13

Cyprus

A Territorially Divided Member State

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I. Introduction

The Republic of Cyprus (hereinafter 'RoC' or 'Republic') became independent on 16 August 1960 and acceded to the European Union (EU) on 1 May 2004 during the 'Big-Bang Enlargement'. During those 44 years, the bi-communal RoC turned into a mono-national state in 1964, experienced a *coup d'état* and a military invasion in 1974 orchestrated by two of its guarantor states – Greece and Turkey respectively – and managed to become an EU Member State in 2004 without resolving the territorial segregation of the two main communities that live on the island.

Because of its turbulent historical trajectory and the constitutional solutions that have been chosen to deal with the political anomalies of the island, the interrelationship between RoC's constitutional system and the EU 'constitutional order of States'[1] is somewhat different than most of the other EU Member States.

The present contribution aims exactly at analysing this interrelationship. It does so by examining the main characteristics of RoC's constitutional system (section II); commenting on the main characteristics of its constitutional culture (section III); presenting the debate concerning its accession (section IV); analysing the constitutional limits to EU integration (section V); examining the constitutional rules on implementing EU law (section VI); and revisiting the relationship between EU law and national law (section VII).

II. Main Characteristics of the RoC's Constitutional System

RoC gained its sovereign independence from the UK by virtue of three international treaties, namely the Treaty of Guarantee, the Treaty of Alliance and the Treaty of Establishment and a Constitution, all of which came into operation on the same day –16 August 1960.[2]

[1] Anthony Arnull et al (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford, Hart Publishing, 2011).

[2] See generally www.kypros.org/Constitution/English/.

The establishment of the independent RoC was seen as a political compromise between the different goals and aspirations of the two ethno-religious communities that live on the island, their motherlands and the former colonial power. In particular, Greece and the Greek Cypriots were fighting for *Enosis* (union with the motherland), the Turkish Cypriots and Turkey were responding by asking for a *Taksim* (partition), and Britain was determined to retain full sovereignty on the island.

So, in order to achieve the balance between those conflicting interests, a complicated power-sharing structure was designed. The Constitution was drawn up explicitly in terms of the two communities.[3] Moreover, all of the principles of a consociational democracy – grand coalition, proportionality, autonomy and veto – were elaborately embodied in the 1960 Constitution.

The Constitution provided for 'an independent and sovereign Republic with a presidential regime, the President being Greek and the Vice-President[4] being Turkish, elected by the Greek and the Turkish communities of Cyprus respectively'.[5] The President and Vice-President exercise executive power.[6] Their common powers are specifically enumerated in Article 47 of the Constitution while the two subsequent Articles provide the exclusive enumeration of their separate, almost identical, powers. According to Article 54 of the Constitution, all the executive powers not expressly reserved to the President and the Vice-President are exercised by the Council of Ministers. The cabinet had to consist of seