filed in a manner consistent with the CPR and may address any requests for remedying procedural irregularities, preliminarily reviews the grounds of appeal and, if the latter are sufficiently justified, issues directions for the submission of written skeleton arguments by the parties. If the appellant does not appear at the pre-trial stage, the appeal may be dismissed, whereas, if the defendant does not appear, the appeal may be heard in his absence. The Court reserves, however, the right to postpone the case for another date prior to dismissing it, or hearing it, depending on the case. An appeal may be reinstated pursuant to an application by summons if the Supreme Court considers it just.

41 *Holiday Tours Ltd v. Kouta and another* [1993] 1 CLR 766 [in Greek], *Avraam v. Nicolaou* [1996] 1 CLR 656 [in Greek], *Demetriou and another v. Sidorenko* [2011] 1 CLR 1095 [in Greek].

42 *Minerva Finance & Investment Ltd v. Georgiades* [1998] 1 CLR 2173 [in Greek], *Kakoullou v. Pohouzouri and another* [1992] 1 CLR 1503 [in Greek]. See also *Polytropo Advertising Ltd v. Adboard Ltd* [2003] 1 CLR 1486 [in Greek], *Sarika v. Michaelides* [2008] 1 CLR 54 [in Greek].

43 *Philippou v. Yiannitai and others* [1996' 1 CLR 1229, *Stroj – Invest Ltd v. NL Nova Trade Offshore Ltd and another* [2007] 1 CLR 524 [in Greek].

Unless otherwise directed, the appellant should submit his skeleton argument within a period of 45 days, and the respondent should subsequently submit his own skeleton argument within an additional period of 45 days. If there is a cross-appeal, the respondent should cover also the grounds of cross-appeal in his skeleton arguments, and the appellant has a right to reply to the cross-appeal with a second skeleton argument within 21 days. The skeleton arguments should succinctly incorporate the argumentation of each party without unnecessary repetitions.[44] The argumentation for each ground of appeal should be developed separately and there should be precise reference to the parts of the evidence, minutes of the first instance proceedings, legal provisions and authorities which support the arguments. Each party should attach copies of the relevant authorities and underline the substantial extracts from decisions. The appellant should further include a chronological table, sketching the development of the procedure.

When a party fails to submit his skeleton arguments during the appeal, the Court may grant an extension of time.[45] If the appellant fails to submit his skeleton arguments, the appeal is dismissed. If the respondent fails to submit his skeleton arguments, then the respondent shall not have a right to be heard at the hearing. However, the Court might order reinstatement. Whereas, the Court is more reluctant to revive an appeal that has been already dismissed by extending *ex posteriori* the time limits for submitting the skeleton arguments,[46] such a reinstatement may be ordered in the appropriate case and if the Court is satisfied that the failure to submit within the time was not the result of indifference or negligence. There can be no inflexible rules which restrict the exercise of the discretion of the Court on this matter.[47]

After the submission of the skeleton arguments, the appeal and cross-appeal shall be set for hearing. Unless otherwise directed, both the appeal and cross-appeal are heard simultaneously. The appellant addresses the Court first for no longer than 30 minutes, and the respondent then shall address the Court also for no longer than 30 minutes. If there is a cross-appeal, the time is extended to 40 minutes. The appellant may then reply for no longer than 10 minutes, but if there is a cross-appeal, the time is extended for 20 minutes. The time spent for replying to questions submitted by the Court is not calculated as part of the allotted time. The addresses should focus on the main points and should avoid reading extracts from judgments. The time allotted

44 *Efthymiou v. Demetriou* [2001] 1 CLR 1721 [in Greek], *Loizias v. Loizias & Sons Contracting Building Overseas Ltd and others*, Civil App. 13/2010, Judgment of 17 July 2014 [in Greek].

45 *Kollatou v. Panayiotou* [2003] 1 CLR 895 [in Greek], *Pissouriou v. Golden Hand Co Ltd* [1999] 1 CLR 257 [in Greek].

46 *Vardianos v. Richards* [1998] 1 CLR 698 [in Greek], *Archbishop Chrysostomos v. Christoforou* [1993] 1 CLR 470 [in Greek], *Royal Insurance Ltd. ν. Δήμου Λεμεσού* [1995] 1 CLR 185 [in Greek].

47 *Adboard Ltd and another v. Municipality of Strovolos* [2013] 1 CLR 1085 [in Greek], *Miaris and others v. Cyprus Popular Bank* [2009] 1 CLR 435 [in Greek].

for the addresses may be extended if the Court considers it necessary. The appellant may at any time abandon his appeal with the respondent's written consent by giving notice to that effect in writing to the Registrar and thereupon the appeal is subject to dismissal. The respondent shall be entitled, if he so wishes, to tax in his favour any costs reasonably incurred by him up to the receipt of such notice.

Powers of the Court

Section 25 § 3 of Law 14/60 provides that the Supreme Court, on appeal, shall not be bound by any determination of facts by the trial Court and shall have the power to review the admitted evidence, reach its own conclusions, admit further evidence and, where necessary, re-hear witnesses that the trial Court has already heard, and may issue any judgment or order necessary, including an order to set aside the judgment and have it retried by either the trial Court or another competent Court. Order 35 also provides that the Court shall have discretionary power to admit further evidence upon questions of fact, either by oral examination or by affidavit. It is provided that such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment, after trial or hearing, of any cause or matter upon the merits, such further evidence, save as to matters subsequent to the hearing, shall be admitted on special grounds only, and not without special leave of the Court. It is further provided that the Court has the power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.

Whereas, the powers of the Court seem sufficiently wide, in interpreting the relevant provisions, the Supreme Court has confined itself to a review of legal issues and whether the trial Court has acted within its discretion. In effect, the Supreme Court has held that section 25 § 3 of Law 14/60 and Order 35 of the CPR should be interpreted in a manner inconsistent with their literal interpretation. It has repeatedly been held that the evaluation of conflicting evidence is within the discretion of the trial Court and that accordingly the Supreme Court will not interfere with the exercise of the discretion of the trial judge, unless it is satisfied that such discretion was wrongly exercised, the presumption being that the trial judge has correctly exercised his discretion.[48] The trial Court shall further dismiss the appeal if, due to subsequent developments, it has been deprived of its subject-matter.[49]

48 *Kotsapas & Sons Ltd v. Titan Construction and Engineering Company* [1961] CLR 317, *Paphitis v. Bonifacio* [1978] I CLR 127, *Yiallourou v. Cyprus Popular Bank Ltd and another* [2011] 1 CLR 1635 [in Greek], *Suphire Finance Ltd v. Papamichael* [2011] 1 CLR 1649 [in Greek], *Hadjiathanassiou v. Parperides and others* [1975] 1 CLR 401,

49 *Mavronicolas and another v. Finioti and others* [1997] 1 CLR 1659 [in Greek].

Admission of further evidence before the Supreme Court has been held to be an exceptional measure, rarely allowed and not easily reconcilable with the role of an appellate Court.[50] Further evidence shall only be allowed where: i) it could not have reasonably been secured in order to be admitted during the trial proceedings by the party concerned, because for instance he did not know it existed, or he could not find such evidence despite reasonable efforts, ii) if such evidence had been admitted before the trial Court, it is likely that it would have substantially affected the outcome of the case; it need not have been decisive, however and iii) such evidence seems trustworthy, although it need not be undisputed.[51] Furthermore, the evidence that is sought to be admitted should be relevant to the notice of appeal, since the primary role of an appeal is to review the judgment of the trial Court. Admission of evidence which did not exist during the hearing before the trial Court cannot be relevant to the determination of the appeal.[52]

The Supreme Court does not have the power to reopen a case before it after a judgment has been issued. In *Korellis* the applicant filed an originating summons to the Full Bench of the Supreme Court, requesting that they set aside their own judgment and claiming that one of the judges had previously participated in the investigations against the applicant and that accordingly the Full Bench had been improperly constituted due to a violation of the principles of natural justice. The applicant cited in particular the *Pinochet* judgment of the House of Lords in England.[53] The majority of the Supreme Court confirmed previous case-law and held that the Supreme Court does not have the power to set aside its own judgments on any grounds. It was further held that the inherent powers that the Court may exercise cannot extend the jurisdiction or the powers of the Court, but are those that are implied by the nature of the judicial functions in order to effectively exercise the Court's powers and prevent abuse of procedure. Accordingly, once a judgment has been delivered, there is no possibility for the Court that has delivered it to rehear argument and to change its decision or set it aside, except to the extent that there has been an error in the judgment under the slip rule.[54]

50 *Pernell v. Republic* [1998] 2 CLR 177 [in Greek], *Andreou v. Psaras Shipping Agencies Ltd* [1996] 1 CLR 1379 [in Greek], *Athinis v. Republic* [1989] 2 CLR 214 [in Greek], *Demosthenous v. Georgiou* [2000] 1 CLR 15 [in Greek].

51 *Martin v. Republic* [1994] 2 CLR 29 [in Greek], *Demosthenous v. Georgiou* [2000] 1 CLR 1541 [in Greek], *Blachin v. Aristeidou* [1997] 1 CLR 195 [in Greek], *Trifonides v. Alpan (Taki Bros)* [1987] 1 CLR 479, *Symeon v. Georgiou*, Civil App. 394/2011, Judgment of 15 Jan. 2018 [in Greek].

52 *Michaelides v. Pourgourides* [2000] 1 CLR 328 [in Greek], *Compagnie Gervais Danone v. Charalambides Dairies Ltd and another*, Civil App. 115/2010, Judgment of 25 Feb. 2014 [in Greek], *Pernell v. Republic* [1998] 2 CLR 177 [in Greek], *Egiazaryan and others v. Denoro Investments Ltd and others* [2013] 1 CLR 409 [in Greek].

53 *R. v.. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [1999] 1 All ER 577.

54 *Korellis* [1999] 1 CLR 1122 [in Greek], *Antoniou v.. Republic* [1998] 3 CLR 339 [in Greek], *Orphanides*

Stay of Execution

An appeal shall not operate as a stay of execution or of proceedings. However, the Court appealed from or the Supreme Court may so order. Before any order staying execution is entered, the person obtaining the order shall furnish such security as may have been directed. If the security is to be given by means of a bond, the bond shall be made to the party in whose favour the decision under appeal was given. The discretion of the Court to grant a stay should take into account on the one hand the right of the successful party to execute the judgment in his favour and on the other hand the right of the unsuccessful party to file an appeal in order to reverse the first instance judgment. The Court should accordingly consider the effect that the decision to suspend the action might have on each party's expectations.[55] A stay of execution shall not be ordered, unless there are special or exceptional circumstances that justify it.[56] Financial inability of the judgment debtor is not on its own considered as special circumstances that justify suspension of the first instance judgment.[57] The likelihood of success of the appeal shall not ordinarily be a decisive factor, since the Court is not expected at this stage to finally assess the merits of the appeal. However, the likelihood of success might be a decisive factor where the Court may predict with some certainty whether the appeal shall be successful or not.[58]

The power to stay the execution refers to a stay of a positive obligation imposed on the person requesting suspension of the said order. It does not give the power to the Supreme Court to grant an order pending the determination of the appeal. Accordingly, if the trial Court has dismissed an application for an interim order, the Supreme Court does not have jurisdiction to grant such interim order pending the determination of the appeal.[59] However, it would seem that the trial Court itself would have jurisdiction to grant such interim order pending the determination of the appeal

v. Michaelides [1968] 1 CLR 295, *Agathocleous v. Edaxyl Wood Company Ltd and another* [1997] 1 CLR 302 [in Greek].

55 *Georgios Fragkis Restaurants Ltd v. Holy Archdiocese of Cyprus*, Civil App. E398/2016, Judgment of 26 Oct. 2017 [in Greek], *Patsalosavvis v. Director of Department of Internal Revenue* [1989] 1 CLR 45 [in Greek], Neofytou v. Demetriou [1989] 1 CLR 592 [in Greek], *Iosifakis v. Aristodemou* [1990] 1 CLR 284 [in Greek], *The Governor and the Company of the Bank of Scotland v. S.S. Sapphire Seas* [2001] 1 CLR 955 [in Greek].

56 *Hatzievangelou v. Dorami Marine Ltd and others* [1991] 1 CLR 172 [in Greek], *Aristidou v. Aristidou* [1985] 1 CLR 649, *Xenidou v. Economides*, App. 28/2014, Judgment of 7 Apr. 2015 [in Greek], *Charlaambous v. A. Panayides Contracting Ltd* [2001] 1 CLR 1978 [in Greek].

57 *Maritime Club of Paphos v. Cyprus Ports Authority* [1991] 1 CLR 1147 [in Greek], *Voyiatzanou v. Attorney-General* [1997] 1 CLR 591 [in Greek], *Constantinides v. Komodromou*, Civil App. 283/2015, Judgment of 23 Mar. 2016 [in Greek].

58 *Papa v. Economidou and others* [2010] 1 CLR 58 [in Greek], *Maritime Club of Paphos v. Cyprus Ports Authority* [1991] 1 CLR 1147 [in Greek].

59 *Bank of Cyprus Public Company Ltd and others* [2005] 1 CLR 1255 [in Greek], *Thanos Club Hotels Ltd v. Cyprus Popular Bank and another* [2003] 1 CLR 312 [in Greek].

in exceptional circumstances.[60] Whereas it can be appreciated that maintaining the subject matter of the appeal is of undeniable significance, it would admittedly be extremely peculiar for the trial Court to grant to the applicant an interim order merely because he has filed an appeal against the judgment of the same Court that dismissed the application for such an interim order.

Appeal on Legal Points Only

An appeal against a decision of the Industrial Disputes Tribunal may be filed only on points of law.[61] The Supreme Court is thus not vested with jurisdiction to make its own findings of fact, either contrary or supplementary to those made by the IDT.[62] Whenever an issue refers to the application of the law to given facts, it raises a pure question of law. Accordingly, so long as the facts to which the court is required to apply the law are not disputed by the appellant, the point is a legal one, raising questions on the construction and scope of the law. The exploration of the ambit of the law is therefore always considered as a question of law and not as a question of fact.[63] Acting on no evidence, or acting on evidence which ought to have been rejected, or failing to take into consideration evidence which ought to have been considered, or proceeding to findings which are clearly inconsistent with, or not supported by, the evidence presented,[64] are considered as matters of law and not of fact.[65]

A distinction should be made between primary facts and the conclusions arising from such facts. Primary facts are those which are observed by witnesses and proved by oral testimony, or facts proved by the production of a thing itself, such as a document. Their determination is essentially a question of fact and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. Insofar as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a lawyer and not a layman, because, for instance, it involves the interpretation of documents, or because the law and facts cannot be separated, the conclusion is one of law on which the appellate court is

60 *Aspis Liberty Life Insurance Public Co Ltd v. Siakatidou* [2011] 1 CLR 1816 [in Greek], *Ocean Corporation Ltd v. Novorossijskybprom Co Ltd* [1996] 1 CLR 1154 [in Greek].

61 *Christou v. Fairways Larnaca Ltd* [2005] 1 CLR 300 [in Greek], *Crown Resorts Ltd v. Kallis* [2011] 1 CLR 1369 [in Greek], *Economou Architects and Mechanics and others v. Demetriou* [2000] 1 CLR 853 [in Greek], *Zertali v. Redundancy Fund* [2003] 1 CLR 178 [in Greek], *Savvides v. SSP Catering Cyprus Ltd and others* [2012] 1 CLR 2096 [in Greek].

62 *Alouet Clothing Manufacturers Ltd v. Athanasiou and another* [1988] 1 CLR 626, *Tryfonos v. Takis Vashiotis Ltd* [1999] 1 CLR 1953 [in Greek].

63 *HjiCostas* [1984] 1 CLR 513, *Stylianides v. Paschalidou* [1985] 1 CLR 49.

64 *Christodoulou v. P.L. Cacoyiannis and Co and another* [2001] 1 CLR 188 [in Greek].

65 *Louis Tourist Agency Ltd* [1988] 1 CLR 454, *A.C.T. Textiles Ltd v. Zodhiatis* [1986] 1 CLR 89, *Kyriakides* [1992] 1 CLR 26 [in Greek], *Loizou v. Stylson Engineering Co Ltd* [1998] 1 CLR 2077 [in Greek].

competent to form an opinion in the same way as the first instance tribunal.[66]

It is therefore permissible to challenge the trial court's evaluation of the evidence before it, insofar as this relates to the construction of the legal principles. On the other hand, grounds of appeal which seek to challenge the findings of fact as such, which were made by the trial court, shall be rejected.[67] It has been held that the question whether the composition of the IDT was a proper one is a point of law.[68] Similarly, the question whether the trial court has properly accepted or rejected the admission of evidence,[69] or whether the trial court's judgment is sufficiently reasoned,[70] are points of law. Moreover, the question of whether the constitutional right of a party to have a fair trial, including the right to be heard, has been safeguarded, is a pure question of law, as it revolves round the application of the law to given facts.[71] However, if the question refers to whether the IDT has correctly exercised its discretion, the point is not a legal one, unless the allegation is that the IDT exceeded the limits of its discretion.[72]

Epilogue

There is little doubt that the right to appeal is substantial for the proper functioning of justice. As indicated by the Network of the Presidents of the Supreme Judicial Courts of the EU in 2015:

> 'quashing judgments that demonstrate clear and evident violations of the laws at the lower level of jurisdiction perhaps can also be seen as a significant public task of the Supreme Court'.[73]

The 2016 Report of the Supreme Court concluded that the current judicial system is hindered by delay, outdated rules and procedures, low level of fees for access to courts, inefficient procedures, insufficient use of information and communication technologies in Court, staff recourses, insufficient number of judges, low level of use of alternative dispute resolution methods, insufficient level of funding and resources allocated to the judicial system. Following these recommendations, a

66 *Aristeidou* [1997] 1 CLR 1264 [in Greek], *Kyros Manufacturing Ltd v. Kleovoulou* [1992] 1 CLR 936 [in Greek], *Argus Stockbrokers Ltd v. Hatzitheodosiou* [2009] 1 CLR 1514 [in Greek].

67 *Antenna Ltd v. Constantinou* [2010] 1 CLR 392 [in Greek], *Galatariotis Telecommunications Ltd v. Vasiliou* [2003] 1 CLR 318 [in Greek], *Panayiotis Kountourides Ltd v. Georgiou* [2003] 1 CLR 980 [in Greek], *Spinneys Cyprus Ltd v. Christou* [2004] 1 CLR 1833 [in Greek].

68 *Demades Auto Supplies Limassol Ltd* [1996] 1 CLR 1139 [in Greek], *Cyprus Workers' Confederation* [1996] 1 CLR 1030 [in Greek].

69 *Eliades* [1994] 1 CLR 184.

70 *Metaxa* [1997] 1 CLR 257 [in Greek].

71 *Kosmos Press Ltd* [1993] 1 CLR 925 [in Greek].

72 *Mintchev v. Georgiou* [2000] 1 CLR 469 [in Greek], Bank of Cyprus [1999] 1 CLR 1010 [in Greek], *Kemal v. Redundancy Fund* [2004] 1 CLR 237 [in Greek].

73 Filtering of Appeals to the Supreme Court, Introductory Report.

number of measures were taken, such as the appointment of additional judges, the establishment of an Administrative Court, the revision of Orders 25 and 30 of the CPR and proceeding with public procurement for the provision of an e-justice system. However, delays continue and there is a growing discontent among judiciary, advocates and the business community that there are no real signs of improvement. On 27 March 2018 the Institute of Public Administration of Ireland officially presented before the Supreme Court their commissioned study for the reform of Cypriot courts so as to address delays.[74]

Whereas, reform is pending and cannot yet be evaluated, it could be argued that structural reform is not sufficient. The current system does not effectively apply a fully-fledged right to appeal in the sense of retrial of the case, rehearing of witnesses and re-evaluation of factual evidence as is the norm in certain jurisdictions. On the contrary, the Supreme Court restricts itself to the determination of legal points and the consideration on whether the decision of the trial court was within the wider limits of the exercise of its discretion. The appellate procedure is an important instrument for promoting justice. And whereas Justice Robert Jackson famously said: 'we are not final because we are infallible; we are infallible because we are final',[75] the fact that the appellate court cannot lead to correctness, this does not diminish the importance of the exercise of authority through proper review procedures of the trial court's decisions. Not only are review procedures an important public function of the appellate courts, but collective deliberation, the experience of justices, the exercise of review of material already evaluated by the trial court and of more targeted arguments by the advocates all lead to better safeguards for quality assurance in the administration of justice.

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'More' Originality for Cypriot Copyright Law According to the CJEU's Case Law

Irini Stamatoudi[1]

Abstract

The adoption of copyright laws at EU level has always been a battle between the two main traditions in copyright: civil law and common law. Cyprus belongs to the latter for which it suffices that a work is not a copy of another work. Originality in the EU has only been partially harmonised. In fact it is provided that photographs, software and databases are protected insofar that they are 'their authors' own intellectual creations'. It was never clear whether this criterion resembled that of the continent or the common law countries. EU member states usually opted to interpret it according to their own tradition. Recently the Court of Justice of the European Union (CJEU) shed light on the matter. This article examines the CJEU's case law in the area and draws conclusions as to how it shapes originality in the EU (in general) and in Cyprus (in particular).

Keywords: copyright, Cypriot copyright law, EU originality, originality, *Infopaq, Murphy, Painer, Football Dataco, BSA, SAS, Ryanair*, Court of Justice of the European Union

Introduction

The adoption of copyright laws at the European Union level has always been a battle between the two main traditions in copyright:[2] civil law and common law. The former corresponds to the countries of Continental Europe, whilst the latter essentially corresponds to England and its former colonial territories, including Cyprus.[3] One of

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2 If one is to take this criterion further by encompassing traditions originating outside Europe, one could argue that there are four traditions concerning originality, including the US criterion on 'minimal degree of creativity' and the Canadian one on 'non-mechanical and non-trivial exercise of skill and judgement'. The former derives from the US Supreme Court's decision in Feist (*Feist Publications, Inc. v. Rural Telephone Service Co*, 499 US 340 (1991) whilst the latter is from the CCH decision (CCH Canadian Ltd v. Law Society of Upper Can (2004) 1 SCR 339), as referred to in E. F. Judge and D. Gervais, (2009) 'Of silos and constellations: comparing notions of originality in copyright law', Cardozo Arts & Ent L J Vol. 27 (2009), 375 and 377–378. According to my view, both the US and the Canadian criteria of originality are variations of the common law tradition and may be considered part of it.

3 'The common law tradition emerged in England during the Middle Ages and was applied within British colonies across continents. The civil law tradition developed in continental Europe at the same time and was applied in the colonies of European imperial powers such as Spain and Portugal. Civil law was also adopted in the nineteenth and twentieth centuries by countries formerly possessing distinctive legal traditions, such as Russia and Japan, that sought to reform their legal systems in

the dividing lines between the two traditions in the area of copyright is the criterion of originality. The civil law tradition runs a strict originality criterion, usually placing the emphasis on the work having the author's personal imprint (or reflecting his personality). For the common law tradition, it suffices that a work is not a copy of another work or presupposes 'skill and labour'.

Originality in the EU has only been partially harmonised. This is done in relation to photographs,[4] software[5] and databases.[6] In all three cases the criterion provided was that a work should be its 'author's own intellectual creation'.

The EU criterion was said to be a compromise between the civil law and the common law originality criteria.[7] In this sense, it raised the 'skill and labour' criterion to meet the requirements of the EU (i.e., the 'author's own intellectual creation'), whilst it lowered the continental one to meet the needs of technology works, i.e., photographs, software and databases.[8] There was also the view that the EU criterion

order to gain economic and political power comparable to that of Western European nation-states'. The Robbins Collection, University of California at Berkeley, avialable at https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html.

4 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (2006) OJ 2006 L 372/12, art. 6. See G. Minero, 'The Term Directive'. In *EU Copyright Law*, ed. I. Stamatoudi and P. Torremans (Cheltenham, UK: Edward Elgar Publishing, 2014), 248.

5 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (1991) OJ 1991 L 122/42, art. 1(3). See M-Chr. Janssens, 'The Software Directive'. In *EU Copyright Law*, 89.

6 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (1996) OJ 1996 L 77/20, art. 3(1). See E. Derclaye, (2014) 'The Database Directive'. *EU Copyright Law*, Vol. 27 (2014), 298.

7 See also I. Stamatoudi 'Article 2, §§ 27'. In *Commentary on the Greek Copyright Act,* ed. L. Kotsiris and I. Stamatoudi, (Athens: Sakkoulas, 2009) 36, where it is argued that this criterion is a compromise between the common law and civil law traditions. See also A. Lucas-Schloetter, 'Is there a concept of European copyright law?', and Janssens, 'The software directive' and Minero, 'The term directive', all in *EU Copyright Law*, 13, 101, 278, 308–309, respectively. See also C. Seville, *EU intellectual property law and policy* (Cheltenham, UK: Edward Elgar, 2009) 28, which argues that the EU criterion has an inclination towards the civil law originality criterion.

8 See also Stamatoudi, 'Article 2, §§ 27', 36. There is the view that the EU criterion comes closer to the continental one, as this is reflected in the Berne Convention and later adopted by the TRIPs Agreement (see article 9(1) TRIPs Agreement, which refers to articles 1–21 of the Berne Convention). See D.J. Gervais, 'The compatibility of the skill and labour standard with the Berne Convention and the TRIPs Agreement', *European Intellectual Property Review* (EIPR), Vol. 26 (2004): 75, 79. Article 2(5) of the Berne Convention provides that 'Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections' (emphasis added). Yet, one has to observe that the states' parties to the Convention operate different originality criteria. It should also be taken into account that the same author provides in an earlier work that copyright subject matter should be applied in accordance with the law of the country where protection is claimed (D. Gervais, *The TRIPs Agreement. Drafting history and analysis,* 2nd ed. (London: Sweet & Maxwell, 2003), 131, as

was introduced to reflect the needs of more functional and utilitarian works closely linked to technology rather than classic works of art, science or literature.

The obscurity of the notion of originality – relating both to its philosophical foundations[9] and to the vagueness of the concept of 'author's own intellectual creation', which was to some extent a convergence of existing (national) elements resulting in an entirely new concept – allowed a considerable degree of flexibility to Member States. To this the view (no longer valid) that, if a concept is not defined in EU law, it is for the Member States to define it according to their national law,[10] should be added. On top of it, many countries ended up operating two separate originality criteria: one for copyright works in general and another for photographs, software and databases.[11]

Recently the Court of Justice of the European Union (CJEU) ended the discussion on originality. It came to the conclusion that there is only one originality criterion for all types of works, which should be interpreted uniformly throughout the EU by all member states. The content of the EU originality criterion was also defined to a certain extent.

This article examines the CJEU's case law in the area and draws conclusions as to how this affects originality in the EU (in general) and in Cyprus (in particular).

The CJEU's Case Law

Uniform Interpretation of 'Originality' for All Types of Works: The Infopaq Case

The *Infopaq* case[12] is about a firm, which, on its customers' request and on the basis of agreed subject criteria, draws up summaries of articles from Danish newspapers by means of a 'data capture process'. These summaries are then e-mailed to its customers. Danske Dagblades Forening (DDF) is an association of Danish daily newspaper

these are referred to in E. Rosati, *Originality in EU Copyright* (Cheltenham, UK: Edward Elgar, 2013), 62–63. See also K. Garnett, G. Davies and G. Harbottle, *Copinger and Skone James on copyright*. 16th ed., (London: Sweet & Maxwell, 2010), 1476, who refer to B. Czarnota and R. J. Hart, *Legal Protection of Computer Programs in Europe: A Guide to the EC Directive* (London: Buttersworth, 1991), 44, who argue that the EU originality criterion was intended to adopt the UK originality criterion.

9 See, for example, B. Vermazen, 'The aesthetic value of originality', *Midwest Studies in Philosophy* (MSIP), Vol. 16 (2010), 266; B. Gaut, 'The philosophy of creativity', *Philosophy Compass*, Vol. 12 (2010), 1034; W. Niu and R. J. Sternberg, (2006) 'The philosophical roots of Western and Eastern conceptions of creativity', *Journal of Theoretical and Philosophical Psychology*, Vol. 26 (2006), 18; J. Hoaglund, 'Originality and aesthetic value', *British Journal of Aesthetics*, Vol. 16 (1976), 46.

10 'Staff Working Paper on the Review of the EC legal framework in the field of copyright and related rights', 19 July 2004, SEC 995, 13–14.

11 Stamatoudi, 'Article 2, §§ 27', 38–39.

12 Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* (2009), judgment of 16 July 2009 ECR I-656.

publishers, whose function is, *inter alia*, to assist its members with copyright issues. DDF argued that the rightholders' consent was required for Infopaq to conduct these activities legally. Infopaq disputed DDF's claim and applied to the competent courts. The case was brought before the Danish Supreme Court (Højesteret), which stayed the proceedings and referred questions to the CJEU. The questions related to the interpretation of the Information Society Directive, particularly to the concept of reproduction.

In order for the CJEU to reply to the questions referred to it, it also had to deal with the extent to which a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and the five subsequent words (i.e., a text extract of 11 words), is protected by copyright.[13]

The Court stated that the author's right to authorise or prohibit reproduction applies to a 'work'. According to the Berne Convention (particularly Articles 2(5) and (8)), the protection of certain subject matters as artistic or literary works presupposes that they are 'intellectual creations'. EU law provides that works, such as computer programs, databases or photographs, are protected by copyright only if they are original in the sense that they are their 'author's own intellectual creation'. That means that copyright protection applies only in relation to subject matter that is original in the sense that it is its author's own intellectual creation.

The Court also stated that the protection extends to the parts of a work, since, as such, they share the originality of the whole work and contain elements that are the expression of the intellectual creation of its author.[14] With regard to newspaper articles, their author's own intellectual creation is evidenced from the form, the manner in which the subject is presented and the linguistic expression.

Words as such are not protected (since they do not constitute elements covered by protection nor are they the intellectual creation of the author who employs them).[15] It is only through the choice, sequence and combination of these words that the author

13 Especially regarding questions 1 and 13, referred by the Danish Court to the CJEU.

14 See also para 22 of Case C-355/12 *Nintendo* (2014), judgment of 23 January 2014, (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201401C0018#201401C0018), where it is provided that [a]s regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work (see Infopaq International, paragraph 38). In relation to videogames the Court went on to provide in para 23 [a]s is apparent from the order for reference, videogames, such as those at issue in the main proceedings, constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29.

15 *Infopaq* [45]–[46].

may express his creativity in an original manner and achieve a result, an intellectual creation. Certain isolated sentences, or even certain parts of sentences in a text, may be suitable for conveying to the reader the originality of a publication, such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences may therefore be protected.[16]

In the light of the above, even an extract of 11 consecutive words is copyright protected insofar as it contains an element of the work that, as such, expresses the author's own intellectual creation. Yet, this determination is for the national court to make.

On the basis of the above, the following conclusions have been reached in *Infopaq*:

(a) The EU criterion covers all works and not just photographs, software and databases. All works, irrespective of their nature or particular characteristics, should be assessed in the same manner in terms of originality.

(b) The EU originality criterion is a qualitative rather than a quantitative one in the sense that even small extracts of works (in the case at issue, literary works) may qualify for copyright protection as long as they contain elements, which are the expression of the intellectual creation of the author of the work. So the criterion is not how small a work is but rather whether it is original (i.e., whether it constitutes its author's own intellectual creation). A de minimis assessment cannot be applied.[17]

(c) The sole criterion for copyright protection is originality, excluding in essence any other criterion (e.g. classification of works, fixation and so on).

(d) The EU originality criterion should be construed in a uniform and autonomous manner throughout the EU, preventing Member States from using their national legal systems for defining it.[18]

16 *Infopaq* [47].

17 In other words, a work is de minimis and therefore not infringing. See J. Griffiths, 'Infopaq, BSA and the "Europeanisation" of United Kingdom copyright law', *Media & Arts Law Review*, Vol. 16 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777027. See also C. Moran, (2011) 'How much is too much? Copyright protection of short portions of text in the United States and European Union after Infopaq International A/S v. Danske Dagblades', Washington J L Tech & Arts Vol. 6, No. 3 (2011), 248, at 258.

18 See also Case C-5/08 *Infopaq International* (2009) ECR I6569 [27]; Case C34/10 *Brüstle* (2011) ECR I-09821 [25]; and Case C-510/10 *DR and TV2 Danmark* (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201204C0076#201204C0076) [33], as referred to in Case C-128/11 *UsedSoft GmbH v. Oracle International Corp.* [39] (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201207C0127). See also, Case C-357/98 *Yiadom* (2000) ECR I9265 [26], Case C-245/00 *SENA* (2003) ECR I1251 [23] and Case C-306/05 *SGAE* (2006) ECR I-11519 [31].

'Author's Own Intellectual Creation' means Creative Choices and a Personal Touch: The Murphy, Painer and Football Dataco Cases

Murphy

The issue of originality was further clarified in a number of judgments that followed *Infopaq*. One of them was *Murphy*.[19]

Murphy concerned the extent to which a system of licences for the retransmission of football matches, which grants broadcasters territorial exclusivity per Member State and which prohibits television viewers from watching these broadcasts with a decoder card in other Member States, is contrary to EU law. The issue of originality was dealt with in the context of the Court considering whether sporting events, which formed the object of the retransmission, were protected by copyright.

The Court provided that Premier League matches themselves cannot be considered as works because they cannot be original in the sense that they are not their author's own intellectual creation.[20] It also stated that sporting events could not be regarded as intellectual creations because they are not works within the meaning of the Information Society Directive. That applies to football matches, which are subject to the rules of the game, leaving no room for creative freedom for the purposes of copyright. According to the Court, either copyright or any other intellectual property right cannot protect sporting events.

With regard to television broadcasts the Court stated that two categories of persons could assert intellectual property rights: the authors of the works contained in the broadcast and the broadcasters.[21] Works contained in the broadcast include the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, and various graphics.[22] Parts of a work may enjoy copyright protection, provided that they contain elements that are the expression of the intellectual creation of the author of the work.[23]

The Court also stated that sporting events have a unique and original character, which can transform them into subject-matter that is worthy of protection comparable to the protection of works. In this light, Member States may grant them protection, where appropriate,[24] by either putting in place specific national legislation or by recognising, in compliance with European Union law, protection conferred upon

19 Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Karen Murphy*, judgment of 4 October 2011, (2011) ECR I-9083.
20 *Murphy* [96–99].
21 *Murphy* [148]
22 *Murphy* [149].
23 *Infopaq* Judgment [39] and ***Murphy*** [156].
24 *Murphy* [100].

those events by agreements concluded between the persons having the right to make the audiovisual content of the events available to the public and the persons who wish to broadcast that content to the public of their choice.

According to Murphy, there is subject matter that falls outside the scope of protection of copyright by reason of the fact that it does not constitute a work. This applies to sporting events, including football games. Sporting events are not works in the sense that they are not intellectual creations. Intellectual creations require creative freedom whilst sporting events are dictated by the rules of the game, leaving no room for creative freedom. Overall a new parameter (which is not mentioned in EU law) is brought into assessing originality; that of the author's creative freedom.

Painer

Almost two years later, the *Painer*[25] judgment shed more light with respect to originality in photographs.

Ms Painer is a freelance photographer specialising in images of children in nurseries and day homes. In the course of her work, she took photographs of Natascha K., designing the background, deciding the position and facial expression, and producing and developing those photographs. The photographs indicated her name and business address. Ms Painer sold those photographs but without conferring on third parties any rights over them and without consenting to their publication. After Natascha K., then aged 10, was abducted in 1998, the competent security authorities launched a search appeal in which the contested photographs were used. The defendants were newspaper and magazine publishers in Austria and Germany. When Natascha K. managed to escape from her abductor in 2006 and, prior to her first public appearance, the defendants published Ms Painer's photographs in their newspapers, magazines and websites without indicating the name of the photographer or a name other than Ms Painer's as the photographer. Some of them also published a 'photo-fit'– an age-progression portrait, created by computer from Ms Painer's photographs, which, since there was no recent photograph of Natascha K. until her first public appearance, represented her supposed image.

Ms Painer turned to the Austrian courts to cease the reproduction and/or distribution, without her consent and without indicating her as author, of the photographs and the photo-fit. Regarding the photo-fit, the Austrian court (Oberster Gerichtshof) held, applying the relevant national rules, that the defendants in the main proceedings did not need Ms Painer's consent to publish the contested photo-fit. In that court's view, Ms Painer's photograph, which had been used as a template for the photo-fit, was, admittedly, a photographic work protected by copyright. However, the

25 Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH and others* (2013), judgment of 7 March 2013 (2011) ECR I-12533.

production and publication of the contested photo-fit was not an adaptation for which the consent of Ms Painer, as author of the photographic work, was needed, but a free use, which did not require her consent. The referring court (Handelsgericht Wien) considered that the question whether it was an adaptation or a free use depends on the creative effort in the template. According to the Court, the greater the creative effort in the template, the less conceivable is a free use. In the case of portrait photographs like the ones at issue, the creator enjoys only a small degree of individual formative freedom. For that reason, the copyright protection of that photograph is accordingly narrow. In addition, the photo-fit based on the template is a new and autonomous work, which is protected by copyright. In this light, the Austrian court stayed proceedings and decided to refer a number of questions to CJEU, including whether photographic works and/or photographs, particularly portrait photos, are afforded 'weaker' copyright protection or no copyright protection at all against adaptations because of their 'realistic image' and the minor degree of formative freedom allowed by such photographs.[26] To put it otherwise, whether article 6 of the Term Directive[27] must be interpreted as meaning that a portrait photograph can, under that provision, be protected by copyright and, if so, whether, because of the allegedly too minor degree of creative freedom such photographs can offer, that protection is inferior to that enjoyed by other works, particularly photographic works, according to article 2(a) of the Information Society Directive.

The Court referred to *Infopaq* and to the fact that copyright applies only in relation to a subject-matter, such as a photograph (including realistic photographs such as portrait photographs), which is original in the sense that it is its author's own intellectual creation.

In this case the Court drew an *a contrario* argument from Murphy.[28] A work is original if the author is able to express his creative abilities in the production of the work by making free and creative choices. With a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production. In the preparation phase, he can choose the background, the subject's pose and the lighting. When taking the photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the final image, the photographer may

26 This forms question 4, which was addressed on the basis of article 1(1) of the Information Society Directive in conjunction with articles 5(5) and 12 of the Berne Convention, particularly in the light of Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 17 of the Charter of Fundamental Rights of the European Union.

27 Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (1993), OJ L 290/9/24.11.1993.

28 Joined Cases C-403/08 and C-429/08 F*ootball Association Premier League and Others* (2011) (2011) ECR I-09083 [98].

choose from a variety of developing techniques or use computer software. By making these choices the photographer can stamp the work created with his 'personal touch'. In this perspective, the freedom available to the author/photographer to exercise his creative abilities will not necessarily be minor or even non-existent. Yet, it is for the national court to determine whether a particular photograph is the author's intellectual creation reflecting his personality and expressing his free and creative choices in the production of that photograph.

With regard to article 2(a) and the issue of whether the protection afforded to portrait photographs is inferior to that enjoyed by other works, particularly photographic works, the Court held that there is nothing in the Information Society Directive or in any other directive applicable in this field that supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works. In that sense, the protection of a portrait photograph cannot be inferior to that enjoyed by other works, including other photographic works.[29]

Painer develops further the analysis on the EU criterion of originality. New elements come into play and existing ones are expanded. According to *Painer*, a work is original if it is the author's own intellectual creation. That means that the work should reflect the author's personality (in the sense that the author stamps the work with his 'personal touch') and expresses the author's free and creative choices in its production (i.e., creation).

Painer also states that there are no varying levels of protection (i.e., inferior protection) of works depending on the degree of creative freedom for their production. It thus confirms that there is only one criterion – originality; and it is the same for all types of works.

Interestingly, the analysis of originality in this case is akin to the one followed in the continent, making references to the author's personality or personal touch. Taking this into account, one may argue that the EU originality criterion comes closer to the continental one than the common law one; this issue was considered under *Football Dataco.*

Football Dataco

Football Dataco[30] and the other applicants in this case drew up annual fixture lists of the football leagues in England and Scotland on the basis of particular rules and procedures. The process of preparing the football fixture lists was not purely

29 *Painer* [85]–[99]. See also the dictum (2) of the judgment.

30 Case C-604/10, *Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others* (2012), Judgment of 1 March 2012 (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201203C0031).

mechanistic or deterministic. It required very significant skill and labour to satisfy the multitude of competing requirements while respecting the applicable rules as far as possible. In effect, the lists were not subject to rigid criteria, as is the case with the compilation of a telephone directory. They required skill and judgment at each stage, particularly where the computer program found no solution for a given set of constraints. In fact, the process was only partially computerised, leaving room for judgment and discretion.

The applicants claimed (amongst other things) that they were entitled to copyright and *sui generis* right protection under the Database Directive for their fixture lists.[31] The defendants contested their allegations, claiming that *they* were entitled to use the lists in the conduct of their business without having to pay financial compensation. The Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and refer to the CJEU the following issues: an interpretation of Article 3(1) of the Database Directive, particularly,

(a) whether the intellectual effort and skill of creating data carries any weight in relation to the application of this provision;

(b) whether the 'selection or arrangement' of the contents, within the meaning of that provision, includes adding important significance to a pre-existing item of data; and

(c) whether the notion of 'author's own intellectual creation' within the meaning of that provision requires more than significant labour and skill from the author and, if so, what that additional requirement is.

It also asked whether the Directive prevents Member States from introducing national rights in the nature of copyright in databases other than those provided for by it.

In an earlier decision, the CJEU[32] judged that a football league fixture list constitutes a 'database' (within the meaning of the Database Directive). It held that the combination of the date, the time and the identity of the two teams playing in both home and away matches has autonomous informative value, which renders them 'independent materials' within the meaning of Article 1(2) and that the arrangement, in the form of a fixture list, of the dates, times and names of teams in the various fixtures of a football league meets the conditions set out in this article as to the systematic or methodical arrangement and individual accessibility of the data contained in the database.[33]

31 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (1996), OJ L 77/20/27.3.1996.

32 Case C444/02 *Fixtures Marketing* (2004) ECR I10549 [33]–[36].

33 Fixtures Marketing [26].

In this case, the Court stated that copyright and the sui generis right form two independent rights whose object and conditions of application are different. The fact that a database does not satisfy the conditions of eligibility for protection under the sui generis right[34] does not automatically mean that it is also not eligible for copyright protection.[35] In order for one to assess copyrightability, one has to see whether the selection or arrangement of the database's contents constitute its author's own intellectual creation. It is the structure of the database that is assessed, not its 'contents' or the elements constituting its contents. This also conforms with Article 10(2) of the TRIPs Agreement and Article 5 of the WIPO Copyright Treaty, according to which copyright protection is afforded to compilations of data, which, by reason of the selection or arrangement of their contents, constitute intellectual creations. That protection neither extends to the contents/data nor prejudices any copyright subsisting in them. In this regard, it does not also extend to the creation of those contents. Therefore, the Court concluded that *any intellectual effort and skill of creating data contained in the database are not relevant in order to assess the eligibility of that database for copyright protection.*[36]

The Court also referred to Recital 16[37] of the Database Directive and to relevant case-law[38] to substantiate its point, namely that the originality criterion refers to the notion of the 'author's own intellectual creation' and is satisfied when, through the selection or arrangement of the data, which the database contains, its author *expresses his creative ability in an original manner by making free and creative choices*[39] and thus *stamps his 'personal touch'*.[40] By contrast, that criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints, which leave no

34 At this point the Court referred to Article 7 of Directive 96/9 and to cases (in relation to fixture lists) C-46/02 *Fixtures Marketing* (2004) ECR I10365 [43)–[47], C-338/02 *Fixtures Marketing* (2004) ECR I10497 [32]–[36] and C-444/02 *Fixtures Marketing* (2004) ECR I10549 [48]–[52].

35 Under article 3 of the Database Directive.

36 *Fixtures Marketing* [33], emphasis added. In [35] the Court stated, [t]hat analysis is confirmed by the purpose of that directive. As is apparent from recitals 9, 10 and 12 of that directive, its purpose is to stimulate the creation of data storage and processing systems in order to contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity (see Case C-46/02 *Fixtures Marketing,* cited above [33]; Case C-203/02 *The British Horseracing Board and Others* (2004] ECR I10415 [30]; Case C-338/02 *Fixtures Marketing* [23]; and Case C444/02 *Fixtures Marketing* [39], cited above and not to protect the creation of materials capable of being collected in a database.

37 Recital 16: 'Whereas no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied'.

38 Case C5/08 *Infopaq International* (2009) ECR I6569 [35], [37], [38], C-393/09 *Bezpečnostní softwarová asociace* (2010) ECR I13971 [45], Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* (2011) ECR I9083 [97] and C-145/10 *Painer* (2011) ECR I12533 [87].

39 Infopaq [45], Bezpečnostní softwarová asociace [50], Painer [89]. Emphasis added.

40 *Painer* [92]. Emphasis added.

room for creative freedom.[41] No criteria other than originality apply to determine the eligibility of a database for copyright protection.[42] In this perspective, it is irrelevant, for assessing the eligibility of a database for copyright protection, whether or not the selection or arrangement of the data (contained in it) includes the addition of important significance to that data.

The issue of significant skill and labour and whether it suffices for the eligibility of a database for copyright protection was also considered. According to the Court, the author's significant skill and labour cannot as such justify copyright protection in the sense that they do not express any originality in the selection or arrangement of the data contained in the database. If the procedures for creating the fixture lists are not supplemented by elements reflecting originality in the selection or arrangement of the data contained in those lists, these lists are not eligible for copyright protection. It is, of course, for the national court to determine whether the databases at issue (i.e., the fixture lists) are original.[43] In effect, the Court linked (once again) originality to the author's free and creative choices and to the stamping of his personal touch on the work.

With regard to whether the Database Directive must be interpreted as precluding national legislation that grants databases (as defined in the directive) copyright protection under conditions which are different to those set out in the directive, the Court pointed to recitals 1 to 4. According to them, the directive aims to remove the differences that existed between national laws on the legal protection of databases, particularly regarding the scope and conditions of copyright protection, and which adversely affected the functioning of the internal market, the free movement of goods or services within the European Union and the development of an information market within the European Union. In that context (and as it also derives from recital 60 and article 3) the directive carries out a 'harmonization of the criteria for determining whether a database is to be protected by copyright'.[44] In that sense, Member States are precluded from enacting legislation conferring on databases copyright protection under conditions that are different from those set out in the directive.

Yet, in *Ryanair*,[45] a few years later, the same Court stated that the Directive is not

41 See, by analogy, *Bezpečnostní softwarová* asociace [48], [49] and Football Association Premier League and Others [98].

42 Database Directive, art. 3(1), rec. 16.

43 See [46] of the judgment according to which, the intellectual effort and skill of creating that data are not relevant in order to assess the eligibility of that database for protection by that right; it is irrelevant, for that purpose, whether or not the selection or arrangement of that data includes the addition of important significance to that data, and the significant labour and skill required for setting up that database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains.

44 BSA [48], [49].

45 Case C-30/14, *Ryanair Ltd v. PR Aviation BV* (2015), Judgment of 15 January 2015

applicable to a database, which is not protected either by copyright or by the *sui generis* right. Articles 6(1), 8 and 15 do not preclude the author of such a database from laying down contractual limitations on its use by third parties, without prejudice to the applicable national law. The issue of originality was not examined in that case because it was taken for granted by the referring court that Ryanair's dataset, which contained flight and other relevant data, did not qualify for either copyright or *sui generis* protection. Thus, although Member States cannot extend protection for databases – especially those not covered by the Database Directive – by copyright or quasi-copyright means, national contract law could work in some instances as a powerful alternative.

Summing up the findings in *Football Dataco* regarding the EU originality criterion, the following can be observed. Firstly, the findings of previous case law have been confirmed. Secondly, the Court has focused strictly on linking the assessment of a database's originality to its structure (i.e., the selection and arrangement of its contents) leaving out any other aspect and especially any aspect relating to the contents/data of the database. Thirdly, the Court precludes the application of the skill and labour criterion, even if skill and labour have been significant. According to the Court, the author's significant skill and labour cannot as such justify copyright protection in the sense that they do not express any originality in the selection or arrangement of the data contained in the database. Originality exists if the author of the work (in the case at issue, the database) expresses his creative ability in an original manner by making free and creative choices and by stamping his 'personal touch' on the work. Member States cannot provide any other copyright or quasi-copyright protection for databases.

Originality in Computer Programs: The BSA and SAS Cases

The CJEU dealt with the issue of originality in two cases concerning computer programs. These cases confirm the Court's findings in its earlier case law and elaborate on them with regard to software.

BSA

In 2001, BSA,[46] as an association, applied to the Czech Ministry of Culture for authorisation for the collective administration of copyrights to computer programs. That application was refused, and legal actions ensued. The case at some stage reached the Court of Appeal (Nejvyšší správní soud). BSA submitted – amongst other things – that the definition of a computer program also covers the user interface. According to BSA, a computer program can be perceived at the level of the source or object code

(published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201501C0010#201501C0010).

46 Case C-393/09, Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury (2010) ECR I-13971, Judgment of 22 December 2010, (2010) ECR I-13971 .

and of the method of communication (communication interface). It also argued that a computer program is used when it is shown in a display on user screens and that, consequently, such use must be protected by copyright. The Court of Appeal decided to stay the proceedings and refer to the CJEU the following issues: (1) whether the Software Directive (article 1(2)) should be interpreted as meaning that, for the purposes of copyright protection of a computer program as a work under that directive, the phrase 'the expression in any form of a computer program' also includes the graphic user interface of the computer program or part thereof, and (2) in case the answer is in the affirmative, whether television broadcasting, whereby the public is enabled to have sensory perception of the graphic user interface (GUI) of a computer program or part thereof, albeit without the possibility of actively exercising control over that program, constitutes making a work or part thereof available to the public within the meaning of Article 3(1) of the Information Society Directive. For the purposes of this chapter, we shall focus on the first issue alone.

The Court stated that, given that the Software Directive does not define the notion of 'expression in any form of a computer program', such notion must be defined according to the letter and context of Article 1(2), where this notion is provided, and in the light of the overall objectives of that directive as well as international law.[47] It also pointed to recital 7, which provides that the term 'computer program' includes programs in any form, including those that are incorporated into hardware. Reference was also made to Article 10(1) of the TRIPs Agreement, according to which computer programs, whether expressed in source code or in object code, are protected as literary works pursuant to the Berne Convention.

Thus the Directive protects the expression in any form of a computer program, which permits reproduction in different computer languages, such as the source code and the object code. The term 'computer program' also includes preparatory design work leading to the development of a computer program, provided that the nature of the preparatory work is such that a computer program can result from it at a later stage, i.e., is capable of leading to the reproduction or the subsequent creation of such a program.[48] Overall, the Court stated that any form of expression of a computer program must be protected from the moment when its reproduction would engender the reproduction of the computer program itself, thus enabling the computer to perform its task.

Interfaces constitute parts of a computer program, which provide for interconnection and interaction of elements of software and hardware with other software and hardware and with users in all the ways in which they are intended to

47 *BSA* [30]. The Court also referred by analogy to *Infopaq* [32].
48 See recital 7.

function.[49] In particular, the graphic user interface is an interaction interface that enables communication between the computer program and the user. The graphic user interface does not enable the reproduction of that computer program, but merely constitutes one element of that program by means of which users make use of the features of that program. In this perspective, the interface does not constitute a form of expression of a computer program and consequently cannot be protected by copyright.

The Court went on to say that, although the graphic user interface is not protected as a computer program, it may be protected as a work if it is its author's own intellectual creation. This is for the national court to determine. In the course of such determination, the national court should take into account, *inter alia*, the specific arrangement or configuration of all the components that form part of the graphic user interface. Components dictated by their technical function do not permit the author to express his creativity in an original manner and achieve a result that is an intellectual creation of that author. In that sense, components are not protected by copyright because the different methods of implementing an idea are so limited that the idea and the expression become indissociable.

BSA seems to bring into the definition of a computer program a new element: that of the capability of the subject matter at issue to lead to the reproduction or the subsequent creation of a computer program. This condition is, however, provided in the Directive in relation to the preparatory design work of a computer program and not in relation to the 'expression in any form of a computer program'.[50] It seems that the Court in this decision has extended the prerequisite of this 'capability' to cover each and every aspect of a computer program. One may wonder how it is possible for aspects of a work (i.e., a computer program) to have as a requirement, in order to be considered parts of it, being capable of leading to its creation and enabling the computer to perform its task. Although this is a viable argument in relation to preparatory design work, it sounds like a circuitous argument for parts of the work itself. If the reasoning of the Court is followed, the parts of a work qualify for copyright protection not only if they are original, but if they also satisfy the additional criterion of being capable of leading to the program's creation and enable its function. It seems that this additional requirement (concerning software only) does not necessarily follow from the letter (or the context) of the Directive.

Effectively, the Court stated that, although GUIs are not protected as computer programs, they may be protected as works if they are their author's own intellectual creation. The Court by its ruling provides that GUIs may be works but not a particular type of work, i.e., computer programs. By differentiating between computer

49 The Court referred to recitals 10 and 11.
50 See recital 7.

programs and other works, the Court places on computer programs an additional (to the originality) requirement for their protection: the ability to perform their task. In that sense the Court seems to imply that originality (or else creativity) is not the sole criterion for protection as it indicated in other cases. One, of course, may argue that the Court's analysis falls under protectable (or qualifying) subject-matter and not under originality. If, however, we follow the premise that what is creative is protectable (i.e., in the sense that a work is an intellectual creation), an exercise of prior classification (either with regard to whether something is a work or not or with regard to what type of a work it is) may not be justified.

The Court also seems to make a distinction between the idea and the expression. Components dictated by their technical function come closer to an idea rather than an expression. According to the Court, when the different methods of implementing an idea are so limited, then the idea and the expression become indissociable. In these cases, no creativity exists and therefore no qualifying subject matter for copyright protection.

SAS

SAS[51] also deals with software. The applicant, SAS Institute, is a developer of analytical software. It has developed an integrated set of computer programs that enable users to carry out a wide range of data processing and analysis tasks, in particular, statistical analysis ('the SAS System'). The core component of the SAS System, called 'Base SAS', enables users to write and run their own application programs in order to adapt the SAS System to work with their data (Scripts). Such Scripts are written in a language that is specific to the SAS System ('the SAS Language'). SAS's customers wrote application programs using the SAS Language. A customer wanting to continue using these application programs (or create new ones) in SAS Language had to continue acquiring a licence by SAS to use its components. If the customer wished to change software suppliers, he had to re-write the applications in a different language. WPL realised that there was a market demand for alternative software capable of executing application programs written in the SAS Language and produced the 'World Programming System'. This software tried to emulate the SAS components as closely as possible and, with a few minor exceptions, attempted to ensure that the same input would produce the same output. This would enable SAS System users to run the scripts on the 'World Programming System'. The High Court of Justice of England and Wales (Chancery Division), which referred the case to CJEU, did not establish that WPL had access to the source code of the SAS components, copied any of the text

51 Case C-406/10, *SAS Institute Inc. v. World Programming Ltd* (2012), Judgment of 2 May 2012 (published in the electronic Reports of Cases: https://curia.europa.eu/jcms/jcms/P_106320/en/?rec=RG&jur=C&anchor=201205C0081#201205C0081).

of that source code or copied any of the structural design of the source code. SAS Institute brought an action before the referring court claiming that WPL conducted a number of infringements. The issues relevant to our analysis are whether Article 1(2) of the Software Directive[52] should be interpreted as meaning that the functionality of a computer program and the programming language and the format of data files used in a computer program to exploit certain functions constitute a form of expression of that program and may, as such, be protected by copyright in computer programs for the purposes of that directive.

According to Article 1(1), computer programs are protected by copyright as literary works within the meaning of the Berne Convention. Article 1(2) extends that protection to the expression in any form of a computer program. The ideas and principles, which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright.

According to recital 11, in accordance with the principle that only the expression of a computer program is protected by copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected by copyright. According to the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is protected by copyright.

The Court stressed the principle that according to copyright law it is only the *expression* rather than the ***idea*** that is protected. In this respect, it stated Article 2 of the WIPO Copyright Treaty and Article 9(2) of the TRIPs Agreement, which provide that copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. According to Article 10(1) of the TRIPs Agreement, computer programs, whether in source or object code, are to be protected as literary works under the Berne Convention.

The Court also referred to the *BSA* case, in which the Court interpreted Article 1(2) of the Software Directive as meaning that the object of the protection conferred by that directive is the expression in any form of a computer program, such as the source code and the object code, which permits reproduction in different computer languages. According to recital 7, the term 'computer program' also includes preparatory design work leading to the development of a computer program, provided that the nature of the preparatory work is such that a computer program can result from it at a later stage. According to the Court, the object of protection of the Directive includes the forms of expression of a computer program and the preparatory design work capable of leading, respectively, to the reproduction or the subsequent creation of

52 Council Directive 91/250/EEC on the legal protection of computer programs (1991) OJ L 122/42/17.05.1991.

such a program.[53] It thus concluded that the source code and the object code of a computer program are forms of expression thereof that, consequently, are entitled to be protected by copyright as computer programs. Yet, it held that a graphic user interface does not enable the reproduction of the computer program, but merely constitutes one element of that program by means of which users make use of the features of that program.[54] Overall, neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute forms of expression of that program for the purposes of the Directive. The programming language and the format of data files used in a computer program to interpret and execute application programs written by users and to read and write data in a specific format of data files, (these) are elements of that program by means of which users exploit certain of its functions.

Interestingly, the Court, in paragraph 45 of its judgment, points out that there is a possibility that the SAS language and the format of SAS Institute's data files are protected, as works, by copyright, if they are their author's own intellectual creation.[55]

Another issue referred to the Court was whether Article 2(a) must be interpreted as meaning that the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright constitutes an infringement of that right in the latter manual.

The Court referred to *Infopaq* and to the fact that the various parts of a work enjoy protection provided that they contain some of the elements that are the expression of the intellectual creation of the author of the work.[56] The Court held that in the case at issue the keywords, syntax, commands and combinations of commands, options, defaults and iterations consist of words, figures or mathematical concepts that, considered in isolation, are not, as such, an intellectual creation of the author of the computer program. It is only through the choice, sequence and combination of those words, figures or mathematical concepts that the author may express his creativity in an original manner and achieve a result, namely the user manual for the computer program, which is an intellectual creation. This is a determination to be made by the national court.

53 The Court referred to *BSA* [37].
54 *BSA* [34], [41].
55 *BSA* [44]–[46].
56 *Infopaq* [39].

The Notion of 'Work': The Levola Case

In a recent decision[57] the CJEU has to decide on whether the taste of cheese is copyright protected. This case gave rise to issues such as whether subject matter such as taste and smell come within the ambit of copyright works. Up to that moment there had been decisions in some Member States that accepted the protectability of smells.[58]

On the basis of the CJEU's case law, it was clear that there was one only prerequisite in order for a work to be copyright protected, i.e. to be an original expression of the mind. Originality was defined as being its 'author's own intellectual creation'. The understanding was that work is anything within the domain of literature, science and art as this is provided in the Berne Convention,[59] the WIPO Copyright Treaty,[60] and the TRIPs Agreement.[61] The Information Society Directive makes no express reference on the matter but it is clear that the EU needs to respect the international treaties that have been ratified by all its Member States. The Court came to the conclusion that a taste of a food product does not qualify as a work because

> 'it cannot [...] be pinned down with precision and objectivity. Unlike, for example, a literary, pictorial, cinematographic or musical work, which is a precise and objective form of expression, the taste of a food product will be identified essentially on the basis of taste sensations and experiences, which are subjective and variable since they depend, inter alia, on factors particular to the person tasting the product concerned, such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed'.[62]

The Court also added that

> 'it is not possible in the current state of scientific development to achieve by technical means a precise and objective identification of the taste of a food product which enables it to be distinguished from the taste of other products of the same kind'.[63]

In other words the Court came to the conclusion[64] that only visual and aural works can be protected as the rest do not present precision and objectivity. The Court also noted that this does not presuppose permanence.[65] Although one could argue that

57 C310/17, *Levola Hengelo BV v Smilde Foods BV* (2018), Judgment of 13 November 2018 (nyr).
58 In 2016 the Supreme Court of the Neterlands accepted that the smell of a perfume could be protected. *Hoge Raad der Nederlanden, Lancôme* (NL:HR:2006:AU8940) (16.6.2016).
59 Article 2(1).
60 Article 2.
61 Article 9(2).
62 Para [42]
63 Para [43].
64 It did not form part of the Court's Dictum.
65 '[...] for there to be a 'work' as referred to in Directive 2001/29, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and

precision and objectivity are terms inherently found in 'fixation', one could easily come to the conclusion that neither fixation forms a prerequisite, as it was clearly stated so by the Advocate General in the case at issue.[66] The AG's statement was not incorporated in the actual text of the judgment, but one should not draw conclusions from that as the Court has been clear in its judgments on originality, that originality was to form the sole prerequisite for protection. Precision and objectivity were not mentioned to signify fixation but rather to make the distinction between literary and artistic works on the one hand and taste and smells on the other.[67] Although the reasoning of the Court may be disputed on grounds that there could also be visual and aural works that are not necessarily precise or objective, in the sense that they are not preceived by everyone in the same manner,[68] it throws light on the notion of a work (or rather 'expression'). The Court could have avoided perhaps all this discussion that led to additional factors for identifying a work, i.e. precision and objectivity, and could have closed the discussion on the basis that taste does not constitute a literary or artistic work (as the international conventions provide). The fact that the Court did not go down this route raises the problem that its reasoning leaves open the possibility that in the future taste and smells may also qualify as copyright works in the sense that although in the current state of scientific development we have not achieved by technical means a precise and objective identification of the taste of a food product, which enables it to be distinguished from the taste of other products of the same kind, in the future, we may.

We also need to note here that on the basis of this judgment the Court leaves open the list of subject matter that may qualify as a work (and thus for copyright protection). That practically means that classification of works as a prerequisite for copyright protection is no longer compatible with EU copyright law. There should be an open-ended list of qualifying subject matter in this respect.

There is also the issue of whether works of applied art and industrial models and

objectivity, even though that expression is not necessarily in permanent form'. Para [40]. See older UK cases where permancence formed a prerequisite: *Merchandising Corporation of America v Harpbond Ltd* [1983] FSR 32. It no longer does though.

66 Opinion of the Advocate General Whatelet, 25 July 2018, para [59].

67 E. Derclaye, 'Copyright law does not protect the taste of cheese', Copyright Licensing Agency (2018, December 3), availale at https://www.cla.co.uk/blog/higher-education/copyright-cheese.

68 Not all people perceive colour in the same way. See e.g., Jordan Gaines Lewis, 'When it Comes to Color, Men & Women Aren't Seeing Eye to Eye. *Psychology Today* (2015, April 8), https://www.psychologytoday.com/intl/blog/brain-babble/201504/when-it-comes-color-men-women-arent-seeing-eye-eye; A. Rodgers, 'The Science of Why No One Agrees on the Color of This Dress', *Wired.com* (2015, February 26), available at https://www.wired.com/2015/02/science-one-agrees-color-dress/, as referred to in Derclaye, See also N. Kritikou, *Comment of the Lavola Case*, DIMEE (in print, 2018), where she queries if a white painting can be protected by copyright (e.g., White Painting (1951), Robert Rauschenberg) or the recording of continuous noise (e.g. "White noise video on YouTube hit by five copyright claims" BBC: https://www.bbc.com/news/technology-42580523).

designs form a special case according to the *Flos* case,[69] which is based on Article 17 of the 98/71/EC Directive (Design Directive). According to it,

> '[a] design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.'

In *Flos*, the Court stated that

> 'it is conceivable that copyright protection for works which may be unregistered designs could arise under other directives concerning copyright, in particular Directive 2001/29, if the conditions for that directive's application are met, a matter which falls to be determined by the national court'.[70]

Yet, this case law seems to be rather outdated in the light of the Court's case law on originality, as explained above. Member States can no longer interpret EU notions according to their national law and these notions can only interpret in a uniform and autonomous manner throughout the EU. The *Flos* case will be tested whether it survives in time by a recent request for a preliminary ruling in the *Cofemel* case.[71] It remains to be seen whether the Court in this case will stick to its principle that for all works the same prerequisite applies, i.e. originality (in order for them to be protected) and originality can only be construed in a particular way.[72]

Conclusion

The CJEU's case law has been rather instructive in the area and comes down to the following conclusions:

1. The EU originality criterion (i.e. that a work needs to be an 'author's own intellectual creation') should be construed in a uniform and autonomous manner throughout the EU. Member States can no longer apply their national tradition to interpret the term.

2. It also applies to all works in the EU and not just to photographs, software and databases (where it is expressly mentioned in the relevant EU directives).

3. If a work forms a copyrightable subject matter, the only criterion for it to

69 C168/09, *Flos SpA v. Semeraro Casa e Famiglia SpA*, [2011] ECR I-00181.

70 Para [34].

71 C-638/17, *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* (request for a preliminary ruling 6.12.2017).

72 I. Stamatoudi, 'Present and future of the copyright/design interface in Greece', in *Copyright/Design Interface in the EU*, ed. E. (Cambridge: Cambridge University Press, 2018), 80.

be protected is to be original, i.e. to be its author's own intellectual creation. No other criteria are applicable (such as fixation, registration, quantity, aesthetic criteria, permancence, distinction between different types of works (i.e. ulilitarian v. artistic works), etc.).

4. Classification is also precluded as it is capable of leaving out of the scope of copyright protection subject matter that does not fall in one of the predifined categories in the law, which may however be considered to be original.

5. According to the EU originality criterion, the work should not solely involve substantial skill and labour; its author needs to have made free and creative choices and to have stamped the work with his or her 'personal touch'.

6. Even small parts of a work are protected as long as they are original (i.e., in the sense that they contain some of the elements, which are the expression of the intellectual creation of the author of the work). In effect, the criteria that apply in relation to a work or part of it are qualitative rather than quantitative since the length of a work should not be an issue.

7. In the light of the above, copyright law should not preclude the protection of a work on the basis of a *de minimis* criterion.

Subject matter (i.e. expression) qualifying for copyright protection should be precise and objective. In that sense, taste and smell do not qualify for copyright protection.

Thus, expression, which is precise and objective, qualifies for copyright protection as long as it is original.

8. In the case of computer programs, the expression in any form of a computer program is protected in as far as its reproduction engenders the reproduction of the computer program itself, thus enabling the computer to perform its task. If that is not the case, the subject matter at issue is not protected as a computer program. However, it may be protected as a work (in as far as it is original).

The above findings seem to affect significantly the notion of originality in Cyprus. According to Cypriot copyright law, an object is not protected unless it is a) classified, b) fixated, and c) original. Originality is defined in s. 3(2)(b) Law 59/1976 as amended[73]

> '[a] work is original if it is a personal intellectual creation of the author and not a copy of an existing work or preliminary work or model work. The recognition of protection does not depend on the implementation of any additional criteria'.

According to *Socratous v. Gruppo Editoriale Fabbri* and *Gnosis Publishing Company Limited* (1992) case, where the judge referred to the Peterson's wording in *University of*

73 The Copyright Law, Law 59/1976, as amended by Law 63/1977, Law 18(I)/1993, Law 54(I)/ 1999, Law 12(I)/200, Law 128(I)/2002, Law 128(I)/2004, Law 123(I)/2006, Law 181(I)/2007, Law 207(I)/2012, Law 196(I)/2014, Law 123(I)/2015 and Law 66(1)2017.

London Press Ltd. v. University Tutorial Press Ltd. Case [1916] *2 Ch. 601* (UK):

> 'The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought […]. The originality, which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author'.

In other words, according to the Cypriot originality criterion, it suffices, for a work to be protected, it should not be a copy of another work and should originate from its author.

CJEU case law suggests that the Cypriot originality criterion on 'judgment, skill and labour', which provides that a work is original if it originates from the author[74] and is not copied from another work, no longer suffices, even if the skill and labour involved are significant. The Cypriot criterion should be construed in a manner that comes closer to the continental notion of originality and conforms to the CJEU's case law. Even if Cyprus opts to maintain its current wording in the law, this wording should be interpreted to reflect the fact that a work should not only originate from the author but that the author should have also made free and creative choices and should have stamped the work with his personal touch.

There also seem to be repercussions on the requirements of classification and fixation under Cypriot law. According to s. 3(2)(b) Law 59/1976 as amended, for a work to attract copyright protection it needs to come within one of the specific categories of works as listed in the relevant act.[75] According to EU copyright law, works are protected insofar as they are original. No other prerequisite applies. One could argue that any other (national) prerequisite contradicts EU law and therefore cannot stand. Other criteria such as *de minimis* or quantitative criteria with regard to a work or parts of it (such as its length), classification and fixation (or permanence),[76]

74 See UK case law in this respect, which reflects the ideas adopted by Cypriot law, e.g. *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (1964) 1 All ER 465, per Lord Pearce, 479. See also *University of London Press Ltd v. University Tutorial Press Ltd* (1916) 2 Ch 601, per Peterson J, 609. See the *Walter v. Lane case* (1900) AC 539 and *Interlego AG v. Tyco Industries Inc.* (1988) 3 All ER 949. See also *Sawkins v. Hyperion Records Limited* (2005) All ER 636. See also P. Torremans, *Holyoak & Torremans Intellectual Property Law*, 6th ed. (Oxford: Oxford University Press, 2010), 180. Yet, skill, judgment and labour merely in the process of copying someone else's work cannot confer originality. *Biotrading & Financing OY v. Biohit Ltd* (1998) FSR 109 and *Interlego v. Tyco*.

75 Section 3(1) Subject to the provisions of this section, the following are protected by this law: (a) under copyright; (i) scientific works; (ii) literary works; (iii) musical works; (iv) artistic works; (v) films; (vi) databases; (vii) sound recordings; (viii) broadcasts; and (ix) publications of works that were formerly unpublished.

76 Section 2(1).

also cannot be maintained. In this respect Cypriot copyright law has to be amended to meet the requirements of EU copyright law.

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Mediation in Cyprus: Theory Without Practice

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Abstract

The paper presents the mediation legislation of Cyprus and the actual practice of mediation in the island, if any. The recent developments and upcoming actions or initiatives on mediation in Cyprus on behalf of the Ministry of Justice, such as the draft law on mediation of family disputes, which is currently under parliamentary review and the proposed reform of the mediation law 159/2012, are also discussed in the paper. In this framework, the goal of the paper is to present the provisions of mediation legislation in Cyprus, the emergence of its problems and gaps, and some critical remarks on the direction to improve the legislation and to promote mediation in practice via compulsory mediation in some categories of civil and/or commercial disputes, as a possible regulatory change in order to succeed actual mediation practice in Cyprus.

Keywords: alternative dispute resolution (ADR), dispute, agreement to mediation, compulsory mediation, court, judge, Cyprus, family mediation, legal order, mediator, mediation process

Basic Principles, Key Features, Advantages and Disadvantages of Mediation as an Alternative Dispute Resolution Method

Two (or more) parties (individuals or businesses) who 'share a dispute' is a common occurance. Those parties may have tried to resolve their dispute or difference by themselves through discussions and they (may) have failed. As a second action, they may have each instructed lawyers to send formal letters, possibly without success. Should court proceedings be the only way out? It seems that the answer to this question is negative, because the opposing parties also have available forms of alternative dispute resolution (ADR). The spectrum of alternative (or amicable or appropriate) dispute resolution methods includes negotiation,[2] mediation,[3] conciliations and ombudsmen,

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2 In the UK, another ADR technique similar to negotiation (least evaluative) is the Round Table Meetings (RTMs). The RTMs operate 'in the direct shadow of the civil courts'. Sometimes they are described as 'mediation without the mediator' as there is no process manager in this type of ADR. Process is worked out by the lead lawyers for each party, who also are the main protagonists in the discussion. This process is frequently deployed in the UK, particularly in clinical negligence and personal injury cases, albeit that where it does not lead to settlement it is sometimes followed by a formal mediation which may yet lead to settlement. See in detail, ADR and Civil Justice, *CJC ADR Working Group Final Report*, November 2018, Section 3: The types of ADR available, 3.6. Available at: https://www.judiciary.uk/announcements/new-report-on-alternative-dispute-resolution/.

3 See further, S. Walker, *Mediation Advocacy: Representing Clients in Mediation* (Haywards Heath: Bloomsbury Professional, 2017), 15-31. On the landscape of ADR provisions in England and Wales,

judicial or private early neutral evaluation[4] and arbitration.[5]

Mediation, in its essence, does not end with a judgment as an outcome of the process but seeks a voluntary solution that is acceptable to the parties involved in a dispute.[6] Moreover, mediation is a flexible, cost-effective and confidential procedure, which assists the parties with the help of a third, neutral person, the mediator, to find common ground and work towards settling and reaching an agreement without delay.[7] It is worth noting that mediation can be a very useful way to resolve disputes out of court, especially in cases where emotions run high, such as in divorce cases.

A form of ADR, mediation is a 'civilized' way to resolve a dispute because, unlike the adversarial method of litigation, mediation is best suited to those cases where the parties genuinely wish to avoid prolonging the dispute and to preserve their relationship. In this framework, mediation is not just an amicable alternative but also an appropriate and effective way to resolve certain categories of disputes, such as civil, family, commercial, or workplace, or disputes related to health care services, where there are specific positions, interests and needs of the disputant parties, but who would like to preserve their (family, working, commercial, business etc.) relationship and cooperation after the resolution of their dispute. This is not the case in civil litigation, where the litigants become involved in a court battle. In other words, one could further define mediation as a voluntary and confidential method of resolving disputes between two or more parties out of court, with the help of a moderator.

A mediator is a neutral person who assists the parties in negotiating and reaching a settlement they both accept[8] in disputes where both parties have the 'power of disposal' of their rights and claims. In contrast with an arbitrator, a mediator neither

see ADR and Civil Justice Council, *CJC ADR Working Group Interim Report* (October 2017), 15-16 and for Overseas 41-48, available at https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf. and ADR and Civil Justice, *CJC ADR Working Group Final Report* (November 2018), Section 3: 3.8–3.10.

4 See ADR and Civil Justice, *CJC ADR Working Group Final Report,* Section 3: 3.8–3.10.

5 Arbitration is the most evaluative method of ADR. Arbitration differs in principle from mediation and other ADR methods, in that parties choose it in order to obtain a private adjudication of their dispute entirely outside the civil court process. The arbitral tribunal is the one who decides on the dispute by rendering its award.

6 R. Rewald, *Mediation in Europe: The Most Misunderstood Method of Alternative Dispute Resolution*, World Arbitration Report (New York City: Weil, Gotshal & Manges LLP, Spring 2014), 14, available at: https://www.weil.com/~/media/files/pdfs/WWAR_Newsletter_Spring2014.pdf.

7 On the core principles, key points and process of mediation, see K. Aubrey-Johnson, H. Curtis, *Making Mediation Work for You: A Practical Handbook* (London: Legal Action Group, 2012), 3-30. Comparison of laws, regulatory models and fundamental issues of mediation are discussed in K. Hopt and F. Steffek (eds), *Mediation. Principles and Regulation in Comparative Perspective*, 1st ed., (Oxford: Oxford University Press, 2013), 3-127.

8 See further, Walker, *Mediation Advocacy: Representing Clients in Mediation,* 15-16, 28-30, 32-36. On mediation in England and Wales, see Civil Justice Council, *ADR and Civil Justice*, *CJC ADR Working Group Interim Report* (October 2017), 16-20.

renders an award on the disputed matters nor applies law.

Furthermore, another view of mediation could be that of facilitated negotiation. Settling early, reducing (emotional) stress, acrimony, legal costs and saving time are results that the parties can actually achieve through the mediation process by using the powerful tool of constructive dialogue. According to the revised definition of mediation of the Centre for Effective Dispute Resolution (CEDR):

> 'Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution'.[9]

This definition seeks to emphasize the idea that while mediation is a process with a powerful format, it is nevertheless fundamentally flexible. Furthermore, it highlights that mediation is a safe environment where parties can talk freely, experiment with ideas and are ultimately in control of the process. It also stresses that mediators should be proactive in assisting parties to find a solution, although the parties have ownership of the outcomes.[10]

Moreover, it is well known that the main benefits and key characteristics of mediation[11] could be summarised as follows:

(a) Mediation is a voluntary process. This means that the opposing parties are the ones who decide and actually try to resolve their dispute through mediation. The outcome of mediation is commonly elaborated and agreed by the parties. Even in jurisdictions such as in England and Wales, where the civil litigation rules do not provide for compulsory mediation, it is recommended that parties consider mediation before going to trial. Mediation clauses are also increasingly used in commercial contracts instead of or as a supplement to an arbitration clause. Moreover, parties can mediate at any stage before or during proceedings, and refusal to mediate can give rise to cost sanctions in court proceedings.

(b) Mediation is confidential and is conducted 'without prejudice'.[12] This means that any information disclosed during mediation may not be used in subsequent arbitration or litigation proceedings without the express agreement of both parties. The element of confidentiality is crucial at all stages of the mediation process, such as preparation, opening, exploration, negotiation and closing. This specific aspect of mediation is very important for both individuals' and corporations' reputation,

9 See CEDR, 'CEDR revises definition of mediation' (2004, November 1), available at https://www.cedr.com/solve/mediation/.

10 See CEDR, 'CEDR revises definition of mediation'.

11 See Aubrey-Johnson and Curtis, '*Making Mediation Work for You',* 31-51, on the question 'Why choose mediation?' See Walker, *Mediation Advocacy*, 63-74, regarding the various mediation models.

12 See Walker, *Mediation Advocacy*, 33-34, 127-130, 229-237.

fame, personal information, data, etc. It is also remarkable that the advantage of confidentiality in mediation provides the parties with the opportunity to resolve their differences in a way that will not attract negative publicity. As a concluding remark, 'confidentiality goes to the essence of the mediation process'.[13]

(c) Any settlement reached is legally binding once put into writing and signed by the parties. Moreover, a written settlement as an outcome of mediation is binding and enforceable according to the provisions of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008[14] on certain aspects of mediation in civil and commercial disputes (the Mediation Directive) and according to the provisions of the national mediation legislation of each state.

(d) Mediation is quick since it is informal and flexible. This is a clear advantage of mediation over litigation and arbitration processes. Usually most mediations are arranged within a few days or weeks. A formal mediation session commonly lasts for only one or two days or even for a few hours, since no lengthy submissions, cross-examination, discovery and legal arguments are involved. This is of significant importance since it is well known that 'justice delayed is justice denied!' Moreover, in monetary claims, a party is likely to agree to a lower amount of money if it will be payed quickly. In addition to that, mediation can run alongside litigation or arbitration. So if the parties reach a settlement via mediation, they terminate every other process, since the dispute is now resolved. Ordinarily, courts (in most jurisdictions) will actively encourage the parties to consider mediation throughout the lifetime of a court case.

(e) In comparison to traditional litigation or arbitration processes, mediation is a cost-effective route to resolving disputes. More specifically, there is a clear advantage of mediating, especially early in the timeline of a dispute,[15] because one can avoid potentially high legal costs from an early settlement. More specifically, the parties can save enormous sums of money by mediating at the right time and preserving a working relationship. In any case, the cheapest lawyer is a settlement.

(f) Mediation gives parties control over the process and its outcome. In addition, the parties have the power and opportunity to choose their mediator. Of course the parties may be compelled to go to mediation but they cannot be compelled to reach a settlement. This, would be of course contrary to the protection of the right of access to court and the right of a person to be heard by a court in a judicial scheme, as well as to each person's private autonomy. These rights are protected by the Constitution

13 Walker, *Mediation Advocacy*, 229.

14 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter Parliament and Council Directive on Mediation), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF.

15 This is very important for jury systems where actions, rights and claims are decided by jury and/or the legal costs in litigation are high.

of each state and the European Convention on Human Rights (ECHR, article 6). To conclude, in mediation, the parties settle their dispute only if they want to settle.[16]

(g) The variety of settlement options in mediation is wide and they are not focused only on monetary settlements. This way parties can find solutions that suit their needs, restore, preserve and maintain future relationships more effectively than through arbitration or litigation, or even create more opportunities for further cooperation. This is not possible in court proceedings, where specific remedies apply and there are limitations on the content of court orders. In comparison to litigation, sustainable monetary or non-monetary solutions could arise through mediation, which is a benefit of strategic importance. The human aspect of the conflict has its own important role in the mediation procedure and the potential settlement.

Based on the above analysis, one could conclude that mediation operates in the shadow of civil courts. Mediation is not a panacea for all kinds of dispute. As any other process, mediation has disadvantages, which are often overlooked. For instance, parties should not use mediation to get to the truth of disputed matters but to find a mutually acceptable solution. Moreover, while in litigation, lawyers have legal arguments, tools and methods to produce evidence and testimony, this is not the case in mediation. Mediators have specific skills that may help restore balance, but there is a limit to what they can do. Finally, mediation may not be successful and the parties may not reach an agreement. In this case, the disputants will have to go through the time-consuming and expensive process of a trial after having spent time and money in mediation.

Regarding the mediator's role,[17] firstly, it should be noted that the mediator is a neutral, third person, who assists the opposing parties by using specific skills and techniques such as active listening, open questioning, positive reframing, empathy, acknowledgement of the emotions of the parties and summarizing, to reach an amicable solution and to resolve their dispute in a mutually acceptable manner. The actual role and duty of the mediator is to encourage the disputants to reveal to her/him what their true interests and needs are and to explore and discuss possible solutions. The mediator is neither a judge nor an arbitrator. As an unbiased intermediary, the mediator listens to potential apologies, explores possible points of settlement and realistic solutions, discusses with each party workable and viable agreements and prioritizes the main points of the dispute and the key issues for each party.

The mediator does not dictate the outcome of mediation but helps both (or more) parties to develop and evaluate new options for resolving the crucial issues at hand,

16 Walker, *Mediation Advocacy*, 33.

17 See in detail, Walker, *Mediation Advocacy*, 39-49, 51-58. Regarding the mediation profession, business or job, see S. Walker, *FAQs for Mediators*, (Haywards Heath, UK: Bloomsbury Professional, 2017) and S. Walker, *Setting up a Business as a Mediator*, (Haywards Heath: Bloomsbury Professional, 2016).

tailoring the solution to their specific needs, and broadening the possible outcomes. Moreover, the mediator listens to potential apologies and explores realistic solutions as possible points of settlement – zones of possible agreements (ZOPA) – discusses and prioritizes the key issues of the dispute for each party.

Every mediator should comply with the rules of conduct for mediators according to the national legislation of each state (if any) which in turn is guided by the European Code of Conduct for Mediators,[18] which sets out a number of principles to which individual mediators may voluntarily decide to commit themselves. Mediators may use the above Code for all civil and commercial matters.

The EU Mediation Directive 2008/52

In 2002, the Council of Europe addressed the problem of the long backlog of court actions and costly legal expenses with the adoption of the *Recommendation of the Committee of Ministers*.[19] The Recommendation encouraged EU member states to clarify the mediation process within their legal systems.

Furthermore, in 2004 the European Commission Directorate of Justice and Home Affairs adopted a *Code of Conduct for European Mediation Services* and a proposal for legislation to ensure uniform practices and standards.[20] This was followed in 2008 by the European Union Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters (Mediation Directive) which provided a framework for cross-border mediation. In 2011, the European Parliament adopted a resolution regarding the implementation of the 2008 directive.[21] This resolution said that individual states should regulate mediation in their own systems in order to meet the requirement for the regulation of cross-border mediation.

The Mediation Directive is designed to facilitate access to alternative dispute resolution mechanisms and to promote the amicable settlement of disputes, while encouraging the use of mediation. The Directive applies to cross-border civil disputes, including family law, and commercial matters. It applies when at least one of the parties is domiciled in an EU Member State. Conversely, it does not apply to disputes concerning revenue, customs, administrative matters, liability of the State or omissions in the exercise of State authority. Neither does it apply to disputes where one or more parties is domiciled or resident in Denmark. The Mediation Directive, together with Directive 2013/11/EU on alternative dispute resolution and Regulation (EU) No

18 European Code of Conduct for Mediators, available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.
19 18 September 2002 (REC 2002).
20 SEC 2004/0251 (COD).
21 2011/2026 (INI).

524/2013 on online dispute resolution, is one of the European legal acts on alternative dispute resolution mechanisms.

The above Directive has been in force since 13 June 2008 and it required EU Member States to implement necessary legislation, regulations, and administrative provisions on cross-border mediation by 20 May 2011, although Article 10 of the Directive set the transposition deadline for 21 November 2010 (Article 12, Directive 2008/52/EC). The Directive has not been amended yet.

Article 3 of the Mediation Directive describes mediation as a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach agreement on the settlement of their dispute with the assistance of a mediator. Mediation can either be initiated by the parties to the dispute, suggested or ordered by a court, or prescribed by the law of a member state. Mediation, as required by the text of the Directive, should generally be confidential. Moreover according to the Directive, agreements resulting from mediation should be generally enforceable. Member States have an obligation to promote and encourage the availability to the general public of information on how to contact mediators or organisations providing mediation services.

The Commission's report on the application of the Mediation Directive of 2016 (COM(2016) 542)[22] noted that the Directive had had a 'significant impact on the legislation of many Member States', while this impact varied 'according to the pre-existing level of national mediation systems'. Despite the fact that the report concluded that there was no particular need to revise the Directive, its application could be improved in some ways. For instance, member states needed to step up their efforts to promote and encourage the use of mediation through various mechanisms included in the Directive, such as providing financial incentives or ensuring enforceability of mediation agreements. In this regard, the Commission also promised to do more to promote the take-up of mediation and to co-finance mediation-related projects, and pages on the member states' mediation systems.

Moreover, in the 27 June 2017 Report of the Committee on Legal Affairs of the EU on the implementation of the Mediation Directive,[23] the main findings are the

22 European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 26.08.2016, COM (2016) 542, Final (2016, August 26).

23 Committee on Legal Affairs, on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0238+0+DOC+XML+V0//EN#title1. See also, J. Tymowski, *The Mediation Directive, European Implementation Assessment, In-depth analysis* (Brussels: European Parliamentary Research Service, 2016), available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2016)593789.

following: Almost all member states opted to extend the Directive's requirements to cover domestic disputes, too. A number of member states allow the use of mediation in civil and commercial matters, including family and employment matters, while not explicitly excluding mediation for revenue, customs or administrative matters or for the liability of the state for acts and omissions in the exercise of state authority. All Member States foresee the possibility for courts to invite the parties to use mediation, while 15 allow courts to invite parties to information sessions on mediation. Less than half of the member states have introduced an obligation in their national laws to inform people about mediation. Finally, the above report noted the need for a balanced relationship between mediation and judicial proceedings.

In addition, on 27 November 2018, the EU Parliament organized an inter-parliamentary committee meeting, in cooperation with the European Network of Ombudsmen. Members of the 28 national parliaments were also invited. In this committee meeting, the key findings of the briefing note titled: 'A Ten-Year-Long EU Mediation Paradox – When an EU Directive Needs To Be More … Directive'[24] were presented. More specifically, it was noted that ten years since its adoption, the EU Mediation Directive remains very far from reaching its stated goals of encouraging the use of mediation and especially of achieving a 'balanced relationship between mediation and judicial proceedings' (Article 1 of the Directive).

The paradox of mediation, which is universally praised and promoted, is that it is used in less than 1% of civil and commercial cases in the EU, which grow disturbingly bigger. Official data and multiple studies have clearly shown that the best way, if not the only one, to significantly increase the number of mediated disputes is to require that litigants make a serious and reasonable initial effort at mediation. During this initial stage, the parties should be allowed the freedom to decide whether or not to continue their efforts at mediation (so-called required mediation with easy opt-out). Behavioural science, in particular, has long demonstrated the limits of any policy approach based on opt-in models, such as those underlying all forms of voluntary mediation.

Italy is the only member state that has adopted and applied an opt-out mediation model, applicable to about 15% of all civil and commercial cases. In those cases, mediation is now playing a very significant role in the effective resolution of disputes. This is not the case for the remaining 85%, where mediation remains opt-in, and, as a result, mediations are extremely rare. In other member states, renewed regulatory

24 The entire briefing note is available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf. The link to the video recording of the meeting, simultaneously interpreted in the 23 official languages of the EU is the following: http://www.europarl.europa.eu/ep-live/en/committees/video?event=20181127-0930-COMMITTEE-PETI-JURI (mediation panel starts at 10.00.30, presentation by Giuseppe de Palo).

attempts at simply encouraging mediation are most likely to prove ineffective (again), while merely requiring mediation before trial without offering an easy opt-out option is equally likely to be later ruled unconstitutional (again). Presented in late 2016 with the proposal to adopt the opt-out mediation model, in 2017 the European Parliament decided to leave the Directive unchanged, thus continuing (according to the briefing note) '...to leave national legislators without directions as to how to achieve the Directive's ultimate goals, and EU citizens and businesses without the financial and other benefits that the increased use of mediation would generate'.

Legislative Framework on Mediation in Cyprus

Mediation has been introduced in Cyprus by the (applicable) Mediation on Civil Disputes Law 159(I) of 2012,[25] which was enacted on 16 November 2012 and governs the mediation process.[26] This law harmonised Cypriot legislation with the (above) Mediation Directive 2008/52/EC[27] of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. In this way, Cyprus adopted appropriate legislation regarding mediation. Yet, this was not enough in order to actually have mediation practice in Cyprus and to benefit from its advantages. In any case, the adoption of laws does not necessarily result in a broader understanding and actual practice of mediation.

Mediation in Cyprus is regulated as an alternative, voluntary, out of court, confidential and cost-effective dispute resolution method. According to the Cypriot mediation legislation, mediators need to meet certain prerequisites, such as mediation training, to be on the mediation registry of the Ministry of Justice and Public Order.

Moreover, the Financial Ombudsman of the Republic of Cyprus aids and cooperates with certified mediators in order to resolve financial disputes between

25 See, the website of the Cyprus Bar Association: http://www.cyprusbarassociation.org/index.php/en/for-lawyers/mediation where there the Law 159(I) of 2012 is available in Greek. The law is also available in Greek at www.cylaw.org.

26 See A. Emilianides and N. Charalampides., 'Cyprus', in *Civil and Commercial Mediation in Europe: Cross Border Mediation,* Vol. 2, eds. C. Esplugues et al. (Antwerp: Intersentia), 103-123 on the monistic legal framework of Law 159(I)/2012. See A. Emilianides and X. Xenofontos, 'Mediation in Cyprus', *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, eds C. Esplugues, J. L. Iglesias, and G. Palao (Antwerp: Intersentia, 2012), 92-94, regarding the long tradition of Cyprus of mediation mechanisms in labour law disputes.

27 The Mediation Directive 2008/52/EC is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF. On the transposition of the EU Mediation Directive in Cyprus, see Emilianides and Charalampides, 'Cyprus'; Emilianides and Xenofontos, Mediation in Cyprus; A. Georgiades, 'Cyprus', in *EU Mediation Law and Practice*, eds. G. De Palo and M. Trevor (Oxford: Oxford University Press, 2012), 47-58; A. Georgiades, T*he Variegated Landscape of Mediation*, eds. M. Schonewille and F. Schonewille (The Hague: Eleven International Publishing, 2014), 99-107.

consumers and banks pursuant to the provisions of Law 84(I)/2010.[28] In the framework of Law 84(I)/2010, as amended or replaced, debt restructuring mediations are taking place in Cyprus between consumers and banks.

Online Dispute Resolution (ODR)[29] is established in Cyprus for disputes between consumers and businesses via the European Consumer Centre in Cyprus, according to the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004, and Directive 2009/22/EC (Directive on consumer ADR)[30] and Regulation (EU) No 524/2013 of the European Parliament and the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).[31]

In addition, a draft law on mediating family disputes is pending and has been under review at the Parliament since 2014.[32] This draft should be passed soon, after the Parliament's law committee modified it extensively over the last four years and mainly during the last two years, based on suggestions and comments from the Cyprus Bar Association and other associations like the Cyprus Association of Mediation (*Cymedas*)[33] and individual experts.

Finally, a recent report on the Functional Review of the Courts System in Cyprus, conducted and delivered by the Institute of Public Administration of Ireland, dated 27 March 2018[34] presented findings on Cyprus' legal order. The report found there to be serious deficiencies with the operations of the courts system that had been highlighted in previous reports e.g. Erotocritou Report (Report of the Supreme Court on operational needs of the courts, 2016). It also looked at comparative EU studies, e.g.

28 See N. Koulouris, *Cypriot Civil Procedure*, in Greek (Athens: Nomiki Bibliothiki, 2017), 335-340.

29 On ODR/E Justice, see indicatively, G. Diamantopoulos and V. Koumpli, 'Mediation: The Greek ADR Journey Through Time', 336, B. Hess and N. Pelzer, 'Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation', 308-309, and A. De Luca, 'Mediation in Italy: Feature and Trends', 363-364, in *New Developments in Civil and Commercial Mediation, Global Comparative Perspectives*, ed. C. Esplugues and L. Marquis (Switzerland: Springer, 2015).

30 Directive on consumer ADR, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0011.

31 Regulation on consumer ODR, available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013R0524.

32 The last amendment of the draft in which the author has access is dated 7 June 2017. On the bill concerning mediation in Family Law Matters, pursuant to Council of Europe Recommendation No. R (98) which was pending before the House of Representatives since 2004, see Emilianides and Xenofontos, 'Mediation in Cyprus', 90-92.

33 Cyprus Mediation Association, https://www.cymedas.com/english/index.php.

34 Technical Assistance Project 2017/2018, supported by the Structural Reform Support Service (SRSS) of the European Commission, available at http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/F8C912FFF71E0020C225825D0038F145/$file/Functional%20Review%20of%20Courts%20System%20of%20Cyprus%20IPA%20Ireland_Final%20Report%20March%202018.pdf.

EU Justice Scoreboard, that show that while Cyprus scores relatively highly on judicial independence, it scores poorly on measures of efficiency. e.g. length of time for case to be processed through the courts, and measures of quality, such as information available to the public.

Furthermore, the report emphasized that the key challenges of the system are: i) chronic delays and a growing backlog of cases; ii) the average waiting time of 6.3 years for the Supreme Court to hear an appeal at the end of 2016, with 4300 cases pending that year; iii) the increase in over 90% of the number of civil and criminal appeals filed in the past 10 years; and, iv) the increasing backlog of civil cases in District Courts. In addition, the above report noted the delays in Cypriot justice would have negative effects on Cyprus's reputation and and rule of law, and that alternative dispute resolution methods are not used much. As a result, the report explicitly stated that 'allowing the system to continue without major reform is not an option'.

Notably, the report recommends to ''introduce ADR mechanisms in consumer disputes and injuries assessments, and consider making recourse to these a requirement prior to recourse to court'. Furthermore, it recommends that 'The Rules of Court should be amended to make provision for the court to refer cases to mediation'.

Mediation Law 159(I) of 2012

The Provisions of Mediation Law 159(I) of 2012

Law 159(I)/2012 has six parts and contains 34 articles. The provisions of this law are applicable to certain aspects of civil[35] and commercial disputes,[36] whether cross-border or not, as well as to cross-border labor disputes.[37] This law is not applicable to family disputes, as it is explicitly defined in Article 2 regarding its scope. The wording of Law 159(I) of 2012 is wide enough to capture the whole spectrum of commercial

35 Article 2 of Law 159(I)/2012 states: 'In this Law, unless the context otherwise provides – "civil dispute" means any dispute which may be an object of civil proceedings by the meaning assigned to this term by virtue of the Courts Law and includes labor disputes but does not include family disputes. "Commercial dispute" means dispute arising from a commercial transaction between undertakings or between undertakings and public authorities, as this term is interpreted by the Combating Late Payment in Commercial Transactions Law'.

36 See Emilianides and Charalampides, 'Cyprus'; Emilianides and Xenofontos, 'Mediation in Cyprus'; N. Koulouris, *Cypriot Civil Procedure*, 335-340.

37 Article 3 of Law 159(I)/2012 states '3. – (1) Subject to the provisions of subsection (2), this Law shall be applied to civil disputes, including cross-border disputes. (2) This Law shall not apply – (a) to any civil disputes, whether cross-border or not, concerning certain rights and obligations, for which the parties are not free to decide themselves under the relevant applicable law; (b) to labor disputes which are not included in the cross-border disputes, notwithstanding if no rights and obligations are raised thereof, for which the parties are not free to decide themselves under the relevant applicable law; (c) to any revenue, customs or administrative disputes, or matters relating to the liability of the state for acts or omissions in the exercise of state authority. ("acta jure imperii")'.

disputes as well as every kind of civil dispute.

Moreover, the mediation law does not apply to any dispute in which the parties have no freedom to determine pursuant to the applicable law, and to tax, customs, administrative disputes, or disputes concerning the state's actions or omissions. The amediation law constitutes an attempt to regulate the mediation process by containing provisions for, among others, the creation of a register of mediators and relevant minimum requirements, mediators' duties during the mediation process, procedural matters of the mediation process, the role of the court and the issue of the enforcement of any settlement agreement reached.

Article 2 of Law 159(I)/2012 states that "'mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. Provided that, it excludes any attempt that may be made by the Court or judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question'. Therefore, mediation is regulated in Cyprus as an alternative, voluntary, out of court, confidential and cost-effective dispute resolution method.

Issues regarding the mediators are regulated in the third part of the law (Articles 5-13), and provisions of the mediation process itself are placed in the fourth part of the law (Articles 14-27). It is important to note that in Cyprus the disputant parties can agree (voluntarily) to mediate their dispute. The court has also the ability but not the obligation to refer a certain dispute to mediation. In practice though, mediation referred by the court is rather rare.

Furthermore, according to the provisions of the above mediation law, the parties are the ones who choose the mediator.[38] The mediation process is prescribed under the law as informal and parties in consultation with the mediator can agree the way of conducting the process, its duration, the obligation of confidentiality of the procedure, the remuneration of the mediator, the terms of payment and any other matter deemed necessary. The parties have of course the choices to reach a certain settlement.

Moreover, the Cypriot mediation law provides for registration of mediators to the Registry of Mediators as well as their removal from the registry. Specifically, according to Article 7, practicing advocates, members of the Cyprus Chamber of Commerce and Industry and of the Technical Chamber of Cyprus have the right to be on the Registry of Mediators if they meet specific criteria. The Mediation Registry is held by the Minister of Justice and Public Order. Actually, according to certain provisions of Law 159(I) 2012, there are two Registers of Mediators: (a) the Register of Mediators where the mediation in question concerns a commercial dispute, and (b) the Register

38 In complex cases or if the parties wish so, the mediation could be conducted with two mediators.

of Mediators where the mediation in question concerns civil dispute, other than commercial.

The detailed procedure a person needs to follow in order to be on the Registries of Mediators is explained (in English too) on the Ministry of Justice's website[39]. Mediation training is needed, and every registered mediator is obliged to continue his/her training on mediation by attending courses of a certain duration and to submit the relevant certification to the Ministry of Justice and Public Order.

When it comes to the enforceability of the settlement as a result of mediation, the parties may apply to the court to declare a written agreement as enforceable (according to Article 32 of Law 159(I) of 2012). In addition, either of the (two) parties may terminate the mediation process at any time, as stated in Article 28 (d).

Does Mediation Actually Work in Cyprus or Is There Just 'Mediation Theory'?

The adoption of a mediation law in a certain state/jurisdiction is not enough for the broader understanding and real practice of mediation to be achieved, at least to the extent that attorneys at law would be comfortable suggesting mediation as a method of conflict resolution to their clients.

It has already been mentioned that mediation has been regulated in Cyprus for a number of years, but there is still no actual practice. Even though there are no available official statistics on mediation, the number of mediations which took place in Cyprus until today is dramatically low. Moreover, there are no data for mediations initiated by Cypriot courts (if any) since 2012, while the number of civil and commercial cases before Cypriot courts remains high. It is therefore urgent to find a solution that would ease the overburdened court system in Cyprus, and this is something that the Cypriot legislator should deal with.

One could argue that the legal culture of Cyprus has no tradition of mediation even though other types of ADR, such as arbitration, are often practiced, especially in commercial and construction disputes. The reality is that the actual practice of mediation in Cyprus is moving slowly despite the fact that this particular ADR method could contribute effectively to the resolution of many disputes in a jurisdiction where a period of approximately 3 to 5 years is usually needed to achieve a final and enforceable[40] judgment in civil and/or commercial disputes, because of the large caseload, which is overwhelming the courts.

39 See Ministry of Justice and Public Order, 'Promotion of Legislative Work', available at http://www.mjpo.gov.cy/mjpo/mjpo.nsf/page21_en/page21_en?OpenDocument.

40 See the 2018 EU Justice Scoreboard, published by the European Commission, which gives a comparative overview of the quality, independence and efficiency of justice systems in the European Union and aims at assisting Member States to improve the effectiveness of their justice systems. Available at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf.

Another argument for holding back the practice of mediation in Cyprus is the fact that the majority of people, businesses and companies do not know much or even anything regarding this ADR method, meaning that the levels of awareness of mediation are very low. Awareness of ADR is an important and difficult challenge in other jurisdictions in Europe too. For instance, the Final Report on ADR and Civil Justice of the CJC ADR Working Group in the UK[41] states that the promotion of ADR must be seen as part of the wider challenge in public legal education.[42] Initiatives such as peer mediation in schools and universities, organization of a 'Mediation Awareness Week', embracement of ADR in law faculties, professional training, disciplinary codes for mediators, coordination between the different ADR areas, creation of a user-friendly online portal with visual information about ADR methods, and ADR references in broadcast and social media by the ADR community should be applauded.

In addition, the viewpoint of the Cyprus Bar Association should be taken into account, and attorneys-at-law should play an important role in encouraging mediation as an effective way of avoiding costly and time-consuming court cases in which only one party can be the winner.[43] This role could be seen as a duty of the attorneys-at-law. Filing an action in a court in Cyprus is not too expensive and the costs of civil litigation in general are not as high as they are in other jurisdictions, where ADR methods are more often used.

The truth is that mediation must be understood by both attorneys-at-law and disputant parties to be effective. It is indeed well known that for a successful (civil or commercial) mediation, one must have the consent of both parties and an adequate if not excellent understanding of mediation and its value on behalf of the involved advocates. Having said that, mediation is most likely to be successful if the lawyers involved in the case may confidently suggest mediation to their clients as an effective way to resolve a dispute. Furthermore, mediation has more chances to be successful if each side knows exactly what is being proposed when the attorneys of both parties are familiar with the mediation process in their respective practice.

Additionally, in the framework of the Cypriot reality, ADR methods are not an integral part of dispute resolution culture. On the contrary, the prevailing legal culture is the litigation culture. Judges and attorneys do not confidently promote mediation to the parties mainly because of their strong confidence in the court system and litigation,

41 ADR and Civil Justice, *CJC ADR Working Group Final Report*, November 2018, Section 2: Executive Summary, Section 6: Awareness of ADR.

42 See S. Shaelou and N. Agapiou, 'Alternative Resolution of Civil Disputes in Cyprus' [in Greek], *In Business News* (2018, July 27), available at: https://inbusinessnews.reporter.com.cy/opinions/article/191248/enallaktiki-epilysi-astikon-diaforon-stin-kypriaki-dimokratia.

43 See R. Levitt, 'Compulsory mediation edges closer after Civil Justice Council report' (23 October 2017), available at https://www.linkedin.com/pulse/compulsory-mediation-edges-closer-after-civil-justice-roger-levitt/?trk=v-feed.

even though they do admit that this system is not as effective as it should and even they are aware that a large caseload is overwhelming the courts and causing substantial delays. There is also widespread uncertainty as to how mediation works in practice and if it is a part of a lawyers' job.

The Cyprus Mediation Association (CYMEDAS) states on its website regarding the reality of mediation practice in Cyprus:

> 'Unfortunately the situation referring to the philosophy and practice of mediation hasn't changed much. There is strong opposition from legal circles who loathe mediation because it bypasses legal proceedings. This was briefly the case in the States in the 90s. Now all advanced countries have legislation covering mediation as alternative to litigation and mediation thieves. Restorative justice is the new development something that is aimed at by European Union... We should though, have in mind the legislation on mediation for family disputes is due to be adopted by the parliament for more than five years and nobody knows when the lawyer-parliamentarians will change their minds'.[44]

Another reason for the low use of mediation is that the courts in Cyprus are not doing enough to promote and encourage mediation, especially at the early stages of a dispute, even though the mediation law gives them this ability.

Finally, the awareness and popularity of mediation in Cyprus could increase if the mediation law is (effectively) reformed in a way that a power would be conferred on the court to compel parties to engage in the mediation procedure, at least in certain categories of civil and/or commercial cases.

The Provisions of the Draft Law on Mediation of Family Disputes in Cyprus Under the Title 'Law on Mediation of Family Disputes'

The draft law on mediation of family disputes has six parts which include 47 articles. The first part of the draft regards definitions, the scope of the draft and general provisions. More specifically, the content of Article 1 of the draft defines the terms 'mediator', 'family case', 'child', 'agreement to mediation' and 'agreement of settlement through mediation'. At this point it should be noted that the draft regards any case relevant to the institution of family and includes, inter alia, cases regarding child custody, sustenance (monetary support) of children or spouses, and property disputes between spouses. Regarding the legal matter of custody, one could argue that this is not a dispute which could or should be resolved via mediation, because there is no authority of disposal of each party (the parents) on this matter. Therefore, there is a solid argument that a dispute between parents on the custody of their child should be

44 Cyprus Mediation Association, available at https://www.cymedas.com/english/index.php.

decided by the court, with the assistance and/or testimony of an expert.

Article 2 combined with Article 4 defines family mediation. According to this definition, mediation means an alternative to the court method of resolving family disputes, through an out of court structured procedure, where two or more members of a family are trying to resolve their disputes with the help of a mediator. The scope of the mediation procedure is described in Article 4, which states that in the framework of family mediation, the parties resort to resolve their family dispute assisted by a mediator.

Moreover, in the second paragraph of Article 4, there are also stated goals of this upcoming family mediation law. Among others, the discussed law aims to encourage family members to consent on approaches to limit hostile behaviour and to improve communication within a family. In addition, it seeks to minimize the negative consequences that could arise out of a family conflict, to encourage the maintenance of family relationships, especially between parents and their children in the present as well as in the future, to safeguard the interests of children and to encourage responsible joint parental custody for the best interest and welfare of the child, according to the Convention for the Rights of Children, which Cyprus ratified in 1990.[45]

Article 5 of the draft contains the basic principles according to which mediation should always be conducted on a voluntary and not mandatory basis, without any kind of discrimination, by securing the interests of the child and of course with confidentiality, neutrality and impartiality on behalf of the mediator. Except for the voluntary character of mediation, the other principles are indeed fundamental to a family mediation procedure. More precisely, family mediation could and should be regulated as compulsory, at least until the point that mediation becomes culturally normal in the Cypriot legal order, and that specific categories of family disputes should be referred to mediation automatically by a (legally regulated) self-policing ADR system and/or by the court, before an action is filed in the Family Court.

Of course, no law can mandate any party to compromise and wave his/her rights. What the law could/should actually do is to compel family members to try (prior to litigation) to find a solution in good will, out of court, with the assistance of a qualified mediator, or at least to mandate the disputants to participate to an information session with a mediator, prior to the commencement of court proceedings and ideally without any judicial intervention or need for court's time.[46]

45 The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by the General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. See also, *United Nations Convention on the Rights of the Child and the Republic of Cyprus,* available at http://uncrcpc.org.cy/index/about-us/uncrc-adoption,-signatures-and-ratifications.html.

46 See ADR and Civil Justice, *CJC ADR Working Group Final Report, November 2018*, Section 8: Government/Court Encouragement of ADR, A way forward: Notice to Mediate, 8.39-8.42.

In some jurisdictions, such as in the UK, referral to mediation is already compulsory in specific family[47] disputes, in the form of pretrial information and assessment meetings, and in employment law cases,[48] and there is still debate about extending its use to civil and commercial areas of law.[49] In addition, Italy is now considering to expand mandatory mediation to family cases. The Italian Justice Commission is currently discussing the approval of the DDL 735, also known as the DDL Pillon. The new bill aims to reform child custody issues, maintenance and childcare, and it is introducing mandatory mediation for family law cases where minor children are involved, in an effort to avoid the 'negative legal environment' when dealing with such delicate cases. Inevitably, this has given rise to an interesting debate, but definitely signposts the increasing international tendency to opt for mandatory mediation.[50]

47 'Mediation information and assessment meetings (MIAMS) first introduced in the family dispute system of the UK in 2010. Since April 2014, it has been compulsory (subject to limited exceptions) for those issuing proceedings for financial relief or for a child arrangements order to attend a MIAM. While the party making the application has to attend the MIAM the Respondent is simply expected to attend. The two parties can attend a single meeting but separate meetings appear to be the norm (where the Respondent attends at all). At the MIAM the mediator will guide the parties as to the available alternatives to court, especially mediation, the advantages and disadvantages of each. Ultimately it is a decision for the parties as to whether to go down the road of mediation but it is a decision reached after discussion with the mediator and therefore on the basis of informed views.' See more in the *ADR and Civil Justice CJR Working Group Interim Report*, and ADR and Civil Justice, *CJC ADR Working Group Final Report,* November 2018, Section 7: Availability of ADR, 7.11-7.20, Section 8.

48 See J. Munby, *Family Mediation in England and Wales: A Guide for Judges, Magistrates and Legal Advisors*, available at http://www.familylaw.co.uk/system/redactor_assets/documents/385/Family_Mediation_in_England_and_Wales_A_guide_for_judges__magistrates_and_legal_advisors.pdf. On the use of mediation in divorce cases in the UK see J. Herring, *Family Law*, 5th ed. (Harlow: Pearson Education, 2011), 136-148.

49 Justice ministers are actually keen to find more ways to settle disputes out of court, and the expert working group of the Civil Justice Council concluded that current measures to promote mediation are not working and should be extended further to include an element of compulsion. The CJC has opened a consultation, requesting written submissions on the findings and recommendations of the latest report, *ADR and Civil Justice CJR Working Group Interim Report*. These submissions were collated and discussed, prior to the preparation and submission to the Government of the final report. See Levitt, Compulsory mediation edges closer after Civil Justice Council report. According to the Executive Summary of the Final Report on ADR and Civil Justice, of the CJC ADR Working Group in the UK, November 2018, Section 7: Availability of ADR, Quality Assurance and Regulation, 7.11, Section 2: Executive Summary, 2.6: 'We do not support the introduction of civil MIAMs. We do not support the introduction of blanket compulsion in the sense of an administrative requirement that proof of ADR activity has to be provided as a precondition of any particular step. We have been keen to identify an acceptable mechanism under which a mediation could be triggered without the intervention of the Court. We identify a number of policy decisions that arise if this option is to be pursued.'

50 La Altra Pagina, 'Presentato in Senato il disegno di legge che prevede la mediazione familiare obbligatoria', available at http://www.laltrapagina.it/mag/presentato-in-senato-il-disegno-di-legge-che-prevede-la-mediazione-familiare-obbligatoria/#.W6nW1Zvyl5Y.

Having said that, automatic referral to family mediation or by the Cypriot Family Court is a proposal that deserves full support due to the real benefits that family mediation can actually achieve for a family. A regulated compulsory effort to attend a family mediation session, could lead the parties to the resolution of their dispute.

The second part of the draft contains provisions for the beginning of a family mediation process, for the required qualifications of the family mediators and regarding the institution of providing legal aid to the parties under the framework of family mediation. When it comes to the question of when family mediation can begin, the answer according to the draft (Article 6) is at any time. This means that family mediation could begin even in the middle of a court proceeding, as long as both parties agree to that. It is noteworthy that, according to the draft, mediation can resolve only a part of a family dispute or the whole of it.

The second part of the draft also contains a detailed analysis of the family mediation registry. The Ministry of Justice and Public Order will be in charge of this registry. Moreover, Article 10 of the draft refers in detail to the duties of a family mediator.[51] Among others, the mediator should be independent, impartial, neutral and efficient, should act according to the principles of the mediation procedure and the rules of the Code of Conduct for Mediators,[52] and should respect the positions of the parties and the balance of their negotiation positions. The mediator should also ensure the private and confidential nature of mediation in order not to reveal any conversation conducted during mediation. Another very important duty of the mediator is to inform the parties that if certain severe matters are disclosed during the mediation, such as child abuse or any other form of violence, the mediator will reveal these matters to the authorities. Additionally, there is an explicit provision regarding the duty of the mediator to decide ad hoc if there is a conflict of interest, and there are certain occasions where it is considered that there is a conflict of interest. Another duty of the mediator is to inform the parties about their right to participate in the mediation process with their lawyers. According to the draft, the mediator cannot force a certain solution upon the parties, but she or he can suggest an idea or solution which may help the resolution of the dispute. This role and ability on behalf of the mediator needs to be handled in a careful way since it risks the mediator's neutrality and/or impartiality.

The third part of the draft regards rules on the procedure of family mediation. The parties have to agree on the appointment of a mediator and can deny her/his

51 See Family Matters Council, 'Code of Practice of Family Mediators in the UK, September 2016', available at https://www.familymediationcouncil.org.uk/wp-content/uploads/2016/09/FMC-Code-of-Practice-September-2016-2.pdf.

52 See the European Code of Conduct for Mediators, available at: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

appointment without reasoning. It is worth noting that the draft provides that a court can suggest mediation to the parties. Moreover, any court and not only the family court, can inform the parties regarding the institution of mediation and its procedure as an ADR method. This provision would be more efficient towards the goal of the broader encouragement of ADR if providing information about mediation was drafted as a duty of the court.

A very interesting provision of the draft is Article 18 (3) which states that if the judge believes that there is a conflict of interest between the parents and the child in a certain dispute, she/he can postpone the court's procedure on the condition that the child will be represented in the mediation by the Commissioner of Children's Rights. The efficient application of this provision will demand readiness and actions from the office of the Commissioner of Children's Rights.

The fourth part of the draft regulates the possible outcome of the mediation procedure, the termination of it and the agreement on the resolution of the dispute. The mediation procedure terminates if the parties settle, which means if they resolve their dispute or decide that they cannot agree, or if the mediator believes that the process has no point, or if any party desires to end the mediation, or if there is a matter of violence. One of the most important provisions of the draft regards the essential content of the written agreement through which the parties actually resolve their dispute. The enforcement of the mediation agreement is possible, according to the draft, if the party who seeks to enforce it proceeds to have it ratified by the competent court. If the mediation process does not end in an agreement, the mediator will draft a document of an unsuccessful mediation.

Finally, the fifth part of the draft contains provisions for disciplinary procedures against family mediators and the last part of the draft regulates final and transitional provisions of the family mediation law.

Critical Remarks on Mediation Law 159(I) of 2012 and Its Proposed Reform

It is true that the main challenge for mediation, especially in Europe, is to have the practice of it promoted so that, at some point, mediation will become one of the regular dispute resolution methods and not just an alternative dispute resolution method. According to an optimistic view, mediation will have a future, central role in dispute resolution, although Cyprus has a long way to go to reach that point.

Moreover, it is indeed difficult to answer the question, 'Why do people not choose mediation?' since mediation is faster and cheaper than litigation, plus it is an efficient way to resolve disputes. As stated above, the level of awareness of mediation as an ADR method is still very low. ADR in general is not adequately marketed, and steps must be taken to make sure that the parties consider all their options to resolve their dispute. Furthermore, the reality is that attorneys-at-law promote litigation more

than mediation and this creates a climate of uncertainty to the parties. In any case, a regulatory change in the field of dispute resolution, could be compulsory mediation in certain categories of civil disputes and especially in family disputes, as a step or condition before the commencement of the litigation proceedings. This could be a dynamic and effective way to make the parties understand that they can resolve their disputes by themselves, assisted by a mediator in a faster and cost effective way.

The existence of mediation legislation itself is of course not enough to promote and enhance the use of mediation in practice. This is the case for Cyprus, too. The local legal culture is resistant to embracing the full benefits of the mediation process. In addition, it is notable that section 15 (1) of the Mediation Law[53] provides that the court, before which an action is pending, may invite the parties to attend an information session on the use of mediation and the possibility of resolving the dispute via mediation. In that case, any of the parties may veto the above suggested possibility and the consent of all parties is required before the court exercise its power to stay proceedings for mediation.

The general picture of the relationship of the (civil) justice system and ADR in Cyprus is characterized by the combined absence of both a court's power or duty to compel parties to participate in any form of ADR practice, other than arbitration and a substantive or procedural obligation for litigants to consider ADR prior to commencing trial proceedings. The above absences are not contributing to the development of ADR in Cyprus and to the effective change of the local legal culture.

In Greece, where the legal system also has no developed mediation culture, an important reform of the mediation law in civil and commercial disputes took place in January 2018. Mediation Law 4512 of 17 January 2018 has substantially amended the

53 Article 15 of Law 159(I)/2012: '15. -(1) A Court, before which judicial proceedings are brought, in relation to a case that falls within the scope of this Law, at any stage of the proceedings and before the issue of a decision, may (a) invite the parties to appear before it, to inform them on the use of mediation and the possibility of settlement of their dispute by using this procedure; and (b) upon a common request of all the parties or one of them, with the explicit consent of the others, when appropriate and having regard to all the circumstances of the case, postpone the judicial proceedings so that mediation can take place. (2) In the event that any of the parties does not agree to use mediation, the Court shall proceed with the judicial proceeding. (3) In the decision of the Court to postpone the judicial proceeding, issued by virtue of subsection (1) explicit reference is made to the consent of the parties and to the duration of the mediation, which may not exceed three (3) months. (4) With the completion of the time-limit set out in the Court decision, the parties shall inform the Court of the procedure followed and the result of the mediation and may, in case no agreement on the settlement is reached, ask for extension of the duration of the mediation, for a period not exceeding three (3) months. (5) The Court may, in proprio motu, or, at the request of any of the parties, interrupt the mediation procedure before the end of the time-limit provided for by virtue of this section. (6) A Court decision issued by virtue of subsection (4) or by subsection (5) is not subject to an appeal.'

previous law (Law 3898/2010).[54] Articles 178 through 206 of Law 4512/2018 regulate the new mediation landscape. In the recent Greek mediation law, there are provisions (Article 182) that introduce compulsory mediation for seven categories of disputes of private law as a pretrial procedural condition before the court's hearing (condition of admissibility of the hearing).[55] Failure to engage in a mediation 'attempt' is sanctioned with inadmissibility of the hearing proceedings. First of all, the claimant's attorney is required to inform his client about the possibility or the obligation to resort to mediation. Regardless of the result, a respective document signed by the party and the attorney must be submitted to the court, otherwise the court will not enter into the merits of the hearing of the dispute and a reopening of the case will be ordered. The reform of mediation legislation in Greece aims to promote and establish mediation in the Greek legal system which will reduce delays in the court system, especially the provision that attorneys-at-law are legally compelled to inform their clients in writing about mediation and to promote mediation as an ADR mechanism prior to filing any sort of legal action, as well as the provision for compulsory pretrial mediation in specific categories of disputes. Moreover, to harmonize more with the European Mediation Directive, the Greek legislator tried adopt the Italian mediation model on compulsory mediation, which has shown successful results so far.[56] Law 4512/2018

54 Law 3898/2010, titled 'Mediation in civil and commercial matters', implemented in Greece the Directive on Mediation. Regarding the mediation landscape in Greece under law 3898/2010, see in detail N. Klamaris and C. Chronopoulou, 'Mediation in Greece: A Contemporary Procedural Approach to Resolving Disputes', in *Mediation. Principles and Regulation in Comparative Perspectiv*e, 1st edition, eds. Hopt and Steffek, (Oxford: Oxford University Press, 2013), 585-604; Sp. Antonelos and E. Plessa, *Mediation in civil and commercial cases, International experience and Greek adjustment*, in Greek (Athens: Sakkoulas Publications, 2014); E. Koltsaki, 'Impartiality and neutrality of the mediator. Theory and practice' [in Greek], in *Legal Issues and Aspects of Mediation*, ed. Ath. Kaisis (Thermi: International Hellenic University, 2014) 79-85; St. Angoura St., (2014), 'The legal nature of the consent to mediate', [in Greek] in *Legal Issues and Aspects of Mediation*, 23-29; Diamantopoulos and Koumpli, 'Mediation: The Greek ADR Journey Through Time', D. Theocharis, *Mediation as an alternative dispute resolution method. Analysis of law 3898/2010*, in Greek (Athens: Nomiki Bibliothiki, 2015); B. Blohorn-Brenneur, *Mediation for all*, trans. Sp. Antonelos (Athens: Sakkoulas Publications, 2016).

55 See in detail A. Georgiades, D. Theocharis, A. Plevri, K. Komnios, and P. Giannopoulos, *Compulsory Mediation and relevant issues* (Athens: Sakkoulas Publications, 2018); H. Meidanis, 'The Mediation Process under Greek Law No 4512/2018', [in Greek], *Journal of Arbitration & Mediation and other ADR Methods*, Vol. 1 (2018), 59-72, N. Klamaris, 'Mediation according to Law 4512/2018' [in Greek], *Review of Civil Procedure*, Vol. 3 (2018), 255-256; D. Mouzaki, 'Compulsory mediation and the right to judicial protection', Vol. 3 (2018), 257-280.

56 See G. De Palo and L. Keller, 'Mediation in Italy: Alternative Dispute Resolution for All', in *Mediation, Principles and Regulation in Comparative Perspective*, 667-695. Further analysis and statistics on the Italian model in G. Matteucci, 'Civil mediation how to kick start it: the Italian Experience. The relevance of training', (2017), available at http://www.academia.edu/35125411/ADR_Matteucci_2017.10.30_Civil_mediation_how_to_kick-start_it_the_Italian_experience._The_relevance_of_training, and http://www.altalex.eu/content/civil-mediation-how-kick-start-it-italian-experience.

contains overly detailed regulation of issues, which is uncommon to a legislative text, and renders the law problematic in its implementation, raising concerns as to its future success. The provisions of the mediation law for compulsory pretrial mediation was about come into force as of 17 October 2018, but a more recent law (No. 4566/2018) was enacted that delayed these provisions from taking effect until September 2019. This legislative development was actually a result of an opinion of the Administrative Plenary Session of the Supreme Court of Greece (No. 34/2018) regarding mandatory recourse to mediation in which it was stipulated that compulsory mediation as a pretrial condition is not compatible with specific provisions of the Greek Constitution and EU Law.[57] More specifically that law's provision for mandatory mediation is in violation of the right of access to justice, since mandatory mediation comes at a cost which is deemed excessive.

In the framework of the Cypriot legal system, the level of awareness of mediation as an ADR method is very low and there is misinformation regarding the potential benefits mediation may confer over the litigation process. In addition, attorneys-at-law in Cyprus could contribute to the promotion of mediation by familiarizing themselves with it and by playing an active role to encourage it.[58] This role could be seen as their duty. Relevant to this discussion, it is a fact that filing a court action in Cyprus is not very expensive and the costs of civil litigation are not as high as they are in other jurisdictions, for example in the UK, the USA or Australia, where mediation is a well-developed, tested and an effective method of resolving disputes.

Moreover, in summer 2018, the Cypriot Ministry of Justice and Public Order stated its intention to reform the core mediation law of Cyprus (Law 159(I) 2012) along with the basic proposed reforms, and it called on any individual or institutions to submit observations to these proposed reforms. The proposed reforms are based on a consultants' report, which was conducted prior to the announcement. In principle, there is need to reform the Cypriot mediation law, but the way in which the Ministry's proposals are drafted may cause more problems than those they intend to resolve. Additionally, the main goal of the Ministry of Justice should be the effective promotion of mediation in Cyprus via legislation and by other means. It seems that this goal is not

57 See further, *Review of Civil Procedure*, Vol. 3 (Athens: Sakkoulas Publications, 2018), 287-325 with comments by Assistant Professor Giannopoulos P., 325-330 [in Greek], *Journal Arbitration & Mediation and other ADR Methods*, Vol. 1 (Nomiki Bibliothiki S.A., 2018), 99-131 [in Greek] with comments by Judge of the Supreme Court Loverdos D., 131-132 and the Memo of the Plenary Session of the Presidents of the Bar Associations of Greece to the Administrative Plenary Session of the Supreme Court of Greece (28.06.2018), available at www.dsa.gr%2Fsites%2Fdefault%2Ffiles%2Fnews%2Fattached%2Fdiamesolavisi-ypomnimashedio_2_28.6.2018.

58 See Roger Levitt, *Compulsory mediation edges closer after Civil Justice Council report*, LinkedIn.com (2017, October 23), available at https://www.linkedin.com/pulse/compulsory-mediation-edges-closer-after-civil-justice-roger-levitt/?trk=v-feed.

served through the proposed reform of the mediation law.

More precisely, the proposed reform does not answer questions, such as how will the judges convince the parties to try mediation, in which stage of the court's procedure and with what motives? For instance, there is a provision in the proposed reform regarding the implementation of compulsory mediation even if the case is pending at the Supreme Court. This is problematic, especially in its relation to each person's constitutional right to be heard by a state judge.

Finally, there is no clear connection between the proposed introduction of compulsory mediation as a condition/stage before litigation proceedings and the reform of the Rules of the Cypriot Civil Procedure, which is absolutely necessary so that the court system and the institution of mediation to be designated accordingly and to be in balance. Furthermore, more specific rules should be introduced regarding compulsory mediation in order that this (pretrial) obligation on behalf of the parties does not lead to additional delays of the proceedings or too an increase in costs if the parties retain a right to bypass the mediation process.

Concluding Remarks

Mediation is a trend in conflict resolution in almost all jurisdictions. Although mediation has primarily been a philosophical concept known to most civilizations, its promotion nowadays is based on a policy choice concerning the governance of the state and the administration of justice. In Cyprus, despite the existence of mediation legislation on civil and commercial disputes in the last six years, the actual practice of mediation in general happens rarely, and there is no mediation culture. Cyprus' legal system is 'litigation-friendly'. The majority of the involved parties and/or professionals are not aware of mediation and its advantages, and there is a complete lack of information and knowledge regarding mediation even among attorneys. An understanding of mediation in comparison with traditional litigation would actually enable parties to choose the most appropriate mechanism for resolving their disputes. This could change only through targeted and dynamic actions. For example, the Ministry of Justice and Public Order could undertake information campaigns and could proposal to use mediation in disputes where big organizations and/or businesses or even municipalities are involved. The Cyprus Bar Association could also support and promote mediation. This could change through legislative initiatives, such as promoting specific motives for using mediation and/or putting in force pretrial, compulsory mediation.

The option of compulsory mediation as a pretrial condition, before the hearing of a civil or commercial claim, or by court mandate, is nevertheless a possibility for every European legislator in the framework of a justice system and its relationship with ADR. This policy maintains that mediation is an adjunct to, not a replacement for, litigation. In this context, it is crucial that among the recommendations of the report

on the Functional Review of the Courts System in Cyprus, conducted by the Institute of Public Administration of Ireland and delivered to the Cypriot Ministry of Justice and Public Order and the Supreme Court in March 2018, there is a clear proposal to introduce ADR mechanisms and to consider making recourse to these a requirement prior to recourse to court.

Finally, Courts in Cyprus should lead the way in supporting and promoting mediation by encouraging the parties to try mediation in cases where settlement is a likely outcome. In other words, Court should be the last resort not the first one.

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Equal Treatment of Women and Men in Employment: An Analysis of the Cypriot and the Greek Legal Frameworks

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Abstract

The principle of equal treatment between women and men holds a major importance in Labour Law and aims to ensure equal opportunities and conditions of employment regardless of gender. The main part of the study focuses on the protective measures and the legal protection in the Cypriot and Greek legal order. Statistical data reveals that gender equality at work has not actually been achieved in the two countries. A deeper analysis suggests that there is a pathogenesis in the labour markets that needs to be overcome. Balancing family and professional life are crucial in combating social stereotypes, occupational segregation, as well as the glass ceiling effect, in order to achieve substantial gender equality in employment life.

Keywords: equal treatment, equal pay, gender equality, labour market, discrimination, stereotypes, pay gap, glass ceiling effect, occupational segregation, work-life balance, maternity

Introduction

The principle of equal treatment holds a particular importance in Labour Law and constitutes a key factor in regulating labour relations. According to the principle, every employee is entitled to equal treatment under the same working conditions, whereas differential treatment between employees is prohibited, unless it can be justified by objective criteria.[3] It is a triennial principle,[4] in the sense that it is addressed to employers, who are obliged to comply with it when they regulate labour relations.

The principle of equal treatment of women and men in employment is based on

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3 I. Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek] (7th edition, Sakkoulas, 2014), 53-54; D. Zerdelis, *Labour Law - Individual Labour Relationship*s, 3rd ed. [in Greek] (Athens: Sakkoulas, 2015), 170 ff.; I. Lixouriotis, *Individual Labour Relationships*, 4*th* ed. [in Greek] (Athens: Nomiki Vivliothiki Publications, 2013), 52 ff.; G. Vlastos, *Equality and equal treatment in labour relationships* [in Greek] (Athens: Sakkoulas, 1988), 155 ff.

4 I. Lixouriotis, *Individual Labour Relationships*, 56; G. Vlastos, Equality and equal treatment in labour relationships, 96.

the need to respect the human dignity of the employee, to protect the employee from the risk of being treated less favourably on the grounds of gender,[5] and to prevent any unjustified and unfair act of discrimination against that employee on the basis of gender.[6] Towards this end, the state takes the initiative to take positive measures to achieve gender equality at work.[7]

Although equal treatment of women and men in employment should, at least in modern times, be considered as self-evident, this is not (yet) the case, even in countries where a sufficient legislative framework that safeguards gender equality is in place. The 'glass ceiling effect' is certainly not something new, as women often find it harder than men to move up the professional ladder.[8] This vertical occupational segregation phenomenon reflects women's comparatively limited career opportunities in positions of senior professional hierarchy, which are statistically dominated by men.[9]

Gender equality is one of the fundamental values of the European Union (EU), enshrined also in Article 21 of the Charter of Fundamental Rights.[10] The EU is dedicated to promoting gender equality within its member states, a principle contained in its very founding Treaties.[11] Over the decades this principle came to be statutorily enhanced through Primary, Secondary and Supplementary Law;[12] with changes to the EU Treaties, adoption of legislation (mainly in the form of Directives), as well as Case Law,[13] the implementation of the principle of gender equality in practice was given a

5 Zerdelis, *Labour Law - Individual Labour Relationships*, 3rd ed. [in Greek], 171, 215 and 223; see also Koukiadis, *Labour Law - Individual Labour Relationships*, 54 and 57ff., where it is argued that equality between men and women at work is linked to the anthropocentric nature of law, since gender discrimination leads to devaluation of the person.

6 Koukiadis, *Labour Law - Individual Labour Relationships*, 57ff.; Zerdelis, *Labour Law - Individual Labour Relationships*, 172; Lixouriotis, *Individual Labour Relationships*, 53; G. Theodosis, *Gender equality in collective bargaining* [in Greek] (Athens: Nomiki Vivliothiki Publications, 2008), 13ff.; T. Doulkeri, *Gender equality in labour relationships*, 3rd ed. [in Greek] (Thessaloniki: Papazisis Publications, 1994), 45.

7 Zerdelis, *Labour Law - Individual Labour Relationships*, 225.

8 The term 'glass ceiling effect' was first introduced by Hymowitz and Schellhardt in their 1986 *Wall Street Journal* article. Five years later, in 1991, the term also entered U.S. Law. The Civil Rights Act of 1991 established the U.S. Federal Glass Ceiling Commission, responsible for issues of gender discrimination.

9 Theodosis, *Gender equality in collective bargaining* [in Greek], 62ff.; A. Papadopoulou, *Equality of men and women in collective bargaining agreements* [in Greek] (2008), 16ff.

10 Official Journal of the European Union, Charter of Fundamental Rights of the European Union (2012/C 326/02).

11 The principle that men and women should receive equal pay for equal work has been enshrined in the European Treaties since 1957, with the Treaty establishing the European Economic Community (EEC). This is current Article 157 of the Treaty on the Functioning of the European Union (TFEU).

12 Zerdelis, *Labour Law - Individual Labour Relationships*, 215ff. and 244ff.; Theodosis, *Gender equality in collective bargaining*, 1, 5-6, G. Vlastos, *Equality and equal treatment in labour relationships*, 72-73; S. Burri and S. Prechal, *EU Gender equality law* (European Commission, 2008).

13 The Court of Justice of the European Union (CJEU) has over the years ruled on multiple cases of

solid foundation. In most recent years, the EU has gone a step further to integrate a gender equality perspective into all EU policies and EU funding programmes (Gender Mainstreaming), with a view to promoting equality between women and men, and combating discrimination. This strategic goal is most recently manifested in the European Commission's Strategic engagement for gender equality 2016-2019.[14]

This article seeks to explore the extensive legislative framework in the field of equal treatment of women and men in employment, which has been adopted by two EU member states – namely Cyprus and Greece. Looking at recent statistics, as well as realities on the ground in the two societies, it is then assessed whether legislation on its own can bring about *per se* equality, or whether deeper social norms, as well as stakeholders across the state and non-state structure play an effective role.

Equality of Women and Men in Employment in the Cypriot Legal Order

Protective Measures

Article 28 §1 of the Constitution of Cyprus safeguards the principle of equality, stating that all persons are equal before the law, the administration and justice, and are entitled to equal protection thereof and treatment thereby.[15] Article 28 §2 of the Constitution ordains that every person shall enjoy all the rights and liberties provided for in the Constitution without any direct or indirect discrimination against any person on the grounds of his/her community, race, religion, language, sex, political

unequal treatment between women and men in the employment sector. Some of these landmark cases include: (a) non-recruitment or non-renewal of a pregnant employee's contract: Case C-177/88 *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen* (VJV-Centrum) Plus (The Netherlands), Case C-207/98 Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern (Germany), Case C-438/99 *Maria Luisa Jiménez Melgar v. Ayuntamiento de Los Barrios* (Spain); (b) dismissal because of pregnancy or during post-pregnancy protection or at the stage of artificial insemination: Case C-32/93 *Carole Louise Webb v. EMO Air Cargo (UK) Ltd* (United Kingdom), Case C-394/96 *Mary Brown v. Rentokil Ltd* (United Kingdom), Case C-109/00 *Tele Danmark A/S v. Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* (Denmark), Case C-460/06 *Nadine Paquay v. Société d'architectes Hoet + Minne SPRL* (Belgium), Case C-506/06 *Sabine Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG* (Austria); (c) direct discrimination on the grounds of pregnacy: Case C-294/04 *Carmen Sarkatzis Herrero v. Instituto Madrileño de la Salud (Imsalud)* (Spain), Case C-232/09 *Dita Danosa v. LKB Līzings SIA* (Letonia); (d) indirect discrimination against woman employee: Case C-100/95 *Brigitte Kording v. Senator für Finanzen* (Germany), Case C-196/02 *Vassiliki Nikoloudi v. Hellenic Telecommunications Organisation SA* (OTE) (Greece), Case C-104/09 *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA* (Spain); (e) professional ascendment of pregnant employee: Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v. Evelyne Thibault* (France); (f) less favourable treatment of pregnant employee: Case C-284/02 *Land Brandenburg v. Ursula Sass* (Germany).

14 Strategic engagement for gender equality 2016-2019, available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/strategic_engagement_for_gender_equality_en.pdf

15 A. Emilianides and C. Ioannou, *Labour Law in Cyprus* (The Hague: Wolters Kluwer, 2016), 159.

or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in the Constitution.[16]

Law 205(I)/2002[17, 18] on 'Equal Treatment of Men and Women in Employment and Vocational Training' partly harmonizes Cypriot Law with Directive 2006/54/EC. Law 205(I)/2002, providing for the application of the principle of equal treatment of women and men in the field of employment and, in particular, as regards access to vocational guidance, vocational education and training, as well as the terms and conditions in which they are carried out, access to employment, the terms and conditions of employment, including career development and the terms and conditions of dismissal (Section 3 of Law 205(I)/2002).[19] Law 205(I)/2002 applies in principle to all employers and with regard to all activities related to employment, with certain exceptions.[20]

By virtue of Section 5 of Law 205(I)/2002, women and men must enjoy equal treatment in the fields of employment, whereas lack of intention on the part of the employer does not preclude the illegal character of the discriminatory act. Moreover, the state and the social partners are encouraged to establish positive measures on gender equality through laws, collective agreements, or any other employer-employee agreements (Section 6 of Law 205(I)/2002).

16 Ibid., 158-159.

17 As amended by Laws 191(I)/2004, 40(I)/2006, 176(I)/2007, 39(I)/2009 and 150(I)/2014.

18 See the analysis of the context of Law 205(I)/2002 in Emilianides and Ioannou, *Labour Law in Cyprus*, 151-153; S. Giannakourou, *Cyprus Labour Law* [in Greek], (Athens: Nomiki Vivliothiki Publications, 2016) 115-120.

19 Actions that amount to direct or indirect discrimination on the grounds of gender mainly refer to: i) access to employment or work position, temporary, full-time or part-time employment and at all levels of an occupational hierarchy; ii) the terms and conditions of employment, including qualifications and other terms, conditions and placement, permanency, accession, transfer, removal, detachment or promotion criteria; iii) the terms and conditions of dismissal from any job or post; iv) membership and participation in employees' or employers' representatives organisations or any organisation whose members practice a specific profession, including any benefits granted by such organisations (Sections 8, 9 and 9A).

20 Section 4 of Law 205(I)/2002 provides that there are certain exceptions in occupational activities where, by reason of the context in which they are carried out, gender constitutes a determining factor. Such exempted occupational activities are listed in the Schedule of Law 205(I)/2002 and refer to: i) artistic activities where the filling of a post with a persons of the other gender would cause a significant difference in the nature of the post; ii) employment in a particular post when the duties of the post include the provisions of services outside Cyprus, in a state where legislation and culture are such that the particular services may not be logically rendered by a persons of the other gender; iii) personal services when it is imperative that these services employ persons from both genders, or referring to the domestic care of elders or persons with disability; iv) employment in the post of warden in women's or men's prisons; v) employment in the security forces or private security bodies when the employment of either gender is necessary to respect the personality of a person, or in special forces; and, vi) employment of women in underground mining works.

According to Sections 8, 9 and 9A of Law 205(I)/2002, any action amounting to direct or indirect discrimination on the grounds of sex shall be prohibited, inter alia, in the following fields: (i) access to employment or work position, temporary, full-time or part-time employment and at all levels of an occupational hierarchy; (ii) the terms and conditions of employment, including qualifications and other terms, conditions and placement, permanency, accession, transfer, removal, detachment or promotion criteria; (iii) the terms and conditions of dismissal from any job or post; (iv) membership and participation in employees' or employers' representative organizations, or any organization whose members practise a specific profession, including any benefits granted by such organizations.

An employer who violates any provision of Law 205(I)/2002 is guilty of an offence punishable with imprisonment of up to six months and/or a fine not exceeding €6,834 (Section 30), while any acts of retaliation by the employer against the employee are strictly prohibited (Section 17).

Law 177(I)/2002[21] aims to ensure the application of the principle of equal pay between women and men for the same work or for work of equal value (Section 3). Equal pay refers to the monthly salary and any other additional benefit paid directly or indirectly, in cash or in kind, by the employer to the employee (Section 2). A system of professional classification that is used for the determination of pay must be based on common criteria for male and female employees and must be designed in such a manner that discrimination based on gender is excluded (Section 5). Any contradictory arrangements which contain direct or indirect gender discrimination should be abolished (Section 7). It is explicitly forbidden to dismiss or discriminate against any employee who would complain about unequal treatment (Section 9).

Maternity protection is mainly regulated by Law 100(I)/1997. The employee is entitled to 18 weeks maternity leave. The period of maternity leave is considered as working time (Section 7). The employee has the right to return to her post after the expiry of the maternity leave under the same working conditions and is also entitled to a reduced working time for a period of 9 months. The employee should not be dismissed for the period since she has informed the employer of her pregnancy until 3 months after the expiry of the maternity leave (Section 4(1)), unless the employee commits a serious misconduct that justifies her dismissal, works under a fixed-term contract which expires or the company ceases to operate.

An employee's unfavourable treatment due to pregnancy or maternity leave is prohibited under Section 4(5) of Law 205(I)/2002. The Court of the EU has judged that gender discrimination also refers to non-recruitment[22] or dismissal[23] owing to

21 As amended by Laws 193(I)/2004, 38(I)/2009 and 151(I)/2014.

22 Case C-177/88 *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*.

23 Case C-179/88 *Handels- og Kontorfunktionaerernes Forbund v. Dansk Arbejdsgiverforening;* Case

pregnancy. The rule of partial reversal of the burden of proof also applies in the case of maternity protection, since the unfavourable treatment against the employee is presumed to be due to her pregnancy or maternity, unless the employer proves the contrary (Section 11).

Finally, Law 47(I)/2012 regulates the right to parental leave. Every parent who has been working for six months for his/her employer has the right to take parental leave without pay for a period of 18 weeks for each child, or 23 weeks if the parent is a widower. The period of leave counts as working time and the employer cannot terminate the employment contract on the grounds that the employee has been granted parental leave. Parental leave favours the participation of women in working life and encourages men to undertake family responsibilities.[24]

Legal Protection

Any dismissal is null and void if the employer dismissed the employee after having complained of a breach in the Equality Law, unless the employer can prove that the dismissal is due to other reasons (Section 17(1) of Law 205(I)/2002). Partial reversal of the burden of proof applies, which means that the employee who suffers infringement of his/her rights should invoke facts which may lead to breach of the Equality Law, whereas the employer must prove that there has been no breach of the provisions of the law and no damage has been caused to the employee (Section 14 of Law 205(I)/2002).[25] The Court of Labour Disputes awards a just and equitable compensation to the employee which covers the moral or physical damage he/she suffered plus legal interest (Section 15 (3) of Law 205(I)/2002).[26] Especially in case of dismissal, re-employment may be ordered by the Court if it is requested by the employee, so the employer is compelled to accept the employee's services (Section 15(4) of Law 205(I)/2002).

As far as the extrajudicial protection against gender segregation at work is concerned, this is developed in three axes. Firstly, the Gender Equality Commission for Employment and Vocational Training (Sections 22-23 of Law 205(I)/2002) constitutes an independent advisory body with responsibility for defining or revising

C-421/92 *Gabriele Habermann-Beltermann v. Arbeiterwohlfahrt*.

24 Case C-222/14 *Konstantinos Maistrellis v. Minister of Justice, Transparency and Human Rights*; Giannakourou, *Cyprus Labour Law* [in Greek], 206.

25 The partial reversal of the burden of proof has been applied by the ECJ before its legislative enforcement, see Case C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening*, Case C-127-92 *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*. See also Case *Elena Aresti v. General Prosecutor of State*, where the Supreme Court of Cyprus retreated to judgments of Irish (*Teresa Mitchell v. Southern Health Board*) and English (*Igen Ltd v. Wong*) courts in order to apply the reversal of the burden of proof, see also Giannakourou, *Cyprus Labour Law* [in Greek], 133-135.

26 See also Case C-407/14 *Camacho v. Securitas Seguridad Espana SA*.

national legislation on gender equality. The Gender Equality Commission may also provide assistance through counseling and giving information on victims' rights, represent victims before the judicial and extrajudicial authorities or even take the initiative to complain to the competent authorities about unequal treatment based on gender. Secondly, the Labour Inspector is equipped with increased powers and guarantees the effective enforcement and application of the Equality Law. The Labour Inspector (Section 24 et seq. of Law 205(I)/2002) is responsible to get complaints for infringement of the Equality Law in order to settle the dispute and drafts a report on the complaint, whereas, if no agreement is reached, introduces the case before the Labour Research and Assessment Committee.[27] Moreover, the Labour Inspector provides information, advice and suggestions to employees and employers on how to effectively comply with the law, reports to the Minister of Labour, Welfare and Social Security on issues that arise in the implementation of the law and submits proposals for the purpose of resolving them.[28] Finally, complaints can also be submitted to the Commissioner for Administration. The Commissioner, according to Law 42(I)/2004, may make recommendations to the competent authorities to investigate the complaints submitted, make recommendations for preventing the unequal treatment and impose fines in case of impeachment of the law.[29]

Equality of Women and Men in Employment in the Greek Legal Order

Protective Measures

The Greek Constitution refers to gender equality: All Greek citizens, men and women, have equal rights and obligations (Article 4(2)). Equal pay irrespective of gender is established in Article 22 (1). The state should adopt measures for the promotion of gender equality and the elimination of inequalities on grounds of gender (Article 116 (2)).[30]

Gender equality in Greece is mainly regulated by Law 3896/2010, which replaced Law 1414/1984[31] and incorporated into the Greek legal order Directive 2006/54/EC

27 Giannakourou, *Cyprus Labour Law* [in Greek], 168-169.

28 See also *Alkiviadou v. Attorney-General* [2011] 1 CLR 2350.

29 A. Papadopoulou, *Equality of men and women in collective bargaining agreements* [in Greek] (2008), 42ff., where there are references to specific cases where the Commissioner for Administration took the initiative and action on cases of dismissal of a pregnant employee, sexual harassment of an employee by her supervisor, unlawful failure to recruit a prospective employee on grounds of gender etc.

30 Koukiadis, *Labour Law – Individual Labour Relationships* [in Greek], 336ff.; Lixouriotis, *Individual Labour Relationships* [in Greek], 59; Vlastos, *Equality and equal treatment in labour relationships* [in Greek], 74-75.

31 Vlastos, *Equality and equal treatment in labour relationships* [in Greek], 83ff.; Doulkeri, *Gender equality in labour relationships* [in Greek], 49ff., G. Kravaritou, *Labour and woman's rights* [in Greek]

of the European Parliament and the Council. Law 3896/2010 aims to establish gender equality in the field of employment and labour market by applying the principle of equal opportunities and equal treatment between men and women in employment (Article 11), career development (Article 12), vocational training (Article 13), social security schemes and working conditions, including equal pay (Article 1). The principle of equal treatment sets the prohibition of any direct or indirect discrimination based on gender, especially with regard to the marital status of the employee (Article 3). Direct discrimination occurs when a person is treated less favourably because of his/her gender,[32] whereas indirect discrimination takes place when an apparently neutral provision or criterion or practice may lead to a disadvantageous result against a person on grounds of gender, unless such provision meets professional requirements or services a social policy, such as maternity protection. (Article 2 (f) (a) and (b)).[33] On the contrary, the adoption or maintenance of measures that eliminate any discrimination on the grounds of gender does not fall within the notion of prohibited discrimination (Article 19).[34] Men and women employees are entitled to equal pay for equal work or work of equal value (Article 4).[35, 36] Termination of employment based on gender or family status or because of the employer's vengeance due to the employee's incompetence with sexual or other type of harassment is prohibited (Article 14).[37]

(Athens: Sakkoulas, 1992), 167ff., P. Agallopoulou, *Violations of the principle of equal treatment of men and women in labour relationships* [in Greek] (Athens: Sakkoulas, 1992), 45ff.

32 Koukiadis, *Labour Law – Individual Labour Relationships* [in Greek], 34ff.; Zerdelis, Labour Law - Individual Labour Relationships [in Greek], 226ff.

33 Koukiadis, *Labour Law – Individual Labour Relationships* [in Greek], 57ff. and 346, where it is stated that indirect discriminations are legitimate, when they are justified by the need to achieve a legitimate aim and the means for its achievement are appropriate and necessary; Zerdelis, *Labour Law - Individual Labour Relationships* [in Greek], 235ff. and 254ff.; Lixouriotis, *Individual Labour Relationships* [in Greek], p. 54; Theodosis, *Gender equality in collective bargaining* [in Greek], 67ff. About exceptions to equal treatment, provided that they are appropriate for a certain profession, see also T. Doulkeri, *Gender equality in labour relationships* [in Greek], 28, 39, 119-120.

34 Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 339; Doulkeri, *Gender equality in labour relationships* [in Greek], 51.

35 About the principle of equal pay, see Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 340ff.; I. Lixouriotis, *Individual Labour Relationships* [in Greek], 55ff.; Zerdelis, *Labour Law - Individual Labour Relationships* [in Greek], 244ff., where it is pointed out that the court should disregard any provision conflicting with the claim for equal pay or prevents its implementation; Doulkeri, *Gender equality in labour relationships* [in Greek], 39ff.

36 Remuneration is broadly defined, in accordance with the jurisprudence of the ECJ, since remuneration is considered to be all wages, salaries and benefits provided, directly or indirectly, in cash or in kind by the employer to the employee for his work, see also Case C-262/88 *Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group*; Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 340 ff.; Zerdelis, *Labour Law - Individual Labour Relationships* [in Greek], 247-249; Theodosis, *Gender equality in collective bargaining* [in Greek], 38ff.; Vlastos, *Equality and equal treatment in labour relationships* [in Greek], 78 and 112ff..

37 Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 350-351.

There are also provisions on equality regarding family obligations of the employee. Maternity, paternity and family life are explicitly protected under the provisions of the law (Article 20). An employer cannot refuse to hire a woman because of the fact that she is pregnant or a mother (Article 20 (2)). Any discrimination against working parents, which arise as a result of parental leave, is prohibited (Article 18). According to Article 36 of Law 3996/2011, a woman should not be dismissed during pregnancy and 18 months after confinement. An employee has the right to return to her job after the termination of the maternity leave, while she also benefits from any improvement in the working conditions during her absence (Article 17).

Legal Protection

An employee who considers that (s)he has suffered unequal treatment because of his/her gender has the right to seek legal protection, even after the termination of employment (Article 22 (1)). An employee may bring an action to the civil courts requesting full compensation, which covers the positive and negative loss suffered as well as reparation of moral damage (Article 23 (1)).[38] Partial reversal of the burden of proof also applies.[39] The employee provides evidence that may result in direct or indirect discrimination, whereas the employer should prove that there has been no breach of the principle of equal treatment irrespective of gender (Article 24).[40]

The extrajudicial protection is preventive rather than repressive, in the sense that it is intended to create a framework which will prevent unequal treatment on grounds of gender. The Ombudsman acts as the authority to monitor and promote the implementation of the principle of equal opportunities and equal treatment of men and women (Article 25). In particular, the Ombudsman is competent to provide assistance to victims of gender discrimination, to carry out the relevant research in case of complaints about impeachment of gender equality, to publish reports on the implementation of equal opportunities and equal treatment, to propose measures to eliminate gender discrimination, to exchange information with counterparts from the member states of the EU and to cooperate with the competent authorities about the implementation of gender equality (Ministry of Labour and Social Security, General Secretariat for Gender Equality, social partners etc.) (Article 3 (6) of Law 3094/2003). In addition, the Ombudsman may request, from a person named in a petition before him/her, documents or other evidence to establish the truth of complaints about violation of gender equality (Article 4 (5) of Law 3094/2003). Moreover, the Inspection

38 Giannakourou, *The equal treatment of men and women under EU and Greek Labour Law* [in Greek], 291; Zerdelis, *Labour Law - Individual Labour Relationships* [in Greek] (Third edition, Sakkoulas, 2015), 291.

39 Case C-127/92 *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*.

40 Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 354, Zerdelis, *Labour Law - Individual Labour Relationships* [in Greek], 294ff.

Body of Labour Relations deals with complaints about violations of gender equality and informs the Ombudsman about them, submitting the results of the actions undertaken and carried out in relation to them (Article 25 (10)).

Trade unions inform their members about their rights deriving from the legislation on equal pay and equal treatment at work (Article 26 (1)). Legal entities and associations of persons who justify a legitimate interest may exercise the rights of the employee who suffers gender inequality, provided that the employee consents to the actions before the competent authorities (Article 22 (2)).[41] Employers are obliged to provide information that makes it possible to ascertain compliance with the relevant provisions (information on the proportion of men and women in a company, cooperation with employees' representatives etc.) and promote equality at the workplace (Article 26 (2-3)). Finally, the Department of Gender Equality of the Ministry of Labour and Social Security is responsible, inter alia, to take legislative initiatives relating to the implementation of the principle of gender equality, maternity protection and the reconciliation of professional, private and professional life, to monitor collective labour agreements in order to verify compliance with the equality legislation and to monitor the measures taken to promote gender equality (Articles 27-28).

The Pathogenesis of the Cypriot and Greek Labour Markets

The Special Eurobarometer survey on gender equality of November 201742 emphasised the need for achieving more convergence in the field of gender equality across the EU member states. One of the many interesting findings of the Survey was that more than one-third of Europeans (35%) believe that men are more ambitious than women, and almost seven in ten respondents (69%) think women are more likely than men to make decisions based on their emotions. Mentalities seem to be a main parameter underlying these findings, as still women are stereotypically linked to the domestic sphere much more than men and, as a result, there is still a rather unequal division of labour and responsibilities within the household that hinders women in their professional lives.

The interesting findings of the Gender Equality Index 2017[43] highlight that progress is very slow; 'The EU's score is just four points higher than ten years ago, now 66.2 out of 100. The top performing country is Sweden with a score of 82.6, while

41 Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 355.

42 Special Eurobarometer 465 (2017), Gender Equality 2017, [EBS 465], available at: http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2154.

43 European Institute for Gender Equality (2018), Gender Equality Index 2017: Measuring gender quality in the European Union 2005-2015 Report, available at http://eige.europa.eu/rdc/eige-publications/gender-equality-index-2017-measuring-gender-equality-european-union-2005-2015-report.

Greece moved to the bottom with 50 points.'[44] According to the findings, progress has even slipped backwards in 12 countries when it comes to the time use of women and men. "Only every third man engages daily in cooking and housework, compared to almost every woman (79%). Men also have more time for sporting, cultural and leisure activities."[45] Greece and Cyprus were among the countries where, according to the Index's findings, a great deal of work still needs to be done in order to achieve a gender-equal society.

In the case of Cyprus, the employment rate is 64% for women versus 72% for men for the age groups 20-64. The total employment rate is 68% and the country has not yet reached the national target of the Europe 2020 Strategy (EU2020), which is in the margin of 75-77%. The full-time equivalent employment rate of women is about 45%, compared to 53% for men. The gender gap in the full-time equivalent employment rate is 6% to the detriment of women in the age group 25-49 and 19% to the detriment of women in the age group 50-64. The full-time equivalent gender gap is much greater among single women and men (35% versus 58%, respectively), in couples with children (64% versus 80%, respectively) and among people with disabilities (18% versus 30%, respectively), always to the detriment of women. Moreover, 17% of women work part-time, compared to 11% of men. On average, women work 37 hours per week, compared to 41 hours for men. Five percent of working-age women versus 0.1% of working-age men are economically inactive or work part-time due to care responsibilities.[46]

In the case of Greece, the employment rate in 2015 was 46% for women versus 64% for men in the age group 20-64, with the total employment rate at 55%. Greece has not reached its national target within the Europe 2020 strategy (EU2020), which is set at 70%. The gender gap in the employment rate is similar when the number of hours worked is taken into account. The full-time equivalent employment rate is around 30% for women compared to 46% for men. Among women and men in a couple with children, the full-time equivalent employment rate for women is 50% compared to 79% for men, indicating a gender gap of 29%. This gender gap is bigger than that of couples without children, a group for which there is a gender gap of 6%. The full-time equivalent employment rate increases as education levels rise. Moreover, among people with low and medium levels of education, the gender gap is much higher, to the detriment of women, than among highly educated people. Thirteen

44 European Institute for Gender Equality (2018), Gender Equality Index 2017: Progress at a snail's pace, available at https://eige.europa.eu/news-and-events/news/gender-equality-index-2017-progress-snails-pace.

45 Ibid.

46 European Institute for Gender Equality (2018), Gender Equality Index 2017: Cyprus, available at: https://eige.europa.eu/rdc/eige-publications/gender-equality-index-2017-cyprus.

percent of women work part-time compared to 7% of men. On average, women work 39 hours per week, compared to 44 hours for men. Three percent of working-age women versus virtually no working-age men are either inactive or work part-time due to care responsibilities.[47]

It is evident from the statistical data above that legislation in itself is not enough to prevent gender discrimination, including wage inequality.[48] Gender equality cannot be achieved unless all stakeholders join forces to deliver. The reality of the labour market in both Cyprus and Greece shows that employment equality between men and women still has significant gaps.

An important pathogenesis of the Cypriot and Greek labour markets is the occupational gender segregation, according to which the jobs and professions are divided into 'male' and 'female', and women mainly work in low-skilled and low-paid jobs and professions.[49] Occupational segregation may either get the form of (i) vertical separation, which concerns the hierarchical position of women, who are limited to employment in the hierarchically lower jobs and professions, resulting in even more intense wage differentials, otherwise also known as the 'glass-ceiling effect', or (ii) horizontal segregation, where women work in specific sectors and professions, mainly in education, human health and social work activities. According to the 2017 Gender Equality Index, gender segregation in the labour market is a reality for both women and men in both Cyprus and Greece. In the case of Cyprus, nearly 20% of women compared to 7% of men work in education, human health and social work activities,[50] whereas in the case of Greece, 22% of women work in education, human health and social work activities, compared to 8% of men.[51]

The main reason for the perpetuation of occupational segregation in the labour market, especially in Cyprus, is the prejudices against women at work. Few cases are pending before the Court of Labour Disputes on the implementation of the Equality Law. Most of the cases relate to recruitment and promotion issues in the wider public sector and the Court does not examine the real facts of the case, but mainly examines

47 European Institute for Gender Equality (2018), Gender Equality Index 2017: Greece, available at: https://eige.europa.eu/rdc/eige-publications/gender-equality-index-2017-greece.

48 The Cypriot Law on equal pay was established only in 1989 (Law 158/1989). Prior to its establishment, in the case *Melpo Gregoriou v. Municipality of Nicosia*, the defendant woman employee was subject to a pay gap due solely to her gender and she claimed equal pay with her men colleagues and her request was upheld by the Supreme Court of Cyprus.

49 P. Agallopoulou, *Violations of the principle of equal treatment of men and women in labour relationships* [in Greek], 29-30.

50 European Institute for Gender Equality (2018), Gender Equality Index 2017: Cyprus, available at: https://eige.europa.eu/rdc/eige-publications/gender-equality-index-2017-cyprus.

51 European Institute for Gender Equality (2018), Gender Equality Index 2017: Greece, available at: https://eige.europa.eu/rdc/eige-publications/gender-equality-index-2017-greece.

if a breach of procedural requirements took place.[52] It is indeed a given that people's perceptions are both shaped, and constrained, primarily by their experiences, and living in a small country like Cyprus, a small island community to be exact, people tend to be relatively cut off from the rest of the world and often follow more conservative, 'island-mentality' lifestyles that make it much harder to transform perceptions.[53]

Conclusion

Gender equality in labour relations starts from the concern to ensure equal pay for work of equal value, extends to equal treatment in working conditions and equal opportunities in the labour market in general, as well as professional evolution in order to achieve social cohesion.[54] It would otherwise be meaningless to establish a provision of equal pay if women could not join the labour market, or could not be recruited in part-time jobs with at least partial wages, partial rights and partial stability, or be recruited in under-skilled jobs, and have the opportunity to even develop their professional skills.

Legislation should take into consideration the different social, family and biological implications[55] that work-life balance has on women and men. The state should adopt measures that facilitate the simultaneous response to professional and family obligations (paid parental leave),[56] create or develop sufficient family support structures (childcare services),[57] ensure the flexibility of working time[58] and the continuity of a woman's professional career during periods of interruption in her career, such as birth and maternity (assimilation of absence time with working time owing to family obligations).[59]

The establishment of measures of judicial and extrajudicial protection, as well as the supervision of their observance, is not enough to prevent occupational gender segregation.[60] Occupational gender segregation cannot be avoided, unless there is

52 Papadopoulou, *Equality of men and women in collective bargaining agreements* [in Greek], 33ff.

53 This is discussed more extensively in C. Ioannou, 'The Europeanisation of Cypriot Social Policy: An Apolitical Europeanisation Process', *Journal of Modern Hellenism*, Vol. 25-26 (2008-2009), 97-128; C. Ioannou and G. Kentas, 'The Europeanisation of Gender Issues in the Labour Sector: Normative vs. Cognitive Adaptation', in *Proceedings of the 13th International Conference of International Society for the Study of European Ideas* (University of Cyprus, Nicosia, 2-6 July 2012).

54 Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 333 and 347ff.; Dimarellis, 'The status of women employees in Greek and Cypriot legal order' [in Greek] *Labour Law Inspection*, Vol. 75, No 5 (2016), 540.

55 Kravaritou, *Labour and woman's rights* [in Greek], 14.

56 Theodosis, *Gender equality in collective bargaining* [in Greek], 107ff.

57 Theodosis, *Gender equality in collective bargaining* [in Greek], 141ff.; Doulkeri, *Gender equality in labour relationships* [in Greek], 36-37; Kravaritou, *Labour and woman's rights* [in Greek], 27, 41.

58 Theodosis, *Gender equality in collective bargaining* [in Greek], 147ff.

59 Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 335.

60 See also Kravaritou, *Labour and woman's rights* [in Greek], 27 and 36-37, where it is pointed out

disengagement from prejudices that limit women to having an auxiliary role in the labour market and occupying jobs which demand less skills. Stereotypes are generally restricting employment into 'female' and 'male' occupations, thus depriving women of access to a well-paid, full-time job and preventing their professional development. It is therefore necessary to abolish anachronistic social structures in order to overcome the concepts that reproduce inequality against women employees.[61]

Family obligations should be restructured in order to correspond to the modern era and to achieve a balance between work and family life.[62] The perception of society remains focused on the dipole of the man as the breadwinner, who is primarily responsible for the survival of the family, and the woman as the child-carer, who should face her complex role within the family and the society.[63] A woman's work depends on many factors mainly related to family responsibilities, which signify the complex and demanding role that she has to respond to.[64] Reconciliation of work and family life can be achieved by abandoning the patriarchal notion that only women should bear family obligations.[65, 66]

The parameter of education is also important. Higher education, vocational training and enrichment of qualifications can help women participate more actively in the labour market, take higher and better-paid jobs, and respond to increasing mobility in the labour market.[67] In addition, women should be encouraged to receive education in line with the new economic, technological and scientific developments in order to move to modern and developing professions.[68]

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that the enforcement of the principle of gender equality in 'brilliant' legislative texts is not enough to ensure the implementation of equality in labour relations, since anachronistic social structures still exist.

61 Kravaritou, *Labour and woman's rights* [in Greek], 39-40; Agallopoulou, *Violations of the principle of equal treatment of men and women in labour relationships* [in Greek], 35; Doulkeri, *Gender equality in labour relationships* [in Greek], 50-51; Dimarellis, 'The status of women employees in Greek and Cypriot legal order' [in Greek], 540.

62 Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 333; Theodosis, *Gender equality in collective bargaining* [in Greek], 105ff.; Kravaritou, *Labour and woman's rights* [in Greek], 12; Vlastos, *Equality and equal treatment in labour relationships* [in Greek], 95-96; Dimarellis, 'The status of women employees in Greek and Cypriot legal order' [in Greek], 541.

63 Kravaritou, *Labour and woman's rights* [in Greek], 118-119, who mentions that the family is interwoven with the woman.

64 Kravaritou, *Labour and woman's rights* [in Greek], 11.

65 Zerdelis, *Labour Law - Individual Labour Relationships* [in Greek], 218, Kravaritou, *Labour and woman's rights* [in Greek], 39ff.

66 Kravaritou, *Labour and woman's rights* [in Greek], 18, 27.

67 Agallopoulou, *Violations of the principle of equal treatment of men and women in labour relationships* [in Greek], 34.

68 Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 335; Agallopoulou, *Violations of the principle of equal treatment of men and women in labour relationships* [in Greek], 75.

The role and activity of trade unions and social organisations should be multilateral.[69] They should examine the pathogenesis of the labour markets and inform the competent authorities about the problems that women face at work, in order to adopt rules that take into account these problems and the multifaceted role that a woman holds as a worker, mother and spouse. Gender mainstreaming has already integrated the gender dimension into existing employment policies. Social organisations may develop actions to reduce gender inequality in labour relations, including increasing society's awareness, upgrading the monitoring mechanisms on equality legislation, and combating occupational segregation on the basis of gender through interventions in education.

Women also hold individual responsibility to take initiatives that will lead to gender equality.[70] Low participation in trade unions, due to lack of time or fear of a possible dismissal, makes it difficult to promote their demands.[71] In this respect, it is particularly important to take the initiative to participate in trade unions, think tanks and decision-making bodies in order to influence the formulation and content of laws, decisions and measures that concern them.[72] In fact, it has been estimated that the participation of women should amount to at least 30% of the total number of employees of the organisations in order for them to influence decision-making.[73]

In conclusion, the crucial concern and aim is to apply substantial equality throughout employment, from recruitment to dismissal or even after that,[74] and from fixing wages and working hours to the provision of welfare measures and respect for women's personality, taking into account the specificities that characterise women's work. A very important issue in this context is the fight against stereotypes which reproduce occupational segregation into 'female' and 'male' professions. We should, therefore, get to the point where a woman occupying a high position is not considered to be something remarkable, but a normal panacea. Indeed, gender equality in every aspect of economic and social life is a basic obligation for every state which ensures equal treatment for all citizens irrespective of their gender.

69 Theodosis, *Gender equality in collective bargaining* [in Greek], 16ff. and 22ff., Dimarellis, 'The status of women employees in Greek and Cypriot legal order' [in Greek], 542-543.

70 Dimarellis, 'The status of women employees in Greek and Cypriot legal order' [in Greek], 543.

71 Kravaritou, *Labour and woman's rights* [in Greek], 189; Agallopoulou, *Violations of the principle of equal treatment of men and women in labour relationships* [in Greek], 73-74, where there is an analysis of the reasons that deter women from an active participation in trade unions.

72 Theodosis, *Gender equality in collective bargaining* [in Greek], 19ff.; Agallopoulou, *Violations of the principle of equal treatment of men and women in labour relationships* [in Greek], 76.

73 Koukiadis, *Labour Law - Individual Labour Relationships* [in Greek], 333.

74 Case C-185/97 *Belinda Jane Coote v. Granada Hospitality Ltd.*, where it was judged that equality law is infringed when the employer refuses to provide a letter of recommendation to the employee after the termination of employment, if the employee has sued against the employer in order to ensure the application of equality law.

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'Circling Round the Economic Sun of Britain':[1] Cyprus and Its Participation in the British Empire Exhibitions

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Abstract

The study offers an examination of Cyprus's participation in the Colonial and Indian Exhibition of 1886 and the British Empire Exhibition of 1924 in London. Drawing on unpublished archival material, the study investigates for the first time the history of Cyprus's exhibition representation and explores the colonial government's early steps in cultural policy. By assembling and examining the Cyprus pavilions' exhibits, architecture, decorations and exhibition catalogues, as well as the official correspondence, the study forms the following argument: Cyprus, at the 1886 and 1924 exhibitions, was curated, displayed and performed through the British imperial gaze. The exhibition committees were responsible for selecting what they considered characteristic specimens of Cyprus's historical past and colonial present. The study argues that a perceived identity for Cyprus, conforming to the imperial agenda of colonial development and profit-making, was projected and communicated to British and foreign audiences through several and diverse visual media.

Keywords: Cyprus, British empire, exhibition, colonial, cultural policy, art, identity, Palestine

Introduction

Cyprus under British rule (1878-1959) participated in several colonial and international exhibitions and fairs. Two of the most noteworthy were the Colonial and Indian Exhibition of 1886 and the British Empire Exhibition of 1924, both in London. This study focuses on the two exhibitions and supports the argument that an 'invented tradition' and hybrid identity for Cyprus, comprised primarily of Christian-Greek, Muslim-Ottoman and Victorian/Edwardian British characteristics was constructed by the country's exhibition committees, and accommodated in the space of the Cyprus pavilions.[3] The discussion which follows examines the ways the 1886 and 1924 pavilions *narrated* a visual fable, performed to the British and foreign audiences through the extensive and repetitive use of visual resources. The study proposes that Cyprus's participation in the empire exhibitions is an important source of new information, their

1 E. Hobsbawm, *Industry and Empire: From 1750 to the Present Day* (London: Penguin, 1999) 114.

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3 E. Hobsbawm, 'Introduction: Inventing Traditions', in *The Invention of Tradition*, eds. E. Hobsbawm and T. Ranger (Cambridge: Cambridge University Press, 1983), 1-14.

analysis offering a better understanding of Cypriot colonial culture. This preliminary study, on a subject that remains unexplored until now, retrieves unpublished archival material from the Cyprus State Archives. The study presents and analyses this material for the first time, and by doing so, it contributes to the literature of colonial Cyprus.

The main research objective of this study is to assemble and deconstruct, through discourse analysis, the visual narrative of colonial Cyprus, as this was exemplified in the 1886 and 1924 empire exhibitions. In order to achieve this, the various and diverse media employed for the synthesis of the Cypriot pavilions will be identified and analysed. The structure of the exhibition committees, the range of exhibitors and exhibits, the financial conditions that affected these participations and the colonial politics that surrounded them will all be examined in order to facilitate a better understanding of the context in which these participations were realised.

An important finding of this research is that a rich visual narrative, put together through the imperial gaze of the British exhibition committees, conformed to the colonial agenda and encompassed Western European notions of progress and civilizational development. As we will see later on, these notions were typical of the period the exhibitions took place in. The discussion which follows and the findings which result from this research derive mostly from written accounts of the time, such as the *Report and Handbook to Cyprus,* produced by the Commissioner of the 1886 participation. Furthermore, extracts of notices from the British press of the time shed light on the so far obscure lines that shape Cyprus's representation. Similarly, information on Cyprus's 1924 participation is accessed via the official guide of the exhibition, the commissioner's brief review, and other correspondence between the commissioner and the colonial government, all *tucked away* in the Cyprus State Archives up until this point. The study also draws information on the visual narrative created for Cyprus through the study of woodcuts, found in the above written sources. These woodcuts illustrate, for example, the 1886 pavilion from various angles. Finally, the set of written and visual tools used for this analysis is completed by the following: paintings, drawings, etchings, photographs, postcards, pottery, handicrafts, such as embroideries and jewellery design, the architecture and decorations of the pavilions, and life-size mannequins representing Cypriot (stereo-)'types'.

Currently, substantial scholarly research and thorough analysis of archival material regarding Cyprus's participations in British Empire exhibitions is extremely limited. India and the settler colonies have attracted the most scholarly attention, Malta and Palestine in the Mediterranean and Near East regions were researched somewhat less, and Cyprus has been neglected altogether.[4] As a result, the country's coordinates are

4 See for example P. H. Hoffenberg, *An Empire on Display: English, Indian and Australian Exhibitions from the Crystal Palace to the Great War*, (Berkeley, University of California Press, 2001); P. Greenhalgh, *Ephemeral Vistas: The Expositions Universelles, Great Exhibitions and*

still missing from this grand map of colonial representations, leaving a gap in the historiography of empire and exhibitions culture, in Cyprus's modern cultural history and the history of the British empire. This original study aims in addressing this issue by expanding our knowledge in the above field through the study of Cyprus's case, and to a lesser degrees Palestine's, which shared a pavilion with the former in the British Empire Exhibition of 1924. The colonial era is made of infinitely inter-connected local histories; by extending our knowledge on Cyprus's participation in the British Empire Exhibitions, we are also informed about other histories, for example the British and the Palestinian. Finally, this study may be considered as the starting point for the exploration of Cyprus's history in the British Empire Exhibitions, from which further studies may be conducted in the future. (See Figure 1)

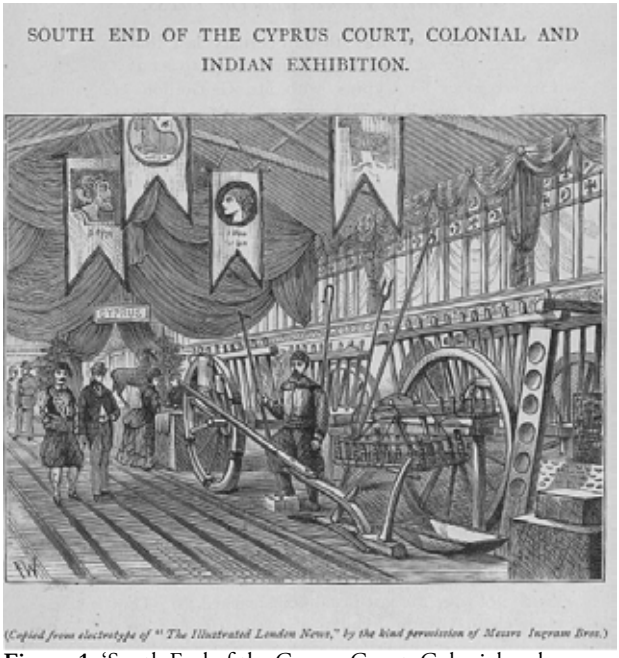

Figure 1: 'South End of the Cyprus Court, Colonial and Indian Exhibition. Copied from electrotype of *The Illustrated London News*, by the kind permission of Messrs Ingram Bros.', R. H. Lang, *Report (with three woodcuts) upon the results of the Cyprus representation at the Colonial & Indian Exhibition of 1886* (Foreign and Commonwealth Office Collection, 1886).

World's Fairs, 1851-1939 (Manchester: Manchester University Press, 1988).

The Colonial and Indian Exhibition of 1886 and the British Empire Exhibition of 1924

The Colonial and Indian Exhibition of 1886 and the British Empire Exhibition of 1924 are to be examined for the purpose of this study. These two exhibitions have been selected from the long list of empire exhibitions for a number of reasons. A practical reason is that the primary material found at the Cyprus State Archives is considerably more extensive than for any other participation. Furthermore, their recognised importance in the historiography of British Empire Exhibitions makes them valuable research material.[5] These exhibitions are particularly interesting since they are not monothematic shows focusing on, and at the same time restricted to, a single aspect of the participating countries' image, for example its agricultural or industrial produce. Several other exhibitions, in which Cyprus also participated, exhibited exclusively minerals, horticulture, agriculture and animals, such as the International Cotton Exhibition of 1914 in London, the Imperial Forestry Conference of 1920 and the Tobacco Exhibition of 1927 in London. On the contrary and quite distinctly, as interpreted by historians such as Annie E. Coombes, the periodic shows of 1886 and 1924 were well-performed multifaceted public spectacles, where the visitor could be entertained and instructed about the empire.[6]

As Paul Greenhalgh argues, despite the contrasting characteristics of the eras of which the empire exhibitions were a part, a standard set of reasons justified their organisation throughout the nineteenth and until the mid-twentieth centuries. The most significant of these reasons were peace amongst nations, education of the masses, trade, and progress.[7] Nevertheless, selecting as case studies two exhibitions that are separated almost by a four-decade break gives rise to considerations. For example, the fact that the 1886 and 1924 exhibitions belong in different chronological, economic and social contexts is by itself problematic. Their choice however is supported by the fact that the preliminary findings of this original investigation will offer a new angle of vision on the colonial state in Cyprus. Specifically, they will inform the reader about imperial ideas on economic and cultural development, and to what degree these changed (or did not) over an almost 40-year span, from the 1880s to the 1920s, covering half the period of British rule in the country.

The 1886 exhibition took place during the Victorian era, when Britain was still prosperous, confident and strong, when it had the world at its feet, and peace had prevailed until the empire joined the First World War in 1914. This exhibition was a profitable enterprise, aiming primarily to enhance trade relations between Britain and

5 P. Greenhalgh, *Ephemeral Vistas*, 114.
6 A. E. Coombes, *Reinventing Africa: Museums, Material Culture and Popular Imagination in Late Victorian and Edwardian England* (New Haven: Yale University Press, 1997), 63.
7 Greenhalgh, *Ephemeral Vistas*, 17.

its colonies, and also to entertain and inform its British audience about the empire. Britain's global expansion, financial developments, technological advances, and capitalist growth were all showcased. As Eric Hobsbawm aptly wrote: 'The exhibitions […] were a kind of planetary system circling round the economic sun of Britain'.[8]

On the other hand, the 1924 exhibition was organised under very different circumstances, only a few years after the end of the Great War, and only a year after the peace treaty of Lausanne was signed in 1923. During these post-war years, Britain and the British people suffered from material and psychological losses. The people therefore had to regain their faith in the empire. They had to be reassured by their government that they were still the citizens of a ruling nation and that they would recuperate successfully from the wounds of the War because, as it would be shown in this exhibition, they had all the resources, skills and capacity to do so. The 1924 exhibition was the product of an inter-war era when Britain strived to generate a collective popular enthusiasm for and faith in empire.[9]

The vital role of the colonies' participation in these exhibitions was abundantly emphasised. Circular despatches related to the 1924 exhibition, stressed that the leading purpose of the undertaking was to take stock of British colonial resources and to ascertain, particularly in raw materials, how far these resources were developed.[10] The 1924 exhibition was an attempt in finding practical solutions to the colonies' commercial and administrative problems, so that new sources of imperial wealth could be exploited to help repair the material losses of the Great War and contribute towards the individual prosperity of each colony. As with the 1886 exhibition, it was also emphasised that the 1924 exhibition was an opportunity for the colonies to promote their products by bringing them 'before the world'.[11]

At the same time, empire exhibitions also focused on their ethnographic component, demonstrated through cultural displays and lectures on 'native' art, history, archaeology and religion. The ethnographic exposition's purpose was to let people know about Britain's authority over the world's cultural heritage and at the same time, to educate the British public about the world beyond their homeland.[12] This projection of power, expressed literally in the form of physical control over other peoples, but also through an attempted control over their culture and heritage, is examined below, using the examples of Cyprus's participations in the 1886 and 1924 exhibitions.

8 Hobsbawm, *Industry and Empire*, 114.
9 J. M. MacKenzie, *Propaganda and Empire: The Manipulation of British Opinion 1880-1960*. (Manchester: Manchester University Press, 1984), 96-120.
10 Cyprus State Archive [CSA], SA1:473/1919/1, Circular, 1922, 39-44.
11 CSA, SA1:473/1919/1, Bradbury Director, Representative of the Board of Trade to Cyprus Chief Secretary 1920, 21.
12 N. E. Roberts, 'Palestine on Display: The Palestine Pavilion at the British Empire Exhibition of 1924', *The Arab Studies Journal*, Vol.15, No. 1, (2007), 70-89, 71.

The Vision of the 'Welcoming Empire'

Welcome! welcome! with one voice
In your welfare we rejoice,
Sons and brothers that have sent,
From Isle and Cape and Continent,
Produce of your field and flood,
Mount and mine and primal wood,
Works of subtle brain and hand,
And splendours of the morning land,
Gifts from every British zone.
Britons, hold your own! (Lord Tennyson, 1886)

Research at the Cyprus State Archives has brought to light a special issue of *The Cyprus Gazette*, published on 6 May 1886. This issue was dedicated to the Colonial and Indian Exhibition of 1886, where Cyprus participated with its own pavilion. The issue, published for the general information of the English-speaking public of Cyprus, included congratulatory messages for Cyprus's participation, for example from the Prince of Wales and the Queen. It also included Alfred Lord Tennyson, Poet Laureate's 'Ode on the Opening of the Colonial and Indian Exhibition'.[13] This piece of poetic propaganda, composed by one of the most popular and celebrated poets of the Victorian era, proclaimed the Victorian idealistic pre-First World War vision of nineteenth century Britain.

According to Tennyson, the 1886 exhibition intended to gather on common ground and 'into one Imperial whole' all the colonies and dependencies of the British Empire, 'from Isle and Cape and Continent', connected by 'one life, one flag, one fleet, one throne', and all guarded by a Christian God. Tennyson's use of vivid visual imagery evoked a representation of the world which had as its epicentre the 'Island-state' of Great Britain, whose flag flew 'between sea and sky' 'welding' together everything and everyone in between. This vision of the welcoming Empire worked on many levels.

The intended result of the poem was arguably to create in the reader of the time, both British and British subject, a sense of pride, privilege and empowerment for belonging to the empire's realm. 'Mother' Britain was inviting all her colonial 'sons' to her 'nest', wishing that in the following years she would be 'featured' in them. In other words, the aim was that peoples under British rule would be raised in the image and likeness of Britain in the British high ideals of the era. It was believed, or at least hoped, that in this way they would develop into being *civilised, modernised* and *Europeanised* British subjects.

On another level, Britain was welcoming to this exhibition all her colonial children, to 'cleave to one another', side by side, displaying their 'produce of […] field and flood, / Mount and mine', to meet and greet and collaborate and finally *profit* from

13 CSA, SA1: 1890/1886, 789.

each other. Furthermore, the exhibition was welcoming its British audience to meet their 'sons and brothers' from 'every British zone' accommodated temporarily in the exhibition space, and to listen to their diverse, nevertheless British-influenced 'myriad voices call'. Britain's personification as the primal mother, takes enormous proportions in this poem.

As much as Tennyson's vision offered an ideological standpoint, shared within Victorian high society, facilitating a viable narrative for the organisation of the empire exhibition of 1886, there was arguably a more important and a more realistic objective of this exhibition: profit. Profit was to result through the development of trade relations between the various participating parts of the empire, showing their progress through the display of their products, manufactures and resources.[14] Cyprus's colonial government, as all the participating governments, hoped that the country would benefit financially from this undertaking, leading to its gradual but steady economic expansion. However, the archival evidence shows that financial obstacles and also the country's still unmodernised state affected Cyprus's quality of participation in the 1886 and future exhibitions. In this way the development of trade relations with other colonies was discouraged, and arguably decelerated Cyprus's pace of economic growth and modernisation processes.

The Colonial Government's Exhibition Participation Policy

Cyprus, under British imperial rule, participated, or was requested to participate but declined the invitation usually due to financial reasons, in more than 160 international and colonial exhibitions, shows and fairs. The participation policy of Cyprus's colonial government in colonial and international exhibitions, annual, periodical or commemorative, was largely irregular throughout the period of the British occupation. Cyprus's poor representation in empire exhibitions, as in the case of the British Empire Exhibition of 1938 in Glasgow, or its absence from them, for example from the 1934 and 1936 Levant Fair in Tel-Aviv, seems to reflect a particular attitude towards economic development among colonial officials.[15]

The colonial government was unwilling to invest in Cyprus's promotion abroad due to the limited funds available from the country's local revenue. Furthermore, local merchants, invited to promote specimens of their produce in exhibitions abroad, many times did so almost reluctantly and only after the prompting of the government. They were reluctant to invest money and produce in undertakings organised outside the country because they considered these a risk with controversial and uncertain benefit. An example is found in the complaints made by some of the merchants participating

14 CSA, SA1: 1966/1886, Memorandum, 3 July 1885, 2-5.
15 CSA, SA1: 659/1937.

in the 1924 exhibition without making profit. For instance, C. Christodoulou & Co., Cypriot importers of cotton piece goods, manufacturer of native cotton and silk tissues, embroideries and all articles of Cyprus handicraft, complained that the 'Pavilion people' had decided to sell the exhibited items at a higher price than previously agreed, thus affecting sales.[16]

For the colonial government, exhibition participation was a complicated issue demanding consideration. This is evident in several samples of written communication between colonial administrators, as in the case of the Cyprus Colonial Secretary and the country's Trade Commissioner in London, in December 1927. The two were discussing the *unspoken rule* which said that, when a country was committing to participate in an annual exhibition, it agreed automatically to participate in all succeeding exhibitions, often for several years to come, otherwise withdrawal gave rise to harmful criticism.[17] Nevertheless, research has revealed that this was not the case with Cyprus, since even though it participated in some annual or biannual exhibitions, it did not always participate in successive shows, mainly because of financial reasons. An example of the latter is Cyprus's participation in the Levant Fair in Tel-Aviv. Cyprus participated in the 1932 fair but not in the following shows of 1934 and 1936. Periodic exhibitions were similarly treated, despite the fact that they were a seemingly different matter, since they were isolated events not requiring the colonial governments' long-term commitment.

In the case of Cyprus, participation in international exhibitions was usually organised by exhibition committees consisting mostly of British officials and some Cypriot members of the mercantile class. For example, the 1886 committee consisted of Commissioner R. Hamilton Lang, Capt. Wisely, and G. Gordon Hake, the Cyprus High Commissioner, Colonel F. Warren and other British colonial and London personnel. The committee also included D. Pierides, T. Peristiany, E. Constantinides, Hussein Effendi, and Mehmet Ali. Similarly, the 1924 Committee consisted of Commissioner R. L. N. Michell (after his resignation, Walter Bevan assumed duty as Cyprus representative on 21 September 1923), also the Deputy Commissioner P. Symeonides, the British Official Captain L. Jones and, as with the committee of the 1886 exhibition, Cypriot merchants of Greek and Turkish descent, such as L. Z. Pierides and Irfan Effendi.

Most exhibitors were primarily Cypriot traders of Greek descent. On several occasions, governmental institutions, such as the Cyprus Museum, erected in 1882, as well as British officials, also lent objects from their collections, for example Cypriot antiquities.[18] Unfortunately, archival research has not so far revealed indications of the

16 CSA, SA1: 473/1919/ 3, 13 January 1926, 39-40.
17 CSA, SA1: 1191/1926/1, 62-63.
18 R. H. Lang, Handbook to Cyprus (with Map of Island): and Catalogue of the Exhibits, (Foreign and

general response of the Cypriot public to these participations. Therefore, until and if further information becomes available, we are left to assume that the mass of the Cypriot population had nothing to do with them. This assumption is further enhanced by an archival entry, which shows that when the Archbishop of Cyprus and the Mufti, the two distinguished Cypriot representatives of the Greek and Turkish communities of the country, were invited by the High Commissioner to participate in the local organising committee of the 1886 exhibition, they declined 'for private reasons'.[19]

The issue of Cyprus being poorly or inadequately represented in the exhibition preoccupied the exhibitions' commissioners and often became the topic of conversation between them and the colonial administration. For example, regarding the 1924 exhibition, in an early letter, sent by Major W. H. Flinn, Assistant Secretary to the colonial government, to Ronald L. N. Michell, Cyprus's pavilion first commissioner, Flinn expressed his discomfort with the fact that it was 'difficult to stir up sufficient enthusiasm' amongst the Cypriot wine-merchants. The merchants could not be persuaded to send fine specimens for display because, as explained, they did not 'readily appreciate the value of advertisement'.[20] Cypriot merchants were not willing to advertise in the press either, for instance in the *Times*, which featured promotional material from various empire territories, such as Palestine.[21] As a result, the Cypriot pavilion was also poorly represented in the press, referred to 'in the most meagre fashion'.[22]

Palestine, on the other hand, Cyprus's 'competitor', was mentioned several times in the press 'for the obvious reason' that it had advertised.[23] The Mandate was an example which was often used by Cyprus's commissioner as a yardstick, to put pressure on the colonial government to invest more in the Cypriot representation, and to 'recognise the desirability of securing for Cyprus rather more publicity and prominence'.[24] However, these attempts were usually unsuccessful, and this is evident, for example, in the small amount of £122.3.6d. spent on Cyprus's publicity in the 1924 exhibition.[25]

Participation in the empire exhibitions conformed to the colonial agenda. It aimed in promoting the development of trade relations with other colonies and Britain; in advertising Cyprus as a tourist resort and; in creating cultural relations within the Commonwealth and beyond. However, these goals were not always met. In the case of the 1886 exhibition, Cyprus's commissioner concluded that fruitful trade

Commonwealth Office Collection, Manchester: Manchester University Press, 1886a), 36.

19 CSA, SA1: 1966/1886, Memorandum, 3 July 1885, 5.

20 CSA, SA1:473/1919/2, 15 December 1922, 5.

21 CSA, SA1:473/1919/2, 336.

22 CSA, SA1:473/1919/2, Comm. Bevan to Nicosia's Chief Secretary, 14 May 1924, 336.

23 CSA, SA1:473/1919/2, Bevan to Chief Secretary, 14 May 1924, 336.

24 CSA, SA1:473/1919/2, Bevan, 336.

25 CSA, SA1:473/1919/2, Acting Chief Secretary Nicosia to Comm. Bevan, 6 April 1925, 414.

collaborations for Cyprus were not achieved.[26] Lang explained that this was due to the fact that Cypriot merchants still had to 'modernise' and conform to European standards of trade in order to answer some of the needs of the British or international market. Trade development, therefore, was to take some time in Cyprus, until it got to a point where it could bring profit to the colony. This was evidently true. However, it could be argued that another important factor contributing to this result was the colonial government's irregular exhibition policy and poor investment in the quality of representation. As will be further discussed, the colonial government's attitude in regards to exhibition participation reflected a general attitude regarding policy-making (or the lack of it), especially on subjects related to the cultural life of the country.

Cyprus in London: 'Possessed and Contained'[27]

Banners, Paintings, Objects and Textual Representations

The organising committees responsible for Cyprus's participation in the Colonial and Indian Exhibition of 1886 and the British Empire Exhibition of 1924 assembled, curated and displayed a colonial identity for Cyprus, using an array of visual resources and exerting influence in an international political arena, as well as in a local cultural and economic one.[28] A historical narrative for Cyprus was reimagined, giving a visual account for the country's past and colonial present, indicating also toward a perceived multi-ethnic future.

In the context of the empire exhibitions, otherwise obscure territorial entities such as Cyprus, previously unknown to British audiences, were given flesh and bones through their compact pavilions. Their architecture, the selection and curation of the show-pieces and artefacts guided the visitor's experience. This experience could be direct through a visit to the pavilion, or indirect through the viewer's interaction with visual reproductions of the pavilions in the press, through engravings and, later on, photographs.[29] The following excerpt from *The Queen*, published on 2 October 1886, serves as evidence: 'Perhaps there is no court in the Exhibition more interesting than that of Cyprus. Its modern products, as well as its relics of ancient times, have a strange fascination for the thoughtful observer.'[30]

26 CSA, SA1: 1191/1926/1, Cyprus Trade Comm. in London to Cyprus Colonial Secretary, 8 December 1927, 62-63.

27 A. E. Coombes, 'The Franco-British Exhibition: Packaging Empire in Edwardian England', *The Edwardian Era*, eds. J. Beckett and D. Cherry (Oxford: Phaidon Press, 1987), 154.

28 Greenhalgh, *Ephemeral Vistas*, 9; Hoffenberg, *An Empire on Display,* 17-18.

29 J. Robinson, 'Introducing Pavilions: Big Worlds Under Little Tents', *Open Arts Journal*, Vol. 2, No.4 (2013), 1-22, 4.

30 Cited in R. H. Lang, *Report (with three woodcuts) upon the results of the Cyprus representation at the Colonial & Indian Exhibition of 1886* (Foreign and Commonwealth Office Collection, Manchester: Manchester University Press, 1886b), 35.

The visual and written resources accommodated in the pavilion served also as a mechanism of control, not necessarily a literal and obvious physical control over Cypriots but, more importantly in this case, control over Cyprus's culture. Cyprus was therefore 'both possessed and contained' in the physical space of the pavilion, whose decorations, fine art objects and other artefacts effectively compiled and offered a concise visual dictionary of this country's mythology, history and present.[31] For example, the 13 banners found in the 1886 pavilion were arguably suitably utilised by the organising committee to reaffirm Britain's ruling status over Cyprus. (See Figure 2, next page)

The banners, prepared and hand-painted 'in an economical, artistic and characteristic manner' by the wife of the Assistant Commissioner, G. Gordon Hake, hovered over visitors, referencing the island's tumultuous past by offering a memorable pictorial narration.[32] The head of the Greek goddess Aphrodite and the head of Jupiter Ammon, both from Cyprian coins of the sixth century B.C. were seen next to a Lion, inspired from a Phoenician coin of the fifth century B.C.[33] The 'Crux Ansata' (cross with a handle), copied from a Cyprian coin of the fifth century B.C., occupied the same space with a banner presenting the Eagle of the Ptolemies, from a coin of Ptolemy I, who conquered Cyprus in 311 B.C. A Byzantine Emperor, inspired by a coin of the empire of the East, to which Cyprus belonged until 1191 A.D., hung next to St. George and the Dragon representing the conquest of Cyprus by Richard Coeur de Lion of England in 1191 A.D. Escutcheon of Luzignan Kings, who reigned over Cyprus between the twelfth and fifteenth centuries A.D., gave way to the Lion of St. Mark, the emblem of the Republic of Venice, to which the island belonged from 1489 to 1571 A.D. The recent past of Cyprus was represented by the Crescent and Star, emblem of the Ottoman empire, which conquered Cyprus in 1571. This was followed by V.R. under a crown, from when Cyprus was ceded to Queen Victoria by Sultan Abdul Hamid under the terms of the Anglo-Turkish Convention of 1878. Finally, the banner of the High Commissioner of Cyprus completed the collection and firmly placed the visitor in the colonial present.[34]

A tableau of the country's history was therefore exhibited through the selection of a collection of images from antiquity to modernity. At the same time, a pluralistic Cypriot identity, primarily Christian and Muslim, was introduced to the visitor. This identity was moderated, curated and controlled by a third one, the British. Several paintings, for example, depicting churches and monasteries of Cyprus, such as the church of Saint Sophia, inevitably evoked a distinctively Christian Orthodox aura,

31 Coombes, 'The Franco-British Exhibition', 154.
32 Lang, Report (with three woodcuts), 2.
33 Lang, *Handbook to Cyprus*, 19.
34 Ibid.

conveying the religion and the ethnic Greek background of the majority of the Cypriot population. These were made not by Cypriot artists but by Captain Sinclair and Tristram Ellis Esq., two British administrators serving at the time in Cyprus.

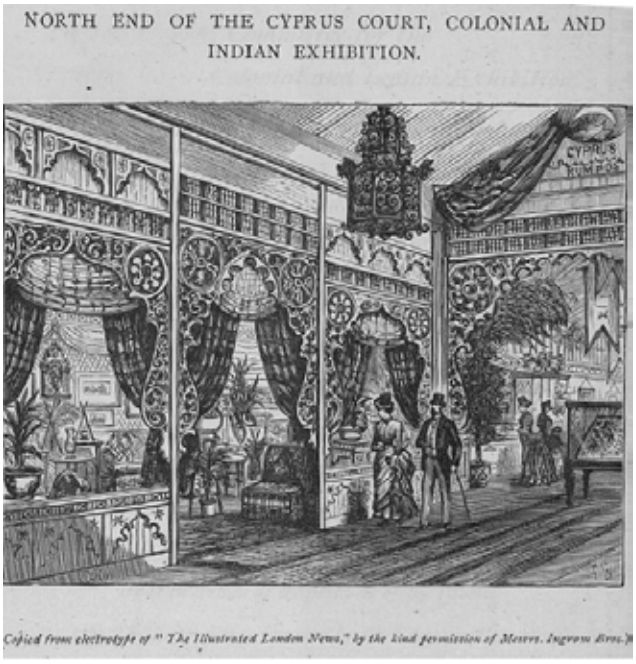

Figure 2: 'North End of the Cyprus Court, Colonial and Indian Exhibition. Copied from electrotype of *The Illustrated London News*, by the kind permission of Messrs. Ingrom Bros.', R. H. Lang, *Report (with three woodcuts) upon the results of the Cyprus representation at the Colonial & Indian Exhibition of 1886* (Foreign and Commonwealth Office Collection, 1886).

The country's Ottoman past was also present, found for example in a painting of a mosque, in the *herat* of the Sultan naming the Archbishop of Cyprus, and in the Turkish divans arranged behind wood-worked screens.[35] Another interesting decorative element of Cyprus's 1886 participation, adding to this double identity, was the painted symbols of the Greek Orthodox Christian Cross and the Ottoman Star and Crescent found side by side on the pavilion's windows. Decorations and paintings coexisted with other visual culture material and symbols deriving from the country's colonial present, for example a photograph of the government house and the British

35 J. McCarthy, 'Reminiscences of the Colonial and Indian exhibition: a lecture delivered by John McCarthy and published for use in the schools of the island', *Foreign and Commonwealth Office Collection* (Manchester, 1887).

summer camps at mount Troodos. The 'little' Cypriot pavilion, as it was called in the British press of the time, was therefore considered to be 'a perfect gem of an annexe in which the products and relics of Cyprus have been artistically grouped', showing 'the picturesqueness of this historically fascinating island'.[36]

Apart from a multi-visual, there was also a multi-lingual representation of Cyprus, which effectively served also as a mechanism of colonial control. For example, above the northern entrance of the pavilion, one could read the inscribed name of the country in English, Turkish, and Greek. Furthermore, upon entering the pavilion, there was an inscription in ancient 'Cyprian' and Phoenician. In this manner, the country's multi-ethnic past and present were explicitly referenced, affirmed and established.[37] Cyprus's façade, in its literal and metaphorical sense, was repeated and confirmed over the years in its exhibition participations abroad. For example, in the case of the 1924 exhibition, the word 'CYPRUS' over the end of its pavilion which had a joint space with the Palestinian representation, was written again, in the following order, 'in English, Turkish and Greek'.[38] Similarly, in the 1924 Palestinian Pavilion, the country's heading was inscribed in Arabic, Turkish, Hebrew and English. In the Cyprus Commissioner's understanding, this addition 'would give a suitable Oriental character to the building'.[39] Through a diversity of visual media, a pluralistic identity for Cyprus, as well as for Palestine, was established.

This co-existence of diverse cultural elements was also put forward through written language. For example, in the descriptive text of the 1886 pavilion's official catalogue, Cypriots were described as 'Mahometans' (Muslims) and '*non*-Mahometans'.[40] This terminology, casually introduced by the British committee to the uninformed reader of the catalogue, emphasised a de facto contradistinction between Cypriots of Greek and Turkish descent. The Christian Greek population inhabiting the island, covering at the time roughly 80% of the country's population, was therefore largely dismissed with the use of the vague and unspecified description 'non-Mahometans', which effectively diminished them into something merely *other than* Muslims. This accentuated opposition between *the one and the other*, between Cypriots of Greek and Turkish heritage, was to put down roots in the years to come and would play a catalytic role in Cyprus's modern history. A related example is the use of the signifier 'non-Jewish communities' in the text of the Balfour Declaration regarding the Mandate for Palestine, setting out the terms of British rule in the country, which effectively

36 *Times*, (1886, August 4-5), 28; *Illustrated London News*, (1886, October 10), in Lang, *Report (with three woodcuts)*, 32-33.

37 Lang, *Handbook to Cyprus,* 19; Hobsbawm, 'Introduction: Inventing Traditions', 1-14.

38 CSA, SA1:473/1919/2, Comm. Bevan to Major Flinn, 23 October 1923, 147-156; Flinn to Bevan, 5 November 1923, 162-164.

39 CSA, SA1:473/1919/2, Bevan to Flinn, 23 October 1923, 147-156.

40 Lang, *Handbook to Cyprus*, 14.

rendered the Arab presence in Palestine invisible.[41] These examples add to a British imperial trend towards representing in this manner the ethnic/religious division in various empire territories.

On the State of the Art in Cyprus

No Cypriot was involved in the arrangements of the 1886 and 1942 pavilions, and no Cypriot artists exhibited their work there. All the artworks displayed were made by Britons. In 1886, decorations were arranged by Commissioner Lang, G. Gordon Hake and Captain Wisely, the two Assistant Commissioners. Ornamentations were made under the superintendence of Ernest Jessop, 'a gentleman of great artistic taste, and possessing an intimate knowledge of the decorative art'.[42] Archival research on the 1886 exhibition has not revealed evidence testifying to the colonial government's attempts to identify Cypriot visual artists who would exhibit their artworks at the Cyprus pavilion. Therefore, we are left to assume that there were no such attempts. This assumption is enhanced by archival sources relating instead to the art section of the Cypriot pavilion of the 1924 exhibition, which confirm that no efforts were made on the part of the colonial government to promote and display the work of Cypriot artists. In May 1922, Cyprus's Chief Secretary received a circular letter, by Thomas C. Gotch, the President of the Royal British Colonial Society of Artists and member of the General Committee of the British Empire Exhibitions. Gotch was letting him know about the proposed Fine Art Section of the exhibition and was asking for his opinion regarding a possible representation of Cypriot fine and applied art exhibits. The Secretary plainly and unflinchingly replied that 'there are no Art Societies in Cyprus and that it is regretted that it is not practicable to furnish an art exhibit from this country'.[43]

For the decorations of the 1924 pavilion, the Cyprus commissioner contacted instead various 'old Anglo-Cypriots who have pictures' in order to borrow a sufficient number for display.[44] He did so despite the fact that Thomas C. Gotch had suggested each of the colonies form a 'native' representative committee to select and organise its own exhibit in order to reflect the present state of 'its various Arts'.[45] A similar lack of support for the provisioning of local artists and artisans was shown in Cyprus's attached pavilion, that of Palestine. Its committee had plans to bring over Arab glassblowers, weavers, and potters, as well as Yemeni Jewish jewellers. However, these plans were eventually cancelled due to insufficient funds.[46]

41 Roberts, *Palestine on Display,* 72.
42 Lang, *Report (with three woodcuts)*, 2.
43 CSA, SA1: M.P. 473/1919/1, 65.
44 CSA, SA1:473/1919/2, Bevan to Flinn, 23 October 1923, 147-156.
45 CSA, SA1:M.P. 473/1919/1, 62.
46 Roberts, *Palestine on Display*, 83.

The issue regarding the visual arts of Cyprus recurred two years later, in 1924, when Alfred Yockney, the Assistant Director of the Applied Arts Committee of the Arts Council for the British Empire Exhibition of 1924, contacted Commissioner Bevan, asking him again for information in regard to the art of Cyprus. Yockney was to write an article on the art of the British Dominions and Colonies and was unable to find out 'whether the art of Great Britain has in the least, influenced the native art or craft of Cyprus', and also 'details of the various native crafts'.[47] Eventually, Geoffrey Jeffery, Curator of Ancient Monuments Cyprus, was asked to write an article with his observations on the topic and forward it to Yockney.[48]

Geoffrey Jeffery's 14-page memorandum on 'The British Colonial Occupation of Cyprus in 1878, and its Influence on the Indigenous Arts and Industries in the Island during the past half century' was produced on 5 February 1924.[49] It had remained undiscovered in the Cyprus State Archives up until this point. The memorandum is of great significance as Jeffery gives there a vivid account on the then state of visual arts and crafts in Cyprus, including painting, sculpture, woodcarving, pottery, architecture, furniture, embroidery and fashion. The document is unique in its content and crucial in the attempt to trace a modern history of visual art and culture in Cyprus. It also offers a window on the colonial government's approach to and perception of the arts in Cyprus under the first half of British rule. This memorandum is also significant because it contradicts the colonial government's statements about the country's inability to 'furnish' the exhibition with 'an art exhibit from this country'.[50] It is worth quoting Commissioner Bevan's reply to the Chief Secretary regarding Jeffery's memorandum, which is typical of the colonial government's ignorance regarding the colony's cultural life and production, but more importantly, its lack of interest in rectifying this. Bevan wrote: 'The article on Cyprus art might not inappropriately begin like a book upon, "Snakes in Ireland", which commenced "There are no snakes in Ireland"!'.[51]

The prevailing unmodernised (cultural) conditions in Cyprus, but also the colonial government's inactivity in introducing a cultural policy of Western European standards for modernising the country's cultural environment, affected and even discouraged the Cypriot artists' and craftsmen's participation in the exhibition of 1924, the Colonial and Indian Exhibition of 1886, and arguably in other empire exhibitions. Nevertheless, lacking a cultural policy for Cyprus did not mean lacking Cypriot artistic production. Jeffery's Memorandum confirms this.

Jeffery was eager to give credit to the British for attempting to, as he thought,

47 CSA, SA1:473/1919/2, Yockney to Bevan, 23 January 1924, 266a.
48 CSA, SA1:473/1919/2, Bevan to Cyprus Chief's Secretary Office, 1 February 1924, 267.
49 CSA, SA1:473/1919/2.
50 CSA, SA1: M.P. 473/1919/1, 65.
51 CSA, SA1: 473/1919/2, 1 February 1924, 267.

and largely succeeding in 'convert[ing] the old world centre of the Levant into a mere province of modern Europe'.[52] Jeffery observed that some of the 'indigenous arts and crafts' disappeared under the influence of modern ideas, such as native wearing apparel and carpet-making. Others, such as the art of dying silk, cotton and linen, he thought were not an important and promising industry in Cyprus. On the other hand, hand-made silk, lace embroidery, such as the Lefkara lace, and most importantly woodcarving for furniture were industries that possibly received a massive impulse from British rule as they had found a market. Nevertheless, Jeffery believed that British influence did not develop any novel or inventive talent: '[N]othing of a localised character is traceable in the innumerable copies of English designs for chairs, sideboards, hat-stands, etc.'.[53]

According to Jeffery, the 'Cypriot artificer' was 'conservative', still practicing industries such as hand-loom, lace-work and musical instruments, 'in ways which are entirely obsolete in Europe'.[54] Therefore, Cyprus's 'backward', as in unmodernised, state could be seen not only in the lack of modern industries and technological and agricultural equipment but, as argued in Jeffery's memorandum, in the under-development of the native arts and crafts. Jeffery however, seemed to acknowledge the fact that these conditions were difficult to change due to the absence of capital.

In his commentary on the graphic arts of painting, Jeffery explained that painting was confined to the religious pictures used in the Orthodox Church for religious purposes, and that there was a complete absence of decorative paintings in domestic spaces. He considered woodcarving as 'par excellence the medium of Cyprus artistic aspirations' and praised its authenticity as 'a genuine art in the ancient sense'.[55] Pottery, he thought, as 'almost identical in texture and design with that of prehistoric times'.[56] Jeffery gave considerable credit to the influence the British had on architecture in Cyprus, claiming that until they took over the island, architecture was 'absolutely nil', with some ruined buildings from the time of the Venetian occupation standing in contrast to the 'plain unadorned edifices' of the Ottoman age.[57]

Jeffery's 1924 memorandum on the native arts and crafts of Cyprus is a unique source of information through the British point of view, helping us today to shape an idea of the then prevailing cultural conditions and emerging trends in the country. By and large, Jeffery typifies Cypriot artists and artisans as 'conservatives', who used 'obsolete' methods of production, lacked an identifiable artistic identity and who had to be further educated and trained in the British western style in order to enter a

52 CSA, SA1: 473/1919/2, 13.
53 CSA, SA1: 473/1919/2, 13.
54 CSA, SA1: 473/1919/2, 1924, 1.
55 CSA, SA1: 473/1919/2, 1924, 4.
56 CSA, SA1: 473/1919/2, 1924, 13-14.
57 CSA, SA1: 473/1919/2, 1924, 7.

modern European cultural era.

Photographs, Post-Cards, Films and Human Exhibits

Even though Cypriot artefacts were not showcased in the 1886 and 1924 exhibitions, nevertheless some other objects of visual culture were showcased, for example photographs. These were hung on the walls showing views of Cyprus such as 'a field of Flax, some orange and pomegranate groves, Troodos, Government buildings, Othello's Tower, Bellapais'.[58] Furthermore, 5000 packets of one set of picture postcards, each containing twelve views of Cyprus, were put on sale.[59] There were also thoughts of using a cinematographer for the projection of a descriptive film of Cyprus for its inclusion in the general exhibition of films from the empire, and also for its projection throughout Great Britain for educational purposes. There was even a suggested scenario written by Commissioner Bevan, however this venture was also abandoned due to financial constraints.[60] Once again, the Palestinian pavilion experienced similar issues with the Cypriot one, when a proposal made from the same filming company to show a film about life in Palestine, presenting 'native craftsmen' at work and large-scale models of religious sites, was rejected because Palestine's exhibition committee was not prepared to support the venture financially.[61]

Even though Cypriot artists were absent from the 1886 and 1924 exhibitions, some Cypriots were nevertheless present in the 1924 exhibition, as human exhibits. Human exhibits were an important display of the empire exhibitions. Exhibition committees thought them to be one of the most effective visual media, having the ability and immediacy to reach out to a large audience of people and make an impression. Human exhibits were thought to bring out 'local colour' and to add to the 'reality and interest' of the colonial pavilions.[62] Cypriot identity was therefore, further typified and simplified through the visual medium of the ethnographic exposition. In the 1886 exhibition, a family of five (three women and two men), were brought from Cyprus to London, dressed both in Greek Cypriot and Turkish Cypriot traditional attire and preoccupied in the traditional activity of weaving silk on a loom.

As Commissioner Lang wrote, this live performance of human exhibits attracted 'universal interest' and created an immediate impression on the visitors who, in their majority, saw for the first time these 'attractive', 'sympathetic' and 'interesting people'.[63] The idea was that Cypriot human spectacles conveyed 'a more just and true notion

58 CSA, SA1:473/1919/2, Bevan to Flinn, 29 October 1923, 174-177.
59 CSA, SA1:473/1919/2, Bevan to Flinn, 19 November 1923, 197-200.
60 CSA, SA1:473/1919/2, Bevan to Flinn, 29 October 1923, 174-177.
61 Roberts, *Palestine on Display*, 82-83.
62 CSA, SA1:473/19/2, Bevan to Flinn, 17 October 1923, 134-141.
63 Lang, *Report (with three woodcarvings)*, 3.

of Cyprus than could have been otherwise communicated'.[64] The Commissioner claimed that the benefit was mutual, because not only did the British public gain a better knowledge of Cyprus but the Cypriot live specimens 'carried away with them to their homes and friends, a more sympathetic appreciation of the Mother Country'.[65] Unfortunately, this remains unconfirmed and biased, since accounts on the Cypriot family's experiences do not exist and we rely only on the British commissioner's official report. In addition to live specimens, the pavilion also contained four life-size mannequins wearing dresses, chemises, and other traditional clothing of the native people of Cyprus.[66] Humans and mannequins therefore embodied 'various native types'.[67] There was another attempt to have Cypriot human exhibits at the 1924 exhibition, showing a continuation in the British way of colonial exhibiting almost 40 years after the 1886 exhibition. Commissioner Bevan repeatedly urged the colonial government to send a chair maker from the village Lapithos to perform his craft in front of the visitors. He also requested a man to show the Cypriot craft of silk reeling with boiling water. However, these ideas were not realised 'chiefly for reasons of space and expense'.[68] (See Figure 3)

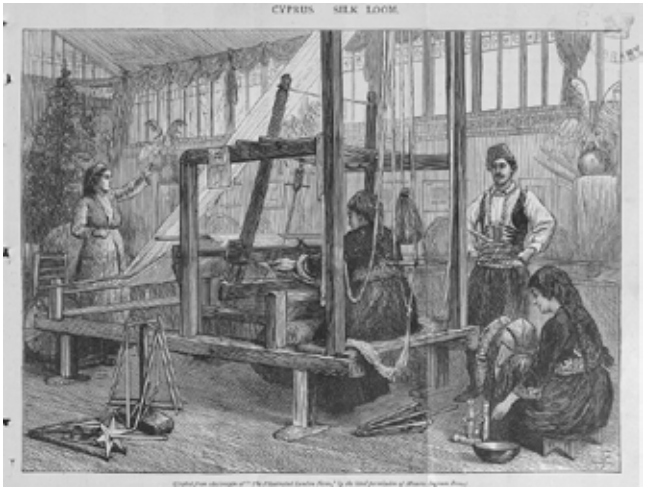

Figure 3: 'Cyprus Silk Loom. Copied from electrotype of *The Illustrated London News*, by the kind permission of Messrs Ingram Bros.', R. H. Lang, *Report (with three woodcuts) upon the results of the Cyprus representation at the Colonial & Indian Exhibition of 1886* (Foreign and Commonwealth Office Collection, 1886).

64 Lang, *Report (with three woodcarvings),* 3.
65 Lang, *Report (with three woodcarvings)*, 3.
66 Lang, *Handbook to Cyprus*, 34.
67 Lang, *Handbook to Cyprus*, 19.
68 CSA, SA1:473/1919/2, Comm. Bevan to Major Flinn, 29 October 1923, 174-177; Flinn's reply, 14 November 1923, 192-194.

Architecture: Cyprus and Palestine, a Shared Space

Expense and space were also the reasons why in 1924 Cyprus shared its exhibition space with Palestine, occupying one-third of it. It was impossible for each colony, dependency and protectorate to have its own pavilion. Therefore, participations were arranged in groups, for example the Eastern group and the West African group. Cyprus was part of the Mediterranean group, together with Malta and the Mandate for Palestine. The rationale behind this grouping was to make it possible to embody in the style of architecture and the laying-out of the surrounding grounds, characteristic features of the territories in the group. These features were supposed to enhance the effect of their exhibits.[69]

In as much as the empire exhibitions formed a territorial unit, showcasing the British empire, they were more evidently 'a cultural jigsaw'.[70] This could be observed in the diverse and numerous colonial participations placed side by side, effectively forming the British empire in miniature, but also often within the confines of a single participation. In 1924, Cyprus was accommodated in a building set up by Palestine, in spite of Cyprus's Chief Secretary's hesitation about joining a larger and competitive country, because there was the distinct possibility of 'dominating our exhibits' and being 'completely swamped by Palestine'.[71] This fear derived from the fact that the neighbouring country was also a producer of wines and fruits. Unfortunately, many of the exhibition visitors entering the 1924 pavilion failed to realise when they had passed from Palestine to Cyprus, despite the attempts of Cyprus's staff to mark the distinction, for example through the curation of the exhibits. (See Figure 4, next page)

In contrast to the Palestine pavilion, whose importance, as argued by Fuchs and Herbert, was in specifically inviting an architectural portrait of the island, Cyprus, at least from an architectural point of view, did not succeed in doing this.[72] The pavilion as a building was of a predominantly Palestinian character.[73] It consisted mainly of an elongated hall, flanked by arcaded aisles, and roofed by a metal and glass roof. The hall terminated at each end in a domed turret-like vestibule of oriental inspiration. The exterior was painted white with horizontal dark stripes evoking Syrian *ablaq* work.[74]

69 CSA, SA1:473/1919/1, Circular despatch 15 March 1922, 39-44.
70 Greenhalgh, *Ephemeral Vistas*, 114.
71 CSA, SA1:473/1919/2, Cyprus Acting Chief Secretary to Cyprus Representative, Mediterranean Group BEE Committee, 33; Flinn to Michell, 6 June 1923, 65.
72 R. Fuchs and G. Herbert, 'Representing Mandatory Palestine: Austen St. Barbe Harrison and the Representational Buildings of the British Mandate in Palestine, 1922-37', *Architectural History*, Vol. 43, No. 309, (2000), 281-333, 309.
73 CSA, SA1:473/1919/2, Minutes of the third Meeting of the Mediterranean Group Committee, 7 March 1923, 37.
74 Fuchs and Herbert, 'Representing Mandatory Palestine', 308.

Cyprus's section was largely 'eclipsed by her larger neighbour', making it impossible to stage an advantageous show for its exhibits.[75]

Figure 4: 'Cyprus Pavilion, British Empire Exhibition, Wembley' 1924 (Look and Learn, www. lookandlearn.com).

Conclusion

In 1923, Major E. A. Belcher wrote about the advantages of the British Empire Exhibition of 1924. One of them, he said, was that it gave the opportunity to the British people who could not travel around Europe to get 'the next best thing at the Exhibition, and see with their own eyes something of the products, activities and even social life of each part of this great Empire'.[76] British colonial governments and their exhibition committees intended to exhibit to the British public an image of their colony, dependency or mandate that was 'next best' to the real thing, which was nothing else but to visit these territories. Nevertheless, as seen from Cyprus's case in the Colonial and Indian Exhibition of 1886 and the British Empire Exhibition of 1924, these participations conformed primarily to a British colonial agenda, often deviating from the prevailing conditions in the respective country.

As it has been established through this discussion, an image for Cyprus was assembled and transmitted through the use of various visual resources such as cultural artefacts, fine art works and ephemeral material, as well as written resources.

75 CSA, SA1:473/1919/1, W. Bevan, 'Cyprus at the British Empire Exhibition, 1924-1925: Brief Review', 292.

76 E. A. Belcher, 'The Dominion and Colonial Sections of the British Empire Exhibition 1924', *Journal of the Royal Society of Arts*, Vol.71, No. 3674 (20 April 1923), 388.

These were gathered, commissioned and produced by exhibition committees, usually comprising British officials serving in the country, who mostly through a combination of arrogance, ignorance and indifference dismissed the Cypriot local input and view of the country. A Cypriot identity, if not persona, admittedly containing characteristics of the Cypriot people, such as religion, ethnicity and customs, was nevertheless a manufactured product, promoted through an imperial gaze. Cyprus's projected image would serve the British colonial interests, and would arguably keep the colony under control, possessed and contained, not only in the space of these pavilions, but perhaps more importantly within its actual geographical space.

Cyprus's participations in the exhibitions of 1886 and 1924 were made possible under adverse circumstances which resulted from financial obstacles, the country's and its people's unmodernised state, and the colonial government's inability, unwillingness and often indecision in whether it should invest in the country. Nevertheless, the 'phenomenal ignorance', as it has been called, of the majority of the visitors to these exhibitions, regarding the location, administration, climate, resources and culture of Cyprus, was relatively dispelled because of the diverse exhibits accommodated in its pavilions. In the words of the 1924 commissioner: 'Wembley has made Cyprus known'.[77] Arguably, the main result of Cyprus's participations in the empire exhibitions abroad was not so much trade development and profit as it was originally intended, but instead a relative publicity that placed the image of Cyprus, so far unknown to the majority of the British public, on the map of the British empire's territorial acquisitions.

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77 CSA, SA1:473/1919/1, Bevan's Review, 6 October 1925, 287.

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The Imperialistic Foundations of British Colonial Rule in Cyprus

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Abstract

Historiography tends to examine Cyprus history through the light of the Cyprus Problem, thereby ignoring the role of British colonial power, which is examined in this paper. Imperialistic control was exercised through political sovereignty, economic penetration and military control of strategic outposts in an effort to secure critical points of passage for British trade or for military expeditions and it was accompanied by a wider programme of development that raised the colony's standard of living. Only as late as the beginning of the 1950s did Britain make efforts to promote colonial prosperity and the neglected Cyprus, the so called Cinderella, was condemned to backwardness. Uncommonly the technological base of improvements was dictated by the compulsions of British imperial interests as well as the development of the Cold War, not the promotion of the welfare of the people.

Keywords: Greek Cypriots, British colonial rule, colonialism, imperialism, nationalism

Introduction

In contrast with other ex-colonies, historiography tends to examine the history of Cyprus through the Cyprus Problem, although recent years have witnessed the emergence of a sophisticated bibliography that focuses on the social and economic aspects of Colonial Cyprus.[2] Certainly one of the major parameters to be examined, which would not deal with Cyprus as an ahistorical island and a reflection of the Cyprus Problem, is the foundation of British colonial rule.

Vitally important to British imperial communications, the occupation of Cyprus served British imperialistic interests and depended on exploiting the island. Although the new regime is thought to have made a breach with the Ottoman past, the British adopted some of the Ottoman structures. In addition radical reforms were not introduced and Cyprus, a neglected colony, the so called Cinderella, was

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2 Γ. Τενεκίδης & Γ. Κρανιδιώτης (eds.), Κύπρος: Ιστορία, προβλήματα και αγώνες του λαού της, (Athens, 2000); F. Crouzet, *Η κυπριακή διένεξη 1946-1959,* Τόμος Α, Β. (Athens: Μορφωτικό Ίδρυμα Εθνικής Τραπέζης, 2011); H. Richter, History of Cyprus, Vol. A': 1878-1949 [in Greek], (Athens: Estia, 2007); R. Katsiaounis, *Labour, Society and Politics in Cyprus during the second half of the nineteenth century*, (Nicosia: Cyprus Research Centre, 1996).

condemned to backwardness. As a result, great disaffection with the colonial rule gave rise to urban and peasant opposition which culminated in the 1931 uprising.[3] The main preoccupation of my study stands in the gradual development of the national movement during the last period of British colonial rule and more specifically the post Second World War period, that led to the insurrection and the liberation struggle of Greek Cypriots in 1955. Therefore, the role of the colonial power is decisive in the destruction of the old and the creation of the new conditions in which the lives of the people changed.[4] By following this methodology we should by no means diminish the importance of Cyprus history and portray the people as little more than pawns of outside forces. Thus colonizers and subjected people must be comprehended as aspects of each other and yet as autonomous. It is well to notice the degree to which the particular quality of imperialistic policies, not only economic but also strategic and cultural, largely determined the character and the extent of the national mobilisation.[5] Moreover changes in the society, economy and political situation in Cyprus were responsible for changes in the forms of imperialistic control. By taking account of the interplay of British imperialism with Greek nationalism, it is possible to understand the different forms of imperial intervention in Cyprus.

Expansion as a Prerequisite of Imperialism

British expansionist impulses were imperialist in character stemming from traditional interests around the world. When Britain acquired Cyprus in 1878 from the Ottoman Empire, it demonstrated the primacy of strategic over economic motives.[6] Cyprus was to be used as a place of arms and was considered to be a key to Asia,[7]and one of the outposts securing the route to India[8]. It is difficult to separate the underlying economic causes, from political and strategic considerations or from the importance

3 For more on the events of 1931, see R. Katsiaounis, *Η Διασκεπτική 1946-1948 με ανασκόπηση της περιόδου 1878-1945* (Nicosia: Cyprus Research Centre, 2008), 34-38, and R. Storrs, *Orientations*. (London: Nicholson & Watson, 1943), 506-512.

4 See R. J. C. Young, *Postcolonialism: An Historical Introduction*. (UK: Blackwell Publishers, 2001), 8. The role of colonial power was decisive in the destruction of the old and the creation of new conditions in which the lives of the people changed.

5 Postcolonial critique enables the historian to comprehend western political, economic and social practices and the continuing ramifications of colonialism in colonised societies. See Young, *Postcolonialism*, 6.

6 See R. Dumett, 'Exploring the Cain/Hopkins paradigm: issues for debate; critique and topics for new research', in *Gentlemanly Capitalism and British Imperialism. The new debate on Empire*, ed. R. Dumett (London: Longman, 1999), 23.

7 C. W. J. Orr, *Cyprus under British Rule*. (London: Zeno, 1972), 44.

8 'Three months after the conquest Disraeli said: In taking Cyprus the movement is not Mediterranean. It is Indian.' Cited in *Times of Cyprus*, 20 August 1956, extract from P. Arnold's book, *Cyprus Challenge*.

of power and national prestige and say where the dominant drive came from. During the political and military acquisitions of the late nineteenth century,[9] the period of 'new imperialism',[10] political and economic factors set in action without distinction. At this point we may paraphrase Lenin's classic work, *Imperialism the highest stage of Capitalism*, and say that 'Imperialism is the highest stage of Colonialism'.[11]

Thus imperial control was exercised through political sovereignty, economic penetration and military control of strategic outposts in an effort to secure critical points of passage for British trade or for military expeditions and it was accompanied by a wider programme of development that promoted civilisation and raised the colony's standard of living.[12]

Exploitation

Taxation

Imperialism manifests itself through economic penetration and exploitation. The empire was formally territorial, whereas it informally extended trade and investments. Exploitation assumed a different form in Cyprus. A real draining came with the 'tribute'.[13] As Cyprus was hired out from the Ottoman Empire, the tribute was the money paid from the vassal state, meaning Britain to its sovereign. This sum was meant to pay the interest on a loan that the Ottomans had taken out in 1855, but it never reached the Ottomans even though it was left as a debt on Cyprus until 1927.[14]

9 In place of free trade in commerce and the British Government's non-interference came an increasingly protectionist period typified by annexations and spheres of influence. When commonly mocked for the acquisition of vast territories in a 'fit of absence of mind', the British ironically answered that: 'Since the oldest of them dates from 1612 (Bermuda) and the youngest only from 1946 (Sarawak) the British must be chronically absent-minded'. (In fact the youngest was Tanganyika acquired in 1919, as Sarawak was a protectorate since 1888.) That is according to the leaflet 'Introducing the Colonies', released by the British Government. Diplomatic & Historical Archives (Y.D.I.A.) of the Hellenic Ministry of Foreign Affairs: 1952, File 30, sub file 6, Embassy of Greece in London to Greek Foreign Ministry, 1 December 1952.

10 See B. J. Cohen, *The question of Imperialism. The Political Economy of Dominance and Dependence*. (New York: Basic Books, 1973), 80.

11 A. Loomba, *Colonialism, Post colonialism*. (London: Routledge, 1998), 11.

12 E. J. Hobsbawm, Η εποχή των Αυτοκρατοριών 1875-1914, (Athens: Μορφωτικό Ίδρυμα Εθνικής Τραπέζης, 2007), 102-105.

13 British politicians before the First World War opposed the Tribute and they either characterized it as an anachronism or an encumbrance. Churchill's official Memorandum in 1907 remains one of the fiercer critiques of British policy still on the Cyprus files. See R. Hyam, 'Churchill and the British Empire', in *Churchill.* eds. R. Blake and L. W. Roger (Oxford: Clarendon Press, 1996), 185. Rider Haggard condemned the dishonest way Britain was 'bleeding the Cypriots dry' in R. Haggard, *Travels to Cyprus in 1900* [in Greek], (Athens: Eirmos, 1994), 231.

14 F. Madden and J. Darwin, (eds.) *The Dependent Empire, 1900-1948: Colonies, Protectorates, and Mandates.*

In fact by pretending to be the protector of the Ottoman Empire and guaranteeing to defend it in case Russians invaded, Britain was protecting its own financial interests as well. Undoubtedly the nucleus of economic force existed inside imperialism. Since 1854, when the first Ottoman loan was subscribed, a series of other loans for the next 20 years plunged the Ottoman Empire into debt and default followed in 1876.[15] Although Britain proclaimed its support for the unity of the Ottoman Empire and aided it to promote reforms,[16] it was sufficiently two-sided to acquire both Cyprus and Egypt for strategic reasons, which were backed by financial commands. British investments had to be protected and payment of debts secured, so Cyprus by paying the tribute, joined in the undertaking.

In this way Cyprus was the only colony that was forced to subsidise the British Treasury and was the only island with the highest percentage of taxes in the world.[17] Although Cyprus was annexed in 1914 and it was declared a British Colony in 1925, and despite the fact that Turkey was exempted from the 1855 loan at the Lausanne treaty in 1923, the Cypriots kept on paying the tribute for 50 years as it was converted to public debt.[18] The tribute was not the only taxation. The tax system, which existed before the occupation, and the mechanisms of collection remained intact and people continued to pay taxes, a well known precedent for them from Ottoman rule. The only difference was that taxes were paid directly to the government in an effort to maximise state revenue.[19] The effectiveness of tax collection led many farmers to bankruptcy after heavy indebtedness to usurers. Vexatious tithes remained a heavy burden for farmers until their final abolition in 1927 and one tenth of the crop production was collected every year despite the failures of harvests at times. There were also taxes on immovable property, trade, and professions, and since the 1920s taxation on clubs, coffee houses and theatres.[20] In the 1950s heavy taxation was imposed on mass consumer goods such as cotton and woolen clothes, sugar, matches, petrol, tobacco and spirits.[21] Because of the high tax on imported raw materials and the low tax on

(Westport, CT: Greenwood Press, 1994), 524, 525.

15 P. J. Cain and A. G. Hopkins, *British Imperialism: Innovation and expansion 1688-1914*. (London: Longman, 1993), 401,402.

16 S. Anagnostopoulou, *Μικρά Ασία, 19ος αι. -1919. Οι ελληνορθόδοξες Κοινότητες. Από το Μιλλέτ των Ρωμιών στο Ελληνικό Έθνος*. (Athens: Ελληνικά Γράμματα, 1998), 19, 20.

17 H. A. Richter, History of Cyprus [in Greek], 108, G. S. Georghallides, *A Political and Administrative History of Cyprus 1918-1926 with a survey of the foundations of British rule* (Nicosia: Cyprus Research Centre, 1979), 16 and Orr, *Cyprus under British Rule*, 63.

18 F. Madden and J. Darwin, (eds) *The Dependent Empire, 1900-1948,* 524, 525.

19 This system was similar to the Ryotwari tax system, which had been at work in the western part of India. Katsiaounis, *Labour, Society and Politics in Cyprus*, 99.

20 Georghallides, *A Political and Administrative History of Cyprus,* 242 and 246.

21 Y.D.I.A.: 1952, File 32, sub file 8, ΕΑΣ (Greek Cypriot Liberation Front) leaflet 'Cyprus fights for

imported goods, due to the government tariff policy, there were serious impediments to the development of local industry in Cyprus. As a result of the high price of imported sugar three marmalade factories went out of business[22] and a match factory had to close down because of the government's refusal to reduce excise duty on production or to restrict importing matches.[23] Furthermore taxation on wood, iron and cement raised the cost of house building and consequently caused housing problems and high rents in the 1950s, at a time when the urban population was steadily increasing. On the other hand, mineral companies, whose production constituted more than half of the island's exports, were vested to the state and their products had very low export tax.[24] In this way foreign investment was encouraged and foreign firms' interests were protected. Generally taxation had increased by 700% since 1939.[25] This meant that money for administration and development was deducted from the population and Cyprus was sustained by its own means.[26]

The Myth of Development

Imperialism was characterised by a particular 'asymmetry of dominance and dependence'.[27] The colonies' autonomy was contravened in certain aspects of their political, social, cultural and financial lives. The notion that the colonisers were there to 'get their subjects back on their feet' prevailed. A pretext used for the reinforcement of imperialist tactics was the conquering power's responsibility for the modernisation of undeveloped areas which lacked education, health, economic progress and technology.[28] Whether mischievous or imperialistic,[29] these acts caused Cyprus economic disaster. Consequently, people had been living on a subsistence level

freedom', Greek Consulate of Cyprus to Greek Foreign Ministry, 27 November 1952.

22 *Έθνος*, 9 May 1954.

23 Y.D.I.A.: 1952, File 30, sub file 8, Ethnarchy report to the Secretary of the United Nations, Greek Consulate of Cyprus to Hellenic Ministry of Foreign Affairs, 14 October 1952.

24 *Δημοκράτης*, (1951, December), 233.

25 Tax revenue in 1939 was 900,000 whereas in the early 1950's it was 7,000,000. Y.D.I.A.: 1952, File 30, sub file 8, Ethnarchy report to the Secretary of the United Nations, Greek Consulate of Cyprus to Greek Foreign Ministry, 14 October 1952.

26 That is according to the leaflet 'Introducing the Colonies', released by the British Government. Y.D.I.A.: 1952, File 30, sub file 6. Embassy of Greece in London to Greek Foreign Ministry, 1 December 1952.

27 B. J. Cohen, *The question of Imperialism. The Political Economy of Dominance and Dependence*, (New York: Basic Books, 1973), 15.

28 'For three quarters of the century Britain let this false make- believe with Cypriots that they were there to build roads, to eradicate malaria, to restore the woods. I doubt whether these thoughts burdened the Cabinet'. *Times of Cyprus*, 20 August 1956, extract from P. Arnold's book, *Cyprus Challenge*.

29 *Νέος Δημοκράτης*, 'Eden's tall story in the U.N', (1952, November 16).

and progress was really slow. The focus of this article is not to blame imperialism for the poverty and the general conditions of the indigenous population but to try to understand the economic and social effects it had on the inhabitants.

Britian only made efforts after the Second World War to promote colonial prosperity. In 1946, Colonial Secretary Arthur Creech Jones announced a ten-year development programme for the improvement of the colonies, which was described as 'blood transfusion'.[30] In the government's report to the UN Assembly it was declared that the ten-year development programme would provide £12 million for Cyprus: six million from the British government, two million from the local authorities and the rest from government loans. In fact the total contribution for Cyprus, as it was stated, would be £1,750,000, and Greek Cypriots mocked this obvious inconsistency in formal reports and the complicated statistics presented, characterizing them as 'acrobatic syllogisms'[31], and they seized the chance to praise Greece, their mother country, which would have taken care of their situation if Cyprus had achieved union with it. On the other hand, British newspapers gave the picture of a flourishing island whose prosperity was shadowed by the struggle for union with Greece.[32]

Agriculture

Throughout colonial rule, Cyprus remained a country with a backward economy. In understanding this we have to realize the depth of colonial intervention as well as non-intervention in peasant affairs.[33] Agriculture was far from being self-sufficient in a country where 75% of the population was farmers, and agricultural economy was the barometer of the people's prosperity. There was little or no improvement in cultivation and ploughing was still primitive.[34] The 'Soil Conservation Bill' was published as late as 1951, and the United Nations soil specialist said that if the existing conditions were not improved, Cyprus would suffer from famine in 50 or probably 100 years.[35]

30 That is according to the leaflet 'Introducing the Colonies', released by the British Government. Y.D.I.A.: 1952, File 30, sub file 6, Embassy of Greece in London to Greek Foreign Ministry, 1 December 1952.

31 Ελληνική Κύπρος, (1954, February), 27.

32 Ελληνική Κύπρος, (1953, December), 259.

33 See T. Smith, *The pattern of imperialism. The United States, Great Britain and the late industrializing world since 1815*, (Cambridge: Cambridge University Press, 1981), 69 and 75.

34 Village life was little in all probability ameliorated from what it had been for the last three thousand years as C.W.Orr had described it in 1916: 'The sun-baked mud houses, the paved threshing floors, the primitive agricultural implements, all recall the shadowy past, the days of the earliest civilization. The wooden plough, with its pointed metal shaft, is of the same pattern as those which are to be seen portrayed on the walls of ancient Egyptian temples, and similar ones must have been in use for thousands of years.' Orr, *Cyprus under British Rule*, 18.

35 Y.D.I.A.: 1952, File 106, sub file 2, a research entitled 'The myth about the prosperity of Cyprus',

In the absence of large-scale organization, piecemeal attempts at improvement were ineffective. To make matters worse, after the Second World War fertile land had to be devolved to the state or was confiscated so that military bases, barracks, concentration camps and airports could be built. Some of this land was even bought by the War Office in 1955 after negotiations with the owners.[36] The government was denounced for acquiring 87,000 acres of land until 1955 in this way.[37]

The unsatisfying condition of agriculture was mainly because cultivation was still done with an old wooden plough and inadequate mechanisation. A great percentage of land (85.7%) was cultivated with the help of animals, and 500 tractors were used on about 4% of the land, while many of them were used in mining, the construction of camps and three or four big farms the government took pride in.[38] It would help to understand the situation if we consider that almost 100,000 families depended on agriculture. Many peasant families lived in primitive housing conditions while half of them either owned no land or were small growers and owned up to 15 acres.[39] The population of Cyprus increased from 361,199 in 1946 to 494,000 in 1952: an increase of 35%. Consequently any reduction or even stagnation in production did not cover the needs of the increased population. There was a continuous rise in the price of bread as 70% of the grain was imported.[40] Although Cyprus used to export meat, in 1950 nutrition had to rely on imports because animal population had decreased since 1925.[41] And despite the fact that Cyprus is an island, fish was considered a luxury and the supply of fish, usually small in size, was not equal to the demand.[42]

Trying to repay credit that had exorbitant interest rates was a serious problem for the rural population. Until 1940 farmers were at the mercy of money lenders and it was a open secret that interest rates often exceeded 12%, which was the legitimate rate fixed in 1919. After the settlement of agricultural debts in 1940 the rate was set at 9%. Then the agricultural credit was undertaken by the Agricultural Bank and the Farmers'

Greek Consulate of Cyprus to Greek Foreign Ministry, 25 July 1952.

36 Y.D.I.A: 1957, File 42, sub file 1, section 1, Parliamentary Debates of 25 July 1957, Embassy of Greece in London to Greek Foreign Ministry.

37 Y.D.I.A: 1954, File 45, Subject: Cyprus, Labour Monthly, November 1954.

38 Y.D.I.A: 1952, File 106, sub file 2, a research entitled 'The myth about the prosperity of Cyprus', Greek Consulate of Cyprus to Greek Foreign Ministry, 25 July 1952.

39 Y.D.I.A: 1948, File 1,5th section, Report of the agricultural conditions of Cyprus by the director of the Greek Ministry of Agriculture, 27 September 1948.

40 Y.D.I.A: 1952, File 30, sub file 8, the Ethnarchy report to the Secretary of the United Nations, Greek Consulate of Cyprus to Greek Foreign Ministry, 14 October 1952.

41 Y.D.I.A.: 1952, File 106, sub file 2, Greek Consulate of Cyprus to Hellenic Ministry of Foreign Affairs, research entitled 'The myth about the prosperity of Cyprus', 25 July 1952.

42 Y.D.I.A.: 1952, File 82, sub file1, U.S. General Assembly, 7th session, Information from non self governing territories, August 1952.

Cooperatives, which charged 6%. The Agricultural Bank was founded in 1925, 47 years after the British took control of Cyprus, but soon capital for long-term loans ran out.[43] In 1938 the Central Cooperative Bank was founded and was financed by Barclays, one of the five biggest London banks. Both banks were the means of profitable investment for British capital and represented the imperialistic interests of the City. The Central Cooperative Bank, which was a semi-governmental department,[44] accumulated capital not only through credit but also by suppling fertiliser from the Imperial Chemical Industry, offering at the same time long-term credits for their payment.[45] In Cyprus where capital kept the farmers in bondage, foreign banking capital came at the top of the credit pyramid and the local landlords and merchants were the main intermediary between the colonial government and the impoverished peasants.

The belated measures the government took to reduce rural indebtedness by passing the Debt Settlement Law did not stop farmers from plunging heavily into debt. Nevertheless the British colonial government did not encourage usury itself but cultivated the agrarian sector's reliance with the exploiters. The British had allowed the system of exploitation to flourish for more than half a century without interfering, abandoning farmers to their own devices. The system, as Tony Smith supports, has its own rules 'that are all the more powerful because their greatest force comes not from an active threat of intervention so much, as from a threat of withdrawal, a withdrawal that would leave these dependent regimes to the fate of civil and regional conflict.'[46]

Industry

Although Britain is not to be blamed completely, as Cyprus was not in a condition for deindustrialization, the administration did everything to exploit the existing factories and industries and to allow favoured foreign companies to build new ones like the Coca-Cola bottler and a cigarette factory.[47] That is the technological base of the industries was dictated by the compulsions of the metropolitan industries, no matter what the local conditions were. The need for mineral resources forced the Government to invest in mines whose rights were vested to the state and whose royalties, in respect of mining leases, were levied by the government.[48] As all of the mining companies

43 Georghallides, *A Political and Administrative History of Cyprus*, 226.

44 Y.D.I.A: 1953, File 104, U.S. General Assembly, 8th session, Information from non self governing territories, 10 August 1953.

45 Y.D.I.A: 1952, File 32, sub file 8, Greek Consulate of Cyprus to Greek Foreign Ministry, ΕΑΣ (Greek Cypriot Liberation Front) leaflet 'Cyprus fights for freedom' 27 November 1952.

46 Smith, *The pattern of imperialism*, 71.

47 An American cigarette factory was established in Cyprus although there were seven local cigarette factories. Νέος Δημοκράτης, (1952, January 1).

48 *Νέος Δημοκράτης*, (1954, January 21).

were foreign, investments favoured foreign interests.[49] Moreover there was little public revenue because products as well as their profits were exported and Cyprus was not allowed to have full benefits thereof. Consequently there was no material foundation upon which manufacturing, chemical or engineering industries could have developed.

There were 34 industries in all. In some instances government measures had an adverse effect upon local industries, as the customs duty imposed on imported raw material was higher than that prevailing for imported readymade articles made of the same material.[50] No effort was made to absorb Cyprus produce, with the result that it would have to be disposed of at low prices. There were urgent cries for the disposal of potatoes and the high price of bread.[51] Exports of many products were restricted to Britain and Commonwealth countries at regulated prices.[52] Exports could have been worse but for the increasing demand for minerals for military purposes. Importation was restricted to goods coming from Britain and flooded the Cypriot market. These concerned luxury goods, cement, fuel oil, iron bars and pipes. Britain also had the monopoly on the import of cars.[53] The balance of trade was based on exports of agricultural products and minerals, with imports seriously outweighing exports.

Table 1: Imports[54]

	1949	1950	1951
From UK	44	47	39
Parts of British Commonwealth	19	12	20
Italy	5	6	6
USA	6	5	3
Others	26	30	32

49 There were five mining companies in all. The Cyprus Mines Corporation was American, an Anglo-Danish company owned the Cyprus Asbestos Mine, whereas the Cyprus Sulphur and Copper Company and the Gypsum and Plaster-board Company were British. There was also the Hellenic Mining Company. *Νέος Δημοκράτης*, (1953, January 11).

50 Y.D.I.A.: 1952, File 30,sub file 8, the Ethnarchy report to the Secretary of the United Nations, Greek Consulate of Cyprus to Greek Foreign Ministry, 14 October 1952.

51 Δημοκράτης, (1954, June), 125.

52 Y.D.I.A: 1952, File 82, sub file1, UN General Assembly, 7th session, Information from non self governing territories. August 1952.

53 That is according to the report 'Colonial Reports, Cyprus 1953', Δημοκράτης, June 1954, 125.

54 Y.D.I.A: 1952, File 82, sub file1, U.S. General Assembly, 7th session, Information from non self governing territories, August 1952. Summary of information by the Government of Great Britain and Northern Ireland in accordance with paragraph 4(a) of the General Assembly resolution 218 (III).

Table 2: Exports

	1949	1950	1951
UK	16	20	18
Parts of British Commonwealth	4	5	5
Germany	17	23	26
USA	7	7	8
Israel	9	9	8

Source: General Assembly, 7th session, Information from non-self-governing territories, August 1952

Hence the large trade imbalance was because Britain had abandoned the precepts of free trade since the end of the nineteenth century and imposed tariff reform in order to promote British industry and the interests of the City, which made Britain the biggest investor, banker, insurer and commodity dealer in the global economy.[55] Consequently Britain's ties with the colonies became tighter in order to secure both defense contributions and exclusive markets for its products and business transactions.

As a result of the high prices and unemployment in Cyprus, there was an alarming increase of emigration in the 1950s, as shown in statistics. There was a great demand for labour during the Suez Crisis as well as the encouragement of youths to join the British army and the prospect of a better life in Britain deprived Cyprus of competent young men.[56] In addition low wages and the demand for social security led to miners' and builders' strikes, which were conducted alongside the farmers' demonstrations.[57]

Technology

Infrastructure improvements in Cyprus were mainly carried out in areas that were strategic for the economy and served imperialist purposes. In the 1950s, of the 3,250 miles of roads only 740 were asphalted[58] and secondary roads were dangerous. Out of 7,784 registered vehicles, 4,167 were private,[59] which means that the rest were

55 Cain and Hopkins, *British Imperialism*, 203-204.

56 According to British statistics in 1957 out of 5,550 Cypriots 4,548 immigrated to Great Britain. Y.D.I.A: 1957, File 42, sub file1, section 1, Parliamentary Debates, 29 July 1957.

57 Peasants took part in rallies complaining about the government's interventionist policy. *Δημοκράτης*, (1948, August 29 and 1948, September 21). Three strikes one of which lasted for more than four months were organized in 1948. *Δημοκράτης*, (1948, April 4).

58 Y.D.I.A.: 1952, File 82, sub file1, U.S. General Assembly, 7th session, Information from non self governing territories, August 1952.

59 Y.D.I.A.: 1952, File 82, sub file1, U.S. General Assembly, 7th session, Information from non self governing territories, August 1952.

used for either government or military purposes. There were no new buses for public transportation except for some assembled with imported chassis. However, seven foreign airlines operated in Cyprus, mostly catering to servicemen and their families.[60] In addition, the railway line, which was an imperialist symbol that Britain used to showcase its iron industry, was closed down in 1951 because it was no longer profitable to operate. Similarly, the only deep port was in Famagusta, and since it was built in the 13th century it had not been widened until 1931, because the government did not find it profitable to use for trade purposes as locals did not have the means to purchase imported goods.[61] In 1957, the government proceeded with a major extension of the port that would double its capacity, but their commitment to the undertaking changed within a few months as plans in the Middle East changed as well. Cyprus would not be used as a naval base but as an air force base.[62] That is to say, imperialistic interests had to be taken into consideration before any work or improvements were made on the island.

In 1949 the American government was given permission to build military bases and to operate a communication station near Nicosia[63] that was 20 times more powerful than permissible. The *Daily Graphic* called it 'The Big Ear of the West'.[64] That was part of an ambitious plan to aid anti-communist propaganda, and Cyprus was chosen for the location. Cold War preparations demanded the use of technology not for the promotion of the people's welfare but for military purposes.[65] Imperialism can comprise unequal and disadvantageous relationships between countries in trade and investment,[66] and the relationship between Britain and Cyprus was no different to the extent that a sizeable part of revenue was transferred to Britain through different ways of imperialist exploitation, such as foreign capital, the flow of technology, trade and the establishment of foreign companies. Consequently, Cyprus's development was delayed, its potentialities as a market were reduced and the prospects for industrialisation were diminished. Cyprus's underdevelopment was part of the past and present relations, economic and other, between the island and the developed

60 Y.D.I.A.: 1953, File 104, sub file1, U.S. General Assembly, 8th session, Information from non self governing territories, 10 August 1953.

61 G. S. Georghallides, *A Political and Administrative History of Cyprus,* 25.

62 Y.D.I.A.: 1957, File 42, sub file 1, section 1, Parliamentary Debates, 22 November 1957.

63 Y.D.I.A: 1949, File 120, sub file4, Parliamentary Debates, 19 January 1949.

64 A. Defty, *Britain, America and anti-communist propaganda 1945-1953: the Information Research Department*. (London: Routledge, 2004), 135-160.

65 There wasn't any public transport in Cyprus. The Cyprus Government Railway stopped operating in 1951, whereas there was an increase in the number of flights from and to Cyprus in the early 1950s transporting mainly military personnel and their families. See S. Argyriou, *Το εθνικό κίνημα των Ελληνοκυπρίων κατά την τελευταία περίοδο της Αγγλοκρατίας 1950-1960.* (Athens: Asini, 2017), 235, 236.

66 E. J. Hobsbawm, *Η εποχή των Αυτοκρατοριών 1875-1914*, 121.

metropolis.[67] Britain employed commodity import and export controls with the aim of maintaining a favourable balance of trade with each of the colonies. In short, underdevelopment was not due to the survival of archaic institutions in regions isolated from the stream of world history.[68] On the contrary underdevelopment was and still is generated by the same historical process which also generated economic development: the development of capitalism itself.

Strategy

Cyprus: A Defence Hub or a Headache

The primacy of geopolitics has to be emphasised.[69] Economic motives cannot be treated separately from strategic or political considerations. The British stand on Cyprus has to be characterised as confusing. There was of course a long period until the First World War when the island went from being an imperial asset to an expendable backwater.[70] After it became a colony in 1925 and until the Second World War concession to Greece was strongly questioned. British ambivalence was evident in the postwar period as opinions ranged between considering Cyprus 'a defense key and potential fortress'[71] and 'a headache and a trouble spot'[72] until the 'Cyprus impasse'[73] in the 1950s. Either way it became diplomatic conundrum. Furthermore it affected the economy of the island as the settlement of military personnel brought inflationary pressures.

Cyprus was valued for its strategic location as it was within bombing range of communist controlled oil fields in Romania and the Soviet Baku region, and also close enough to the Middle Eastern oil area and the Suez Canal.[74] Britain's interest in Cyprus grew along with its increased interest in oil.[75] Prime Minister Eden declared

67 See W. Mommsen, 'The end of Empire and the Continuity of Imperialism', in *Imperialism and after. Continuities and Discontinuities*, eds. W. Mommsen and J Osterhammel, (London: Allen & Unwin, 1986), 335.

68 A. G. Frank, 'The development of Underdevelopment', in *Imperialism and Underdevelopment: a reader*, ed. R. I. Rhodes (New York: Monthly Review, 1970), 9.

69 R. Hyam, *Understanding the British Empire*, (Cambridge: Cambridge University Press, 2010), 71.

70 See A. Varnava, *British Imperialism in Cyprus, 1878-1915. The inconsequential possession*, (Manchester: Manchester University Press, 2009), 202.

71 Y.D.I.A.: 1949, File 120, sub file5, *New York Times*, 17 May 1949.

72 Y.D.I.A.: 1954, File 76, *Philadelphia Bulletin*, 23 August 1954 and *Baltimore Sun*, 27 August 1954.

73 Y.D.I.A.: 1954, File 57, *Time and Tide*, 4 December 1954.

74 Y.D.I.A.: 1950, File 50, sub file2, *San Francisco News*, 8 March 1951.

75 Uncommonly in the 1950's Middle East represented 17% of the international oil production, as compared with 2% in 1920 and most importantly the confirmed reserves amounted to 66% of the

in Parliament that British prosperity relied on Cyprus, which was considered to be a frontier guarding imperial interests and mainly oil.[76] Such strategic conceptions were rather ambiguous during the Suez Crisis when the British had to leave its military bases in Egypt and relocate to Cyprus in 1952.[77] An air force base was established and bomber squadrons capable of delivering nuclear weapons were deployed on the island.[78] According to the Britain's Ministry of Defence, Cyprus was an important link in the route to other Commonwealth countries and the only British territory in the Middle East where the British could operate reinforcements in case they were needed.[79] In addition, according to a report prepared by the Chiefs of Staff, the British could not afford to leave a power vacuum on NATO's southern flank, whereas discussion in the United Nations would put strain on the Greek-Turkish relations.[80]

On top of that there had been heightened American involvement in world affairs, dictated by the development of the Cold War. The US kept an air force base on Cyprus to guard the approaches to the rich oil area of the Middle East[81] where great American interests lay too. The sharing out of oil resources between the English and American oil monopolies in the Middle East and the subsequent cooperation between the two imperialist nations brought about common strategic concerns. Cyprus was an important key in the North Atlantic Treaty Organization's network of defence points so it was no wonder that it became a 'pawn' in the diplomatic chessboard of the Great Powers[82] and an international problem. Therefore, it proved difficult for the British to retain imperial control, face the rising national movement and at the same time deal with the dispute with Greece in the United Nations.

international production.

76 L. Ierodiakonou, *Το Κυπριακό Πρόβλημα. (Πορεία προς την χρεωκοπία)* (Athens: Papazisi, 1970), 108.

77 That is according to the leaflet issued by the 'British Society for International Understanding' in answer to the question: 'Why we retain Cyprus'. See Y.D.I.A.: 1951, File 71, sub file1, Embassy of Greece in London to Greek Foreign Ministry, 18 September 1951.

78 That is according to the leaflet issued by the 'British Society for International Understanding' in answer to the question: 'Why we retain Cyprus'. See Y.D.I.A.: 1951, File 71, sub file1, Embassy of Greece in London to Greek Foreign Ministry, 18 September 1951.

79 FO 371/112863, from the Ministry of Defence, 18 September 1954.

80 FO 371/112863, from the Foreign Office to Washington, 20 September 1954.

81 Middle East retained immense strategic importance. J. Kent, *British Imperial Strategy and the origins of the Cold War 1944-1949*, (Leicester: Leicester University Press, 1993), 213 and E. Hatzivassiliou, Στρατηγικές του Κυπριακού: Η δεκαετία του 1950 (Athens: Pataki, 2005), 287.

82 Νέος Δημοκράτης, (1952, April 6), 2. Cyprus had become an 'Apple of Discord'. *Die Welt*, 21 December 1954, Y.D.I.A.: 1954, File 85, Subject: Newspaper articles, German Embassy to Hellenic Ministry of Foreign Affairs.

Cultural Imperialism

As imperialism exercised undue influence through finance as well as through intervention in the subject nation's social and cultural affairs, its opponents multiplied. The British falsley claimed that colonisation was a civilising mission of their imperial power, and their responsibilities were for purely humanistic reasons, such as to promote culture and to improve the social and financial conditions of the colony. This was characterised as 'enlightened'[83] imperialism. The tactics used in Cyprus were different from those used in countries where people were considered to be primitive and backward.[84] Nevertheless cultural imperialism included importing customs, imposing the English language and constructing an English identity so as to sever any bonds with Greece and create loyal people with allegiance to the Crown.

The English education system was not imposed in Cyprus as there were Greek and Turkish schools, though in the 1950s the British came to the point to regret it[85]. Nevertheless they exercised control over education aiming by checking the Hellenic affinities of Greek schools. The imposition of authoritarian laws after the 1931 uprising was an attempt for greater control by Governor Palmer. In 1935 English was introduced as part of the curriculum in the top two classes of elementary schools. In addition, from 1935 teachers were to be recruited from the Government Teacher Training College in Morphou, where the medium of instruction was English, and from 1938 no teacher was to be appointed or promoted unless he had passed the Distinction Examination in English[86]. These laws were enacted for purely political reasons or would acquire political significance during the liberation struggle, such as the law which provided for teachers to be appointed or dismissed by the government.

Furthermore, although all textbooks for Greek schools were imported from Greece, from 1935 on, only the readers were imported. As a result resentment was

83 H. A. Richter, *History of Cyprus, Vol. A* [in Greek], 317.

84 A proud and ancient people cannot be treated in the offhand way with which we treated the Africans in the Victorian times.' Cited in the *Daily Mail*, (1954, December 6) Y.D.I.A.:1954, File 85, Subject: Cyprus problem, Embassy of Greece in London to Greek Foreign Ministry.

85 'If the English system had been imposed, schools wouldn't have become the cradle of opposition' said Lord Kinross in his book *The Orphaned Realm*, translated in *Ελληνική Κύπρος*, (1952, April), 66. Governor Chief of Staff during 1955-1956, Brigadier G. H. Baker had declared: 'No single factor in the Cyprus situation did more to prepare the ground for violence and rebellion than the failure…to take control of secondary education in the island'. Cited in A. Karyos, 'Britain and Cyprus, 1955-1959: Key Themes on the Counter-Insurgency Aspects of the Cyprus Revolt' in M. Kontos, S. Theodoulou, N. Panayiotides and H. Alexandrou (eds.), *Great Power Politics in Cyprus: Foreign Interventions and Domestic Perceptions*. (Newcastle upon Tyne: Cambridge Scholars Publishing, 2014), 47.

86 Δημοκράτης, (1951, January), 44 and *Έθνος*, (1952, March 20) wrote about the manipulation of teachers.

great because Greek history was taught as foreign history and not as the history of their homeland.[87] Greek flags, the Greek national anthem and portraits of Greek heroes were banned from schools, but after WWII, these measures were gradually relaxed only to be reinstated when political agitation increased in 1952 and the government enacted a law to provide publicly funded schools. Greek Cypriot secondary schools were until then independent to choose their own curriculum and were financed by the Church. Many of these schools, as a result of the increase in the number of pupils with financial problems, succumbed to accepting the funding.[88] Having established state education, the government had the right to close down schools, refuse licenses to teachers and ban youth organisations when secondary school pupils frequently rioted in 1953.

Another reason for an increase in nationalism was the fact that from the beginning of the occupation the British highlighted their superiority and were disrespectful towards their subjects. Most of them did not bother to learn the Greek or Turkish languages and showed 'contemptuous arrogance' even in their social intercourse with the educated islanders. Rider Haggard, an advocate of imperial responsibility, which is an ideology he shared with his friend Rudyard Kipling, described the arrogance of the British towards the indigenous population,[89] and Laurence Durrell, almost half a century later, wrote that Cypriots were considered as 'a bunch of Cyps' for the British, or rather 'Chimps', that is to say an inferior race.[90] Durrell also remarked that Greek Cypriots were attached to Greece as their mother country because they could be appointed to high positions and even become ministers in the Greek government, whereas in Cyprus it was impossible for them to be high ranking officers.

In 1954 Arthur Lennox Boyd spoke in the House of Commons about the 'races'[91] that had made Cyprus their home through the centuries without stressing the fact that the majority of the population was Greek. In the 1950s, the British tried to minimize the importance of the Greek demand for enosis by encouraging Maltese, Palestinians and Lebanese to immigrate to Cyprus. Moreover, Greek Cypriot newspapers published articles about British plans to settle Jews in Cyprus before the foundation of the state of Israel as well as to allow 30,000 Pomaki Turks to come to Cyprus from Bulgaria.[92]

87 Ελληνική Κύπρος, November 1951, 244 and Δημοκράτης, March 1951, 60.

88 P. K. Persianis, Church and State in Cyprus Education. The Contribution of the Greek Orthodox Church of Cyprus to Cyprus Education during the British Administration (1878-1960) (Nicosia, 1978), 132.

89 R. Haggard, *Travels to Cyprus* [in Greek], 175.

90 L. Durrell, *Bitter Lemons* [in Greek], (Athens: Grigoris, 1959), 158.

91 Y.D.I.A: 1954, File 57, File title: Cyprus problem, House of Commons talks, 20 December 1954.

92 *Εθνικός Κήρυξ*, 8 March 1951, Y.D.I.A.: 1951, File 71 , Sub file 7, forwarded by the Greek foreign Ministry to the embassies of London and Washington.

Furthermore, it was the general policy to present the Cypriot population as an 'ancient folk' in whom Greek, Turkish and Arabic influences were blended[93] or to identify them as either Christians and Muslims.[94] The cunning policy of divide and rule was at force, and national identity was suppressed in view of the rising wave of nationalism. There were even proposals for a common English-Greek nationality so that all 'tastes' could be satisfied and the demand for union with Greece postponed.[95] The British tendency to deny the 'Greekness' of Greek Cypriots is best described by Arnold Toynbee who referred to the rise of Greek nationalism, which was a classic case of a national movement, adding that the reaction of British imperialism was unfortunately classic too. He said that the official British view was that there were no Greeks in Cyprus but only British subjects of Christian Orthodox religion, who happened to speak Greek as their mother tongue.[96]

Accordingly, cultural nationalism became the strongest form of nationalism and a weapon against colonialism. Greek Cypriots, determined in their resistance, denounced the suppressive methods of the British in newspapers, in the streets and at schools, using the slogan 'ENOSIS' and hanging Greek flags everywhere.

Imperium et Libertas or Divide and Run?[97]

In conclusion, Cypriot nationalism increased and strengthened with the formation of political parties and the politicisation of the urban and rural populations. These changes did not occur instantaneously but they were a gradual process. To understand the impact of imperialism, we should take into account the political structure in Cyprus and the liberalisation brought about by the colonial regime in the post-war period. The hallmark of modernity was the establishment of AKEL, which was a progressive political party based on communist ideology, but also the leadership of Archbishop Makarios.[98] After the restoration of the Church, which was not only a religious but also a political authority since the Ottoman times, there is the unusual phenomenon of

93 In the leaflet 'Introducing the colonies', 24, Y.D.I.A.: 1952, File30, Sub file 6, forwarded by the London Information Office, 1 December 1952.

94 Y.D.I.A: 1954, File 45, part 1, Xanthopoulos Palamas, permanent representative of Greece at the UN, commenting on the information of the British Government on Cyprus, 26 August 1954.

95 *The Cypriot*, 24 January 1947.

96 Georgallides, G. S., 'Ο ιστορικὸς Arnold J. Toynbee *και* η Κὐπρος', ***Epiteris*** XVIII, (Nicosia: Cyprus Research Center, 1991), 387.

97 'Imperium et Libertas' was the title of a pamphlet containing the text of the address delivered by Alan Lennox Boyd to the Conservative Political Centre meeting, held on 9 October 1958, SA1/2183/1950. 'Divide and run' Opinion expressed in *Daily Express,* (1957, July 9). Y.D.I.A: 1957, File 28, Sub file 4 forwarded by the London Embassy to the Hellenic Ministry of Foreign Affairs.

98 A comment in The Times was that Makarios and his followers constituted a political party whose goal was enosis- that is union with Greece. *Έθνος*, (1952, May 30).

a priest and not a political party leading the national liberation struggle.[99] The demand for enosis was pursued with determination and the plebiscite in January 1950 gave a great impetus to the national movement.

Post-war constitutional advances were put forward by the British in an effort to appease the national mobilisation of Greek Cypriots and temper people's discontent.[100] Thus the political structure of the two community groups, right and left, struggling and allying with each other so as to give themselves identity under the aegis of the Church, profoundly influenced the pace of constitutional advances on the part of the British.[101] As the British were trying to gain the acquiescence of a better-off people, Makarios politicised Greek Cypriots by standing along side them in their desire to solve their problems, which would be settled once Cyprus was united with the mother country, Greece.[102] Like their Ottoman predecessors, the British divided the population of Cyprus with ethno-religious criteria: people were either Muslims or Orthodox Christians. The introduction of modern civil institutions based on ethnic and racial identification brought about the politicisation of the ethno-religious identities that already existed under the millet system.[103] As a result the political future of the island was undermined. Social and cultural integration of Greek Cypriots and Turkish Cypriots was not feasible, and a space for the spread of nationalist ideas for both communities was created. The Turkish Cypriots, after the rise of Turkish nationalism, projected the idea of an oppressed minority group whose rights were protected by the British.[104] They viewed with abhorrence union with Greece and highlighted their demand for the partition of Cyprus and union with Turkey.[105] The role of the British

99 Although the British were suspicious of the Orthodox Church and resented the ethnarchic tradition, in 1955, Sir John Harding, the newly appointed governor, invited Archbishop Makarios to the negotiating table in order to discuss constitutional proposals.

100 In 1947 the British formed the Consultative Assembly as as step towards the creation of a Legislative Assembly and a more democratic government. The Assembly was assigned to prepare constitutional proposals which were almost a year later proposed by the British government itself and were subsequently rejected by the Greek Cypriots. R. Katsiaounis, *Η Διασκεπτική 1946-1948 με ανασκόπηση της περιόδου* 1878-1945. (Nicosia: Cyprus Research Centre, 2008).

101 This is true regarding the 1947 Consultative Assembly which coincided with the Civil War in Greece and influenced the relations between AKEL and the right wing party. V. Protopapas, *Η εκλογική ιστορία της Κύπρου. Πολιτευτές, Κόμματα και εκλογές στην Αγγλοκρατία* 1878-1960. (Athens: Themelio, 2012), 423-439.

102 Sophia Argyriou, *Το εθνικό κίνημα των Ελληνοκυπρίων κατά την τελευταία περίοδο της Αγγλοκρατίας* 1950-1960. (Athens: Asini, 2017), 135-137.

103 Millet was an Ottoman term used to describe religious communities.

104 Turkish Cypriots declared: 'We aren't orphans. The British-Turkish shadow is our guardian'. Y.D.I.A:1949, File 95, Sub file 3, part 1, *Κύπρος* newspaper, 12 December 1949.

105 The idea of partition was first put forward by Turkey in 1949 after the Dodecanese islands joined Greece. Y.D.I.A:1949, File 11, Sub file 4, Secretariat General of Information and Communication,

government was decisive as all the constitutional plans after the tripartite conference favoured the Turkish minority.[106] The Secretariat in Nicosia had also sent five elaborate plans of the partition of Cyprus even before the Turkish Cypriots sought partition with fervour.[107] The efforts of the communist party AKEL, in the post-war period, to create a common anti-imperialistic front where Greek Cypriots and Turkish Cypriots could form a political identity proved unsuccessful, due to the rise of nationalism.[108] What happens then, when nationalism and imperialism are in conflict? Liberation struggles were in dialectic terms with colonialism, in which by forcing sovereignty, violence is confirmed. In the 1950s the pervasive tension and escalation of violence on the part of Greek Cypriots were largely determined by the oppressive measures and the violence imposed by the colonial government. EOKA (National Organisation of Cypriot Fighters), which was a secret armed organisation, turned the nationalist ideas into action. EOKA leader George Grivas[109] incited people to revolt and fulfilled the aspirations of Greek Cypriots. The process of mass participation and the creation of collective dynamics, which led to violent conflicts with the colonial power, were achieved by the mobilization of students, young people, as well as the populations of the cities and the countryside. As a result the national movement of the Greek Cypriots, as a movement of self determination and union with Greece, took the form of a massive, anti-colonial, national liberation struggle and clashed with British colonial rule.

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A Critical Assessment of the Cyprus Protocol Annexed to the UK's Withdrawal Agreement: The Consensual Continuation of a Metacolonial Realm[1]

Giorgos Kentas[2]

Abstract

A European Commission memo mentions that UK's Withdrawal Agreement covers inter alia 'a protocol on the Sovereign Base Areas in Cyprus, protecting the interests of Cypriots who live and work' there. This paper suggests that this is neither an accurate nor a fair description. The Protocol may protect some of the rights ascribed to Cypriot citizens due to their EU identity, but at the same time it preserves certain strategic interests of the UK in Cyprus. As such, the Protocol echoes some major elements of a metacolonial realm in Cyprus. This however, is yet another instance demonstrating the consent of the government of Cyprus for the continuation of that realm. The Protocol assigns to the UK the authority for applying the Union's acquis in the 'base areas', whereas the Republic of Cyprus is considered a UK-entrusted EU Member State 'with responsibility for implementing and enforcing provisions of Union law in the Sovereign Base Areas'.

Keywords: postcolonial anomaly, metacolonial realm, incomplete decolonization, servitude regime, Brexit, Withdrawal Agreement, UK 'bases areas' in Cyprus, Protocol 3, 'SBAs' Protocol, Cyprus, UK, EU

Introduction

This paper makes a critical assessment of the Cyprus ('SBAs') protocol annexed to the draft agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018. A memo prepared by the Commission states that that protocol is 'protecting the interests of Cypriots

1 This paper was very much benefited by some extensive fieldwork and background conversations. I would like to thank all people who talked to me. Special thanks to Dr. Nicholas A. Ioannides who discussed with me some aspects of section 1 of the paper in relation to the status of the British bases in Cyprus. I would also like to thank the two anonymous reviewers for their comments and suggestions. The views expressed are solely these of the author.

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who live and work in the Sovereign Base Areas'.[3] That reading of the protocol, however, pertains to just one part of its provisions and, at the same time, it blurs some other essential parts of it which pertain to the strategic context that surrounds the way in which that protocol was drafted in order to preserve and extend certain strategic interests of the UK in Cyprus under a colonial context.[4] At the same time, it constitutes yet another instance of the voluntary acceptance of the UK asserted sovereignty in the 'base areas' by the Government of the Republic of Cyprus.

Writing in 1960s, Antony Verrier observed that the UK kept some territory in Cyprus aiming 'first and foremost to preserve Britain's strategic interests in the island, which, through bases and other installations, provide in theory the facilities for operations in the Middle and Far East'.[5] This conception of the military presence of the UK in Cyprus, which, by paraphrasing,[6] perpetuates an image of Cyprus as a British *strategic prize*, is pertinent to a lasting '*postcolonial anomaly*' that engenders a '*metacolonial realm*'. These two concepts ('postcolonial anomaly' and 'metacolonial realm') are coined to describe the situation, and they constitute the prime theoretical lenses through which the protocol is critically examined. As such, these two concepts,

3 European Commission 'Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018', *EC.Europa.EU* (2018), available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf. European Commission 'Fact Sheet - Brexit Negotiations: What is in the Withdrawal Agreement', Brussels. European Commission (2018), available at file:///C:/Users/User/Documents/Desktop%20files%20as%20of%20Nov.%202018/Papers/MEMO-18-6422_EN.pdf.

4 The UK took administrative control of Cyprus in 1878 after an agreement with the Ottoman Empire (L. Oppehheim, *International Law: A Treatise* (Cambridge: Whewell House, 1920), 309 and 395). In 1914, the UK annexed Cyprus. In 1923 that annexation was 'normalized' in the context of the Treaty of Lausanne, by which Turkey 'recognizes the annexation of Cyprus proclaimed by the British Government on the 5th November, 1914' (J. A. S. Grenville, *The Major International Treaties. A History and Guide with Texts*, (London: Methuen, 1974), 79-80). Between 1923 and 1960 Cyprus was administered as a Crown Colony (M. Simmons, *The British and Cyprus: An Outpost of Empire to Sovereign Bases, 1878-1974* (Gloucestershire: The History Press, 2015)). In 1960, the UK terminated the administration of some 97% of Cyprus' territory (conferred to the newly established Republic of Cyprus). The UK however, kept the rest 3% of Cyprus territory under the same conditions of a colonial regime (Treaty No. 5476, 1960). That territory of Cyprus is one of the fourteen overseas territories of the UK. The so-called Treaty of Establishment and the British 'base areas' constitutes a highly problematic document, from legal and political perspectives (T. Tzionis, 'The Sea and the British Bases: Two overlooked aspects of the Cyprus Problem' [in Greek], *Apopseis* (2018), available at https://www.apopseis.com/thalassa-ke-vretanikes-vasis-dyo-xechasmenes-ptyches-tou-kypriakou/.

5 A. Verrier, 'Cyprus: Britain Security Role', *The World Today* (1964), 131.

6 B. O'Malley and I. Craig, *The Cyprus Conspiracy: America, Espionage and the Turkish Invasion*. (London: I.B. Tauris, 1999).

as they are developed here, lie in the field of postcolonial studies.[7] In that regard, the paper should be seen as a critical analysis of a case study in the postcolonial setting of Cyprus.

Postcolonial anomaly is used here to describe the terms upon which the independence of the Republic of Cyprus is restrained by a number of provisions of the Treaty of Establishment,[8] as well as by the subsequent policies of the UK (and other third countries) in Cyprus.[9] The chief element of that anomaly is the British claim for *sovereign control* of the Cypriot territory it kept under colonial rule, even after the independence of the Republic of Cyprus. As such, the postcolonial anomaly in Cyprus pertains to a situation of *incomplete decolonization*,[10] as well as a contested political demand of the UK to exercise effective sovereign control there.[11] This is an *anomaly* (an asymmetrical and irregular situation) in many respects. The (remaining) UK controlled territory in Cyprus is still under British colonial rule,[12] even if it was renamed 'base

7 A fuller development and analysis of these two concepts deserve a longer discussion, which shall be pursued in a future work. Here, the concepts are developed to the extent needed for elucidating the core arguments of the paper. (Ashcroft, Griffiths and Tiffin, 2000)

8 The actual name of that the treaty is 'Treaty (with annexes, schedules and detailed plans) concerning the establishment of the Republic of Cyprus'. It was not a treaty that Established the Republic of Cyprus, but one that regulates certain issues around the establishment of the Republic of Cyprus, namely, which rights were accorded to the UK over the 3% of the territory of Cyprus and beyond that.

9 That postcolonial anomaly is also part and parcel of the Cyprus Problem, a dimension which is not pursued here; see Tzionis, 'The Sea and the British Bases'.

10 The concept of incomplete decolonization was defined and elaborated by a number of UN members in the context of a recent case before the International Court of Justice (ICJ) that concerns the separation of the Chagos Archipelago from Mauritius in 1965. For a synopsis of the positions expressed before the ICJ, see N. Ioannides, 'The ICJ Advisory Opinion concerning the Chagos Archipelago and the Possible Consequences on the Legal Regime of the British Bases in Cyprus', (manuscript under review for publication, 2018).

11 That claim is occasionally contested, yet not rejected, by the Cypriot authorities. This paper suggests that any such contestation is inconsistent, since the Cypriot authorities have established strong ties with the authorities of the base areas and work with them to embellish the situation. British-asserted 'sovereignty' should be mainly examined from an ethical, legal and theoretical perspective. See N. Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention*, (Cambridge: Cambridge University Press, 2002); R. Young, *Postcolonialism: An Historical Introduction*, (Oxford: Blackwell 2001).

12 The continuation of the colonial rule of Britain in Cyprus is presented in a recent decision of the UK Supreme Court (see T*ag Eldin Ramadan Bashir and others (Respondents) v. Secretary of State for the Home Department (Appellant) [2018] UKSC 45*). From a legal and political standpoint, this case tested the relevant provisions of Protocol No. 3 (see below) in relation to the asserted right of the UK to regulate issues of refugees and illegal immigrants in the base areas, as well as tested a bilateral agreement between the UK and the Republic of Cyprus for the implementation of the same provisions of Protocol No. 3. Reflecting on arguments raised by the Appellant the Court had to rule on the status

areas' (Treaty No. 5476, 1960, Article 1). In that context, UK advances its national interests at the expense of, and sometimes against the interests of Cyprus and its people, who never actually gave their express consent for this situation.[13] For example, the Treaty of Establishment and the subsequent British policies and practices confine a number of rights, interests and potentials that the state of Cyprus would have had if it could have exercised sovereignty over that territory, as well as utilize all the resources of these areas and their strategic value for the benefit of its people and its communities.[14] In addition, this situation is anomalous because a number of citizens of the Republic of Cyprus (and, as of 2004, EU citizens) who live and/or work in the UK-controlled territory of Cyprus (up to 11,000) are subject to an ambivalent administrative and legal regime, and they are exposed to the strategic interest of the UK with regard to their treatment as Cypriot and EU citizens. Their human rights (e.g. property rights) are restrained, even in the EU context.

That anomaly is further perplexing by the reluctance of the Republic of Cyprus to question or challenge UK's asserted 'sovereignty' in these areas, as well as by claim that the territory is kept under colonial rule. From the standpoint of postcolonial studies this would be problematic, in the sense that postcolonial states feel uncomfortable when their sovereignty is restrained by colonial rulers and they claim restoration of their rights.[15] The case of Cyprus seems to be different. Since 1960, the Cyprus government

of the British bases in Cyprus, which it did. The relevant segment of paragraph 69 of the judgement reads as follows: 'In the case of the SBAs, the only change which occurred in 1960 was that whereas they had previously been part of the UK-dependent territory of Cyprus, they were thereafter the whole of it. The mere fact the United Kingdom lost 97% of the island of Cyprus did not alter the status of the 3% that it retained. The status of the SBAs vis-à-vis the rest of the world did not change, except in relation to the rest of Cyprus, and that was because of a change in the status of the rest of Cyprus and not because of a change in the status of the SBAs.

13 This is not the way in which the situation is seen by UK officials and officers of the Foreign Office. Although it is admitted that the bases emanate from the colonial legacy, that legacy is deemed not strong in the British thinking when dealing with bilateral issues. They are 'very much focused on the here and now', as a source put it. This paper suggests that there is a merit in looking into aspects of the bilateral relationship that reproduce some strong elements of the colonial legacy, which, from some angle, may be seen as a perpetual situation.

14 Some British scholars suggest that this is not the case. The work of James Ker-Lindsay may be the more paradigmatic in that regard; see for example J. Ker-Lindsay, 'Great Powers, Counter Secession, and Non-Recognition: Britain and the 1983 Unilateral Declaration of Independence of the 'Turkish Republic of Northern Cyprus', *Diplomacy & Statecraft*, Vol. 28, No. 3 (2017), 431-453, DOI: 10.1080/09592296.2017.1347445.

15 For example, G. Premnath, 'The Weak Sovereignty of the Postcolonial NationState', in *World Bank Literature*, eds. A. Kumar, J. Berger and B. Robbins, (Minneapolis, MN: University of Minnesota Press, 2003); H. K. Babha, 'The Other Question: Difference, Discrimination, and the Discourse of Colonialism', in *Black British Cultural Studies: A Reader*, eds. H. A. Baker, Jr., M. Diawara, R. H. Lindeborg and S. Best, (Chicago, Illinois: University of Chicago Press, 1996); P. Chatterjee,*The*

undertook a number of actions that seem to regulate and normalize the postcolonial situation. Although the Republic of Cyprus expresses some legal arguments that challenge the continuation of colonial regimes in world politics,[16] for its own case it does nothing more than contribute to the embellishment and the continuation of a metacolonial realm. In the last 15 years (2003-2018), the Republic of Cyprus, as an acceding EU Member State and as a Member State of the EU, has concluded two agreements with the UK (a Protocol in 2003 and another Protocol in 2018), which were adopted by EU Treaties (Cyprus' Act of Accession and UK's draft Withdrawal Agreement) to provide for the application of EU law in the British 'base areas', under the 'sovereign' authority of the UK. Whether these actions are voluntary or taken in the context of a 'compulsive' colonial regime is a subject to be examined in the context of international law analysis.[17] From a political science standpoint, however, these actions seem to be – independent of the soundness of their calculation – quite aimful since, as shown in this paper, they are celebrated as successful.

The concept 'metacolonial realm' denotes the strategic and other implications of the postcolonial anomaly in Cyprus. In postcolonial studies, the situation described here is discussed in the context of a long critical literature on decolonization, postcolonialism, postcolonial state, neo-colonialism and neo-imperialism.[18] I use the prefix 'meta' to underline the continuation and adaptation (the metamorphosis) of the British colonial realm in Cyprus by political, military and other means. In that regard, the metacolonial realm in Cyprus should be examined, as Crawford suggests for similar situations,[19] not under the conditions that it was founded, but under the conditions that it functions in the course of time. The way in which the Treaty of Establishment is implemented and enforced in the areas under UK civil-military (metacolonial) control in Cyprus, as well as the context and the actual implementation and enforcement of some provisions of EU acquis and policies, there (and, at the same time, the restrictions on the full implementation and enforcement of the EU treaties and acquis in these areas) constitute some typical examples of that metacolonial realm.

Nation and its Fragments: Colonial and Postcolonial Histories, (Princeton, NJ: Princeton University Press, 1993).

16 Republic of Cyprus, 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)' Written Statements for the ICJ, (2018). Republic of Cyprus, 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)', Oral statement for the ICJ, (2018).

17 Cf. M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties*, (Oxford: Oxford University Press 2007).

18 B. Ashcroft, G. Griffiths and H. Tiffin, P*ost-Colonial Studies*, (London: Routledge, 2000), 56-59, 146-148, 168-173, 174-175.

19 J. Crawford, *The Creation of States in International Law*, 2nd ed., (Oxford: Oxford University Press. 2006).

In the context of UK's Withdrawal Agreement, that metacolonial realm is extended to include elements of EU treaties, as well as some institutional arrangements for the UK to be responsible for the implementation and enforcement of EU policies, whereas UK will entrust the Repubic of Cyprus to implement and enforce a limited number of EU policies .

With the EU context being the focal point of analysis, this paper suggests that the UK (on the voluntary or reluctant consent of the Cyprus government) instrumentalized the accession of Cyprus to the Union as a means to preserve, enhance and extend the strategic interests it enjoys on the island in an adapted and reconfigured metacolonial realm. When Cyprus joined the Union in 2004, Protocol No. 3,[20] as well as Article 2(2) of Protocol No. 10[21] ingrained that realm in the EU acquis under some 'exceptional' conditions. That instance also reveals the strategic lever and power of imposition the UK employed for securing the benefits of its metacolonial regime. The analysis also reveals that the new Cyprus ('SBAs') protocol annexed in the draft Withdrawal Agreement shall be used by the UK as yet another convenient vehicle to consolidate and even further its strategic posture in Cyprus vis-à-vis the Republic of Cyprus and vis-à-vis the EU. This protocol is primed to perpetuate and extend the British postcolonial (geopolitical) anomaly in Cyprus and enhance the implications of the metacolonial (hegemonic) realm, which are engendered by it. In other words, Cyprus' participation in the EU is effectively instrumentalized by the UK as a means to preserve and extend its strategic interests, even on its way out of the Union.

If there is any merit in that analysis, research must also be directed to the way in which that (diplomatic and legal) outcome emerged in the context of the negotiations between the British and the Cypriot delegations (in 2002-2003 and in 2017-2018). This issue is acknowledged and examined without, however, delving into details, mainly due to space limitations. The main conclusion is that UK's political will is stronger and more effective in preserving its metacolonial realm in Cyprus, i.e., in preserving all the elements that pertain to its assertive 'sovereign' control over its base areas in Cyprus. The Republic of Cyprus appeared eager in collaborating to that end, although, under the new protocol, it assumed some more responsibility in implementing and enforcing some provisions of EU Treaties in the base areas, which the UK (i.e., the 'sovereign' authority there) entrusted to it. If, compared with the previous situation, under Protocol No. 3, where the Cypriot authorities had responsibility to implement

20 Official Journal of the European Union, 'Protocol No 3 on the sovereign base areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus', L 236, Vol. 46, (2003, September 23), 940-943.

21 Official Journal of the European Union, 'Protocol No 10 on Cyprus,' L 236, Vol. 46, (2003, September 23).

just one element of the Union's agricultural policy in the base areas (e.g., for the administration and payment of Community funds to farmers), the new arrangement could be interpreted as an extension of its responsibility to implement the acquis. In the end, however, although under Protocol No. 3 the Republic of Cyprus assumed the responsibility to implement just one EU policy, under the new protocol, it will have responsibility to implement more policies in the bases areas, but only because the UK will entrust it to Cyprus. In that regard, the UK was successful in 'restoring' a tiny rift in its 'absolute sovereignty' in the base areas, by claiming successfully the full authority to hold and entrust responsibility for the implementation of EU law there. The new protocol is nothing else but an explicit acceptance by the Republic of Cyprus of the asserted British 'sovereignty' in the base areas.

In sum, the new protocol annexed to the Withdrawal Agreement allows for a more functional and more convenient metacolonial realm in the UK-controlled territory in Cyprus. On the day the European Commission announced the agreement, the President of the Republic of Cyprus saluted it and expressed 'full support to the final result [as] the continuation of the acquis in the British Bases, which was right from the start a primary objective of the Government' was achieved.[22] That statement conveys a political acknowledgement of British asserted 'sovereignty' in the base areas and the intention not to question it, but instead to live with it. The case study of the protocol is another instance in the course of a number of iterated instances by which the Cyprus government agrees with the British government to accommodate the metacolonial realm in Cyprus, or, as this paper suggests, another instance that reproduces and elaborates the British metacolonial realm in Cyprus.

Implications of an Intentionally Lasting Postcolonial Anomaly

The theoretical premise upon which this paper is written pertains to the strategic objective of the UK to preserve, enhance and perpetuate its strategic interests in Cyprus, in the context of a metacolonial 'sovereign' regime. The analysis also takes into account the response of the Republic of Cyprus (and other actors) toward that objective. Although UK's strategic objective has a number of facets and may be discussed in many different contexts, the focal point is on the way in which the UK instrumentalized Cyprus' EU accession negotiations and its membership to the Union as a means for perpetuating its metacolonial realm on the island. The diplomatic effort attached to that goal demonstrates that the postcolonial situation is far from static;

22 Stockwatch, 'Anastasiades welcomes agreement in principle on Brexit', *Stockwatch.com.cy* (2018). Available at https://www.stockwatch.com.cy/en/article/politika/anastasiades-welcomes-agreement-principle-brexit.

it seems to be a dynamic and evolving situation which responds and adjusts (mainly) to external, regional and international, contingencies. Developments in the EU that pertain to Brexit and more particularly to the protocol on the UK-occupied territory in Cyprus (known as the Sovereign Base Areas, or SBAs), demonstrate just one instance of the dynamic nature of the UK's postcolonial regime in Cyprus.

Ever since the inception of the Republic of Cyprus, UK's rule in the base areas maintains all the elements of a (meta)colonial regime. The Treaty of Establishment, which spells outs the terms of the British metacolonial rule in Cyprus, constitutes the cornerstone of a lasting postcolonial anomaly. According to that treaty:

'The territory of the Republic of Cyprus shall comprise the Island of Cyprus, together with the islands lying off its coast, with the exception of the two areas defined in Annex A to this Treaty, which areas shall remain under the sovereignty of the United Kingdom. These areas are in this Treaty and its Annexes referred to as the Akrotiri Sovereign Base Area and the Dhekelia Sovereign Base Area' (Treaty No. 5476, 1960, Article 1).

In the context of that article, as well as in the context of a number of other provisions of the same treaty, the sovereign rights of the Republic of Cyprus are restrained to a considerable degree (at a territorial and non-territorial level). The latter is also obliged to accord to the UK (and to other third states) a number of rights and privileges, which are not pertinent to independent, sovereign and territorially integrated (normal) states. Article 2 of the treaty, for instance, sets out that: '[t]he Republic of Cyprus shall accord to the United Kingdom the rights set forth in Annex B to this Treaty... [and] shall co-operate fully with the United Kingdom to ensure the security and effective operation of the military bases situated in the Akrotiri Sovereign Base Area and the Dhekelia Sovereign Base Area, and the full enjoyment by the United Kingdom of the rights conferred by this Treaty' (Treaty No. 5476, 1960, Article 2).[23] In that regard, not only the UK confined the territorial and sovereign rights of the Republic of Cyprus during and after independence, but it also imposed upon the Republic of Cyprus a *suis generis* postcolonial servitude regime,[24] which in this paper

23 Annex B comprises a catalogue of rights and privileges that the Republic of Cyprus must provide to the United Kingdom. That Annex is one of the longest sections in the Treaty of Establishment and comprises 50 pages. An additional annex to that treaty, Annex C (50-pages long), provides for arrangements concerning the status of military forces in Cyprus, including the way in which the military presence of Britain in Cyprus will be served by the Cyprus government. Lastly, a number of provisions in Annexes B and C provide for the role, obligations and rights of other foreign troops in Cyprus, i.e. Turkish and Greek forces.

24 That servitude regime was imposed by the UK (with the consent of Greece and Turkey, who also signed the Treaty of Establishment) as a condition for accepting the Establishment of the Republic of Cyprus. Cyprus was left with no option but to accept a servitude regime, otherwise it would not have been established. (cf. A. J. Esgain, 'Military Servitudes and the New Nations', in *New Nations* in

is dealt with as part and parcel of a broader metacolonial realm. The same regime is also extended to two other third states, namely Greece and Turkey, to which the treaty offers special rights and privileges (Treaty No. 5476, 1960, Articles 3 and 10; Annexes B and C).[25]

The perpetuation of such a postcolonial anomaly, and the metacolonial realm that it entails, are made possible due to the might and determination of the UK to preserve and extend its strategic interests in Cyprus, as well as to adjust them in accordance with domestic, regional and international developments. The continuation of that situation however is also facilitated (yet not determined) by activities (and perceptions) of other parties who are involved. Considered from a global strategic perspective, UK's postcolonial regime in Cyprus was consistent with the Cold War contingency.[26] UK military bases in Cyprus were essential for advancing British and generally Western security and strategic objectives in the Middle East and beyond, as well as in containing the influence of the Soviet Union in key countries. In the post-Cold War era, these bases were readily available for the UK's new strategic planning in the region[27]and they were deemed vital assets for US's (new) strategic objectives. For instance, UK military installations and capabilities in Cyprus were used in critical instances, such as the Gulf War of 1991, the Iraq War of 2003 and the Syrian crisis in early 2010s.

In addition to the strategic interests of the UK and the services its military bases occasionally offer to the US and other allies, one may also need to consider the way in which UK's metacolonial realm is contemplated by other parties. The Cyprus government, although not (always) in concord with UK interpretation(s) of the Treaty of Establishment and its subsequent implications for Cyprus, it appears generally not willing to question UK's metacolonial realm, with a limited number of exceptions that concern the actual content and breadth of the (unilateral) British assertion of the 'sovereign' nature of its base areas. A number of actions and cooperation agreements attest to the opposite.[28] The general approach of the Cyprus government, as it will

International Law and Diplomacy, ed. W. V O'Brien, (London: Stevens & Sons, 1965), 42-97.

25 Of particular importance are the Treaty of Alliance and the Treaty of Guarantee, especially Article 3 of the latter.

26 K. A. Kyriakides, *British Cold War strategy and the struggle to maintain military bases in Cyprus, 1951-60,* (University of Cambridge, Doctoral thesis 1996).

27 K. A. Kyriakides, 'The Sovereign Base Areas and British Defence Policy Since 1960', in H. Faustmann and N. Peristianis (eds), *Britain in Cyprus: Colonialism and Post-Colonialism 1878-2006*, (Mannheim: Bibliopolis, 2006).

28 An example pertains to an agreement on development policy, see 'Arrangement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Cyprus relating to the regulation of development in the Sovereign Base Areas', (2014, January 15), available at http://www.sbaadministration.org/docs/admin/announcements/NMD_signed.pdf.

be demonstrated in more detail below, is to make the British metacolonial realm in Cyprus more functional and convenient. The overall rationalization given for that approach is that the right time to open that front is after the solution of the Cyprus Problem. In the aftermath of the crisis of 1964 and after the de-facto division of the island, following a Turkish invasion in 1974, and the unilateral declaration of independence of the 'Turkish Republic of Northern Cyprus' in 1983, the Treaty of Establishment, as well as other arrangements of 1960s, is considered by Greek Cypriot politicians as important for preserving the legal continuation of the Republic as well as its transformation in the context of a future settlement. Occasionally, some Greek Cypriot politicians would even consider the military presence of UK in Cyprus essential for the security of the island.[29] On the other hand, the UK is not considered as a credible guarantor power, in the context of a future settlement, by neither Greek Cypriot nor Turkish Cypriot grassroots. In general, the UK's presence in Cyprus is approached with skepticism. Both communities generally considered the UK to be a biased actor in the Cyprus Problem.[30] The prevalent preference among Greek Cypriots and Turkish Cypriots is the ultimate termination of the UK's military presence in Cyprus and the dismantlement of its military bases.

Of particular interest is the political and military posture of Turkey on the subject matter. In the context of Cyprus's talks on security and guarantees, Ankara referred, on a number of occasions, to the British military bases in Cyprus. Turkey opposes the idea of the demilitarization of the island on strategic grounds, contending that, if there will be no Greek and Turkish military forces in Cyprus, the 'strategic value' of the island, in the context of the regional (Eastern Mediterranean and Middle East) security complexes will be fully in control of the UK. In that regard, Turkey insists on preserving an active military base on the island in the context of a post-settlement new security architecture. This standpoint is instrumental for rebalancing Cyprus, which is not limited to Greece and Turkey (as sometimes suggested),[31] but is also extended to

29 This is expressed occasionally, even by Government officials or by Government sources cited in Newspaper reports. It seems to relate however to a misperception (or wishful thinking) that UK's military presence in Cyprus function will be a 'protective shield' against any further Turkish actions on the island. It is also necessary to note that after 1974, and apart from the Greco-Turkish dispute, Cyprus security was externally threatened three times (i.e. in 1991 (during the first Gulf War), in 2003 (during the Iraq War) and in 2011-2012 (during the Syrian crisis)) due to the military activities of the UK and allies in the region, using the installations of the British bases. For a discussion and documentation see Kentas 2013. On the other hand, some see the British base of Dhekelia as a 'buffer zone' between the Turkish troops and the National Guard of the Republic of Cyprus. Should Britain abandon the area under the existing situation, 'there is no guarantee that the Turkish forces will not occupy that area' a source stated. This however is an issue not discussed any further here.

30 For a different view see Ker-Lindsay, 'Great Powers, Counter Secession, and Non-Recognition'.

31 That conception of 'balance' was incorporated in the UN Plan (known as the Annan Plan) that

the military presence of the UK on the island.[32]

A number of developments seem to have benefited the perpetuation of UK's (intentional) metacolonial regime in Cyprus.[33] This, however, is far from a convenient situation. UK's metacolonial regime constitutes an anomalous international, regional and domestic experience from both an international law standpoint[34] and a diplomatic/political/legal perspective.[35] In the EU context, two important historic junctures put the content and the resilience of the metacolonial realm in Cyprus to the test, one when Cyprus was negotiating its entrance to the Union and one when the UK was negotiating its withdrawal from the Union. As it is demonstrated in the sections that follow, the content of that realm was amended to the extent that some provisions of the Union's acquis are implemented in the base areas, but its resilience (i.e., UK's claim on 'sovereign' control of these areas) was generally left unaltered, mainly due to the consensual approach of the Republic of Cyprus in the context of various perceptions and misperceptions (which are presented at a later stage). The UK seems to have been quite effective in enhancing and furthering the metacolonial realm in Cyprus by adjusting it in the context of the Union's acquis (when it was an EU member) and by ingraining it firmly in the framework of its future relationship with the Union (on its way out of the EU). The Republic of Cyprus, on the other hand, could not achieve any more than the consent of the UK (as the self-declared 'sovereign' authority) to be delegated with the implementation and enforcement of some provisions of EU law there.

The British Occupied Areas in the EU Context

During accession negotiations between the EU and the Republic of Cyprus (1998-2002), the status of the British base areas (SBAs) was dealt with as a special issue,[36] but only in the very last moment before the conclusion of these negotiations. The last Regular Report on Cyprus revealed the issue with a very brief (one paragraph)

was submitted in November 2002 and rejected in 2004. That Plan however confined the concept of 'balance' in Cyprus between Greece and Turkey, by ignoring the UK element in the strategic equation.

32 G. Kentas, 'The peculiar concept of "balance" between Turkey and Greece in Cyprus', *Great Power Politics in Cyprus: Foreign Interventions and Domestic Perceptions*. eds M. Kontos et al., (Newcastle: Cambridge Scholars Publishing 2014).

33 Cf. H. Faustmann and N. Peristianis, *Britain in Cyprus: Colonialism and Post-Colonialism 1878-2006*, (Mannheim: Bibliopolis 2006).

34 Ioannides, 'The ICJ Advisory Opinion concerning the Chagos Archipelago'; A. Pellet, 'The British Sovereign Areas', *Cyprus Yearbook of International Law* (2012).

35 Tzionis, 2018

36 cf. Shaelou, 2011

reference.[37] It was actually the first time after Cyprus' independence that the British metacolonial realm was brought in a result-oriented political framework that entailed bilateral and multilateral negotiations at an international (EU) level.[38]

In the context of accession negotiations, a number of bilateral meetings were held between the UK and the Commission, as well as some trilateral meetings among UK, the Commission and Cyprus. Cyprus' accession to the EU would ultimately have an impact on the British base areas, since some thousands of Cypriots were living and working there. These citizens of the Republic of Cyprus would inevitably need to have the same rights with all other Cypriots. Although this was relatively undisputed, there were a number of other issues to be dealt with, taking into account that, on its entrance into the European Community, the UK had excluded its bases in Cyprus from all Community/Union treaties, and hence the Union's acquis (and policies) were not implemented there. Four of these issues were of particular interest. First, the civic status of Cypriot citizens living and/or working in the SBAs was regulated by the Treaty of Establishment, as well as by some relevant agreements and arrangement between the Cyprus government and the UK government. In that regard, there was an issue on whether that status would change when Cyprus entered the EU. Second, since the base areas were excluded from the territorial and sovereign control of the Republic of Cyprus, accession negotiations that pertained to the adoption of the Union's acquis and the relevant EU policies in the Republic of Cyprus would not include these areas. In that regard, there was a question on how the citizens of the Republic of Cyprus who live or work in these areas would have the same treatment with all other citizens of the Republic. Third, the Union's acquis and policies were not implemented in the base areas. In that regard, there were questions as to whether, to what extent and how would or could the Union's acquis and policies apply there. If the Union's acquis and policies would be applied to the base areas, there were questions regarding (i) the extent that they would be applied, (ii) who would be affected and how (e.g., only Cypriot citizens or the entire base areas), and (iii) which authority would be responsible for the effective implementation and enforcement of the acquis there, if that would be the outcome of the negotiations. Four, there was a question on how would an overall agreement on the three previous issues be presented and adopted in the context of Cyprus' accession to the EU.

From the UK's standpoint, the starting point of the discussion was the very fact that its Treaty of Accession to the European Economic Community in 1972 provided

37 European Commission (2002), 14.

38 In 1972, when the UK joined the Union, it (unilaterally) excluded the territory of SBA's from its accession treaty, without any consultation or negotiation with the Cyprus government or any other actor.

that all the Treaties of the European Communities shall not apply to the SBAs. That provision, a primary law of the Union, was incorporated in Article 299(6)(b) of the Treaty Establishing the European Community (TEEC). The UK was not willing to renegotiate the status of the SBAs under the Union's law,[39] but would only discuss some exceptions which would be necessary for the adoption of special arrangement that would facilitate the application of some parts of the acquis for Cypriots who live and/or work in the SBAs. In addition, the UK's position was that any discussion on the exceptional implementation of the Union's acquis in the SBAs must be in accord with the Treaty of Establishment. Thirdly, the UK insisted that, as the 'sovereign' authority in the SBAs, it (i.e., the relevant authorities in the SBAs) would be solely responsible for the implementation and enforcement of any exceptional arrangements for the adoption of the acquis, in accordance with the Treaty of Establishment.

In addition to the above, there was still another difficult issue to deal with. The Republic of Cyprus would accede to the EU with all its territory, but the Union's acquis would be suspended in the areas of the Republic of Cyprus which are not under the effective control of its government (which are effectively under Turkish military control). The base areas of Dhekelia and Akrotiri would not be part of the EU (as they were excluded from the territory of the Republic of Cyprus), and the British base of Dhekelia would have an artificial boundary with the Turkish controlled areas, where the Republic of Cyprus did not exercise effective control. In that regard, the question was how would that boundary issue be dealt with. The UK insisted that it should be defined as an external border of its military base of Dhekelia with the aforementioned areas, and subsequently an external boarder between the EU and the UK-occupied territory in Cyprus.

In the context of the negotiations, the Cyprus government expressed a number of views on these issues by emphasizing the implementation of the Union's acquis in the base areas without any discrimination. The Cypriot delegation expressed a number of observations and variant interpretations of all the elements of the negotiation, but in the end the British positions were accepted by the chief Cypriot negotiator(s), on political directions from the government. The outcome may also need to be considered in the context of some perceptions or misperceptions that the Cyprus government held at the time. Out of the many views expressed, three must be put in perspective. First, the UK, being a member of the EU and holding veto power over the accession

39 UK excluded the base areas from the then EEC territorial scope under the principle of 'full territorial exclusion': According to Article 299(6)(b) of the TEEC (2002), 'This Treaty shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus'.

of Cyprus to the Union, was negotiating from a superior position and it certainly had a stronger lever on the outcome. Second, the Cyprus government set EU accession as a strategic goal and was not willing to risk the conclusion of the negotiations for different viewpoints on certain provisions of the Treaty of Establishment or by claiming authority in applying the acquis in the base areas. Although the implementation of the acquis was of primary importance, Nicosia ultimately appeared willing to accept an arrangement that would be in accordance with the UK perspective, as already explained (and detailed in the following section). Third, during the same period (2002-2003), when accession negotiations were climaxing, there was a simultaneous effort to reach a comprehensive agreement on the Cyprus Problem, on the basis of a UN Plan. In that regard, Nicosia invested more resources and energy in dealing with the Cyprus talks. In the context of Cyprus talks, an element of the future status of the base areas (i.e., the size of its territory and nothing but that) was also considered in the context of a UK gesture to 'cede' a part of these areas to a 'reunited Cyprus'.[40] Founded or unfounded, these perceptions or misperceptions were essential in ultimately leading to Protocol No. 3.

Protocol No. 3

Protocol No. 3 (hereafter Protocol[41]), as ratified in April 2003 and published in the Official Journal of the European Union in September 2003,[42] spells out the terms under which some part of the Union's acquis would be implemented in the base areas. The Protocol takes into account provisions of the Treaty of Establishment with regard to customs arrangements between the SBAs and the Republic of Cyprus, as well as arrangements that authorize the Cyprus government to administer public services in the base areas. It also clarifies that the accession of Cyprus to the EU will not affect rights and obligations of the UK and the Republic of Cyprus to the Treaty of Establishment. The Protocol does not affect whatsoever any political or strategic interest of the UK, but instead it makes the situation to look more convenient for all sides.

The Protocol comprises nine articles and one annex with four parts. Article 1 reaffirms that the TEEC shall not apply to the base areas. It amends Article 299(6)(b) of the TEEC in order to allow some exceptions, as they are provided in the subsequent Articles of the Protocol. In fact, Article 1 reaffirms that the UK occupied territory in Cyprus is not part of the Union, but it allows for some exceptional implementation

40 Palley, 2005

41 In order to differentiate between one another, Protocol No. 3 will be written with a capital 'P' and the new one (a protocol annexed to the Withdrawal Agreement) with a small 'p'.

42 Official Journal of the European Union, 'Protocol No 3.

and enforcement of the acquis there, under some very specific provisions. Article 2 provides that the base areas shall be included within the customs territory of the Community, under special conditions, amendments and exceptions listed in Part One of the Annex. In addition, Article 2 states the way in which acts on turnover taxes, excise duties and other forms of indirect taxation will apply to the SBAs, under special conditions, amendments and exceptions set out in the Annex. All relevant provisions on the same subject that apply to the case of Cyprus, in the context of its accession to the EU, will also apply to the SBAs, but only to the extent that the special conditions, amendments and exceptions of the Annex would allow that. The same Article safeguards all reliefs and exemptions from duties and taxes on supplies to the military forces of the UK and the personnel of the base areas as provided by the Treaty of Establishment.

Article 3 stipulates that 'Title II of Part Three of the EC Treaty, on agriculture and provisions adopted on that basis', as well as 'measures adopted under Article 152(4)(b) of the EC Treaty' will apply to the base areas.[43] Article 4 affirms the relevant arrangements of the Treaty of Establishment with regard to the social security rights of Cypriot and other Community citizens living and employed in the base areas. Those persons shall be treated for the purposes of Council Regulation 1408/71 as if they were residents or employed in the territory of the Republic of Cyprus.

In essence, Articles 2 through 4 regulate issues and broaden an already agreed upon and functional regime in the SBAs to take into account provisions of the Union's acquis (i.e., tax policy and employment rights) that pertain to the status of Cyprus as an EU Member State. At the same time however, these articles preserve all the relevant interests of the UK in Cyprus and reaffirm all the relevant obligations of the Republic of Cyprus vis-à-vis the UK. All these, by the ratification of the Protocol, were endorsed as primary law of the Union.

Although the aforementioned provisions pertain to relatively soft political and economic issues (that provide for the way in which SBAs shall be part of the customs territory of the Union, with certain exceptions), Article 5 introduces provisions which are pertinent to the maintenance and extension of some of the most problematic areas of the metacolonial realm in Cyprus. In particular, paragraph one of this article states that "'[t]he Republic of Cyprus shall not be required to carry out checks on persons crossing their land and sea boundaries with the Sovereign Base Areas and any Community restrictions on the crossing of external borders shall not apply in relation to such persons.' In that regard, the boundaries between the territory of the base areas and the Republic of Cyprus (as defined by the Treaty of Establishment)

43 A European Commission Declaration attached to the Protocol clarifies the provisions of Community law that will be applicable to the SBAs pursuant to Article 3(a).

are introduced, in the context of the Protocol, as boundaries between the EU and the British military-controlled areas of Akrotiri and Dhekelia. In fact however, it would not be practically possible to carry out checks on persons crossing these boundaries, since (i) this was an already established practice on the island, (ii) these boundaries may be marked in different ways, but they are not fenced (protected or patrolled),[44] and the entrance and exit would always be discernible enough for people crossing them, and (iii) the UK has already assumed a commitment (under the Treaty of Establishment) not to create customs ports or other frontier barriers between the base areas and the Republic of Cyprus, as well as not to establish commercial or civilian seaports or airports. In addition, such a control would have created mutual concerns in Cyprus for both the Cypriot citizens and the British military and civilian personnel who cross these boundaries. In other words, apart from emphasizing the existence of boundaries between the territory of the Republic of Cyprus and the territory occupied by Britain in Cyprus, paragraph one reconfirms a pre-existing practice of unobstructed crossing across boundaries, which is incorporated in the Union's primary law. This is important from a legal perspective, but from a political perspective it is just a reminder that these boundaries exist.

Paragraph two of Article 5 however adds some perplexity to, or even redefines the metacolonial realm in Cyprus in the EU context. That paragraph makes it a condition that '[t]he United Kingdom shall exercise controls on persons crossing the external borders of the Sovereign Base Areas in accordance with the undertakings set out in Part Four of the Annex to this Protocol.' The concept of 'external border' of the base areas is an unfortunate novelty of the Protocol, since such a reference does not exist in the Treaty of Establishment, but it was agreed upon between the Cyprus government, the British government, and the Commission, to be adopted in the Protocol.[45] According to Part Four of the Annex, '"external borders of the Sovereign Base Areas" means their sea boundaries and their airports and seaports, but not their land or sea boundaries with the Republic of Cyprus.' According to the same Part '"crossing points" shall mean any crossing point authorized by the competent authorities of the United Kingdom for the crossing of external borders.'

According to Part Four of the Protocol, the UK will be the only authority to allow people to cross the 'external borders' of the SBAs, under some provisions provided in

44 Within the Akrotiri and Dhekelia bases there are some restricted areas which are effectively and meticulously controlled by military and civic personnel. The residential and industrial areas of the military bases which are generally inhabited by Cypriots are 'freely' accessible.

45 The Treaty of Establishment refers to 'boundaries' of the 'base areas'; some see that as equivalent to borders. From a legal perspective this may make sense. The point made here is that the use of the concept 'external borders' is meant to stress some of the most problematic elements of the metacolonial realm in Cyprus.

paragraph three of the same Part of the Protocol. The provision on external borders of the UK-defined, controlled, surveilled and patrolled crossing points introduce new modalities in the administration of the base areas that enhance UK's metacolonial realm in Cyprus.[46]

Another problematic provision of Part Four of the Protocol that relates to the concept of 'external borders' is defined in paragraph seven, in which it provides for the treatment of asylum seekers and illegal migrants who may enter the island of Cyprus from the SBAs.[47] These persons 'shall be taken back or readmitted to the Sovereign Base Areas at the request of the Member State of the European Community in whose territory the applicant is present.' This provision is problematic, since the Protocol ascribes to the UK the exclusive right and authority to control the newly defined external borders and crossing points of its occupied territory in Cyprus, without however giving to the Republic of Cyprus any authority to control or check (i) the movement of those persons within the territory of the base areas (ii) and/or their entrance in its own territory. To the contrary, the second subparagraph of paragraph seven obliges the Republic of Cyprus to 'work with the United Kingdom with a view to devising practical ways and means of respecting the rights and satisfying the needs of asylum seekers and illegal migrants in the Sovereign Base Areas, in accordance with the relevant Sovereign Base Area Administration legislation.' This provision is problematic because it draws beyond the provisions of the Treaty of Establishment in a way that extends the obligations of the Republic of Cyprus vis-à-vis the UK and it makes SBA 'legislation' abiding by the Cyprus government in the EU context.[48]

Article 6 of the Protocol refers to the conditions under which the Council may amend Articles 2 through 5 (including the Annex) or 'apply other provisions of the EC Treaty and related Community legislation to the Sovereign Base Areas on such terms and subject to such conditions as it may specify.' Both the UK and the Republic of Cyprus shall be consulted before the Commission may bring a proposal in that regard. This article is generally unproblematic and fair to the extent that it introduces

46 The concept of 'external border' is also used in Protocol 10 (Protocol No. 10, 2003) as follows: 'The boundary between the Eastern Sovereign Base Area and those areas referred to in Article 1 shall be treated as part of the external borders of the Sovereign Base Areas for the purpose of Part IV of the Annex to the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus for the duration of the suspension of the application of the acquis according to Article 1.'

47 The same paragraph defines the British controlled territory in Cyprus an area 'outside the European Community.'

48 The UK and the Republic of Cyprus concluded an agreement on the treatment of asylum seekers, but when that agreement was put on test it was proved difficult to be implemented due to a number of complications which are not discussed here. For more information see the T*ag Eldin Ramadan Bashir and others (Respondents) v. Secretary of State for the Home Department (Appellant) [2018] UKSC 45*).

a clear process for amending the relevant articles, but it gives an equal say to the two sides over the possible extension of Community legislation with regard to Cypriot citizens who live or work in the base areas. From a legal perspective this makes sense, but a careful reading of Article 6 reveals a sense that the rights of citizens of the Republic of Cyprus and the EU are eternally subject to the political whims of the UK, if not a sense that they are eternally enclaved in UK-controlled territory.

The final observation is that Article 7 amplifies the application of the acquis in the base areas, and the UK not only exercises some administrative control but it also acts as a self-asserted 'sovereign' metacolonial ruler that controls the degree to which the rights of Cypriot/EU citizens who live or work there may be restricted or extended. That Article provides that 'the United Kingdom shall be responsible for the implementation of this Protocol in the Sovereign Base Areas.' The only exception is the responsibility ascribed to the Republic of Cyprus, as provided in paragraph two of this Article, 'for the administration and payment of any Community funds to which persons in the Sovereign Base Areas may be entitled pursuant to the application of the common agricultural policy in the Sovereign Base Areas under Article 3 of this Protocol and the Republic of Cyprus shall be accountable to the Commission for such expenditure.' The UK demanded and ultimately succeeded in maintaining the exclusive executive legal responsibility to implement and enforce the EU acquis and its subsequent policies 'in the fields of customs, indirect taxation and the common commercial policy in relation to goods entering or leaving the island of Cyprus through a port or airport within the Sovereign Base Areas'; 'customs controls on goods imported into or exported from the island of Cyprus by the forces of the United Kingdom through a port or airport in the Republic of Cyprus may be carried out within the Sovereign Base Areas'; as well as it shall be responsible 'for issuing any licenses, authorizations or certificates which may be required under any applicable Community measure in respect of goods imported into or exported from the island of Cyprus by the forces of the United Kingdom'. Paragraph three of Article 7 provides for some conditional delegation by the UK to the 'competent authorities of the Republic of Cyprus[…]any functions imposed on a Member State by or under any provision referred to in Articles 2 to 5 above'. Paragraph four of Article 7 refers to the aims and scope of cooperation between the UK and the Republic of Cyprus for the effective implementation of the Protocol.

From the standpoint of this paper, Article 7 is the most important one. It affirms that the sole 'sovereign' authority in the base areas is the UK (and the British administration there), with one responsibility given to the Republic of Cyprus. This is an epiphenomenon (or a direct 'legal' implication) of the Treaty of Establishment. That legal normality, however, is not necessarily a reasonable reality. From the perspective of world politics, it is a sustained outcome of the UK's power of imposition, in the context of a colonial regime. This is an abnormal, anomalous phenomenon in the

context of contemporary European politics.[49] Nevertheless, the fact is that between 2003 and 2004 that situation was incorporated into the EU context, with the consent of the Republic of Cyprus (and of some other 23 EU Member States who ratified the Protocol, in addition to the UK).

Concerning the actual implementation of the Protocol, to date it is not pursued by the authority that assumed the responsibility to do that. Essentially, it is the authorities of the Cyprus government, which under the terms of a bilateral Memorandum of Understanding between the UK and the Republic of Cyprus,[50] are delegated by the UK to do so. In that regard, the relevant authorities of the Cyprus government act as delegated agencies of 'Grown ordinances', as one source described it, to implement and enforce the acquis in the SBAs. This is yet another paradox of the metacolonial realm in Cyprus that may be interpreted from different angles. From the perspective of this paper, this is an instance of the demonstrated consent of the Cyprus government for the continuation of the metacolonial realm under the most convenient circumstances.

Article 8 states that the Protocol will not constitute 'a precedent, in whole or in part, for any other special arrangements which either already exist or which might be set up in another European territory provided for in Article 299 of the Treaty', but it is exclusively pertinent for 'the sole purpose of regulating the particular situation of the Sovereign Base Areas of the United Kingdom in Cyprus.'

The last Article of the Protocol, Article 9, states that the 'Commission shall report to the European Parliament and the Council every five years on the implementation of the provisions of this Protocol.'[51] Parts One, Two and Three of the Annex mainly concern Directives and Regulations which are part of the Protocol. It is provided that these Directives and Regulations 'shall be interpreted as references to those Directives and Regulations as amended or substituted from time to time and their implementing acts'. A number of Regulations and Directives are amended and replaced in those three parts to correspond to the relevant provisions of the Protocol.

49 J. M. Magone, *Contemporary European Politics*, (Oxon: Routledge, 2011).

50 That Memorandum has not been made public to date.

51 No such report came to the attention of the author.

UK's Withdrawal Agreement[52]

The strategic implications of the metacolonial realm in Cyprus are omnipresent and ever-evolving, but they are made (more) visible during some critical historic junctures. As already discussed, at the EU level, Cyprus' accession negotiations was a first instance, whereas Brexit negotiations was a second one. In the context of negotiations for the withdrawal of the UK from the EU, as well as in the context of its future relationship with the Union under Article 50 of the Treaty on the European Union, some strategic implications of that realm were elaborated. The specific situation relating to UK-controlled territory in Cyprus came under consideration. The main issue that was discussed was the application of the Union's acquis in the base areas. The main questions to be addressed concern the degree to which EU law will (continue to) apply there, the authority that will implement and enforce it, and the arrangements needed to handle those points. This section discusses the specific provisions in the draft Withdrawal Agreement (hereafter the Agreement) on the subject matter, and the following section specializes on the relevant protocol annexed to the Agreement.[53]

The Agreement was presented on 14 November 2018.[54] With regard to the territorial scope of the overall Agreement (under Article 3), it covers *inter alia* the SBAs of Akrotiri and Dhekelia in Cyprus. There is a clause, however, that limits the territorial scope of the Agreement with regard to SBAs only 'to the extent necessary to ensure the implementation of the arrangements set out in the Protocol [No. 3] on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of […] the Republic of Cyprus, […] to the European Union' (Article 3). In that regard, the Agreement reproduces and incorporates the provisions of Protocol No. 3, into a new protocol named 'a protocol relating to the sovereign base areas of the United

52 In the overall context of Brexit negotiations at the EU level, the Cyprus government approached the relevant issues from two angles: (i) issues of general concern to the Union and its Member States; and, (ii) issues that relate to the situation in the British bases. Regarding the former, a number of concerns were expressed, which are not discussed here e.g. the economic impact of Brexit on Cyprus, the Cypriot students in the UK.

53 In addition to the Cyprus protocol, the Withdrawal Agreement also covers two other issues in the context of two additional separate protocols, i.e. a protocol on Ireland/Northern Ireland and a protocol on Gibraltar. Although there are some similarities (as well as differences) with the case of Cyprus, no analysis is made to that direction due to space limitations.

54 European Commission, 'Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018', EC.Europa.com (2018), available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf.

Kingdom of Great Britain and Northern Ireland in Cyprus'.[55]

It is affirmed that the new protocol relating to the UK-controlled territory in Cyprus shall form an integral part of the Agreement (Article 182). With regard to the entry into force and the application of the Agreement, there is a provision (Article 185) clarifying that the new protocol shall apply as from the end of the transitional period (i.e., at the moment when the UK will cease to be treated as a Member State), with the exception of Article 11 of the new protocol. The latter refers to any measures that may be adopted in the SBAs during the transitional period (i.e., the period during which the EU will treat the UK as if it were a Member State) that relate to Article 6 of Protocol No. 3.[56] The Agreement, also makes reference to the establishment of a Specialized Committee on issues related to the implementation of the new protocol (Article 165(1)(d)). The mission of that Committee is defined in Article 9 of the new protocol.

Finally, one of the other two protocols annexed to the Agreement, the Protocol on Ireland/Northern Ireland makes a specialized reference with regard to provisions on a single customs territory and movement of goods between the EU and the UK (Protocol on Ireland/Northern Ireland, Article 6) that concern the implementation of the SBA protocol. According to that provision, until the future relationship between the UK and the EU becomes applicable, there will be a single customs territory between the Union and the United Kingdom. Northern Ireland shall be in the same customs territory as Great Britain. The single customs territory between the UK and the EU shall comprise the customs territory of the Union as defined in Article 4 of Regulation (EU) No 952/2013 and the customs territory of the UK. Under the same Article, it is clarified that the customs territory of the UK is without prejudice to the specific arrangements set out in the Protocol relating to the SBAs in Cyprus. These arrangements are spelled out in Article 2 of Protocol No. 3 (which shall remain 'active' during the transitional period).

A close reading of the areas covered by the Agreement – without any detailed reference to the content of the SBA protocol – seems to show that the UK has achieved all kinds of safeguards for ingraining its metacolonial realm in Cyprus within the EU context even after it leaves the Union. The extent to which this was achieved is examined in the section that follows.

55 Ibid., 476-495.

56 Article 6 of Protocol No. 3 concerns possible amends that may be adopted by the Council of the EU on Articles 2-5 (of Protocol No. 3).

The New Cyprus (SBA) Protocol

The prospect of the application of certain provisions of the Union's law in the base areas (after the UK has left the EU) was not an actual issue of contestation in the bilateral negotiations between the UK and the Republic of Cyprus.[57] Bearing in mind that the acquis was already implemented and enforced there under Protocol No.3 and the relevant bilateral arrangements, both sides expressed a mutual intention to find the proper way for the continuation of that situation. What was left to negotiate, however, i.e. the modalities for applying the acquis and certain EU policies in the base areas, entailed some legal complexities and political challenges.

Looking at these issues from the standpoint of the Cypriot side, the political goal was confined to the continuation of the acquis in the base areas. Beyond that, it was up to the negotiations/negotiators to show the way. There was however, an intra-governmental debate (mainly in the Ministry of Foreign Affairs and the Office of the Attorney General) on how to approach the situation legally and politically.[58] No consultation or any kind of deliberations were held with the political parties or the public (not even with the people who live or work in the base areas, whose interests were supposed to be the major issue of the negotiations). Apart from some public statements on the intention to preserve the application of the acquis in the SBAs, no other elements of the pursued goals were made known. Even after the new protocol was published, very few details of the negotiations were revealed.[59]

From the theoretical and conceptual standpoint of this paper, there are some elements of the negotiations that need to be taken into account in order to understand the outcome. At the early stage, the British side insisted on the continuation of the same legal and political arrangement for the application of the acquis in the base areas, as provided by Protocol No. 3. The central aim of the British government was to avoid any (new) arrangement that would entail a sense of joint sovereignty between the UK and the Republic of Cyprus in the base areas, as this would have constituted a problematic development in relation to other cases. In particular, the Spanish government has been claiming joint sovereignty in Gibraltar, which the UK rejects systematically. In addition, any arrangement in Cyprus that would question the sovereign control of the UK in the base areas could also have had negative implications for Northern Ireland. From that end, the aim was to adapt the arrangements of the previous Protocol in the context of the general terms of the (would-be) Withdrawal

57 The Commission was involved in drafting the protocol and played an important role in finalizing it.

58 The Office of the Attorney General offered specific legal advice, which was discussed at the Ministry Foreign Affairs level, where some different views were expressed.

59 P. Xanthoulis, 'Skliros Simvivasmos Lefkosias-Londinou gia tis Vaseis', *Phileleftheros* (2018, November 18).

Agreement, always in accord with the Treaty of Establishment (UK's interpretation of it) and Protocol No. 3. Another element of the negotiations that was generally kept out of sight is the British position that, as long as the Cyprus Problem is unsettled, there will be no change of the legal and political status of the British bases in Cyprus. The UK believes that it is in the interest of the Republic of Cyprus not to attempt any amendments of the status of the Treaty of Establishment before a solution is reached. This view seems to be shared by the Cyprus government, which is supported by Turkey and the leadership of the Turkish Cypriot community.[60]

The UK was successful in having its major legal and political position adopted in a Joint Statement between the UK and the EU negotiators in June 2018. With regard to the case of Cyprus, the statement read that 'both Parties have confirmed their commitment to establish appropriate arrangements for the SBAs, in particular with the aim to protect the interests of Cypriots who live and work in the SBAs following the UK's withdrawal from the Union, in full respect of the rights and obligations under the Treaty of Establishment'.[61] The same statement announced progress that was made 'in agreeing the text of the Protocol that will give effect to this'.[62] The main aim of the UK was the new protocol to preserve its asserted sovereign control of the territory it occupies in Cyprus. From the moment that this would have been secured – which was indeed secured in the very early stages of the negotiations with the consent of the Cyprus government – the UK could have considered a number of options in finalizing the new protocol. In addition, the UK held a number of outreach meetings in Cyprus on Brexit[63] and a debate opened in the context of the UK Parliament's Exiting the European Union Committee.[64]

With regard to the preparation of the Cypriot side, a number of different views were stated and different angles from which negotiations could have been approached were

60 Both Turkey and the leadership of the Turkish Cypriot community intervened in the process of the negotiations leading to the new protocol. The intervention was directed to the Commission and the UK Government. The main claim was not to alter the status of the bases or make an agreement that would be to the political benefit of Greek Cypriots.

61 European Commission, 'Joint statement from the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union', EC.Europa.eu (2018), par.8, available at https://ec.europa.eu/commission/sites/beta-political/files/joint_statement.pdf.

62 Ibid.

63 S. Lillie, 'Brexit – ask the High Commissioner', *Cyprus Mail*, (2018, November 11), available at https://cyprus-mail.com/2018/11/11/brexit-ask-the-high-commissioner/.

64 C.f. K. A. Kyriakides, 'The European Union (Withdrawal) Bill in the context of the Republic of Cyprus and the Sovereign Base Areas of Akrotiri and Dhekelia – Written Evidence', UK Parliament (2018), available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/71167.html.

expressed. These approaches were stated in the context of internal brainstorming and discussions, as there were different legal and political interpretations of the situation.[65] For instance, some issues on which different views were expressed concerned the status of Protocol No. 3 and the extent to which the Republic of Cyprus could claim legal responsibility for the implementation and enforcement of the acquis in base areas after the UK has left the Union. Views were also expressed as to whether the asserted sovereignty of the UK in the base areas could have been challenged or even questioned. In addition, different views were expressed with regard to the possibility of a no-deal, not only in the overall context of the Brexit negotiations but also in case the Cypriot side would not be satisfied with a draft protocol. A number of instances are relevant with all these different views and perspectives. Three of them are of particular interest. One concerns different views expressed on risk assessment, with regard to the pros and cons of a deal or a no-deal with the UK. The view that prevailed was that there was no other option but a deal. A second concern related to estimations on the extent to which the Cypriot delegation would be able to press for certain issues/outcomes. This was a crucial aspect, especially with regard to the authority that would have the responsibility to implement the acquis in the base areas. A third issue was negotiation tactics. This was the most difficult one for many reasons, some of which are examined below.

Beyond the internal dimension that relates to the preparation and the approaches of the two negotiating sides, the very structure of the negotiation and its process are also vital for understanding the result. In the particular case, negotiations were structured on a bilateral level, between the UK and the Republic of Cyprus, at a trilateral level, among the two sides and the Commission, as well as at a level of (separate) consultations between the Commission and the two sides. The Cypriot side also had the Commission as part of its delegation during meetings with the British delegation. There are different perspectives as to the authorship of the first draft of the protocol. A first draft seems to have been drafted by the Commission (with UK insertions), whereas a first comprehensive draft was finalized by the Cypriot delegation and the Commission before it was presented to the British side. The final draft of the protocol was concluded after consultations between the Commission and the sides.

Although certain provisions of the protocol were not satisfactory to the Cypriot side, it consented to the final text (for reasons which are not deemed necessary to be narrated here). What matters is that the Ministry of Foreign Affairs decided not to reopen negotiations, although the Commission gave this option to both sides.

65 The first chief negotiator (a senior diplomat) disagreed with a certain legal approach/interpretation and resigned from that position to be replaced by another senior diplomat. The members of Cypriot negotiation team were also changed.

Regarding the process leading to the final outcome, the bilateral negotiations were not systematic, but rather sporadic and occasional. Judging with the benefit of hindsight, the British side was successful in playing the tactic of a last minute arrangement, as within a year or so of negotiations, some 'tough issues' were left open to the last minute. This may also be related to the tactical approach of the Cypriot side, as well as the degree of coherence of the negotiation positions. There seems to have been some discontinuity of commitment to the process due to internal disagreements and a gap in making final decisions by the political leadership. The final text was brokered under a very interesting contingency, the details of which are not necessary to be narrated here.

Having Protocol No. 3 as the founding document and the basis for the new arrangement, as well as the Cypriot side having accepted British sovereignty in the base areas as an undisputed reality, what was left for the sides to discuss was the extent to which the acquis (and EU policies) will be implemented in the base areas and the extent to which the Republic of Cyprus will have any more responsibility with regard to the application of the acquis there, than it had in the context of Protocol No. 3. The result shows that the sides took every effort to make the British metacolonial realm in Cyprus as functional and convenient as possible in the context of the UK's withdrawal from the Union. The membership of the Republic of Cyprus to the EU was the vehicle by which the new arrangement will give effect to a elaborated metacolonial realm in Cyprus in the context of an agreement between the EU and the UK.

Concerning the substance of the protocol, as presented in the draft Withdrawal Agreement, the intention here is not to discuss the 'points' that each side 'scored' or to analyse the legal interpretations or perspectives on certain provisions but to assay its main implications for the future of the metacolonial realm in Cyprus in the EU context.[66] The crux of the protocol is that the base areas shall continue to be relevant with regard to the EU treaties, by being part of the customs territory of the Union, in accordance with the relevant EU law, and to the extent that certain provisions of the Treaty of Establishment, and the subsequent (established) policies that emanate from that treaty (as they are implemented at the time) would enable or restrain that, as provided by Article 2 of the protocol. In the same context concerning the SBAs as a 'customs territory of the Union', the UK assumed the responsibility to implement and enforce Regulation EC No. 866/2004 'in relation to the Sovereign Base Areas in accordance with the provisions of that Regulation' with regard to '[g]oods arriving from the areas of the Republic of Cyprus in which the Government of the Republic

66 Problematic aspects of provisions of the new protocol which emanate from the re-introduction of provisions of Protocol No. 3, as discussed in the relevant section, are not discussed here, as the same approach applies.

of Cyprus does not exercise effective control [into the] the Eastern Sovereign Base Area' (Article 2(8)).

Provisions of 'Union law on turnover taxes, excise duties and other forms of indirect taxation adopted pursuant to Article 113 TFEU shall apply to and in the Sovereign Base Areas', as well as '[t]ransactions originating in or intended for the Sovereign Base Areas shall be treated as transactions originating in or intended for the Republic of Cyprus for the purposes of value added tax (VAT), excise duties and other forms of indirect taxation' (Article 3(1)(2)). In addition, the protocol incorporates all the relevant provisions and established policies that emanate from the Treaty of Establishment and relate to a peculiar regime of duty relief in the interest of the UK (Article 4(1)). Article 4(2) regulates 'duties that may be collected by the United Kingdom authorities in the Sovereign Base Areas as a result of sale of the goods referred to in paragraph 1 [which] shall be remitted to the authorities of the Republic of Cyprus'.

Regarding issues of social security that relate to 'persons resident or employed in the territory of the Sovereign Base Areas', Article 5 envisions the necessity for further arrangements between the UK and the Republic of Cyprus 'to ensure the proper implementation of Article 4 of Protocol No 3 after the end of the transition period'. The extent to which EU law will apply in the base areas in relation to agriculture, fisheries and veterinary and phytosanitary rules is regulated in Article 6. Article 7 incorporates all the relevant provisions referred to in Protocol No. 3 with regard to checks on persons crossing the external borders of the base areas, as well as the function of crossing points there. This Article is essential for defining the base areas as a Cypriot territory which is outside the EU, and for incorporating certain policies of the UK in the EU context (i.e., carrying out checks on persons crossing, giving permission to third country nationals to cross the external borders, dealing with asylum seekers and illegal emigrants, and exercising external boarder surveillance).

The necessity of cooperation between the UK and the Republic of Cyprus, as well as the aims of such cooperation, is spelled out in Article 8. The role and the mission of a Specialized Committee is provided in Article 9. A Joint Committee shall be also established in accordance with the provisions of Article 10. Article 11 provides for the operation of Article 6 of Protocol No. 3 during the transitional period.

Article 12 provides for the supervision and the enforcement of the new protocol. This is an interesting Article (with some equally interesting background during the phase of negotiations). In particular, this Article states that 'the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to this Protocol and provisions of Union law made applicable by it' over the base areas and 'in relation to natural and legal persons residing or established in the territory of those' areas (Article 12(1)). In this respect, 'the Court of Justice of

the European Union shall have jurisdiction as provided for in the Treaties' which shall apply in the base areas (Article 12(1)). In essence, the UK, at the Commission's request (and Cyprus' insistence), accepted that, when it assumes the responsibility to implement the acquis in the base areas, it also needs to accept the jurisdiction of the Court of Justice of the European Union there (over the aspects of EU treaties applied there). As clarified, '[a]cts of the institutions, bodies, offices and agencies adopted in accordance with paragraph 1 shall produce the same legal effects with regard to and in the Sovereign Base Areas as those which they produce within the Union and its Member States' (Article 12(2)).

This was a sensitive issue for the UK, since the jurisdiction of EU Court of Justice was a principal 'red line' for London in Brexit negotiations (i.e., something that it would not accept). The acceptance of Article 12 (i.e., the exceptional acceptance of the jurisdiction of EU Court of Justice in the base areas) was the price the UK was willing to pay for not conceding any sovereigntyto another authority in the territory it occupies in Cyprus. One may also observe that the UK (through its bases in Cyprus) shall acquire a peculiar legal and (considering together provisions of various Articles of the protocol) political status in the EU context, even though the UK (as a State) shall leave the EU. In that regard, UK's asserted sovereignty in Cyprus has some legal and political implications for the Union and the Republic of Cyprus as a Member State of the EU. In Article 12, there are some safeguards and assurances for the implementation of EU treaties in the base areas (to the extent that they will apply there), but at the same time, this Article is yet another confirmation of the base areas as a territory of Cyprus where special provisions of the acquis will apply, even though this territory shall remain outside the EU.

Article 13 assigns to the UK the responsibility for the implementation and enforcement of the new protocol, while it also entrusts some responsibility to the Republic of Cyprus. It is stated that '[u]nless otherwise provided in this Protocol, the United Kingdom shall be responsible for the implementation and enforcement of this Protocol in the Sovereign Base Areas' (Article 13(1)). The same paragraph clarifies that '[n]otwithstanding paragraph 3 [of Article 1], the competent authorities of the United Kingdom shall enact the domestic legislation necessary to give effect to this Protocol in the Sovereign Base Areas'. In essence and with regard to the EU treaties applied in the base areas and to the extent that the UK assumes the responsibility to implement and enforce them, these EU treaties and the relevant acquis (and the EU policies they entail) will be implemented and enforced in accordance with domestic legislation that the UK will introduce in the territory it occupies in Cyprus. This paragraph of Article 13 is essential for understanding that the UK will be responsible and, at the same time, accountable to the EU for the implementation of the protocol.

Paragraph 2 of Article 13 stipulates that '[t]he United Kingdom shall retain the

exclusive right to implement and enforce this Protocol in respect of its own authorities or on any immovable property owned or occupied by the Ministry of Defense of the United Kingdom, as well as any coercive enforcement power requiring the power to enter a dwelling house or a power of arrest.' The same paragraph also provides that '[t]he United Kingdom shall retain other coercive enforcement powers unless otherwise provided in the legislation referred to in paragraph 1'. This paragraph is meant to underline the exclusive sovereignty of the UK over the issues referred to in relation to the territory it occupies in Cyprus. In the context of the negotiations leading to this protocol, this paragraph was a contested one, for which the Republic of Cyprus expressed reservations. In the end, however, it was accepted as it stands. It is also important to note that this paragraph reveals the dominant role of the British Ministry of Defense (over the Foreign Office) in pursuing some sensitive issues in Cyprus.

Another provision that was contested during negotiations (maybe the most contested one) was paragraph 3 of Article 13. That paragraph sets out that '[t]he Republic of Cyprus is entrusted with the responsibility for implementing and enforcing this Protocol in the Sovereign Base Areas in accordance with Article 2(10) and Articles 3 and 6'. The preamble of the protocol leaves no doubt as to who is entrusting the Republic of Cyprus with that responsibility, i.e., the UK. During the negotiations, the Republic of Cyprus claimed responsibility in implementing and enforcing the protocol in many areas, even claimed to have full responsibility for implementing and enforcing the protocol, except maybe some areas that the UK deemed sensitive. Nevertheless, in the course of time, that claim was watered down and ultimately confined by the UK to Article 2(10) and Articles 3 and 6.

The most problematic aspect of paragraph 3 is the use of the word 'entrusted'. This explicitly demonstrates that the Republic of Cyprus shall have responsibility to implement the relevant acquis, because some other authority (the UK) entrusted that responsibility to it. That wording (i.e., the legal definition of the source of responsibility) took away from the Republic of Cyprus even a clear responsibility it had under Protocol No. 3, as explained in this article's Introduction. Whereas the UK appears to have an 'inherent' responsibility in implementing and enforcing the protocol in the territory it occupies, the Republic of Cyprus appears to have an externally acquired responsibility for implementing and enforcing some Articles of the protocol.

Conclusion

Articles 12 and 13 of the new protocol – and especially paragraph 3 of Article 13 – summarize the essence of what this paper defines as the UK's instrumentalization of Cyprus' EU membership for enhancing, extending and perpetuating its metacolonial

realm in Cyprus, on its way out of the Union. The very fact that UK's claim for sovereignty over the territory it occupies in Cyprus – the gist of a lasting postcolonial anomaly in Cyprus that engenders a metacolonial realm – is (directly) envisaged by the new protocol as amenable, not only to the strong will of Britain to achieve that goal but also to the reluctance of the Republic of Cyprus to question or challenge it. To the contrary, as the Minister of Foreign Affairs of Cyprus affirmed in a statement he made in the context of the General Affairs Council in November 2018, '[I]t is very important [for the Cyprus government] that the Protocol safeguards the unabstracted continuation of the implementation of the European [EU] acquis in the Base areas, in the domains provided by Protocol [No.] 3 of the Act of Accession of the Republic of Cyprus to the EU, as well as [it preserves] the legal rights and interests of the Cypriots and other European citizens who live and work in the areas of the British Bases'.[67] The emphasis attached by the Cypriot minister to the application of some part of EU law in the base areas was meant to depict the achievement of negotiations (i.e., the protocol). At the same time, his silence on the continuation of the postcolonial anomaly in Cyprus (ingrained in the EU in the context of the protocol) is read by this article as a political intention to present the metacolonial realm in Cyprus as a functional and convenient situation, as well as an attempt to do away with the problems it entails. The protocol seems to give comfort to the Cyprus government which appears satisfied that the UK has entrusted some responsibility to it 'for implementing and enforcing provisions of Union law in the Sovereign Base Areas'.

In conclusion, the new protocol is primed to perpetuate a metacolonial realm in Cyprus in a politically convenient way. This paper reveals and problematizes the eagerness of the UK and the Republic of Cyprus to achieve that goal. An external shock or some political and democratic maturity may be the trigger for a thorough debate on that situation in the future.[68] Unavoidably, sooner or later this situation will meet its limits as all similar situations shown in world politics. Although nothing seems capable to alter that metacolonial state of affairs in the foreseeable future, there is an epistemological merit in defining and elucidating its many facets in the best possible way.

67 Phileleftheros, 2018

68 Not many alternative views were expressed during Brexit negotiations in Cyprus. An interesting contribution was made by Emily Yiolitis who recommended the renegotiation of the status of the British bases (E. Yiolitis, 'Back to base: what does Brexit mean for UK sovereign bases in Cyprus?' *Lexology,* 2017), available at https://www.lexology.com/library/detail.aspx?g=aa35f06c-c8f6-402d-8d5c-40f2fdf96525; E. Yiolitis, 'Brexit kai Vretanikes Vaseis, [in Greek], *Sigmalive* (2017), available at http://www.sigmalive.com/news/opinions_sigmalive/460317/brexit-kai-vretanikes-vaseis. See also G. Kentas, 'Local concerns over Brexit: the peculiar case of the British military bases in Cyprus' unpublished note, available upon request (2017); a note shared across many interested parties, yet not published. Unfortunately and unlike the British Government, the Cyprus government did not initiate any public debate on the issue.

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GUEST-EDITED SECTION

Current Trends in Education

Letter from the Guest Editor

Dear Readers,

The education system of Cyprus seems to be improving, but it still lags behind those of other European countries. Although the Cyprus Government seems to underfund education in relation to other services, in the last few years there have been efforts for improvement, especially after the introduction of the new curriculum in 2011. Yet there is still a general disatisfaction amongst educationalists regarding the effectiveness of our schools. In this section of the journal, we consider the current trends of education in Cyprus.

In the first paper, Hajisoteriou and Angelides explore the global debate for intercultural education at the national level of Cyprus. Papanastasiou and Evagorou, in the second paper, present how data from the Trends in International Mathematics and Science Study (TIMSS) can be used for a professional development workshop focused on helping teachers identify reasons for low achievement in science, and they propose ways to support students in science. In the third paper, Karageorgakis and Nisiforou explore the educational affordances and students' perceptions of virtual reality systems as supportive tools for teaching English as a foreign language and concluding, in the end, the implications for the implementation of virtual reality in the educational system in Cyprus are discussed. Finally in the fourth paper, Neophytou, Valiandes and Hajisoteriou examine the implementation of interculturally differentiated instruction by Cypriot teachers in real, mixed-ability and culturally diverse classroom settings.

Panayiotis Angelides

Developing and Implementing Policies of Intercultural Education in Cyprus in the Context of Globalisation

Christina Hajisoteriou[1] and Panayiotis Angelides[2]

Abstract

Although the area of intercultural education, in general, has been widely researched, there is a shortage of published research examining the intersection of globalisation and intercultural education. In this paper, we try to answer the following question: What are implications of the global debate for intercultural education at the national level? To address this question, we have selected Cyprus as the case study of our examination. We draw upon previous research carried out in Cyprus across the macro-level of the state and meso-level of the school in order to examine the phases of the adoption and implementation of globalised intercultural education policies.

Keywords: globalisation, intercultural education, Cyprus education, intercultural education policies, macro-level, meso-level

Introduction

Sutton points out that 'the "epochal" dimensions of globalisation, such as wide scale human migration and intensification of global communication, have complicated social identities within many nations and therefore stimulated public debate on how pluralism is recognised in the curriculum and pedagogy in national school systems'.[3] Despite such observation, Gibson contends that as intercultural education has not yet critically responded to the effects of globalisation, educational policies around the globe still perpetuate different forms of injustice.[4] Although the area of intercultural education, in general, has been widely researched, there is a shortage of published research examining the intersection of globalisation and intercultural education. Nevertheless, for modern societies to establish social cohesion, education research should examine issues of citizenship, democracy, and intercultural education under the

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2 Panayiotes Angelides is a Professor and the Dean of the School of Education at the University of Nicosia.

3 M. Sutton, 'The globalization of multicultural education', *Indiana Journal of Global Legal Studies*, Vol. 12 No. 1 (2005), 97-108.

4 M. L. Gibson, 'Are we "reading the world"? A review of multicultural literature on globalization'. *Multicultural Perspective*, Vol. 12, No. 3 (2010), 129-137.

lens of globalisation. After all, 'throughout different countries, contexts and education systems, multiculturalism as a normative, as well as intercultural education as a diversity driven pedagogical strategy, have become truly global throughout the last decades'.[5]

What stems from our argumentation above is that we ought to address the question: What are implications of the global debate for intercultural education at the national level? To address this question, we have selected Cyprus as the case study of our examination. We draw upon previous research carried out in Cyprus across the macro-level of the state and meso-level of the school in order to examine the phases of the adoption and implementation of globalised intercultural education policies.

The Context of Cyprus

Cyprus provides for a prominent context to set in a study examining the interrelationship between globalisation and intercultural education. From 1960, Cyprus has been an independent, sovereign republic of a presidential type. After 1974 that the island was divided, the Greek Cypriot government has controlled the southern part of Cyprus. Nonetheless, it is considered as the *de jure* government of the whole island. Cyprus has traditionally had a multicultural and multilingual character not only because of the two major communities, but also due to the presence of three religious minorities that are also recognised by the 1960 Constitution, namely Armenians, Maronites and Latins. Since 1974, the two major communities of the population that are constitutionally recognised have been living apart; Greek Cypriots (and the other minorities) were relocated in the south and Turkish Cypriots in the north. As a result of the Cyprus problem, education has been attached to the nation-building project aiming to prove political sovereignty.

What we argue is that the ongoing political problem and the subsequent internal conflict have influenced the development and implementation of intercultural education policies because of socio-cultural, religious, ethnic, and political reasons attached to the Cyprus political problem. More recently, and mainly after its accession to the European Union in 2004, Cyprus has received an unprecented number of migrants furthering its multicultural character. Arguably, examining the influence of globalisation on intercultural education has particular salience in the socio-political, cultural and historical context of Cyprus. It should, nevertheless, be noted that the analysis included in this paper refers to policies developed and enacted in the areas

5 N. Palaiologou and G. Dietz, 'Introduction. Multicultural and intercultural education today: Finding a "common topos" in the discourse and promoting the dialogue between continents and disciplines', in *Mapping the Broad Field of Multicultural and Intercultural Education Worldwide: Towards the Development of a New Citizen*, N. Palaiologou and G. Dietz (eds) (Newcastle: Cambridge Scholars Publishing, 2012), 1-21.

controlled by the *de jure* government of the island.

Cyprus's accession to supranational organisations, such as the United Nations (UN), the Council of Europe (CoE), and the European Union (EU), has been regarded as an international proof of the sovereignty of the Cyprus Republic.[6] Even though the Republic of Cyprus acceded to the EU in 2004, the application of the acquis communautaire of the EU is suspended in those areas of the Republic of Cyprus where the government of the Republic does not exercise effective control.

With regards to the structure of the Cypriot education system, externally prescriptive policy interventions, directed by the central government, leave limited space for school initiatives.[7] There is a tendency towards forwarding reforms through a mechanistic, rational, discursive and controlling agenda due to the highly centralised character of the Cypriot education system. In the education system in Cyprus, head-teachers, teachers, parents, and students are trapped in a managerial and bureaucratic system, having limited freedom to exercise agency, to self-evaluate their practices, and to apply new ideas.[8] They are thus seen as having 'weak' power in co-constructing education reform by offering their professional views and judgments.

In this context, in the next sections, we examine the phases of adoption and implementation of globalised education policies. In terms of examining adoption, we discuss the four types of explanations of globalisation, including material, political, cultural, and scalar justifications. We then examine the ways in which issues of school leadership, teacher practices, and student voice influence implementation.

The Macro-Level of the State: Developing Policies of Intercultural Education

Immigration issues first became intertwined in the educational agenda of the Ministry of Education and Culture (MEC) of Cyprus in 2001.[9] Immigrant children may enrol in public schools, regardless of their parents' legal or illegal immigration status to the

6 C. Hajisoteriou, 'Europeanising intercultural education: Politics and policy making in Cyprus'. *European Educational Research Journal,* Vol. 9, No. 4 (2010), 471-483.

7 C. Hajisoteriou, 'Duty calls for interculturalism: how do teachers perceive the reform of intercultural education in Cyprus? Teacher Development'. *International Journal of Teachers' Professional Development, 17*(1) (2013) 107-126; C. Hajisoteriou and P. Angelides, *The Globalisation of Intercultural Education: The Politics of Macro-Micro Integration* (London: Palgrave-MacMillan, 2016a); C. Hajisoteriou and P. Angelides, 'Intercultural education in situ: Examining intercultural policy in Cyprus in the context of European integration'. *Journal for Multicultural Education,* Vol. 10, No. 1 (2016b), 33-52.

8 M. Nicolaidou and A. Petridou, 'Evaluation of CPD programmes: challenges and implications for leader and leadership development'. *School Effectiveness and School Improvement,* Vol. 22, No. 1 (2011), 51-85.

9 C. Hajisoteriou, 'Europeanising intercultural education: Politics and policy making in Cyprus'. *European Educational Research Journal,* Vol. 9, No. 4 (2010), 471-483.

country. Despite these efforts, literature contends that public schools still remained ethnocentric and culturally monolithic.[10]

On that account, the state had to evidence its capacity to design an intercultural policy. To this end, during the school year 2003-2004 the Ministry of Education and Culture (MEC) launched the programme Zones of Educational Priority (ZEP) on a pilot basis. The policy of the ZEP constitutes a strategic choice of the MEC in order to fight functional illiteracy, school failure and school marginalisation in schools with high concentrations of immigrant pupils. Additionally, in 2004 the MEC began a campaign to address issues related to intercultural education. The slogan 'Democratic Education in the Euro-Cyprian Society' was adopted to describe the efforts to steer the national education system towards an intercultural orientation according to europeanised and globalised discourses.[11]

In addition, in 2008, the Council of Ministers in Cyprus approved the 'Policy Document of the Ministry of Education and Culture for Intercultural Education'. The 'new' policy directive aimed at creating an intercultural school that does not exclude but aims to promote immigrants' inclusion in the education system and society of Cyprus. Instead, intercultural schools should be conducive to the success of all students despite their socio-cultural, linguistic or religious diversity. The MEC declared its willingness to promote social justice in education, while eradicating stereotypes and prejudices.[12] Research in the Cypriot context has indicated that, although the MEC adopted the rhetoric of intercultural education, its documentation still failed to provide not only a concrete definition of intercultural education.[13] Furthermore, the MEC referred to the knowledge of other cultures, instead of the interaction and the interchange between Greek Cypriot and other cultures. Gregoriou[14] argues that the MEC still adhered to monocultural notions of education, as it conceptualised cultural difference as an

10 Hajisoteriou and Angelides, *The Globalisation of Intercultural Education*; Hajisoteriou and Angelides, 'Intercultural education in situ: Examining intercultural policy in Cyprus in the context of European integration'.

11 CER – Committee for Educational Reform (2004). *Democratic and Humanistic Education in the Euro-Cyprian Polity. Prospects for Modernisation. Manifesto of Educational Reform. Overview of Philosophy and Recommendations* [in Greek] (Nicosia: Ministry of Education and Culture, 2004), 1.

12 MEC – (Cyprus) Ministry of Education and Culture, *Curricula for Pre-Primary, Primary and High-School Education*. Vol. A and B [in Greek] (Nicosia: MEC, 2010).

13 Hajisoteriou, 'Duty calls for interculturalism: how do teachers perceive the reform of intercultural education in Cyprus? Teacher Development', *International Journal of Teachers' Professional Development,* Vol. 17, No. (1) (2013), 107-126; C. Hajisoteriou and P. Angelides, 'Facing the "challenge": School leadership in intercultural schools', *Educational Management, Administration & Leadership,* Vol. 42, No. 4 (2013), 65-82.

14 Z. Gregoriou, *Policy analysis report* (Cyprus, 2010). Available at http://www.gemic.eu/wp-content/uploads/2009/04/cyprus-wp3.pdf.

exclusive characteristic of immigrant pupils. Thus 'the migrant student and not the mutlicultural class, the cultural difference of the "other" and not ethnicity and ethnic borders became the focus of educational policy'.[15]

Last but not least, during the school year 2011-2012, a 'new' national curriculum has been put in practice in Cyprus on a pilot basis. Arguably, we can still not examine its impact on educational practice in Cyprus. Yet, we can draw some preliminary observations regarding the dimensions of intercultural education in the new curriculum. Discourses of intercultural education appear to emerge in the new curriculum. Hajisoteriou and Angelides[16] argue that intercultural education is mediated through the notions of the 'democratic and humane school', which are set to be the cornerstones of the new curriculum. As defined in the official curriculum, the democratic school is a school that includes and caters for all children, regardless of any differences they may have, and that helps them prepare for a common future. It is a school that guarantees equal educational opportunities for all and, most importantly, is held responsible not only for the success but also for the failure of each and every child. On the other hand, the humane school is a school that respects human dignity. It is a school where no child is excluded, censured or scorned. It is a school that celebrates childhood, acknowledging that this should be the most creative and happy period of the human life.[17]

Despite the MEC's efforts for change, Cypriot research asserts that there is a gap between policy rhetoric and practice and between policy intentions and outcomes.[18] The official state policy draws upon the discourse of interculturalism as it includes humanistic manifestations about respect for human rights, justice and peace. However, what previous research showed is that in practice the MEC policy pertains to monoculturalism, as immigrant students are seen as in need of assimilation in order to overcome their deficiency and disadvantage.[19] In examining the reasons behind this gap, Cypriot research concludes that the development of intercultural education policy

15 Ibid., 39.

16 Hajisoteriou and Angelides, 'Facing the "challenge"'.

17 Ministry of Education and Culture, *Curricula for Pre-Primary, Primary and High-School Education*. Vol. A and B. (Nicosia: MEC, 2010), 6 [In Greek].

18 C. Panayiotopoulos and M. Nicolaidou, 'At crossroads of civilizations: multicultural educational provision in Cyprus through the lens of a case study'. *Intercultural Education,* Vol. 18 No. 1 (2007), 65-79; M. Zembylas and S. Iasonos, 'Leadership styles and multicultural education approaches: an exploration of their relationship'. *International Journal of Leadership in Education,* Vol. 13 No. 2 (2010), 163-183.

19 E. Papamichael, Greek-Cypriot teachers' understandings of intercultural education in an increasingly diverse society'. *The Cyprus Review,* Vol. 20, No. 2 (2008), 51-78; Gregoriou, *Policy analysis report*; Hajisoteriou, 'Duty calls for interculturalism'; Hajisoteriou and Angelides, *The Globalisation of Intercultural Education*; Hajisoteriou and Angelides, 'Intercultural education in situ'.

was not accompanied with the reconceptualisation and restructuring of the national education system and schooling. The state did not adopt a balanced governance model between school autonomy and centralised management.[20] Consequently, it did not communicate to schools coherent policies that allow for clear understandings of intercultural education, nor did the MEC translate this policy into clear organisational policies or practices for schools.[21] Last but not least, the MEC did not provide teachers and students with the opportunity to bring their experiences into the planning of such policies through the development of intercultural school-based curricula and initiatives.[22]

The Meso-Level of the Schools: Filtering Globalised Policies of Intercultural Education

In the Cypriot context, we have extensively examined the development of intercultural education policies in Cyprus in the context of European integration, while also focusing on the Europeanisation of such policies by means of interviews with key stakeholders and policy-makers and through document analysis.[23] In our recent book, *The Globalisation of Intercultural Education,*[24] we have examined macro-micro integration, by means of school case studies across Cyprus, including head-teachers, teachers, and students. What our research over the last decade has concluded is that Cyprus, seen as a case of bi-communal conflict, was called by supranational organisations, such as the EU, the CoE, and the UN, to expand its intercultural education policies to address both the challenge of reunification of the Greek Cypriot and Turkish Cypriot communities, but also to promote immigrants' inclusion.[25] Such calls were addressed in a number of international or European reports that gave negative evaluations, for example UNESCO[26] or the European Commission against Racism and Intolerance.[27]

20 Hajisoteriou, 'Duty calls for interculturalism'.

21 Hajisoteriou and Angelides, *The Globalisation of Intercultural Education*; Hajisoteriou and Angelides, 'Intercultural education in situ'.

22 C. Hajisoteriou, C. Karousiou, and P. Angelides, 'Successful components of school improvement in culturally diverse schools', *School Effectiveness and School Improvement, Vol. 29, No.* 1 (2018), 91-112.

23 Hajisoteriou, 'Duty calls for interculturalism'; C. Hajisoteriou, L. Neophytou, and P. Angelides, 'Intercultural dimensions in the (new) curriculum of Cyprus', *Curriculum Journal,* Vol. 23, No. 3, (2012), 387-405.

24 Hajisoteriou and Angelides, *The Globalisation of Intercultural Education*; Hajisoteriou and Angelides, 'Intercultural education in situ'.

25 Ibid.

26 UNESCO – United Nations Educational, Scientific and Cultural Organization, *Appraisal Study on the Cyprus Education System* (Paris: International Institute for Educational Planning, 1997).

27 ECRI – European Commission against Racism and Intolerance. *Annual Report on ECRI's Activities Covering a Period from 1 January to 31 December 1999* (1999), available at http://www.coe.int/t/e/

Secondly, our past research concluded that other supranational organisations, such as the Fundamental Agency of Human Rights (FRA), imbued the national socio-political environment with intercultural and inclusive discourses, while using various mechanisms of influence, such as legal and financial incentives (i.e., the development of Zones of Educational Priority via the EU structural funds), diffusion of ideas (i.e., through anti-discrimination campaigns), and elite learning (i.e., participation of Cypriot policy-makers in European committees).[28] Our findings also demonstrated that participation in the EU, but also in other supranational organisations, such as the UN, demonstrated by compliance to their European and international conventions, guidelines, and incentives, was seen as the only concrete evidence of the Cypriot state's sovereignty – meaning the need to prove its existence as a nation-state and the rule of the Greek Cypriot government despite the division of the island.[29]

Thirdly, our previous research has demonstrated that Cyprus has initiated education reform (including a reform of the national curriculum, leading towards a more intercultural orientation) in order to harmonise its policy discourse with the EU.[30] This was explicitly stated in the preamble of the 'Manifesto of Educational Reform', produced by the Committee for Educational Reform (CER), arguing that intercultural education was seen as part of the state's drive towards the creation of a 'Euro-Cyprian society'.[31] As a result, since 2008, the state and particularly the Ministry of Education and Culture (MEC) replaced the previously used terms of 'multicultural education' and 'integration' with the rhetoric of 'intercultural education' and 'inclusion'. As a result of the educational reform, Papamichael[32] concludes that the MEC deployed the discourse of intercultural education as the establishment of a school which provides equal educational opportunities for access, participation and success for all students. This turn was also ratified by the new 2010 curriculum, in which the MEC envisioned

human_rights/ecri/5-archives/1-ECRI's_work/2Annual_reports/Annual%20Report%201999.asp.
ECRI - European Commission against Racism and Intolerance, *Second Report on Cyprus*. (2001), available at http://www.hri.ca/fortherecord2001/euro2001/vol2/cyprusechri.htm.
ECRI - European Commission against Racism and Intolerance, *Third Report on Cyprus* (2006), available at http://www.coe.int/t/e/human_rights/ecri/1-ECRI/2-Country-by-country_approach/Cyprus/Cyprus_CBC_3.asp#TopOfPage.

28 Hajisoteriou and Angelides, 'Intercultural education in situ'.

29 C. Hajisoteriou, 'Europeanising intercultural education: Politics and policy making in Cyprus'. *European Educational Research Journal,* Vol. 9, No. 4 (2010), 471-483; Hajisoteriou et al., 'Intercultural dimensions in the (new) curriculum of Cyprus'; Hajisoteriou and Angelides, 'Intercultural education in situ'.

30 Hajisoteriou et al., 'Intercultural dimensions in the (new) curriculum of Cyprus'.

31 CER – Committee for Educational Reform, *Democratic and Humanistic Education in the Euro-Cyprian Polity,* [in Greek].

32 E. Papamichael, 'Greek-Cypriot teachers' understandings of intercultural education in an increasingly diverse society'.

the creation of a 'humane' and 'democratic' school which includes and does not exclude, by respecting diversity and cultural, linguistic and religious pluralism.[33]

Nevertheless, previous research in the Cypriot context has cautioned that the developed intercultural policies appeared to adhere to 'simulated' and 'token' Europeanisation[34] globalisation.[35] This research argued that although the MEC 'markedly' included the intercultural dimension of education in its national policy and curriculum discourse, it did not provide schools with necessary resources to implement such policies. The unavailability of sufficient funds, appropriate infrastructures, and adequately trained personnel operated as material constraints that turned schools into 'simulated' intercultural spaces.[36] Hajisoteriou,[37] in her research conducted in Cypriot primary schools, concluded that the MEC left the formulation and implementation of concrete intercultural initiatives to the discretion of the schools and their personnel. However, the extremely centralised character of the Cypriot education system does not allow the development of school-based curricula, leading schools to interpret the Ministry's stance as the complete absence of intercultural policy.[38] It is thus no surprise that past research evidences the lack of clearly-defined, adequate, and successful intercultural policies in Cypriot schools, which often adopt superficial and folklore practices.[39] This observation brings us to the conclusion that it is inappropriate to 'uncritically' model policies that seem to be successful in developed, adequately-funded, highly professionalised, and well-regulated education systems to education systems that fall short in these dimensions.

More recently, Cyprus's unsuccessful participation in the 2012 and 2015 PISA studies (resembling previous results in other international assessments such as TIMMS) has triggered an intense debate on the reasons behind such underperformance.[40] The news referred to the PISA results by using headings such as 'Cypriot teen's biggest dunces in the EU[41] or 'Bottom in EU on OECD education league, again'.[42] Although

33 Hajisoteriou et al., 'Intercultural dimensions in the (new) curriculum of Cyprus'.
34 Hajisoteriou and Angelides, 'Intercultural education in situ'.
35 Hajisoteriou and Angelides, *The Globalisation of Intercultural Education*
36 Hajisoteriou and Angelides, 'Facing the "challenge"'.
37 Hajisoteriou, 'Duty calls for interculturalism'.
38 Hajisoteriou, 'Duty calls for interculturalism'.
39 Papamichael, 'Greek-Cypriot teachers' understandings of intercultural education in an increasingly diverse society'; Hajisoteriou, 'Duty calls for interculturalism'; Hajisoteriou and Angelides, 'Intercultural education in situ'.
40 Hajisoteriou and Angelides, *The Globalisation of Intercultural Education*.
41 Cyprus Mail, 'Cypriot Teens Biggest Dunces in the EU', *The Cyprus Mail* (2013, December 4), available at http://cyprus-mail.com/2013/12/04/cypriot-teens-biggest-dunces-in-the-eu/.
42 Cyprus Mail, 'Bottom in EU on OECD Education League, Again', *The Cyprus Mail* (2015, May 14), available at http://cyprus-mail.com/2015/05/14/bottom-of-the-oecd-education-league-again/.

Cyprus lags behind in meta-analysing such results, what public opinion and the media have suggested is that specific characteristics of Cypriot education are the ones to be 'blamed', namely: the centralisation of the education system, the lack of school autonomy, inappropriate teaching methodologies, and the high percentages of immigrant students in Cypriot schools.[43] Remarks on immigrants' presence seem to lead to the emergence of neo-assimilationist discourses, overemphasising Greek-language learning, the necessity to expand the programme of the Zones of Educational Priority to accommodate immigrant students, and lastly, immigrants' cultural and structural adjustment. Hajisoteriou and Angelides[44] also argue that the rise of neo-assimilationist (but also neo-xenophobic) discourses was furthered by the global economic crisis leading to Cyprus' bailout by the Eurogroup, European Commission (EC), European Central Bank (ECB) and the International Monetary Fund (IMF). Arguably, such discourses collide with the more inclusive discourses of the state's intercultural education policy.

What previous research has also shown is that beyond material reasons, political and cultural factors lie also behind the *symbolic* adoption of globalised policies of intercultural education in Cyprus.[45] In response to the Cypriot political problem, education has been used as a means of the nation-building project drawing upon cultural purification.[46] As education strictly patrols the boundaries of citizenry and belongingness, subordinated groups, including minorities and immigrants, have been purposively under-recognised and excluded. In this sense, previous research asserts the MEC, in serving the state's nation-building objectives, aimed to maintain immigrants' assimilation into the dominant 'native' culture, and thus it has deliberately omitted to develop effective initiatives leading towards successful implementation.[47] As a result, change has occurred only at the level of national policy rhetoric, but not in practice. In more detail, the political culture fostered access-based policies and practices of intercultural education, safeguarding all children's right to access school communities. Nonetheless, as such policies and practices were exclusive of outcome-oriented definitions of equity, they impeded action on social justice.

43 Phileleftheros, 'Low Performances of Cypriot 15-year-olds in Reading and Mathematics', [In Greek], *Phileletheros* (2013, December 3), available at http://www.philenews.com/el-gr/top-stories/885/174365/chamiles-epidoseis-kyprion-15chronon-se-anagnosi-kai-mathimatika.

44 Hajisoteriou and Angelides, *The Globalisation of Intercultural Education*.

45 Hajisoteriou and Angelides, 'Intercultural education in situ'.

46 Gregoriou, *Policy analysis report*. Cyprus; Hajisoteriou, 'Duty calls for interculturalism'; Hajisoteriou and Angelides, 'Intercultural education in situ'

47 Hajisoteriou and Angelides, 'Facing the "challenge"'; Hajisoteriou and Angelides, *The Globalisation of Intercultural Education;* Hajisoteriou and Angelides, 'Intercultural education in situ'.

The Implementation of Globalised Policies of Intercultural Education

Moving from the phase of adoption to implementation, scalar factors contributed in the 'illusory' enactment of globalised (and/or Europeanised) policies of intercultural education in the Cypriot context.[48] Verger et al.[49] caution that head-teachers and teachers, who are actually responsible for making new policies work, often feel alienated to reforms coming from above and do not gradually progress from previous practices. In the Cypriot context, both Zembylas and Iasonos[50] and Hajisoteriou and Angelides[51] examined the ways in which school leadership influenced the implementation of intercultural education approaches. It is striking that the findings of both studies indicate that most of the participant head-teachers felt 'uncertain' and 'insecure' about how to react to diversity. They thus adopted a combination of assimilationist and cultural-deficit approaches, and transactional leadership styles. As a result of education policies emanating from standardisation in relation to the creation of the 'knowledge economy', these head-teachers emphasised the need for homogeneity in order to sustain the so-called smooth operation of their schools. Their leadership styles took the form of a business-as-usual approach, as they did not acknowledge their students' diverse socio-cultural backgrounds in developing and implementing appropriate school cultures, policies, and practices.

What the two studies note is that most of the participant Cypriot head-teachers failed to implement inclusive socially-just policies in their schools. By adopting managerial types of leadership, these head-teachers reproduced 'sometimes unwittingly, conditions of hierarchy and oppression, in particular by fostering compliant thinking rather than critical reflection'. On the other hand, both studies conducted by Zembylas and Iasonos[52] and Hajisoteriou and Angelides[53] 'spotted' exceptions of Cypriot head-teachers, who adopted cultural-pluralist definitions of diversity and inclined to transformational leadership styles. These head-teachers lent support to social-justice leadership by examining the institutional barriers, structural inequalities, and power dynamics that influenced inclusion (or exclusion) within their culturally-diverse school settings. They run their schools in more collaborative forms by fostering

48 Hajisoteriou and Angelides, *The Globalisation of Intercultural Education*.

49 A. Verger, M. Novelli, and H. K. Altinyelken, 'Global education policy and international development: An introductory framework', in *Global Education Policy and International Development: New Agendas, Issues and Policies,* eds. A. Verger, M. Novelli and H. K. Altinyelken, (London: Continuum 2012), 3-33.

50 Zembylas and Iasonos, 'Leadership styles and multicultural education approaches'.

51 Hajisoteriou and Angelides, 'Facing the "challenge"'.

52 Zembylas and Iasonos, 'Leadership styles and multicultural education approaches'.

53 Hajisoteriou and Angelides, 'Facing the "challenge"'.

cooperation among their teaching faculty. Additionally, they often networked with other professionals, such as education psychologists, to develop school plans and programmes aiming to combat discrimination. They also prioritised on their school agendas increased student engagement, immigrant parental involvement, intercultural teacher training, and school self-evaluation.

The big gap between the new policy rhetoric on intercultural education and the previous ethnocentric character of the Cypriot education system further added to the decoupling between global and European policies on intercultural education and the local school 'reality'.[54] Previous research carried out in Cypriot schools illustrates that Cypriot teachers failed to implement new intercultural education initiatives, not only because they lacked appropriate training to do so, but mainly because they did not 'understand' the necessity and the content of the reform.[55] Additionally, research focusing on children voices cautions about the failure of the education system and the implementation of pertinent policies to address marginalisation and exclusion.[56] Despite the gradual development of friendships between Cypriots and immigrants, stereotypical behaviour and racist incidents against immigrant students continue to persist in schools.[57] To make a long story short, the way that different visions of national education have become confused in the MEC's policy (ranging from ethnocentrism to inclusion) was reflected in head-teachers', teachers', and students' understandings of intercultural education initiatives, thus, leading to 'problematic' implementation.

Conclusion

The epicentre of this paper was the examination of the globalisation process of intercultural education in Cyprus. We, thus, examined the ways in which globalised intercultural policies are mediated by the national-state level and the micro-level of the school. To this end, we examined the socio-political, historical, and educational aspects of the Cyprus context. We then drew upon previous research conducted in the field to explore the formation of the issue of intercultural education at the stages of administration, adoption, and implementation; school leadership, and teaching for

54 Hajisoteriou and Angelides, *The Globalisation of Intercultural Education*.

55 Panayiotopoulos and Nicolaidou, 'At crossroads of civilizations: multicultural educational provision in Cyprus through the lens of a case study'; Papamichael, 'Greek-Cypriot teachers' understandings of intercultural education in an increasingly diverse society'; Hajisoteriou, 'Duty calls for interculturalism'; Hajisoteriou and Angelides, *The Globalisation of Intercultural Education.*

56 K. Messiou, 'Collaborating with children in exploring marginalisation: An approach to inclusive education', *International Journal of Inclusive Education,* Vol. 16, No. 12 (2011), 1311-1322; Hajisoteriou, et al., 'Successful components of school improvement in culturally diverse schools'.

57 E. Partasi, 'Experiencing multiculturalism in Greek-Cypriot primary schools', *Compare: A Journal of Comparative and International Education,* Vol. 41, No. 3 (2011), 371-386.

intercultural education; and, childrens' voices on education policy for intercultural education.

Drawing upon our examination, we conclude that Cyprus provides for an example of the ways in which globalised policies of intercultural education have been mutated when it comes to the phases of adoption and implementation. What becomes apparent in the context of Cyprus is that socio-historical and economic parametres have greatly influenced the adoption and implementation of globalised intercultural education policies. The conclusion that stems from our examination of the Cyprus example is that, although globalised discourses of intercultural education seem to be adopted, as the amendment of policy rhetoric is not accompanied with reform of the systemic and school structures, immigrant students are still excluded within mainstream schools. In attempting to 'reconcile' international calls and national interests, Cyprus state authorities may have deliberately omitted to develop effective practical initiatives towards the globalisation of state-derived intercultural policies.

On the basis of our conclusions, we argue that the adoption and implementation of globalised policies of intercultural education is affected by the agreement between international and national interests and policy goals, communication between the different levels of the system and the availability of resources for implementation. In the examination of the adoption and implementation, we should take loose coupling into consideration, meaning that the coordination, monitoring, and communication of the system may be weakly connected. Loose coupling bears a neutral connotation for adoption and implementation as it may have both positive and negative implications. For Berman,[58] 'looseness' implies that different education institutions and the actors operating within these institutions have their own problems, perspectives, and goals according to their specific cultures and structures, and that institutions as such have more or less autonomy within the macro-structure of the education system.

Our examination bears implications for all the phases of globalisation in education, including development, adoption, and implementation. To begin with, at the phases of development and adoption, international and national actors influencing policy development should examine and take into consideration broader structures and parametres affecting the implementation of policy. For example, both international organisations and nation states should acknowledge that economic structures (i.e. productivity and funding) could potentially mediate policy. In order to facilitate the implementation of successful globalised intercultural policies, international and national organisations ought to institutionalise resource allocation in terms of funds and thereby space, materials and personnel.

At the phase of implementation, loose coupling has particular salience for the

58 Berman, *The study of Macro and Micro Implementation of Social Policy*, (Santa Monica, RAND, 1978).

implementation of globalised policies of intercultural education. According to Ainscow,[59] in order to reach out to *all* learners, we should develop 'a more tightly coupled system without losing loose coupling benefits'. That is, we should sustain coordination and cooperation within schools without restricting teachers' autonomy to ground their own decisions in their classrooms according to the individuality of their students. The successful implementation of any globalised education policy for intercultural education at the grassroots relies upon teachers' willingness and ability to tailor their practices to their students' needs, interests, and learning styles.

In conclusion, we should acknowledge that the adoption and implementation of globalised intercultural education policies is facilitated, formed, and constrained by not only multiple variables but also by complex and often counteractive influences, such as policy and school actors' values regarding diversity and social justice issues. What we suggest according to our study is that globalisation studies in the field of intercultural education should examine agency and the powerful role of actors beyond the macro-level, by combining supranational, international and national locus of analysis. What the Cypriot case material has shown is that a trajectory type of approach is necessary in the study of globalisation of education, in general, and intercultural education, in particular. In this type of research, globalised intercultural education policies should rather be seen as processes of negotiation, cooperation, and conflict between various organisations, groups, and individual actors operating across and within supranational (or international), national, and local levels, inside and outside the official mechanisms of policy development, adoption, and implementation. By viewing policies as authoritative and 'powerful' (or not) allocations of values and interests, examinations of the globalisation of intercultural education should encompass both systemic and structural, but also cultural analyses. To this end, future research aiming to achieve macro-micro integration in the field of globalisation should examine the four parametres of adoption and implementation that refer to material, political, cultural, and scalar explanations.

59 M. Ainscow, *Reaching Out All Learners: Some Lessons from Experience.* Keynote address made at the International Conference on School Effectiveness and Improvement, Manchester (1998, January), 21.

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Utilizing Data from International Achievement Studies in Teacher Professional Development in Science

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Abstract

Cypriot students have consistently scored low in science in international studies since 1995 despite various curriculum reform efforts during the last decades. Given the importance of teacher professional development, and the opportunity to further utilize data from an international study, the purpose of this paper is to show how data from the Trends in International Mathematics and Science Study (TIMSS) can be used for a professional development workshop focused on helping teachers identify reasons for low achievement in science, and proposing ways to support students in science. Overall, this professional development workshop could be considered as an effective way of using empirical data from international studies for professional development purposes as it gave teachers the opportunity to reflect on possible reasons that Cypriot students did not do well on certain items while allowing them to make connections between their teaching practice and student content knowledge misconceptions.

Keywords: professional development, Trends in International Mathematics and Science Study (TIMSS), international studies, science education, science achievement

Introduction

The growing importance of science and science education worldwide is clearly evident in the emphasis placed on these subjects in developed countries,[3] as well as through their links with a country's human capital. A country's human capital is often determined by the quality of schooling, which, according to Woessmann,[4] is measured by students' performance on cognitive achievement tests. These cognitive achievement tests have shown to exert an impact on the level of economic development,[5] and for Cyprus these measures, especially in science and mathematics, have been consistently

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3 National Research Council. *Taking Science to School: Learning and Teaching Science in Grades K-8*. (Washington, DC: The National Academies Press, 2007), DOI.org/10.17226/11625.

4 L. Woessmann, 'Central Exit Exams and Student Achievement: International Evidence', in, *No Child Left Behind? The Politics and Practice of School Accountability.* eds P. E. Peterson and M. R. West (Washington, D.C.: Brookings Institution Press, 2003).

5 E. Hanushek and D. Kimko, 'Schooling, Labor-Force Quality and the Growth of Nations'. *American Economic Review,* Vol. 90, No. 5 (2000),1184–1208; L. Woessmann, 'Growth, Human Capital and the Quality of Schools: Lessons from International Empirical Research', *Strategies for Employment and Growth in Austria*, Vol. 10, (2006), 74-98.

low during the last decades.[6]

Very often student outcomes are linked to the quality of teacher professional development within a country.[7] Because of this link, countries across the world have applied various professional development methods to improve science teaching and consequently student outcomes.[8] Therefore, current professional development programmes place an emphasis on teachers' pedagogical knowledge and skills and also on making the connection between teaching and learning.[9] However, despite the changes in teacher professional development in science education within Europe, recent EU reports[10] still point out that the number of students choosing science as a field of study is declining and that the quality of science education in terms of relative attainment and scores are lower than expected in a number of countries, including Cyprus.[11]

Cypriot students have consistently scored low in science in international studies since 1995[12] and this is especially evident with elementary and middle school students. Despite various curriculum reform efforts during the last decades,[13] most of them focusing on changing the curriculum materials without placing an emphasis on teacher professional development, assessment scores remain low. There are many discussions on why Cypriot students are not successful in international studies. However, very few researchers within Cyprus have actually utilized the data from international studies to verify whether the various assumptions made are correct.[14] Nor have the data

6 Word Bank Report, *Analysis of the Function and Structure of the Ministry of Education and Culture of the Republic of Cyprus*. (Washington, D.C.: The World Bank, 2014).

7 OECD, *PISA 2006: Science Competencies for Tomorrow's World* (Paris: OECD Publications, 2006); J. Osborne and J. Dillon, Science Education in Europe: Critical Reflections. (UK: Nuffield Foundation, 2008).

8 M. Evagorou, J. Dillon, J. Viiri, and V. Albe, 'Pre-service Science Teacher Preparation in Europe: Comparing Pre-service Teacher Preparation Programs in England, France, Finland and Cyprus'. J*ournal of Science Teacher Education*, Vol. 26, No. 1 (2015), 99–115. DOI.org/10.1007/s10972-015-9421-8.

9 M. Cochran-Smith, 'The Problem of Teacher Education'. J*ournal of Teacher Education,* Vol. *55,* No. 4 (2004), 295–299. DOI:10.1177/0022487104268057'.

10 European Commission. *Developing Key Competences at School in Europe: Challenges and Opportunities for Policy.* (Brussels: European Commission, 2012); Eurydice, *Science Education in Europe: National Policies, Practices and Research* (Brussels: Education, Audiovisual and Culture Executive Agency, 2011).

11 OECD, *PISA 2006: Science Competencies for Tomorrow's World* (Paris: OECD Publications, 2006).

12 Word Bank Report, *Analysis of the Function and Structure of the Ministry of Education and Culture of the Republic of Cyprus*. (The World Bank, 2014).

13 Ministry of Education and Culture (MOEC), *New Curriculum for the Teaching of Science.* (Nicosia: Ministry of Education and Culture, 2011).

14 E. C. Papanastasiou and M. Zembylas, Did the Cypriot students really cheat on TIMSS? *Research in Comparative and International Education, Research in Comparative and International Education,* Vol.

been utilized in the past in order to guide the creation of professional development programmes in science.

Given the importance of teacher professional development and the opportunity to use data from an international study, the purpose of this paper is to show how data from the Trends in International Mathematics and Science Study (TIMSS) can be used for a professional development workshop focused on helping teachers identify reasons for low achievement in science and proposing ways to support students in science.

Trends in International Mathematics and Science Study

The Trends in International Mathematics and Science Study (TIMSS), which is conducted by the International Association for the Evaluation of Educational Achievement (IEA), is an international assessment of the performance of fourth and eighth grade students in mathematics and science. TIMSS has been conducted every four years since 1995 and has collected comprehensive data on students' contexts of learning mathematics and science. The goal of TIMSS, as provided by the IEA, is to help countries

> make informed decisions about how to improve teaching and learning in mathematics and science. With its strong curricular focus and emphasis on policy relevant information about the home, school and classroom contexts for learning, TIMSS is a valuable tool that countries can use to evaluate achievement goals and standards and monitor students' achievement trends in an international context.[15]

In 1995, data were collected from three target populations in 45 countries. These were defined as (a) the two adjacent grades where the majority of 9-year-old students were enrolled, (b) the two adjacent grades where the majority of 13-year-old students were enrolled and (c) students in their final year of secondary education.[16] In 1999, the target population was limited to eighth grade students. From 2003 onwards, the sampling scheme includes fourth- and eighth-grade students, while in 2015, students in their last year of high school were also sampled. During the 2015 administration of TIMSS, more than 57 countries and more than 580,000 students participated in the assessment.

The selection of schools in each country is based on a two-stage random sampling design.[17] Schools are first sampled from each national school sampling frame with

1 (2006), 120-125.

15 TIMSS and PIRLS International Study Center, *About TIMSS 2015* (Chestnut Hill, MA, 2016), available at http://timss2015.org/timss-2015/about-timss-2015/.

16 M. O. Martin and D. L. Kelly (eds.), *TIMSS technical report, volume I: Design and development*. (Chestnut Hill, MA: Boston College, 1996).

17 S. LaRoche, et al., 'Sample Design in TIMSS 2015', in *Methods and Procedures in TIMSS 2015*,

probabilities that were proportional to school size (and sometimes stratified on certain demographic information), while at a second stage, intact classes are chosen through equal probability systematic random sampling.

At the elementary school level, Cyprus participated in TIMSS in 1995, 2003 and 2015. In 2015, 4343 fourth grade students from 148 schools participated in the study. The average science performance of Cyprus in 2015, at the fourth-grade level, was 481, which was below the international average of 500. This achievement was almost identical to our performance in 2003, which was 480, although in 1995 our performance was much lower (450). So, by comparing our country's results with our own performance in the past, it is evident that no progress has been made in the performance of our students in the last decade, as evident by TIMSS trends.

The Workshop

As a way to support teachers' understanding of the underlying reasons for the low scores of Cyprus in TIMSS science, a professional development workshop was created for elementary school teachers in Cyprus in 2017. According to Gess-Newsome et al.,[18] students' outcomes in science should be used as part of teacher professional development programmes as a way to empirically help teachers reflect on their teaching practices and improve them. However, such data are not always available to teachers, which is the case in Cyprus, and therefore, using data from TIMSS had provided a unique opportunity for this workshop. Furthermore, the utilization of such data was of special significance since no other nationwide assessment takes place within Cyprus which could be used to evaluate outcomes from science education for elementary and middle school students.[19]

The workshop was collaboratively developed by academics in science education and measurement, with the support of the Ministry of Education and Culture in Cyprus (MOEC) and, more specifically, with the science inspector for elementary schools. This collaboration enabled researchers, science educators from three universities in Cyprus, curriculum developers and textbook writers to come together with the common goal of identifying the reasons for the low achievement of Cyprus in elementary school science, in an effort to support teachers to improve their practice. In a preparatory

eds. M. O. Martin, I. V. S. Mullis and M. Hooper (TIMSS and PIRLS International Study Center, Lynch School of Education, Boston College and International Association for the Evaluation of Educational Achievement, 2016), 3.1-3.37.

18 J. Gess-Newsome, et al., 'Teacher pedagogical content knowledge, practice, and student achievement', *International Journal of Science Education*, (2017) DOI: 10.1080/09500693.2016.1265158.

19 E. C. Papanastasiou and M. P. Michaelides, 'Issues of Perceived Fairness in Admissions Assessments in Small Countries: The Case of the Republic of Cyprus', in *Higher Education Admission Practices: An International Perspective*, eds. M.E. Oliveri and C. Wendler (Cambridge: Cambridge University Press, 2019).

workshop in May 2017, the aforementioned stakeholders worked together looking at TIMSS restricted-use items and responses from fourth grade Cypriot students. The discussions focused on whether the items were part of the taught curriculum, the ways in which the specific topics are typically taught and possible reasons for which Cypriot students were not successful on each specific item. The outcomes of the discussions were used as guidelines to design the main workshop targeted to elementary school teachers.

The final version of the workshop took place in January and February 2018 and was repeated in Nicosia, Limassol, Larnaca and Paphos. This was a compulsory workshop for all teachers who act as coordinators for science lessons in elementary schools, so a total of 346 teachers participated in the four workshops. Some of the teachers had experience with TIMSS as their students had participated in the study in the past. The workshop took place during school time and had a total duration of five hours.

The Structure of the Workshop

The workshop was structured around three main components: a) Introduction to TIMSS; b) Reflecting on students' responses; and c) Strategies to support students.

Introduction to TIMSS: In the first part of the workshop, elementary school teachers were presented with an overview of TIMSS to help them understand the rationale and the processes behind the study (i.e., how items are designed and piloted, links to local curricula, translation of items). A presentation of the findings of the study, with an emphasis on the performance of Cyprus in science since 1995 followed. The teachers were asked to comment on the findings based on their experiences, and after the discussion, the teachers were invited to complete an online poll regarding their beliefs for the main reasons Cypriot students did not perform well in TIMSS science. Specifically, teachers were asked to indicate the single most important reason among five possible ones for the low results of Cyprus on TIMSS. These five options were selected based on what we already know from the literature[20] and the discussions taking place in Cyprus regarding students' low achievement. The reasons included in the poll were: lack of skills in answering multiple-choice questions, difficulties in reading instructions, difficult language/terminology in the questions, lack of motivation, and lack of content knowledge. The outcomes of the online poll were not presented to the teachers at this point, but were used in the third part of the workshop to compare the teachers' initial views and how these might change after engaging with and discussing

20 A. Cavagnetto, et al., 'The Nature of Elementary Student Science Discourse in the Context of the Science Writing Heuristic Approach'. *International Journal of Science Education*, Vol. 32, No. 4 (2015), 427–449, DOI: 10.1080/09500690802627277; J. Wellington and J. Osborne, *Language and Literacy in Science Education* (Buckingham, UK: Open University Press/McGraw-Hill International, 2001).

each restricted use item along with their results.

Reflecting on students' responses: In the second part of the workshops, teachers were assigned to groups and were provided with released and restricted use items from TIMSS. TIMSS items are divided in categories of content domains (Life Science, Physical Science, Earth Science) and by cognitive levels (knowing, applying, reasoning), so this information was available for the teachers. Each group focused on different questions. Furthermore, along with each item, the teachers were given the percentage of correct responses of the Cypriot students, as well as the international percentage of correct responses. Each group was led by two moderators: a science curriculum developer, who was involved in the development of teaching materials, and a science educator. The curriculum developers provided the following information about each of the items: whether the content on which the item was based was included in the local curriculum, in which grade and the context in which it was presented to the students. Figures 1 and 2 provide examples of how the items were presented to the teachers.

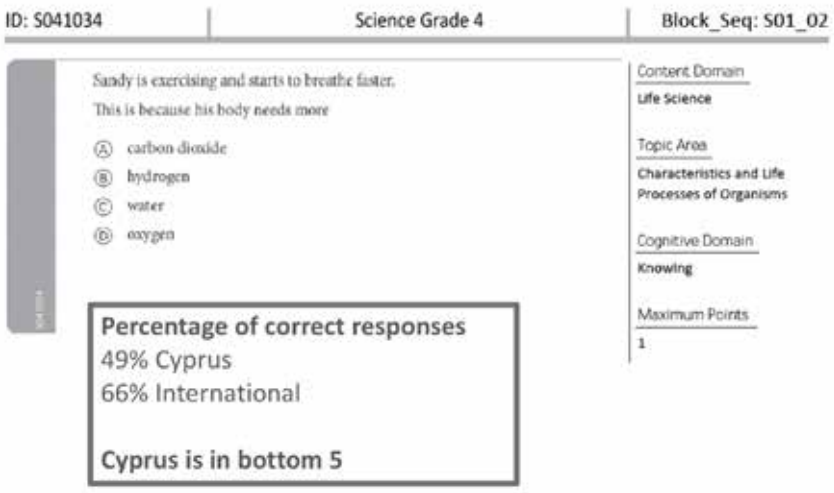

Figure 1: Example of a TIMSS released item that was presented at the workshop

When applicable, a note was made on whether Cypriot students' performance was in the ten top or bottom countries in terms of percentage of correct scores. Each item was presented to the whole group and the moderators asked the participants to reflect on the question and the percentage of correct responses. Based on the provided information and their experience in class, teachers were asked to explain the performance of Cypriot students for each item by commenting on the taught curriculum, possible misconceptions or other reasons for which students could not

identify the correct response. The discussion was recorded by one of the moderators, and at the end of the group work, an overview of the possible reasons for the low science scores in Cyprus was summarized to be presented to the other groups.

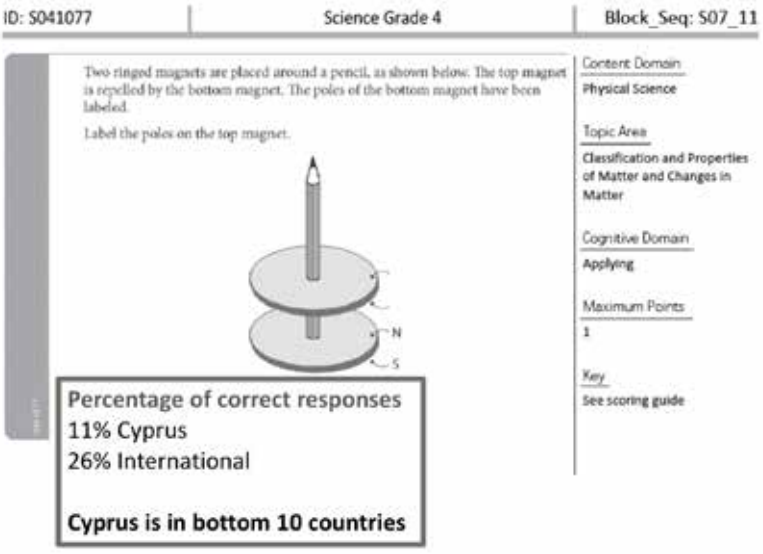

Figure 2: Example of a TIMSS released item that was presented at the workshop

Strategies to support students: In the third part of the workshop teachers returned to the whole group to discuss the findings from the group work. The last part of the workshop was designed in a way to emphasize teaching practices to support elementary school students to improve their reading, writing and oral skills,[21] as well as their skills in answering multiple choice questions.[22] At the end of the workshop, the teachers were asked to reflect on their needs in terms of professional development, with the majority of the teachers reporting the need to participate in communities of practice with other teachers and to participate in professional development on how to support language skills in science.

21 M. Evagorou and J. Osborne, 'The role of language in the learning and teaching of science', in *Good Practice in Science Teaching*, 2nd ed., eds. J. Osborne and J. Dillon (New York, NY: Open University Press/McGraw Hill, 2010), 135–157; K. L. McNeill and J. Krajcik, S*upporting grade 5-8 students in constructing explanations in science: The claim, evidence and reasoning framework for talk and writing* (New York, NY: Pearson, 2012).

22 C. Dignath, et al., 'How can primary school students learn self-regulated learning strategies most effectively?: A meta-analysis on self-regulation training programmes'. *Educational Research Review*, Vol. 3, No. 2 (2008), 101–129, DOI: 10.1016/j.edurev.2008.02.003.

Results

In the first part of the workshop, a poll took place among the workshop participants in order to gather their pre-existing views on the reasons why the performance of the Cypriot elementary school students in TIMSS science was inadequate. According to the results of the poll, the reason that was selected by the majority of the teachers (35%) was the student's difficulty in reading the instructions for the test items. The second most frequently selected reason (25%) was that these students did not have a lot of skills in answering such tests. Twenty-two percent of the participants indicated that the terminology that was used in the science items was the reason why Cypriot students did not do well. Finally, 11% indicated that the students did not have enough motivation to do well on the test, while 6% indicated that the low results were from a lack of science content knowledge.

At a later stage of the workshop, the qualitative descriptions of the discussions that took place were summarized, while emphasizing the variety of reasons that were used to explain the performance of the Cyprus students on each item. Based on this summary, a number of distinct patterns emerged. First of all, the wording of specific items was a significant factor that could explain part of the performance of students in Cyprus. In some cases, for example, the terminology that was used for certain items was more scientific and differed from the everyday terminology that is typically used by the students. As a result, this more unfamiliar terminology might have been one factor that could potentially explain the unsatisfactory results on some test items. In addition to problems with terminology, the students also tended to have difficulties in reading and comprehending text intensive items that were quite lengthy. Therefore, students from Cyprus were either not able to properly comprehend these items, or were less likely to make an effort to read and answer them correctly.

A second and very important finding from the workshop verified the fact that Cypriot students tended to do better on the items that included scenarios that were closer to their everyday experiences. For example, because of Cyprus' climate, students appeared to be very knowledgeable of how to protect themselves and their skin from the sun and performed quite well on items related to this issue. The positive results on the items related to their experiences were found even with items whose content was not included in the science curriculum up to the fourth grade and thus were never taught in the classroom. Moreover, as expected, Cypriot students did less well on items with content that was not related to their experiences or the local context (e.g., items about fossils).

Conclusion

Overall, this professional development workshop could be considered as an effective way of using empirical data from international studies for professional development purposes. This was especially important for Cyprus, as no other large-scale standardized testing data are available for such purposes for elementary school students.

Some effective components of this professional development workshop were the following: First of all, the presentation of the restricted-use items along with the percentage of correct responses from Cyprus drew the teacher's attention to the main building block of these assessments (the items) and away from discussions on the usefulness of league tables and a country's rank. This also gave them the opportunity to reflect on possible reasons why our students did not do well on certain items, while allowing them to make connections between their teaching practice and student content knowledge misconceptions. Specifically, the teachers highlighted difficulties with language skills and lack of experiences as important reasons for students' low achievement. Researchers in science education have repeatedly highlighted these reasons in the past,[23] but according to the teachers the local science curricula does not place an emphasis on these aspects of science, especially the aspect of language and terminology. Moreover, the participation of all education-related stakeholders in these workshop discussions led to fruitful exchanges among all participants, who all had a common goal in mind: the improvement of the quality of science education within Cyprus.

Finally, the detailed briefing about the design and development of the TIMSS items clarified many of the teachers' misunderstandings in regard to such studies and enabled them to better understand such studies. For example, most of the teachers were not aware that some TIMSS items are also written by educators in Cyprus or that the test items do not perfectly match the curriculum of any specific participating country.

Since TIMSS also has a mathematics component, and since Cyprus has participated in other international studies in the past (e.g., in the Progress in International Literacy Study (PIRLS)), this model could be replicated in other subject matters, too. Through the collaboration of all relevant stakeholders, and by utilizing the freely available data provided by these international studies, we are confident that significant progress can be made in the educational system of Cyprus in terms of learning outcomes with the ultimate goal of providing a better future for our students.

23 A. Cavagnetto, B. M. Hand and L. Norton Meier, 'The Nature of Elementary Student Science Discourse in the Context of the Science Writing Heuristic Approach' *International Journal of Science Education*, Vol. 32, No. 4 (2015); Wellington and Osborne, *Language and Literacy in Science Education*.

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Virtual Reality in the EFL Classroom: Educational Affordances and Students' Perceptions in Cyprus

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Abstract

Virtual reality has attracted the interest of the research community due to the endless possibilities it offers in the educational arena. Although a wide range of applications already exists, further research is required to establish effective practices for a fruitful classroom implementation. This quantitative research of a sample of 37 primary school students explores the educational affordances and students' perceptions of virtual reality systems as supportive tools for teaching English as a foreign language. To address the objective of the study, an evaluation test and a questionnaire were administered to the participants. The results showed a positive outcome on students' performance, since it motivated them to visualize abstract knowledge within the virtual world without having to leave the comfort zone of their classroom. The current work revealed the growing potential of VR in the teaching and learning practices and can serve as a reference point for studies to follow. The vision of further agenda on the dynamics of virtual reality in the field of foreign language education is highlighted. Finally, implications for the implementation of VR in the educational system in Cyprus are discussed.

Keywords: virtual reality (VR), educational technology, primary education, students, Google Cardboard, Google Expeditions, English as a Foreign Language (EFL), constructivism

Introduction

There are several definitions that have been proposed in an attempt to clarify what virtual reality (VR) is. According to Sanchez, Lumbers and Silva,[3] it is a computer-based technology that introduces its user to a non-real world, using audiovisual and touch stimuli to create a sensation immersion in the virtual world. Although VR systems were initially developed for entertainment,[4] they are also used for demanding

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3 J. Sánchez, M. Lumbreras and J. Silva, 'Virtual Reality and Learning: Trends and Issues', in *Proceedings of the 14th International Conference on Technology and Education,* Oslo, 10-13 August 1997 (1999).

4 C. Stein, 'Virtual Reality Design: How Head-Mounted Displays Change Design Paradigms of Virtual Reality Worlds'. *MediaTropes,* Vol. 6, No. 1 (2016).

training environments in industries that require effective simulations, such as medicine, military, aviation and engineering.[5]

Theorists and educators now seek to integrate VR into the classroom as they believe that it has the means to completely transform the teaching method, taking into account its multiple benefits, as it seems to follow the theory of constructivism, according to which students build essential knowledge from their personal experiences and authentic situations.[6]

Various technological tools, although not originally developed as a means of promoting education, are now being used to enhance teaching and to facilitate learner engagement and knowledge retention. Therefore, there is a need for continuous diversification of the teaching methods based on the evolutionary course of the digital media. Virtual reality (VR) is the new great achievement that requires the reformulation of teaching to keep up with current trends.[7]

Given these statements, the Cyprus Educational system lacks virtual reality technological readiness; hence, digital education initiatives should be present in the Cypriot educational context. VR integration in primary school curriculum clearly creates a challenge that must be addressed today, since both students and teachers need to become members of a digital citizenry and responsible users of digital technologies. The global community is now endeavouring to develop students into digital citizens, capable of finding solutions for the world's greatest technological advances.[8]

Henceforth, this research was conducted to examine the potential benefits and drawbacks of the implementation of VR technology into the classroom and to investigate students' perceptions of this medium.

Theoretical Background

Recent studies exemplified the possible benefits of virtual reality in subjects that demand authentic situations, such as foreign language learning.[9] Phenomena and situations that may be inaccessible or too difficult to perform in the physical world can

5 J Rong Yang, et al., 'Classroom Education Using Animation and Virtual Reality of the Great Wall of China in Jinshanling'. *The ASEE Annual Conference & Exposition* (2017).

6 Bouras and Tsiatsos, 2006; Huang, Rauch & Liaw, 2010; X. Chen and M. Chen, 'The Application of Virtual Reality Technology in EFL Learning Environment in China'. 2016 *International Conference on Sensor Network and Computer Engineering,* eds Liu Weiguo, C, Guiran, Z. Huiyu (Paris: Atlantic Press, 2016).

7 Chen and Chen, 'The Application of Virtual Reality Technology'.

8 Logan (2016).

9 Chen and Chen, The Application of Virtual Reality Technology'; D. Liu, et al., 'The Potentials and Trends of Virtual Reality in Education'. In *Virtual, Augmented, and Mixed Realities in Education*, eds D. Liu, C. Dede, R. Huang, J. Richards (Singapore: Springer, 2017),

now be created securely in the digital environment, allowing students to experience realistic interactions.[10]

Constructivist Approach

According to various researchers' VR follows the constructivist theory of learning.[11] The lack of external stimuli achieves a high degree of immersion in the digital world, as the user unconsciously builds primary patterns of learning that lead to the subliminal capture.[12] The obstruction of external visual and acoustic stimuli minimizes student disorientation and assists the connection with the learning material.[13] The user and median interaction that takes place leads to the argument that a VR system is an experiential learning environment, which, according to constructivists, will trigger the establishment of new knowledge as the person learns through actions.[14] Inside the virtual world, the user interacts freely with the virtual objects, receiving immediate feedback, which leads to the assumption that VR promotes discovery learning, enriching even more the user's experience.[15] The introduction of practical knowledge into the classroom is achieved as students, instead of just listening to the teacher, acquire real experience through the virtual environment, becoming able to recall the associated information more easily for later use, which is a practice which the theory

10 C. Christou, *Virtual reality in education. Affective, interactive and cognitive methods for e-learning design*, eds A. Tzanavari and N. Tsapatsoulis (Hershey, PA: IGI Global, 2010); W. S. Alhalabi, 'Virtual reality systems enhance students' achievements in engineering education'. *Behaviour & Information Technology*, Vol. 35, No. 11 (2016); J. Rong Yang et al., 'Classroom Education Using Animation'; C. W. Shen, et al., 'Behavioral intention of using virtual reality in learning'. In *Proceedings of WWW '17 26th International World Wide Web Conference* (Geneva: International World Wide Web Conferences Steering Committee, April 2017), 129-137.

11 L. Jensen and F. Konradsen, 'A review of the use of virtual reality head-mounted displays in education and training'. *Education And Information Technologies*, Vol. 23, No. 4 (2018), 1515. DOI:10.1007/s10639-017-9676-0; J. Martín-Gutiérrez, et al., 'Virtual Technologies Trends in Education'. *Eurasia Journal of Mathematics, Science and Technology Education*, Vol. 13, No. 2 (2017).

12 K. Tsolakidis and M. Fokidis, 'Virtual reality in education: An initial reflection'. *Modern Education* (2004).

13 R. Gadelha, 'Revolutionizing Education: The promise of virtual reality'. *Childhood Education*, Vol. 94, No. 1, (2018), 40-43.

14 Y. Chen, 'The Effects of Virtual Reality Learning Environment on Student Cognitive and Linguistic Development'. *The Asia-Pacific Education Researcher,* Vol. 25, No. 4, (2016); Liu et al., 'The Potentials and Trends of Virtual Reality'; Greenwald et al., 'Technology and applications for collaborative learning in virtual reality'. In *Making a Difference: Prioritizing Equity and Access in CSCL, 12th International Conference on Computer Supported Collaborative Learning* (CSCL), Vol. 1, eds B. K. Smith et al., (Philadelphia, PA: International Society of the Learning Sciences, 2017), 719-276.

15 Martín-Gutiérrez et al., 'Virtual Technologies Trends in Education' *EURASIA Journal of Mathematics Science and Technology Education*, Vol. 13, No. 2 (2017).

of constructivism encourages as the most appropriate way of learning.[16] The user is transformed from a passive observer into an active explorer, learning through one's own actions and experiences.[17] This systematic process of exploration and discovery will ultimately enable the cultivation of imagination and the promotion of user creativity.[18]

Enhanced Learning Experience

An increased level of motivation is also achieved since learning becomes easy and fun with the use of VR systems in the classroom.[19] The fun nature of VR will definitely enhance student's interest, thus leading to higher engagement.[20]

Researchers stated that the strongest attribute of VR is the fact that it assists the user to visualize situations and abstract ideas that other mediums fail to do so.[21] The visualization of objects and processes from different angles in a 3D perspective is the main reason behind this unique characteristic of VR.[22] Consequently, visualization not only makes the understanding of new concepts possible, but also allows better knowledge retention for students.[23] Eventually this will influence students' performance

16 S. Minocha, 'The State of Virtual Reality in Education – Shape of Things to Come', *International Journal of Engineering Research*, Vol. 4, No. 11 (2015).

17 Christou, 'Virtual Reality in Education'; E. Barilli, 'Virtual Reality Technology as a Didactical and Pedagogical Resource in Distance Education for Professional Training', in *Distance Education*, ed. P. Muyinda (London: IntechOpen, 2013); M. Dávideková et al., 'Utilization of Virtual Reality in Education of Employees in Slovakia'. *Procedia Computer Science*, Vol. 113 (2017).

18 Chen, 'The Effects of Virtual Reality Learning Environment'; J. Tempchin, 'How Virtual Reality Will Democratize Learning'. *ReadWrite.com* (2016, March 23); Dávideková et al, 'Utilization of Virtual Reality in Education'; Parmaxi et al., 'Enabling Social Exploration Through Virtual Guidance in Google Expeditions: An Exploratory Study', in *Interactive Mobile Communication Technologies and Learning: Proceedings of the 11th IMCL 2017*, eds M. Auer and T. Tsiatsos (Basel: Springer. 2018).

19 Minocha, 'The State of Virtual Reality in Education'; S.H. Lee, et al., 'Assessing Google Cardboard virtual reality as a content delivery system in business classrooms'. *Journal of Education for Business*, Vol. 92, No. 4 (2017); B. Ozkan, 'The Reflections of English as a Foreign Language Teachers' on the Use of Virtual Reality in Classroom Practice (International Black Sea University Case)'. *Journal of Education in Black Sea Region*, Vol. 2, No. 2 (2017).

20 Chen and Chen, 'The Application of Virtual Reality Technology'.

21 Chen, 'The Effects of Virtual Reality Learning Environment'; Parmaxi et al., 'Enabling Social Exploration Through Virtual Guidance'; G. Yildirim, et al., 'Analysis of Use of Virtual Reality Technologies in History Education: A Case Study.' *Asian Journal of Education and Training*, Vol. 4, No. 2 (2018), 62-69.

22 J. Rong Yang et al., 'Classroom Education Using Animation'.

23 T. G. Moesgaard et al., 'Implicit and Explicit Information Mediation in a Virtual Reality Museum Installation and its Effects on Retention and Learning Outcomes', in *Proceedings of The 9th European Conference on Games-Based Learning: ECGBL 2015*, eds R. Munkvold, & L. Kolås (Reading, United Kingdom: Academic Conferences and Publishing International, 2015); I. Stojšić, et al., 'Possible application of virtual reality in geography teaching'. *Journal of Subject Didactics*, Vol. 1, No. 2 (2017).

and bolster learning.[24]

Despite the high expectations and popularity of educational VR,[25] few researches have defined the necessary elements allowing its integration in the classroom, as its merits are based mainly on assumptions and theories.[26] Besides, most of those works focus on adults instead of underage students, which leads to the assumption that there is a need for further investigation. Therefore, the current research study aims to examine the integration of VR into the EFL (English as a foreign language) classroom for A1 and pre-A2 language learners, by exploring students' attitudes and its educational affordances.

Google Cardboard and Expeditions

The learning affordances of the VR systems affordances in the classroom were not fully exploit up until 2014. This was due to the fact that those systems not only were expensive but also required extremely costly equipment to operate, making their acquirement almost impossible.[27] The appearance of Google Cardboard reversed that situation since it was cheaper to obtain and at the same time it did not require any state-of-the-art hardware besides a smartphone.[28] Google Cardboard is an HMD (Head Mounted Display) that adapts to the user's head and is responsible for immersing the user in the simulated world through the digital representations projected by the smartphone. Inside the Cardboard, two optical lenses exist, creating the necessary sense of depth, and two magnets are responsible for triggering the phone's touch sensors, enabling a form of interactivity.[29] In an HMD, the main controller is the human head instead of the hand since it is equipped with built-in sensors that detect the person's movement.[30]

Undoubtedly, Cardboard suffers from a few drawbacks, too. Some VR applications

24 Alhalabi, Virtuatl reality systems enhance students' achievements in engineering education.; Ozkan, 'The Reflections of English as a Foreign Language Teachers'.

25 Schaffhauser, D., 'VR and AR Come of AGE'. *THE Journal,* Vol. 44, No. 3 (2017); Gadelha 'Revolutionizing Education'.

26 Jensen and Konradsen, 'A review of the use of virtual reality head-mounted displays'.

27 Dávideková, et al., Utilization of Virtual Reality in Education'; A. Gronstedt, 'The Immersive Reality Revolution', *TD: Talent Development* Vol. 72, No. 2 (2018), 32.

28 M. Hussein and C. Natterdal, 'The benefits of virtual reality in education: A comparison study', Bachelor's thesis (University of Gothenburg, Göteborg, Sweden, 2015); E Mann Levesque, 'Is virtual reality ready for school?' ***Brookings.edu*** (2016); M. Yap, *Google Cardboard for a K12 Social Studies Module,* (Honolulu: ScholarSpace, 2016).

29 Hussein and Natterdal, 'The benefits of virtual reality in education' 2015; D. Vergara et al., (2017) 'On the Design of Virtual Reality Learning Environments in Engineering'. *Multimodal Technologies and Interaction*, Vol. 1, No. 2 (2017).

30 Alhalabi, 'Virtual reality systems enhance students' achievements in engineering education'; Stein, Virtual Reality Design; C. Woodford, 'Virtual reality'. *Explainthatstuff.com* (2017, March 14).

require specialized controls for proper navigation and interaction, functions that cannot be executed by the simplistic magnetic trigger which is incorporated inside the Cardboard.[31] Another issue is that its motion sensors take advantage of the smartphone's accelerometer, possibly leading to headaches or a feeling of nausea for the user during prolonged periods of time.[32] Finally, dependence on the smartphone results in the lack of plausibility offered by other HMDs that are connected to personal computers.[33] Despite the aforesaid disadvantages, Google Cardboard provides an opportunity for classroom integration given the widespread of smartphones and its promising characteristics,[34] focusing in particular on its low cost compared to other VR systems.[35]

In 2015 Google launched 'Expeditions', an Android application for Cardboard, perceiving its possibilities in the learning process.[36] This app provides students the opportunity to embark on expeditions which consist of different scenes that immerse the viewer in a visual experience. At the moment over 500 expeditions are included, varying from historical places and museums to outer space.[37] A portable device is used by the teacher to control the expedition assuming the role of the guide, while a number of useful features exist to support the teaching of the student-explorers, such as detailed information of the various scenes.[38]

Methodology

A quantitative approach was followed to clarify the learning outcomes resulting from the use of virtual reality in the EFL classroom. An evaluation test and a questionnaire were administered to measure VR educational affordances and determine learners' attitudes.

31 Stojšić et al., Possible application of virtual reality in geography teaching'.
32 Hussein and Natterdal, 'The benefits of virtual reality in education'.
33 Jensen and Konradsen, 'A review of the use of virtual reality head-mounted displays'; Martín-Gutiérrez et al, 'Virtual Technologies Trends in Education'.
34 A. Brown and T. Green, 'Virtual reality: Low-cost tools and resources for the classroom'. *TechTrends*, Vol. 60, No. 5 (2016); B.-W. Lee et al., 2017b, (2017, May) 'Educational Virtual Reality implementation on English for Tourism Purpose using knowledge-based engineering', in *Proceedings of the 2017 IEEE International Conference on Applied System Innovation* (Piscataway, NJ: IEEE, 2017), 792-795; Stojšić et al., 'Possible application of virtual reality in geography teaching'.
35 A. DeNisco, 'Wearable tech expands new horizons'. District Administration, Vol. 51, No. 11 (2015); F. Rasheed et al, 'Immersive virtual reality to enhance the spatial awareness of students', in *Proceedings of the 7th International Conference on HCI, India HCI 2015* (NY, NY: ACM 2015, December); Yap, Google Cardboard for a K12 Social Studies Module.
36 Stojšić, et al., 'Possible application of virtual reality in geography teaching'.
37 Yap, Google Cardboard for a K12 Social Studies Module.
38 Brown and Green, 'Virtual reality'; Parmaxi, et al., 'Enabling Social Exploration Through Virtual Guidance'.

Participants

The research sample consisted of 37 learners studying in four different classes of a language school during the academic year 2018-19. Their level of the English language ranged from A1 to pre-A2, according to the CEFR (Common European Framework for Languages), as determined by their scores in a language test that took place about six months before the end of the data collection. Half of the classes were randomly assigned to the experimental group, while the other two were assigned to the control group. For data collection purposes, the post-experimental design of two equivalent groups was chosen to explore the relationship between the research variables.

Material

The questionnaire of the control group explored students' attitudes towards static pictures as a tool for supporting English language learning, while the questionnaire of the experimental group aimed to find out students' attitudes towards VR as a supportive tool for learning English. The design of the two questionnaires was based on Davis' Technology Acceptance Model (TAM), which is a conceptual model developed to examine users' acceptance of technological innovations.[39] TAM is used by many researchers to capture and predict the behaviour of the individual against various information systems and applications.[40] The primary source for the development of the questionnaire was the survey of Huang, Rauch and Liaw,[41] which examined pupils' attitudes towards the VR systems in a constructivist approach, and the case study by Yildirim, Elban and Yildirim[42] who sought the influence of VR systems when teaching history to higher education students. Also, in order to formulate the factors alleged to be related to student opinions, the questionnaire of Shen, Ho, Kuo and Luong[43] was taken into consideration, which examined students' intentions towards educational VR. The questionnaire was made up of three categories that recorded students' demographics, their attitudes towards educational VR and the impact of VR to their learning. All 23 items besides the two demographic questions were measured on a 5-point Likert-type scale with responses ranging from 1 (disagree) to 5 (agree).

39 F. D. Davis, 'Perceived usefulness, perceived ease of use, and user acceptance of information technology'. *MIS Quarterly* (1989), 319-340.

40 H. Huang and S. Liaw, 'An Analysis of Learners' Intentions toward Virtual Reality Learning Based on Constructivist and Technology Acceptance Approaches', *International Review of Research in Open and Distributed Learning*, Vol. 19, No. 1 (2018).

41 H. M. Huang, U. Rauch and S. S. Liaw, 'Investigating learners' attitudes toward virtual reality learning environments: Based on a constructivist approach'. *Computers & Education*, Vol. 55, No. 3 (2010).

42 Yildirim, et al., 'Analysis of Use of Virtual Reality Technologies in History Education'.

43 Shen, 'Behavioral intention of using virtual reality in learning'.

To compile and create the evaluation test that measured students' knowledge acquisition and retention, a survey by Yang, Chen and Jeng[44] (2010) was used, which examined the educational outcome of VR technology, as well as a questionnaire by Mark Lee et al.[45] that explored the potential of Google Cardboard in the classroom as a means of transferring new knowledge. In addition, an evaluation test, developed by Moesgaard et al.,[46] that investigated the cognitive impact of simulation systems in a historical museum on Danish high school students was also used. Finally, to further inspect the learning effects of VR technology, the test of this research was also based on Shih's test,[47] which measured the probable acquisition of cultural knowledge within a modified virtual environment.

Setting

The course was divided into two parts. The first part was common for both groups. The students learnt about famous sights of the city of London by listening to an English-speaking narrator. In the second part, teaching the control group was supported using the conventional method of a sequence of static images depicting famous city-sights, followed by a verbal description of each picture in English. On the other hand, the subjects of the experimental group were exposed to the effect of the experimental variable, namely the use of the VR system. Each experimental group was given six Google Cardboards and six Android smartphones that were preconnected to the school's Wi-Fi. Since both of those groups had more than six participants, ten and seven respectively, students were asked to often swap their HMDs with their peers' to ensure that all participants would spend enough time immersed in the virtual world. The application employed was Google Expeditions, which was controlled by the instructor, who was also responsible for providing the necessary verbal information regarding each scene. Subsequently, the control and the experimental groups were asked to sit a test and a questionnaire in order to extract the necessary data.

Data analysis

Quantitative data analysis was conducted via SPSS 19.0, which consisted of two separate steps. First, descriptive statistics were calculated in order to examine the

44 Yang, Chen and Jeng, 'Integrating video-capture virtual reality technology into a physically interactive learning environment for English learning'. *Computers & Education*, Vol. 55, No. 3 (2010), 1346-1356.

45 Lee et al., 'Assessing Google Cardboard virtual reality'.

46 Moesgaard et al., 'Implicit and Explicit Information Mediation in a Virtual Reality Museum Installation'.

47 H. Y. Shih, 'A virtual walk through London: culture learning through a cultural immersion experience.' *Computer Assisted Language Learning*, Vol. 28, No. 5 (2015).

variables of the questionnaires. Then an independent sample T-test was executed to determine whether there was a statistically significant difference between the test scores of the two groups.

Results

Participants' descriptive statistics are reported in tabular form in Table 1. Cronbach's alpha was calculated to assess the level of internal consistency reliability of all variables of interest. The reliability coefficient (Cronbach's alpha) showed high consistency across the items of the tools: (experimental group, $\alpha = .916$), (control group, $\alpha = .809$). To determine whether the differences in the two teaching modes are statistically significant, the test of independent samples was used. It was found that there is no statistical difference between the scores of the evaluation test extracted from the experimental group ($M = 7.59$, $SD = 1.23$, $N=17$) and the scores of the control group ($M= 6.95$, $SD= 2.09$, $N=20$); $t= (35) =1.11$, $p>.05$.

Table 1: Descriptive Statistics

	Group	N	Mean	Std. Deviation
Total Test Score	Experimental	17	7.59	1.23
	Control	20	6.95	2.09

The summary of the results from both questionnaires on students' perceptions is illustrated in Figure 1. The experimental group showed increased means in all but two questions, which were related to the perceived usefulness of VR, as it was found that the control group showed a more positive stance regarding the traditional method of teaching (Q12, Q19). Besides the experimental group showed decreased ability to maintain focus while using the media compared to the control group which demonstrated marginally higher level of dedication (Q8). Finally, it was pinpointed that students of the experimental group found it harder to interact with the tutor while being immersed in the virtual world (Q4).

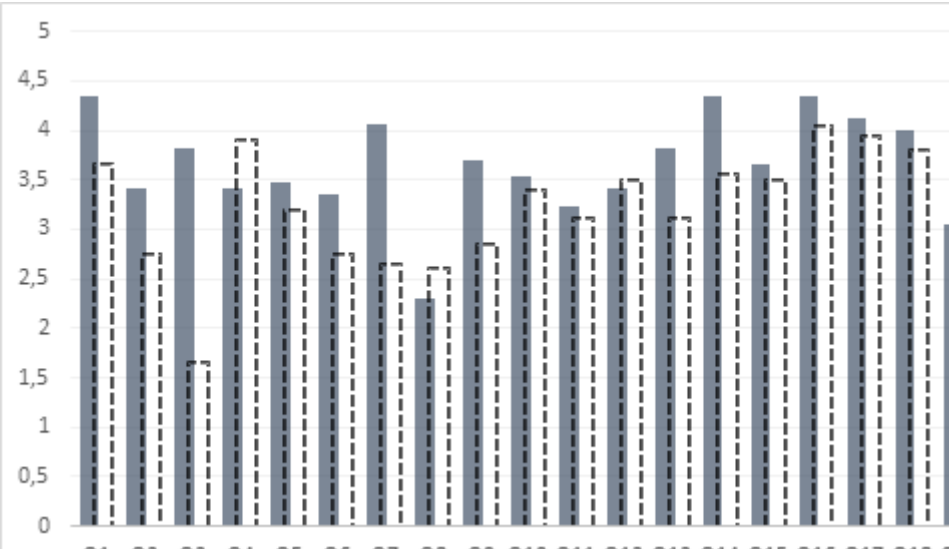

Figure 1: Mean differences between VR system (experimental group) and Static Images (control group)

Discussion

In this research the potential of virtual reality in the EFL classroom was investigated. Results' analysis showed that Google Cardboard was found to have a higher level of perceived usefulness compared to the sequence of images that was used. This can also be presumed by the highest score achieved by the students taught with the help of the virtual reality system, although it was not as great as other scholars have recorded.[48] With the help of a VR system, the user is able to better understand abstract concepts and complicated processes.[49] This visualization of information is seen as an essential advantage of simulation systems as recalling knowledge becomes easier.[50] On the other hand, it should be noted that according to students' beliefs, there was no substantial difference in terms of knowledge retention, learning new information, and understanding between the two methods.

48 Alhalabi, 'Virtual reality systems enhance students' achievements in engineering education'.

49 D. Janßen, C. Tummel, A S. Richert, and I. Isenhardt, 'Towards Measuring User Experience, Activation and Task Performance in Immersive Virtual Learning Environments for Students', in *Immersive Learning Research Network: Second International Conference, iLRN 2016 Santa Barbara, CA, USA, June 27 – July 1, 2016 Proceedings*. ed. C. Allison et al. (Switzerland: Springer, 2016), 45-58.

50 Yap, Google Cardboard for a K12 Social Studies Module.

Despite the fact that students found the VR system to be more interactive compared to the sequence of images, the degree of interactivity was low for both methods of teaching. The lack of substantial interaction largely degrades the usability of the VR system, as through this method, a user's attention deviates over longer periods of time while the margin for learning by personal experience is reduced.[51] Such a conclusion has already been drawn by Chen and Chen,[52] who consider interactivity essential for the users, empowering them to modify the objects of the virtual world as they wish. In the digital world of the current research, students were unable to use the objects they viewed, as Google Expeditions did not provide a satisfying degree of object manipulation.

Besides, according to students' beliefs, the depth of achieved immersion was not formidable. Based on related literature, one of the negatives that can be attributed to Google Cardboard is the low immersion which is created for the person involved.[53] Although the users found the digital representations realistic and qualitative, they failed to maintain their focus in the virtual world. The experimental process may have influenced this outcome, as students were occasionally called to withdraw from the virtual world by removing the HMD due to the lack of the necessary number of Cardboards. The main problem behind this is that, in order for a VR system to be as realistic as possible, it has to immerse one's mind and body to a high degree,[54] a situation which was not achieved in the study.

The reduced immersion may also have been caused by some technical problems that had occurred in the process. Although the combination of HMD and the Expeditions application was excellent and no technical issues arose, the students reported they were physically inconvenient to use. Physical discomforts such as nausea were reported because of the smartphone's accelerometer. This issue was also present in other researches which identified physical discomforts from the prolonged use of Google Cardboard.[55]

It is beyond a doubt, however, that the learners were greatly entertained by the use of VR during the EFL lesson, and wished it would be adopted by other school subjects. These responses are fully justified, as it was found during the literature review that one of the main advantages that VR offers is the reinforced motivation to engage in the

51 A. B. Ray and S. Deb, (2016, December) 'Smartphone Based Virtual Reality Systems in Classroom Teaching – A Study on the Effects of Learning Outcome'. In *Technology for Education* (T4E), 2016 IEEE Eighth International Conference on IEEE (2016), 68-71.

52 Chen and Chen, 'The Application of Virtual Reality Technology' (2016).

53 Martín-Gutiérrez et al., 'Virtual Technologies Trends in Education'.

54 Woodford, 'Virtual reality'.

55 Hussein and Natterdal, 'The benefits of virtual reality in education'.

subject being taught.[56] This positive attitude of students will help their learning since people tend to learn efficiently when dealing with situations that draw their interest[57].

Implications for Practice

The uses of virtual reality in education are impressively vast. This paper offers important educational and theoretical significance for teachers and policy makers in Cyprus in regard to the uses of virtual reality in primary education. Specifically, the great potential of integrating VR as a teaching and learning tool in EFL classes was revealed, promoting research in the field of virtual reality-based education. VR-based education can improve teaching and learning practices, providing new ways for students to interact and gain hands-on experience. In modern multicultural societies, students who would like to study abroad need to gain an in-depth knowledge and comprehension of a foreign language to fully understand the teaching material. To this extent, VR allows built-in translations, which promote students' conceptual understanding and help them accomplish their educational goals in a more efficient and engaging way.

Given the increased digital skills required by the job market in Cyprus and abroad, educational policy-makers should grasp the aforementioned benefits of VR in the classroom and suggest implications for curriculum reform at the primary level in Cyprus. Henceforth, the revised curriculum needs to (a) encourage primary teachers to use experiments and hands-on activities when teaching abstract concepts and complicated processes to students; (b) provide opportunities for students to use VR applications to understand and recall abstract and complicated concepts through the visualization of information; and (c) teachers and students should be prepared for the implementation of VR technology in education through continuous professional development and training.

Conclusion and Future Directions

Virtual reality has been subject to intense discussion and reflection by the teaching community with regards to the educational affordances it offers. Being physically present in the safe classroom environment enables students to travel to a digital world, experiencing a new way of learning. In relation to the cognitive effects of this medium, there was a marginal improvement in students' performance taught with the aid of

56 L. Freina and M. Ott, 'A literature review on immersive virtual reality in education: state of the art and perspectives'. In *The International Scientific Conference eLearning and Software for Education*, Vol. 1 (2015, January), 133; Yap, Google Cardboard for a K12 Social Studies Module.

57 Tsolakidis and Fokidis, 'Virtual reality in education'.

VR, as opposed to those taught without it, confirming that it has the elements to stand out as a beneficial learning tool. VR allowed students to visualize new information and helped them to construct the necessary subconscious patterns required to turn theory into substantive knowledge. At the same time, this teaching approach led students to a higher level of engagement with the English language since considerable motivation was achieved. The small financial burden of purchasing the Google Cardboard system, along with the widespread use of mobile phones, assisted the introduction of VR in the EFL classroom. However, due to this dependence on mobile phones, user experience was affected. It should be stressed that the restrictions posed by the HMD that was used, influenced user-experience, as the levels of immersion and interactivity were far lower than the ones found from more expensive VR systems.

To conclude, Google Cardboard offers great potential to be utilized in education as students are given the opportunity to explore places and situations through a completely new perspective, while incorporating the element of entertainment. On the contrary, this technology suffers from a number of constraints which may affect the growing potential of VR in learning. The evolution of technology will lead to the improvement of both Cardboard and Expeditions, as well as other educational applications, guaranteeing that Virtual Reality will shape learning in the near future.

Further studies should investigate how this technology affects students' motivation when they are immersed in virtual worlds in the long-run. The current research can also be the reference point for further exploration of the dynamics of virtual reality in the field of foreign language education. Upcoming studies can suggest a teachers' guide on how to integrate VR in the curriculum that will support and enhance students' twenty-first century skills. Besides, future application designers need to take into consideration the issues that have been explored with the use of Google Expeditions, and develop their applications in a way that fosters interactivity and ensures enhanced feedback.

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Interculturally Differentiated Instruction: Reflections from Cyprus Classrooms

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Abstract

Nowadays, teachers are called to address the needs of all students in their culturally-diverse and mixed-ability classrooms. Despite the widespread concern about the underachievement and marginalisation of students with disabilities and students from diverse cultural backgrounds; the reasons for this have, for too long, been attributed to the students and their families, rather than to the curricular, pedagogical, and organisational structures of schools and the inequitable framework of our society. Within this context, two pedagogical approaches appeared in the research and literature: intercultural education and differentiated instruction that only recently have been combined to form interculturally differentiated teaching. In this paper, we examine the implementation of interculturally differentiated instruction by Cypriot teachers in real, mixed ability, and culturally diverse classroom settings. Our analysis indicates that teachers are unable to connect intercultural competence with educational effectiveness, consequently failing to create inclusive instructional practises that could maximise learning potential along with intercultural competence for all children. Based on these findings, we question the effectiveness of teacher professional development on interculturally differentiated teaching.

Keywords: intercultural education, differentiated instruction, mixed-ability classes, cultural diversity, inclusive instruction

Introduction

More than ever, teachers are called to address the needs of all students in their culturally-diverse and mixed-ability classrooms. Despite the widespread concern about the underachievement and marginalisation of students with disabilities and students from diverse cultural backgrounds, the reasons for this have, for too long, been attributed to the students and their families, rather than to the curricular, pedagogical, and organisational structures of schools and the inequitable framework of our society. All these viewpoints have had their share on transforming and reshaping education, shifting its focus on the necessity to respond to the needs of all students. Within this context, two (among many others) distinct pedagogical approaches appeared in the scientific literature: intercultural education and differentiated instruction.

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Despite the fact that both approaches are based on the premises of inclusion, equality and equity, most of the research and publications have focused on one at the expense of the other. Scholars of each tradition often use the same argumentation, propose similar strategies and reach similar conclusions. Nevertheless, the emphasis is different: while intercultural education celebrates students' cultural backgrounds and uses them for the development of effective classroom instruction and school environments, differentiated instruction focuses on academic aptitude, therefore requiring a systematically planned curriculum and instruction that meets the needs of academically diverse learners. Thus, while both approaches share the vision of inclusion, their underlying philosophies differ. Differentiation of instruction is focused on the individual's prerogative for success and happiness; on the other hand, intercultural education is focused on the community, and therefore it is mostly concerned about the preservation of collective identities. Attempting to pinpoint the philosophical background pertaining to each approach, we may argue that differentiated instruction is associated with liberalism and positivism, while intercultural education is linked to communitarianism and critical pedagogy.

The aforementioned distinction helps us realise that the challenge for educators in contemporary multicultural classrooms is twofold: to sustain collective identities and to facilitate individual academic success. Accordingly, blending together premises and practices of both approaches (intercultural instruction and differentiated instruction) may be the optimum way to handle diversity.[4] Thus, utilising a blended approach, called interculturally differentiated instruction, this paper examines the implementation of intercultural education and differentiated instruction by Cypriot teachers in real, mixed ability, and culturally diverse classroom settings. Drawing upon interview and observation data, along with lesson plan analysis, we discuss how teachers define, understand, and apply intercultural education and differentiated instruction and if they are able to make connections between these two notions.

Interculturally Differentiated Instruction: Theoretical Framework

Only recently, literature has proposed a blended approach of intercultural education and differentiation of instruction that challenges the alibi often used by education systems regarding school failure.[5] Only through this way, can teaching in culturally

4 S. Valiandes and L. Neophytou, 'Teachers' professional development for differentiated instruction in mixed-ability classrooms: investigating the impact of a development program on teachers' professional learning and on students' achievement', *Teacher Development*, Vol. 22, No. 1 (2018).

5 S. J. Alenuma-Nimoh, 'Taking multicultural education to the next level: An introduction to differentiated-multicultural instruction'. *The Journal of Multiculturalism in Education*, Vol. 8, No. 1 (2012), 1-17. Valiandes and Neophytou, '"Teachers" professional development for differentiated instruction'.

and academically diverse classrooms address socio-economic, psychological, and institutional factors that influence students' school success and social inclusion. In order to frame our theoretical framework, we turn to Culturally Sustaining Pedagogy within which the blending of intercultural education and differentiation of instruction occurs. In agreement with Klinger *et al.*,[6] we recommend the creation of a culturally sustaining education system grounded in the belief that all culturally and linguistically diverse students can excel in school when their evolving personal and group cultures, languages, heritages, and experiences are valued and used to facilitate their learning and development, and when all students are provided access to high quality teachers, programmes, and resources.

Therefore, for the blending of intercultural education and differentiated instruction to be realised in practice, we propose that teachers should deploy the strategy of interculturally differentiated teaching. In this context, the framework utilised for lesson design is also used in the development of differentiated lessons, however, being enriched with items from intercultural instructional methodology. This is what we have illustrated using Alenuma-Nimoh's[7] proposal for merging the key elements of Intercultural Education and Differentiated Instruction. Interculturally differentiated teaching values and draws upon all students' lived experiences in order to overcome 'the pathologies of silence about differences (including those of ethnicity and class) and work explicitly to replace deficit thinking with deep and meaningful relationships, we will have taken great strides toward achieving education that is socially just and academically excellent for more children'.[8]

A key element of differentiated instruction is *affect*. In incorporating *affect* in intercultural education, interculturally differentiated teaching should have also a socio-emotional character. In this way, it may help students to recognise and counter oppression by promoting empathy and examining discrimination from the immigrant's perspective.[9] Emotionally responsive intercultural differentiation in teaching may provide all students the opportunity 'to express their emotions appropriately, regulate their emotions, solve common problems, build positive relationships with their peers and adults in their environment, and engage and persist in challenging tasks'.[10]

6 J. K. Klinger, et al., 'Addressing the disproportionate representation of culturally and linguistically diverse students in special education through culturally responsive educational systems. education policy analysis archives', *Education Policy Analysis Archives*, Vol. 13, No. 38 (2005), n38.

7 Alenuma-Nimoh, 'Taking multicultural education to the next level'.

8 C. M. Shields, Dialogic leadership for social justice: Overcoming pathologies of silence. *Educational Administration Quarterly*, Vol. 40, No. 1 (2004), 128.

9 C. Hajisoteriou, L. Neophytou and P. Angelides, 'The perceptions of high-level officers in Cyprus about intercultural education and their underlying assumptions'. *Curriculum Journal*, Vol. 26, No. 1 (2015).

10 M. L. Hemmeter, M. Otrosky and L. Fox, 'Social and emotional foundations for early learning'.

Drawing from our discussion above, we may argue that teachers have to perform complex roles in order to meet the demands of a 'super-diverse' learning environment. First of all, teachers have to develop methods that cultivate all students' decision-making and critical-thinking skills in order to avoid future risks of social exclusion and marginalisation. Moreover, teachers should take into account the identities of all students in their educational practice in order to give them the opportunity to have equal learning opportunities.[11] This will contribute decisively to their possible future school success and improvement. It should also be noted that teachers should not exclusively aim at the cultivation of knowledge. Instead, they should aim at the moral, emotional, and social development of their students.[12]

The Case of Cyprus

For the purposes of this research, we used Cyprus as our case study. The official education policy, developed by the state and the Ministry of Education and Culture, has adopted the rhetoric of interculturalism and inclusion to respond to immigration. According to the national curricula, including all students regardless of their origin suggests the creation of democratic schools that provide equal educational opportunities for access, participation, and success by respecting diversity and cultural, linguistic and religious pluralism.[13] However, research asserts that there is a gap between policy rhetoric and practice.[14] In practice, culturally diverse students are still seen as in need of assimilation in order to overcome their deficiency and disadvantage.[15]

Differentiation in the context of the recent curricular reform in Cyprus is declared to be the optimal instructional methodological tool to address student diversity in mixed-ability classrooms. Acknowledging the ineffectiveness of teaching and learning in Cyprus, as shown by the results of PIRLS-2001 for reading[16] and the

School Psychology Review, Vol. 35, No. 4 (2006), 585.

11 C. Hajisoteriou and P. Angelides, *The Globalisation of Intercultural Education: The Politics of Macro-Micro Integration* (London: Palgrave-MacMillan, 2016).

12 L. Boutskou, (2012). *What is the Teachers' Role in a Globalised Learning Environment?* [In Greek]. *Lemonia-boutskou.gr* (2012). Available at http://www.lemonia-boutskou.gr/data/pdf/ergasies_mou/rolos-ekpaideytikoy.pdf.

13 MOEC - Ministry of Education and Culture. *Curricula for the Public Schools of the Cypriot State* [in Greek] *(*Nicosia: Ministry of Education and Culture, 2010).

14 See Hajisoteriou, Neophytou and Angelides, 'The perceptions of high-level officers in Cyprus about intercultural education'; M. Zembylas and S. Iasonos, (2010). 'Leadership styles and multicultural education approaches: an exploration of their relationship'. *International Journal of Leadership in Education*, Vol. 13, No. 2 (2010).

15 C. Hajisoteriou and P. Angelides, 'Collaborative art-making for reducing marginalisation and promoting intercultural education and inclusion'. *International Journal of Inclusive Education*, Vol. 21, No. 4 (2017).

16 K. Papanastasiou and M. Koutselini, *IEA: PIRLS - Primary School Students' Literacy Performance* [in

poor performance of 15-year-olds in reading, according to PISA results,[17] curricular reform that was initiated in 2010 in the Republic of Cyprus stressed the importance of differentiated instruction along with the necessity for optimal teacher training practices that could enable teachers to differentiate their instruction in mixed-ability classes. Teacher training in both intercultural education and differentiated instruction appears to be limited and ill-supported. Stavrou and Koutselini[18] point out that teachers' inability to differentiate is primarily a result of ineffective pre- and in-service education. Further, as the Teacher Policies Report in the Republic of Cyprus[19] points out, despite the multiple kinds of professional development schemes, most activities take the form of one-time training, with very little follow up for evaluation and further development. As a response, Valiandes and Neophytou[20] emphasise the need for high-quality professional development programmes, which include active learning and collective participation that is closely related to the curriculum and the existing teaching realities, sufficient duration, and sustainability.

Methodology

For the purposes of this research, we adopted a qualitative research design by researching each school as a case study. Our final sample included a total of 22 schools across Cyprus. All schools were located in urban and suburban areas, which had a highly culturally diverse profile. The percentage of immigrant students exceeded 30% in all the participant schools. Most of the immigrant students in all schools were first generation immigrants with 0–12 years of residency in Cyprus. Their countries of origin varied, including mostly Bulgaria, Romania, Poland, Iran, Syria and Lebanon.

The research team carried out interviews with 50 teachers from all the participant schools. The final sample included 28 female and 22 male teachers. Thirteen female and eight male teachers were aged between 25 to 35 years old and had less than 15 years of teaching experience; nine female and seven male teachers were between 35 to 45 years old, and their experience ranged from 16 to 25 years; and lastly, eight female and five male teachers were between 46 to 55 years old, and their experience ranged from 26 to 35 years.

The interview schedule referred to issues such as teachers' perceptions of

Greek]. (Nicosia: University of Cyprus, 2008).

17 OECD, *PISA 2012 Results*, OECD.com (2012), available at http://www.oecd.org/pisa/keyfindings/pisa-2012-results.htm.

18 T. E. Stavrou and M. Koutselini, 'Differentiation of Teaching and Learning: The Teachers' Perspective'. *Universal Journal of Educational Research*, Vol. 4, No. 11 (2016).

19 World Bank, *Teacher Policies in the Republic of Cyprus*. (Poverty Reduction and Economic Management Unit, Southern Europe Program Europe and Central Asian Region, 2014).

20 Valiandes and Neophytou, '"Teachers" professional development for differentiated instruction'.

differentiated teaching, intercultural education, and their instructional approaches within their culturally diverse classrooms and their practices per se. All teachers were interviewed only once and for approximately 40 minutes. The interviews were tape-recorded and fully transcribed so that no verbal information would be lost. To maintain credibility, we adopted a member check measure,[21] thus we asked interviewees to review and revisit the interview transcripts and the themes that emerged from their interview accounts.

From January 2017 to June 2017, the research team carried out three non-participatory observations for a full day per week in 10 of the participant teachers' classrooms. Observations referred to occurrences during teachin, which we considered to be related to differentiated instruction (DI) or intercultural education (IE) practices. We also kept field notes and reflections regarding not only the classroom dynamics and students' behaviour, but also regarding teachers' understandings, characteristics, and teaching styles. In parallel, we analysed the lesson plans for the lessons observed to examine whether DI or IE strategies were acknowledged in lesson design.

In the event, a total of 50 interviews, 30 observations, and 30 lesson plans inserted in a thematic analysis cycle. In order to examine the multiple positions and viewpoints addressed by the interviewees, we carried out an inductive analysis of the data in order to identify the thematic priorities of each interview according to our previously stated research questions. These priorities were compared and contrasted across the different interviews so that common themes could emerge.

The three researchers independently carried out their analyses. In the end, we examined agreement between the three analyses. We ensured inter-rater reliability in our qualitative thematic analysis, meaning that the researchers had agreed upon the emerging themes to a great extent. Then, we read our data closely and we also kept notes about our thought processes. After that, we began examining our data for themes and we tried to locate how these were connected within a theoretical model (Robson, 2002). We continued the process of analysis and we divided the data into thematic categories. Finally, we began looking at our data in order to substantiate the emerging thematic categories with raw data. In trying to establish the trustworthiness of the data, we examined and triangulated our data from multiple angles and different perspectives, continually looking for alternative possibilities and different explanations, trying to develop a richer understanding of them.[22]

21 N. K. Denzin and Y. S. Lincoln, *Sage Handbook of Qualitative Research* (London, SAGE 2005), 2.

22 J. W. Creswell, V. L. Plano Clark, M. L. Gutmann and Hanson, W. E., 'Advanced mixed methods research designs', in A. Tashakkori and C. Teddlie (eds) *Handbook on Mixed Methods in the Behavioral and Social Sciences* (Thousand Oaks, CA: Sage Publications, 2003).

Findings

In presenting our findings, we used Alenuma-Nimoh's (2012) proposal for merging the key elements of Intercultural Education (IE) and Differentiated Instruction (DI). Namely, our coding was based on the following themes that we discuss and substantiate with data:

- Content (DI) – Content integration, Knowledge construction and Prejudice reduction (IE)
- Process element (DI) – Equity pedagogy, and Prejudice reduction (IE)
- Product (DI) – Knowledge construction and Content integration (IE)
- Affect and Learning environment (DI) – Empowering school culture (IE)

Content (DI) – Content Integration, Knowledge Construction and Prejudice Reduction (IE)

What stemmed from our analysis is that teachers appear to use existing textbooks or additional sources in order to make their students feel included. Through the content of their lessons, along with the content used to decorate their classrooms and carry out school celebrations, teachers attempt to represent the various and diverse cultures of their students:

> 'During school celebrations we always make reference to the tradition, the culture and the customs of other countries, in particular the countries of our students' origin.' (T22, female, 5th grade teacher, 11 years of service)

Through their practices, teachers address prejudice reduction, since diversity of content helps students become acceptant to racial, gender and ethnic diversity. However, despite achieving a certain level of content integration and prejudice reduction, their practices are still failing to address the overarching principle of DI, which is ensuring the success for every child.

Arguably, teachers' practices were rather superficial, as they added folkloric content in their teaching, rather than focusing on the ways culture (e.g., worldviews, problem-solving techniques) and thus culturally responsive content may influence students' learning. Classroom observations made by the researchers revealed that, in every case, no substantial changes were made by the teachers to optimise the content of their lesson, nor to pair it with strategies of effective instruction. Therefore, no actual adaptation was made in order to take into consideration the readiness level or the pre-existing knowledge of the students, not only in terms of their cultural background but also in terms of their learning aptitude. Content integration appears to be done mostly in a folkloric manner (music, dance and food) coupled with integration of moral content, instructing students that they 'should' accept diversity. Instructional content appears to be taught in a vacuum, disconnected from its cultural or political context,

and is lacking deliberation about how and why specific information may be included or excluded. Therefore, teachers' practices appear to lack the perspective of knowledge construction process that would empower students to investigate and understand how unspoken norms and conventions effect how knowledge is fabricated.

Process Element (DI) – Equity Pedagogy and Prejudice Reduction (IE)

The participant teachers seemed to be employing various interactive techniques and methods (e.g., collaborative groups, simulations, role-playing, and discovery learning). Nonetheless, they seemed to focused only on ability, while neglecting culture:

> 'Our textbooks have easy, medium-level, and more difficult exercises. […] Children from other countries usually can do the simplest [...] but not always[…] if they can they move on and do more difficult exercises. This is what we also do for children from Cyprus ... we do not discriminate.' (Γ22, female, 5th grade teacher, 11 years of service)

Without considering how culture influences the way people interact in groups, one cannot be certain that students from different cultures will collaborate and benefit equally from mixed-ability/mixed-culture groups. In this sense, the approaches that teachers use, reflect the mentality that 'one size fits all', the very mentality that differentiation of instruction strongly advocates against.

Instead of prejudice reduction, differentiation of process, as applied by the participant teachers in our study, may lead to the development of condescending attitudes and reinforce stereotypes towards immigrant children. Diversity becomes a deficit: skills and attitudes that immigrant children lack in order to fit in and benefit from the 'enhanced' learning process that teachers believe to apply. For example, students may be struggling to participate in a discussion about a picture depicting an 'average' Western-type family, not because they lack abilities, but because their own representations of family may be quite different. Students of different origin may be considered inferior, not because of their intellectual ability but because their cultural background may signify different modes of behaviour, or may derive from different ethical standards or cultural norms.

Product (DI) – Knowledge Construction and Content Integration (IE)

Teachers in our research provided, in many cases, various alternatives to students regarding how to present their work, usually at the final stage of the lesson and almost exclusively in language and social studies lessons. In some cases they used the options given by the textbooks and in other cases they improvised activities on their own:

> 'Of course we give students choices...when they are finished they can draw a picture, make a dialogue…. These activities are mostly used in language and history...you cannot do that in math.' (T5, male, 2nd grade teacher, 6 years of service)

The way differentiation of product was implemented indicated that teachers considered it as a garniture, a noncompulsory extra component, something that was done after 'serious' work was concluded. By limiting differentiation of product only to courses related to language and social studies, teachers enhanced the development of the hidden curriculum, sending tacit messages about the hierarchy of the disciplines[23] and implicitly suggesting that you can 'mess' with Language and Humanities, but not with Math and Science.

Arguably, the participant teachers seemed to neglect knowledge construction process and content integration. Alternatives provided were dictated by content. Therefore, culture or any forms of diversity other than learning styles were not taken into consideration when teachers provided alternatives to students for presenting their learning. Further, silent or non-dominant groups' voices were never brought forward and discussed. Even in cases when empathy was required for the completion of an exercise (i.e., write a dialogue between two historical persons), teachers failed to provide sufficient guidance or options that would help students utilise their cultural backgrounds. Additionally, researchers observed that, in drawing exercises, depictions and guidance provided by the teachers were primarily based on Western types of illustrations that seemed to be more 'child-friendly' rather than promoting alternative artistic representations that would utilise immigrant children's cultural heritage (e.g. Arabic art).

Affect and Learning Environment (DI) – Empowering School Culture (IE)

In almost all their statements, participant teachers emphasised the importance of taking into consideration children's emotions and making them feel included. They often used positive reinforcement in order boost to 'positive emotions' (e.g., happiness, confidence) in trying to enhance students' self-concepts and their motivation to learn. Regarding the learning environment, all teachers in our research decorated their classrooms in a child-friendly way. About empowering school culture and social structure, teachers made many efforts to include children from diverse backgrounds in the classroom councils, either by campaigning for diversity or by tacitly 'suggesting' for whom to vote. In some cases, teachers even applied gender or nationality quota in the classroom elections:

23 L. Neophytou, 'A critical analysis of the hidden curriculum associated with critical thinking' [in Greek], *Epistimes tis Agogis* Vol.. 1 (2015).

> 'We are trying to involve everyone, from all countries, to events, to celebrations and in councils. But when we have children who have another mother tongue, they find difficulties in participating in all these things' (T3, female, 6th Grade teacher, 18 years of service)

Despite teachers' efforts, the involvement of culturally diverse students in classroom councils remained limited. This was mostly due to language issues that, according to teachers, made it extremely difficult for them to understand the discussions that took place during meetings. Yet, even Cypriot children's involvement in the decision-making process was typical and superficial. Topics discussed were on the 'safe side' (e.g., choosing decorations for school or the destination for an excursion from certain given options). Students played the role of the council, without actually being one. Researchers observed that these meetings were always rigidly controlled by teachers who safeguarded the agenda and facilitated 'proper' conduct. Thus, empowering school culture was not achieved. Children did not have any power, control or authority, and consequently they had no mechanism to ensure that their opinions were taken into consideration or mattered in any way.

Conclusion

Our findings suggest that regardless of teachers' hard work to meet the needs of their students and to take into consideration both learning and cultural diversity in their classrooms, their efforts remain at the surface level, failing to succeed neither intercultural competence nor academic success. Researchers observed that teachers' attempts to incorporate methods and techniques from both intercultural education and differentiation of instruction were unconnected and discontinuous. Despite the fact that multiple techniques and methods from both approaches were utilised, these were isolated and fragmented, lacking continuity and focus. Instruction was obviously enriched, yet, the various components appeared to be random, since no learning objectives could be directly related to the methods used. The result was a shuffle of random techniques that indicated, on the one hand, teachers' willingness to differentiate their instruction and to enhance inclusion and intercultural education, and on the other, their unsuccessfulness in achieving learning for all children. Once again, teachers appeared to teach 'to the middle', failing to meet the needs of student diversity, both in terms of culture and readiness.

Teachers should be empowered to bring change in their schools and classrooms.[24] Change can be achieved by building communities where all school actors can develop

24 Neophytou, 'A critical analysis of the hidden curriculum'; Valiandes and Neophytou Teachers' professional development for differentiated instruction in mixed-ability classrooms.

and learn from each other.[25] Inclusive cultures need to be set so schools can promote social equality by empowering all those involved to engage in a sense of a shared purpose, one which emerges through the collaboration of committed individuals.[26] Arguably, teacher professional development is necessary to help teachers respond to these complex roles by implementing culturally sustaining pedagogy in practice through interculturally differentiated teaching.

Teacher professional development should promote their interdisciplinary and intercultural competencies 'by combining all these valuable forms of knowledge, more sustainable practices can be developed and better resolutions to current issues may be achieved'.[27] To this end, we suggest that intercultural professional development should encompass teachers' ethical orientation and efficiency, enabling them to promote not only the academic, but also the social development of their culturally diverse students. Ethical orientation refers to the values, interpersonal attributes, and orientation to diverse people, while efficiency orientation includes the organisational skills and abilities to act in various roles and situations.

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The Case of Ibrahim: The Doctrine of Necessity and the Republic of Cyprus

Polyvios G. Polyviou
Chrysaffinis & Polyviou (Nicosia, 2015), xvi & 234 pp.
ISBN: 978-9963-2006-2-7

The Republic of Cyprus and the Doctrine of Necessity

Edited by Achilles C. Emilianides, Christos Papastylianos, Costas Stratilatis
Sakkoulas Publishers (Athens – Thessaloniki, 2016), vi & 189 pp.
ISBN: 978-960-568-500-3 [in Greek]

The case that introduced the doctrine of necessity in to the Cypriot legal system turned 50 years old recently (see *the Mustafa Ibrahim case,* 1964).[1] The anniversary gave rise to fresh authorship on this subject, an excellent sample of which are the books under review. The distinguished Cypriot lawyer and legal scholar Polyviou delivers us a comprehensive work that serves for getting acquainted with the case, the facts preceding, the decision's reasoning and its conclusions, the current state of the Cypriot law of necessity, as well as framing some of the major constitutional issues raised by the case (dealing mostly with *types and criteria of constitutional change*).

The second oeuvre, consisting of three lengthy contributions[2] by the academics

1 To sketch out a brief summary: Following the inter-communal conflicts of 1963 and the subsequent, withdrawal of Turkish Cypriot officials from functions and bodies of the Republic, the Cypriot legal system ended up at once unable to reproduce itself by, and in accordance with, its own framework and legality (of which the principle of bi-communality was a basic constitutional trait). The Parliament, consisting solely from now of Greek Cypriot members, passed a law that overrode certain provisions of the Constitution related to the bi-communal composition of the judicial bodies and the adoption and promulgation of legislation. The Supreme Court rendered the pivotal decision The Attorney General of the Republic v. Mustafa Ibrahim and others [1964] CLR 195, ruling famously that the aforementioned legislation is not subject to unconstitutionality, due to the 'law of necessity' (fundamental maxim of which, as stated, is that the salvation of the Republic should be the supreme law, see 'salus populi [rei publicae], suprema lex'). Judgement available at: http://www.uniset.ca/other/cs2/1964CLR195.html.

2 Elaborated forms of the papers they presented in a conference, held by the Law Department and the Department of International Relations and European Studies (now the Department of Politics and Governance) of the University of Nicosia, on 3 June 2014 (Conference title: 'The Doctrine of Necessity and the Cyprus Republic. 50 years from the *Ibrahim* case').

Emilianides, Papastylianos and Stratilatis, elaborates on several aspects of the *Ibrahim* case, while getting deeper into the background legal theory questions: What are the fundamentals, if any, of a constitutional polity that is worthy of its name? Does it truly make sense to distinguish *legality* from *legitimacy*? Is the *juridical* (just) a polished version of the *political* – and the *political* possibly a metonymy for the *distinction between enemies and friends*? Do exceptional cases make bad law[3] or maybe do *extremely exceptional* cases make *no law at all*?

Polyviou offers a clear, detailed overview of the material facts, the ruling and the impact of the *Ibrahim* case (up to page 122). Still, the most intriguing part of the book, in our opinion, is the analysis and argumentation sketched out in chapter 8 of the book (pp. 149 ff., under the title 'Revolution, necessity, legal discontinuity'). The chapter draws upon Kelsen's 'legal theory of revolution'[4] to pinpoint similarities and differences between *necessity* and *revolution* as instances of legal rupture. A revolution takes place – from the juridical point of view – when a new legal and political system has been brought about without reference to the old one and its provisions. According to Kelsen, the new ('revolutionary') legal system turns valid when, over and above the rupture incurred, it becomes *effective,* by its implementation on behalf of the officials and its acceptance on behalf of the people.

Polyviou stresses, then, that both 'revolutionary law' and 'necessity law' share the same basic foundation (i.e., that *factual realities override and supercede given legal systems*) and same legitimacy criteria (see *legal effectiveness* and *popular acceptance*). However, they differ substantially in regards to the following: necessity is deemed to be derived from – and justified by – an unwritten or an implicit, yet undoubtedly *legal*, principle. Revolutions mean to declare that a *new legal order begets and claims its own legality,* whereas necessity rather suggests that *legality itself requires and begets a modified order.*

Polyviou builds on the above to reach his main conclusion (stated at the ending of the book, pp. 221-222). When a court decides, as in the *Mustafa Ibrahim* case, that the legal order is to be preserved solely by resorting to the 'law of necessity', it basically reaffirms its own allegiance to legality: 'in effect takes the view (whether one calls it a legal or ultimately

3 There is a saying among lawyers, according to which 'exceptional cases make bad law'. The saying, by itself, does not say a lot about which cases count as exception or how they should relate to law. By coining the phrase bad law, though, it seems to welcome the suggestion that 'exceptional facts' may require a ruling actually not applying but altering the content of the general legal rule(s) applicable. The underlying assumption of such a view resonates with the key-positions of a certain legal theory school of thought, known as 'legal realism'. Legal realists tend to reason, from the (correct) starting-point that the rules and concepts of law are subject to interpretation, to the conclusion that the legal authorities apply them in whatever policies they happen to pursue or favor, an inference not actually self-standing or valid by itself. We shall retouch briefly this issue by the end of the present review. For a comprehensive introduction to the main themes-ideas of legal realism see Michael Freeman, *Lloyd's Introduction to Jurisprudence* [8th ed.], London, Sweet & Maxwell, 2008, 985 ff., 1209.

4 See Hans Kelsen, *Pure Theory of Law*, trans. from German by Max Knight, University of California Press, Berkley and Los Angeles, 1967, chapter V, 193 ff.

policy decision, does not really matter) that it is better to preserve the original Constitution even if deviations from it are to be permitted', instead of 'allowing the matter of legitimacy to be resolved by external forces with no allegiance to the existing political and legal order'. The author firmly shares the view that grave consequences depend on whether necessity is to be considered *lawful* or not; yet by leaving unanswered whether the proper response falls within law or an ultimate policy decision, he ends up redoubling the question. To borrow the expression coined by David Dyzenhaus, the *legal puzzle of necessity* remains: is necessity just *declared* and *justified through law* or is it, instead, *prescribed by law* and moreover *bound by law*?[5] The collective work of Stratilatis, Emilianides and Papastylianos touches extensively, in our opinion, on this.

In his paper, Stratilatis scrutinizes the whole issue through the lens of the juridical-political theory of Carl Schmitt. Schmitt proves to be the evident theoretical reference when touching on such matters, since he contests the very idea of the self-styled 'rule of law', by which the exercise of power is – said to be – delimited and governed. Schmitt insists not only on (a.) that the legal rules are not at all operable under atypical conditions, but furthermore on (b.) that the very distinguishing between the legal *normal* and *exceptional* is itself a matter of political decision.[6]

In regard to his theoretical-methodological choices, Stratilatis distances himself from the *legal positivist* standpoint (which casts out all history references when commenting on law) as much as the *historical positivist* standpoint (which, in turn, works on history apart from all evaluative judgements). Stratilatis discerns the traits of a Schmittian presence back already to the origins of the Cyprus Republic. Following the author, we could read the initial constitutional profile of Cyprus under the light of Schmitt as tantamount to the *repulsion* of antagonistic power politics (i.e., rival nationalisms, guarantor countries aspirations etc.) *via a pseudo-neutral Fundamental Law*, and, at the same time, the *consolidation* of the conflictual structure through its dysfunctional and non-revisable provisions (see pp. 22-42).

Accordingly, the author queries whether *Ibrahim* case-law should be accurately considered as an instance of the *rule of law* or of (Schmittian) *decisionism*. Bringing necessity under judicial control – as in the case, by adjudicating on the urgency and the gravity of the situation, the absence of alternatives, the temporary nature of the emergency measures etc. – seems, after all, to discard the famous saying that 'necessity knows no law'. The decision, as we shall see in more detail below, concluded actually that necessity stood not *as a breach* of the Constitution, but as a *constitutional rule implicit within* it. However,

5 See David Dyzenhaus, 'The puzzle of martial law', *University of Toronto Law Journal,* Vol. 59 (2009), 2-3.

6 To paraphrase the famous Schmittian citation, the sovereign is not only he who decides on the state of exception, but also the one who decides upon its lawfulness, see Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (1922), trans. by G. Schwab (Chicago: University of Chicago Press, 2005), 5.

the author insists on the hidden 'Schmittian moments' (see pp. 78-79) of the case. Leaving aside whether the *formal* Constitution allowed indeed for the above interpretation, from the very fact that this substantially modified the *material* Constitution (providing for the continuity of the Republic on a non-bicommunal basis), the whole case could easily line up with Schmitt: serving as the *sovereign decision for a new condition of normality*. Stratilatis concludes that the only way to get out of the indeterminacy is through the democratic re-appropriation of the sovereign decision, in other words through the *exercise of constitution-making power 'from below', on behalf of the people* (pp. 90-91).

Emilianides, in his paper, elaborates upon a certain line of argumentation stressed in the Ibrahim decision by Judge Triantafyllides, in particular that the 'law of necessity' does not somehow refer to an extra-legal source or a supra-constitutional principle, but actually *is an intrinsic part* of the constitutional corpus. More specifically, it is deduced from the proper interpretative reconstruction of the art. 179 of the Constitution, that declares constitutional supremacy (primacy of the Constitution over ordinary norms). The author suggests the view that the law of necessity was rightfully understood as a methodological precondition for the legal system as a whole; by rendering the Constitution viable, necessity turned out to be the pivotal *norm of norms*. Emilianides then denominates it colorfully as the 'zeroth law', in the sense that all the other – enumerated – articles of the Constitution, apply only insofar as *the zeroth law enables so* (see pp. 103-105).

In such a manner, the author sums up (drawing upon the legal philosophy of H. L. A. Hart), the law of necessity modified the *rule of recognition* of the Republic of Cyprus, serving as a mode of transcending the original Cyprus Constitution (pp. 106-107, 148 ff.).[7] Under the influence of Hartian positivism, the author identifies here the legal content and authority of the law of necessity with the *empirical fact* of its effectiveness. For someone who is skeptical about legal positivism, however, this might be received as somehow cyclical: had it not been understood as a legal norm from the start, necessity could not in any case become effective. It is the former argument of Emilianides, in our opinion, that matters at this point. If the law of necessity proves to be an indirect manifestation of the integrity of law, we could add here that *it ought to be understood as well as embedded in – and subject to – the integrity of law* (the latter being preserved, as is well-known, under the aegis of fundamental principles such as *equality, human rights* etc.). And here, too, we find the appropriate resources of critique, in regards to the probable uses and misuses of the doctrine(s) of necessity.

Papastylianos directly contributes to the above discussion, since the questions mainly raised by his paper are the following: (a) should we legitimately accept that necessity might bear harmfully on political freedoms and individual and social rights? And (b) what are the dimensions that the doctrine of necessity acquires by the fact of the territorial division of the Republic, concerning the *implementation* of rights (and as regards the claims of

7 Emilianides has written in detail on this, see *Beyond the Cyprus Constitution* [in Greek] (Athens: Sakkoulas, 2006).

all right-holders, including members of the Turkish-Cypriot community)? In relation to (a), the author firmly answers that by no means should we take account of necessity as limiting the exercise of rights. Rather the opposite is – or should be – the case; it is the law of necessity that must serve to *implement* protection of rights, at this regard *under the new factual ensemble*. Thus, the author sheds some philosophical light on the Ibrahim case, usually absent from standard commentaries that align – uncritically – with the *salus reipublicae* thesis: As classical thinkers of the Enlightenment would say (the author, here, is referring to John Locke), the state is not an 'end in itself', but rather an *end that serves the common good and the equal rights of all*. Having clarified that, Papastylianos proceeds by dealing with (b).

The author then puts forward a powerful argument, resting on the assumption that in order to address the question of the effective exercise of fundamental rights we need first to reassess their normative content and its actual *ratio obligandi* (see the analysis on pp. 173 ff., 182-189). Accordingly, he elaborates on the distinct rationale behind the *individual rights* on one hand and the *political and the social rights* on the other. Individual rights, the author affirms, serve no other purpose than providing for individual spheres of action immune from state intervention (see private life, expression, property etc.). Applications of the doctrine of necessity should not, therefore, invalidate their specific structure as limits on state's powers. Territorial considerations, in the case, *may bear on the conditions of exercise* of an individual right, *but in no way prescribe its disqualification*. When it comes to asserting property rights, for example, under conditions of effective lack of ability to use immovable property, there is a strong case for an equitable and fair compensation (*validating*, thereby, the right's content *under conditions of necessity* and not the reverse: *denying the right* on *grounds of necessity*).

Things are different however in the case of political and social rights, since their ratio differs. The right to political participation is essentially tied with the state of *being subject to the legislation*, which you rightfully shape, and an actual *member of the community*, of which you claim a democratic share. In a somehow parallel way, claims on social redistribution (i.e. *social rights*) inextricably presuppose the initial contribution 'according to one's abilities' to the *distribuendum* (see *economic-social resources*). As Papastylianos concludes, territorial circumstances may and should serve as a defining factor for conditioning representative and distributive rights. What is essential here – and quite apart the concrete legal applications of the above (which has to do, for instance, with the criteria of entering the electoral roll or the list of beneficiaries of a given allocation) – is to point out that the author wisely departs from the discourse of necessity when it comes to rights. As we understand it, the author raises an argument that treats necessity status no more, no less than the factual context that helps to define/specify the exercise of each constitutional right *in accordance to* – and not *in default of – its general normative content*.

Even if we don't wholly agree in all lines of arguments of the books under review, or in any case endorse the same conclusions, we cannot but acknowledge that all contributions preserve the following critical idea: Despite the famous saying according to which 'necessity

knows no law', there are truly some *fundamental* and *distinctively legal* answers to ask. And this means, at least, that there are some self-styled 'necessity solutions' that are just hardly acceptable.

Contrary to *legal formalism* assumptions, abstract and 'black-letter' legal reasoning may – truly – be unable to decide *in extremis* or on so-called *exceptional circumstances*. That is, however, the case *for all legal cases:* either 'easy' or 'hard', 'typical' or 'atypical'. There remains always the need for what a Kantian would call *reflective judgement*, i.e. to 'find' the appropriate universal for a given particular, through systematic - teleological reconstruction of the existing legal landscape. Equally therefore in contrast to what *legal realists* or *political decisionists* assert or hope for, the impasse of formalism does not legitimize the move to the 'politics of law' or the 'struggles over the political decision'. And if the 'universal sought' is for an 'extreme particular' that has to do with the rescuing of the constitutional order, then the appropriate judgement necessarily draws upon the very presuppositions and rationale of the right itself 'to have a constitution' (*self-disposition of all* and *equal freedom for each*).

Stergios Mitas

Education in a Multicultural Cyprus

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The subject addressed in this volume is like the 'elephant in the room', or better 'the elephant in the divided society of Cyprus'. The role of education in the peace-building process is a subject that the relevant authorities in Cyprus have consciously or unconsciously ignored or has not addressed properly. Although there are seemingly never-ending diplomatic efforts towards reunification, the equivalent political will to invest in education as a tool for building a culture of peace has so far been absent, not only between the two major communities on the island, but among the many minority groups who also live there. While individual researchers and academics have previously published on the subject, this is the first collective effort to approach education in Cyprus from different theoretical approaches and thematic angles, making it an insightful and valuable contribution to the field.

Education in a Multicultural Cyprus is a collection of papers from the conference 'The Role of Education in Multicultural Cyprus', which was held at the University of Nicosia in 2013 and was funded by Friedrich-Ebert-Stiftung. According to the editors, the aim of the book is to deal with education in Cyprus as an institution and to investigate the content and structure of curricula (formal and informal), competing historical narratives, dominant perceptions of the Other, construction of social memory and internalisation of collective trauma storylines that might be reproduced or embedded in the existing educational system. More importantly, some of the authors focus on the cultural implications of these challenges. Although the authors clearly avoid proceeding with policy recommendations, it is clear that the book could have some serious policy implications for education in Cyprus.

The 14 chapters of the book are organised into three sections. The first section deals with international and theoretical perspectives on education in divided societies like Cyprus, Turkey, UK and Northern Ireland. The first chapter, by Matthew Lange, challenges the popular belief that education promotes peace and tolerance. The author reviews several comparative historical analyses and provides evidence that education can promote ethnic violence instead of tolerance and co-existence if led in that direction. Lange focuses on Cyprus as a case study and discusses the impact of education on the creation of ethnic frameworks, emotional prejudice and the mobilisation of resources for nationalistic movements. The author argues that the content of education plays a crucial role in determining whether education will contribute towards peace and

tolerance or violence and intolerance.

Kenan Çayır focuses on the educational system of Turkey and argues that essentialism promotes exclusionary national narratives which lead to social inequalities in multicultural settings and anachronistic readings of history. The author argues that combating essentialism in education is necessary if we want to create an inclusive imaginary community that will allow multiple identities to coexist in a peaceful and sustainable social environment. Çayır discusses the positions of three social groups in Turkey on the debate over de-essentialising education and developing a new inclusive shared identity.

Chapter three, by Tony Gallagher, explores the concept of coexistence and its application in various educational systems in diverse contexts. Gallagher highlights the importance of adjustability when applying the idea of coexistence to a particular educational setting, arguing that there is no fixed formula for pursuing coexistence in education. He brings to the discussion the example of Northern Ireland, where the 'share education' approach has been adopted recently, paving the way for collaborative networks between schools, teachers and students.

In chapter four, Wendy Booth discusses the idea of citizenship currently being disseminated through the educational systems, suggesting that schools incorporate sociological and psychological approaches into their curricula so that students can learn to contextualise differences and appreciate diversity. Sotos Shiakides closes out the first part of the volume with a discussion on international and theoretical perspectives. Shiakides focuses on the development of a 'political' or 'civic' identity in Cyprus, using the Habermasian approach to multicultural coexistence. The author proposes a two-level model where ethno-cultural and civic identities complement each other in the framework of a reunified Cypriot state.

The second part of the book is on the evolution of educational systems in Cyprus. Specifically, it offers a comprehensive analysis of how schools, and particularly history teaching, contributed to the construction of competing national narratives during the colonial years and after Independence. Panayiotis Persianis' well-written chapter opens the second part of the book by questioning how the two separate educational systems in Cyprus have shaped the perspectives of the local communities in relation to national identity. Persianis concentrates mainly on the British period and describes the cultural conditions under which the educational systems of the two communities remained separate, a situation inherited from the Ottoman empire. According to Persianis, the measures taken by the British colonial government in the 1930s proved incapable of restraining the strong national identities of both communities that were then reproduced in the divided educational system of the country. Persianis briefly mentions the post-Independence period and concludes that schooling has the power to create a sense of identity, or, as in the case of Cyprus, to split it in two.

In a similar vein, chapter seven has to do with Turkish Cypriots' efforts to gain control of the educational and religious institutions in Cyprus during the colonial era. Turkish Cypriots used education as an instrument for the infusion of nationalistic ideas and imaginaries. Like Persianis, Nikolaos Stelgias addresses the vital role that the two divided educational systems played in the development of competing national identities and narratives. According to Stelgias, school textbooks and curricula promoted the idea of a separate 'Sunni Muslim Turkish Cypriot identity', leading the Turkish Cypriot community to envision partition as the only solution that would ensure a peaceful settlement of the problem.

Chapter eight is co-authored by Samani and Tarhan and focuses on history education in north Cyprus. They argue that education, and particularly history textbooks, has reproduced an 'ethno-nationalist narrative', based on the premise that Turkish Cypriots are the victims of the Cyprus conflict, that legitimises the existence and perpetuation of division. The authors discuss the relatively recent revision of history textbooks and the effects those narratives have had on public school education over the past five years. This chapter addresses the weaknesses and problems that arose during the revision process and explains what led to the new books being replaced with the old in 2009. It also demonstrates how non-governmental initiatives by groups like the Association of Historical Dialogue and Research (AHDR) can provide an alternative historical narrative.

Chapter nine, by Dilek Latif, offers readers a well-balanced overview of the cultural context in which history is being constructed and re-constructed in both communities. While other chapters touch on the content of history books and various efforts to revise them, Latif gives a much more detailed and nuanced review of that process within both communities. Like the other authors, Latif looks at the role of non-governmental organisations, like AHDR and POST, in peace building and reconciliation.

In the last chapter of this section, Evgenia Partasi writes about the policy and practice of intercultural education as enforced by the Ministry of Education and Culture of the Republic of Cyprus. The author analyses the concept of intercultural education as it appears in important policy documents issued by the Ministry, while taking into consideration the changes that have occurred throughout the years. The author investigates the actual implications of these policies by interviewing teachers.

The last section deals with 'Understanding Coexistence'. While the first two chapters mainly tackle perceptions of cultivating peaceful coexistence and representations of the Other, the final two focus on initiatives taken by civil society towards trust and peace-building. In a particularly well-written chapter, Panayiota Charalambous, Constadina Charalambous and Michalinos Zembylas analyse Greek-Cypriot government educational policies stemming from the Cyprus Problem. The authors provide a short review of the educational policy 'I Don't Forget', which the Ministry directed in the

1980s, and the newer, complimentary policy of 2008-09, which aimed at cultivating the idea of peaceful coexistence with the Turkish Cypriot community. The authors treat the educational policies as 'discourse' and the views of teachers, recorded in the form of an interview, as 'interpretative repertoires'. The teachers were interviewed on their perceptions and stances on peaceful coexistence and their understanding of the relationship between the two educational policies.

In a particularly interesting study, Christiana Karayianni and Irene Photiou provide a discourse analysis of the representation of Turkish Cypriot Roma people who crossed to the south and settled in Limassol in the 1990s. The reader is given an account of the overarching themes that shaped the representation of this community in the newspapers. While the chapter sketches the rather negative attitude taken by the media, the authors underline the positive initiatives taken by the teachers and management of local elementary schools.

Chapter thirteen, by Andri H. Constantinou and Vasiliki Andreou, investigates a relatively understudied subject: the role of theatre as an informal education tool in the divided society of Cyprus. The authors focus on the interaction of Turkish Cypriot actors, directors and theatre clubs with the Greek Cypriot community after the events of 1974 and provide a detailed review of joint performances and events organised before and after the opening of the checkpoints in 2003.

The last chapter, by Maria Hadjipavlou, examines the peace-building activities organised by Winpeace for young participants from Cyprus, Turkey and Greece. This chapter is inspiring for anyone who deals with policy-making in divided societies. The author gives detailed information about the method and structure of the workshops, along with the participants' thoughts and reactions. Hadjipavlou highlights the role of civil society as a leader in social transformation and the need to have these efforts officially supported by the state.

Overall, *Education in a Multicultural Cyprus* is without a doubt a significant contribution to the study of education in Cyprus, arguing persuasively for education as a peace-building tool. Chapters have been selected carefully in order to contribute to the overall theme of the volume, and there is a balance between the topics examined and the historical periods and communities under scrutiny. In edited volumes that focus on a particular society or cultural context, there are inherent weaknesses, such as overlapping or repetition of historical backgrounds or settings. Nonetheless, it is clear to the reader that all 14 chapters belong in the volume and complement each other effectively. This book is the first collective effort to investigate the role of education in the divided society of Cyprus from a multidisciplinary perspective. It certainly sets the stage for further research and discussion of issues that are not fully addressed here. For example, the modern educational system(s) in Cyprus and nationalism are both cultural products of the so-called modern paradigm, and this relationship is

insufficiently explored in the cultural context of Cyprus. This could be the subject of a follow-up conference or a second volume in the series. Despite these gaps, the book is a well-thought-out synthesis of chapters with diverse perspectives and angles that give readers an in-depth conversation on the divisive or reconciliatory role that education could play in divided societies like Cyprus.

Evi Eftychiou

Cyprus in the 1930s: British Colonial Rule and the Roots of the Cyprus Conflict

Alexis Rappas
I.B. Tauris (London, New York, 2014), 254 pp.
ISBN: 978-1-78076-438-2

Alexis Rappas' book on British Colonial rule in Cyprus makes a remarkable contribution to a rather neglected time period of modern Cypriot history, that of the interwar years and more specifically the 1930s. Indeed, most researchers working with the history of Cyprus and the Cyprus issue begin their narration from the 1950s, whereas Alexis Rappas tries to reproduce the 1930s in order to highlight the conditions that led to the outbreak of the Cyprus conflict. And he succeeds by covering various social and political issues that shaped Cypriot society on the eve of the events that led to independence and partition of the island.

The book comprises six chapters. The introductory chapter covers the revolt of October 1931 and its aftermath, the response of the colonial government and the consolidation of an authoritarian rule that lasted for decades. What is really interesting in this chapter is the view of the colonial government in regard to the riots, which leads the reader to the second chapter, entitled 'The Three Pillars of Arcadian Cyprus: Experiments in Social Engineering'. In my opinion, this is the book's most fascinating chapter due to the analysis of the colonial government's policies towards the political elite after the 1931 riots. Rappas analyses the main characteristics of *Palmerocracy* and the attempts to restruct the colonial administration in Cyprus by imposing tighter control on education and agriculture to minimize Greek and Turkish influence on school curricula on the one hand and relieve farmers from their dependence on usurers. Rappas rightly names this policy 'social engineering' and puts emphasis on Palmer's effort to turn Cypriots away from politics and the ambitious yet ill-fated determination to introduce Cypriotness.

The third chapter under the title 'Rituals of Bureaucratic Governance' offers a quite interesting review of the British colonial administration and the approach of the administrators towards Cypriots but also towards the governor himself. This chapter describes eloquently the attitude of the British bureaucrats regarding their tasks and also in relation to Governor Palmer, who was fiercely criticized even by members of the colonial administration (pp. 66-67). In this chapter we also find information about the nature of the colonial administration in relation to the representation of the two communities. This is achieved with a reference to an incident of a dismissal of a police officer serving in the village of Kolossi, in Limassol. The reports of the police officer

himself and the inspectors in the police department describe how bureaucratic issues regarding native personnel were tackled. Finally, emphasis is put on the detachment of the British bureaucrats who would spend years serving the colonial administration without intermingling with the local population.

In the fourth chapter, entitled 'The Constitutionalist Movement and the Avenues of Politicization', the author describes the failed, yet crucial, attempts of members from various political and social classes, comprising both Turkish and Greek Cypriots, to pressure the colonial government to restore constitutional liberties. It is interesting that this mobilized not only the Greek and Turkish Cypriot political elite but also members and sympathizers of the Cypriot left in London. Focus is put on the role of the coffee houses, traditionally a place of socialization and politicization for Cypriots regardless of ethnic or religious background. It was in the coffee houses were various petitions to the government were circulated and signed. What I found quite fascinating is the account of the government's reaction and the attempts to delegitimize the movement in favour of the restoration of the constitution.

The fifth chapter, under the title 'The Orthodox Church and the Displacement of the Public Sphere', deals with the ill-fated policy of the Colonial Administration to curb the Cypriot Church's influence on local politics using as an excuse the 'Archiepiscopal Question'. Rappas offers a fresh approach to an issue that has been thoroughly investigated; he connects the church's role in local politics with the absence of any kind of political representation after 1931 in order to present the church as an 'autonomous public sphere', which justifies the politicization of the Archiepiscopal Question and answers the question why did the colonial administration fail to control and limit the church's influence. The Church of Cyprus survived under the British because of its dual role 'as an institution the church's activity was "public"; but it presided over a matter, the Cypriots' faith, which is successfully presented as private and, thereby to be preserved from state intervention' (p. 150).

Finally, the sixth chapter, entitled 'The Labour Question: Political Stakes in a Battle of Denominations', deals with the labour movement and how it managed to introduce new social jargon, the notions of working class and labour, into everyday language. The colonial administration did not acknowledge the labour movement in Cyprus, but through the role of trade unions, as they are depicted in the miners' strike of 1936 and the Famagusta Cotton Factory strike of 1938 the issue of the workers' rights became an issue that affected both communities and was covered in depth by the press. This success can be witnessed even today in the role of trade unions in both communities. It created a new public sphere that allowed for the workers' rights and needs to be expressed and heard, but at the same time it did not succeed to unite Greek and Turkish Cypriot workers under AKEL, given that the vast majority of Turkish Cypriot workers remained uninvolved.

Alexis Rappas' monograph is a valuable addition to the historiography of Cyprus because, through the analysis of diverse yet interconnected social and political issues of the neglected 1930s, it manages to underline the reasons for the repeated failures of the following decades to make Cyprus a common space for both Greek and Turkish Cypriots. The attempt of the Colonial Government to depoliticize the Cypriot society after the 1931 riots is to blame for this failure. Rappas offers an invaluable approach to the Cypriot 1930s, a decade that, due to the ban on politics imposed by the Colonial Government, gives the impression that 'nothing really happened'.

Yiannis Moutsis

Imperial Control in Cyprus: Education and Political Manipulation in the British Empire

Antigone Heraclidou
I. B. Tauris (London, 2017), xv + 314 pp.
ISBN: 978-1-78453-952-8

Antigone Heraclidou's important study explores the way with which political developments in colonial Cyprus impacted upon the evolution of the education system. This is the first book to explore this dimension of education under the British. Heraclidou charts the British efforts to reform the education system on the island, giving emphasis to the post-1931 period. Such efforts, she argues, aimed primarily at introducing a British atmosphere on the island, thus making the younger Cypriot generations loyal to the British Empire. This in turn would secure Britain's leading position in the Mediterranean and the Near East, especially after the end of the Second World War. The book demonstrates how such endeavors were eventually unsuccessful: The British failed to penetrate Greek Cypriot society as exemplified by the mass participation of the youth in the EOKA revolt in the latter part of the 1950s.

The author initially sets the historical background from the arrival of the British on the island, in 1878, until the onset of the 1931 October revolt. Upon their arrival, the British were met with demands for union with Greece, although those were put forward – at least until 1931 – in a peaceful fashion. The book shows how education eventually became a platform for the supporters of enosis. Simultaneously, financial restraints were also at the heart of educational policy. The Tribute, as well as other heavy taxation, remained for many years a critical problem between the Cypriots and the British. Financial limitations meant that the administration of education was left to local communities and religious authorities; here the role of the institution of the Orthodox Church of Cyprus, which traditionally controlled education (a privilege it had enjoyed under Ottoman rule), was critical. The author explains how during this period, education gradually entered a centralization process; one that the British would fully implement during the 1930s.

Following the quick suppression of the 1931 revolt, the British imposed on the island a repressive policy; in Greek Cypriot historiography, this period is known as Palmerocracy. During this phase education was seriously affected as the colonial government sought to assume greater control over it. The British goal was the eradication of the enosis movement and the subsequent transformation of the island into a loyal Crown Colony. The book discusses the education laws of the 1930s which aimed at ending or at least weakening the links between Cyprus and Greece. Indeed,

with two laws enacted in 1933 and 1935, the British gained complete control over elementary education (including the curriculum and the selection of textbooks) while they also managed to have a degree of supervision over secondary education determined by the provision of financial aid. The author shows how the British met fierce reaction of the Locum Tenens of the Archiepiscopal See, Leontios. Indeed, following the experience of 1931, it was axiomatic in local official British circles that the role of the Orthodox Church in politics should be reduced and this concerned also the institution's involvement in educational matters. By curtailing the influence of the Church, the British believed Philhellenism in Cyprus would die. For Leontios, Church and education were inseparable, especially as the religious institution had always been the guardian of Hellenism and the higher educational authority for Greek Cypriots.

Other British educational reforms which were pursued during the 1930s included, *inter alia*, the introduction and dissemination of the English language, the development of the English School (established in 1901) into a government school and the advancement of rural education. It was Palmer's belief that such reforms would enhance loyalty towards Britain and that a 'British' system of education was a precondition for any return to representative life which was halted after 1931. We learn other plans for reform included talks for the establishment of a university in Cyprus, although in the end such a prospect did not materialize due to financial restrictions. By the end of the decade, amidst critical regional and international developments, Palmerocracy gradually ran out of steam, although reforms in education remained at its heart until its end. By then, the author stresses, this type of administration only increased mistrust and suspicion between the Greeks of Cyprus and the British. Allegations for the de-Hellenization of Cyprus remained at the core of such critique, although – as Heraclidou rightly points out – the British never had any such intentions.

The outbreak of the Second World War, especially Greece's entry in 1940, witnessed the revival of the enosis movement with all its old vigor. Cypriot contribution in the war on the side of the British was remarkable and this resulted in a relaxation of measures adopted during the post-1931 regime. The war further saw the remaking of Cypriot politics, including the founding of new parties, most prominently AKEL. War conditions momentarily halted any government initiatives on education. However, the author shows that the matter was an integral part of the 1943 municipal election campaigns – the first to be held after 1931. Indeed, education was to become a powerful tool the political parties employed during the war and after, especially as the rivalry between the local Left and Right became more intense in the later stages of the 1940s.

Simultaneously, the aftermath of the war brought further challenges for the island, especially as the British reaffirmed their intention not to abandon Cyprus when demands for enosis reached their peak. Precisely because they were determined to hold on tight to the island, the British put forward a Ten Year Development Plan (of which

education formed a crucial part) as well as constitutional proposals in 1946/1947. The book explores how such developments, including the convening of the Consultative Assembly, intertwined with developments in education. Indeed, Heraclidou aptly demonstrates how education is testimony of the extent to which political developments had now infiltrated all aspects of Cypriot life, affecting relations within Greek Cypriots and deepening the gap between themselves and the colonial government. Interestingly, the author also discusses the use of language in schools: the debate over the use of the *demotiki* and the *katharevousa* was in itself a reflection of the heightened polarization with Greek Cypriot political life.

The elevation of Archbishop Makarios in 1950 was a turning point in the history of the island and paved the way for crucial developments of the following years. The new Archbishop reorganized the Orthodox Church and placed special emphasis on education and the role of youth. In 1950 the Educational Council of the Ethnarchy was set up, which organized resistance to the British educational plans. Here, Constantinos Spyridakis, who was prominent in Greek Cypriot educational affairs during the 1950s and beyond, is also explored. In 1951 the First Pancyprian Educational Conference was convened, and, following a proposal put forward by the Archbishop, it was decided that the Church would take over secondary education by sponsoring secondary schools. It was indeed imperative, the author asserts, that the Church should defend its stake in secondary education. In early 1952, Makarios delivered his 'Call to Youth' speech at the Phaneromeni Church in Nicosia, in which he called for the intensification of the enosis struggle, and the Pancyprian National Youth Organization (PEON) was also established, soon to become the nursery of many EOKA fighters. Here, as Heraclidou notes, lies the beginning of the active involvement of schoolchildren in the struggle for enosis. Indeed, for Makarios the involvement of schoolchildren in the national struggle was a key part of his strategy. Schools gradually became the source of reaction against the British. This was especially true for the Pancyprian Gymnasium, which, in the words of Lawrence Durrell, was 'the perfect laboratory in which to study national sentiment […] indeed a Greek island within Cyprus' (pp. 218-219). The book shows how, despite efforts, the British failed to penetrate into secondary education, which became more attached to the Ethnarchy in the dawn of the post-war era. Eventually, Greek gymnasia became a basic source for EOKA recruits.

The author further explores the role schools played in the EOKA revolt and the way with which the island's education system was affected by the 1955-1959 developments. As Heraclidou underlines, the extent of youth participation in the EOKA struggle was testimony of Britain's bankrupt education policy. One is left wondering whether the outcome would have been different had educational reforms taken place as soon as the British had arrived on the island. Images of clashes between British soldiers and pupils throwing stones at them – such as during the Severios Battle in January 1956 – remain

to this day iconic in Greek Cypriot consciousness. Further to processions and strikes, students also played an active role in passive resistance by boycotting any activities which were put forward by the Department of Education. In the end, the Zurich-London Agreements of 1959, which ended colonial rule in Cyprus, dictated that the administration of education would return, after many years, to the communities of the island. Inevitably – being a highly politicized issue – education continued to preoccupy Cypriot society in its post-independence experience up to the present.

In her absorbing analysis, Antigone Heraclidou uses a wide range of primary (including interviews and the Foreign and Commonwealth Office Migrated Archives) and secondary sources. In doing so, the book brings new knowledge regarding the origins of the deadlock in relations between Cypriots and the British during the colonial era. It helps us better understand the development of a sector of Cypriot life that sparks political confrontation even today. All in all, *Imperial Control in Cyprus: Education and Political Manipulation in the British Empire* comes as an indispensible addition to the existing literature of the history of colonial Cyprus and as such it is highly recommended.

Anastasia Yiangou

Call for Papers
The Cyprus Review (2019 issue)

The Cyprus Review invites submissions for a Special Section of Volume 31, 2019 on **A Tribute to the Memory of Prof. Andreas C. Sophocleous**.

Prof. Andreas Sophocleous passed away in July 2018. He was a Professor in Communication and Mass Media at the University of Nicosia, former Dean of the School of Humanities, Social Sciences and Law of the University and former Director of the Mass Media and Communication Institute (IMME). He served as the Director of the Press and Information Office for many years. His research interests mainly revolved around the history of the Cypriot press, the history and geography of Cyprus, media and communications, journalism and Cypriot literature and bibliography.

We invite submissions on any topics pertinent to the research interests of the late Prof. Sophocleous and in particular Cypriot media and communications, as well as Cyprus history and geography for the special section. Any research work submitted should be pertinent to Cyprus.

Interested scholars should submit their papers online by the final submission deadline of 30 April 2019. *The Cyprus Review* is available at http://cyprusreview.org, and authors should consult the journal's guidelines for submission.

In addition to the Special Section, each issue of *The Cyprus Review* will also contain its standard features of Articles, Essays and Book Reviews, as well as a guest edited section. Submissions in the fields of interest of *The Cyprus Review* are always welcome.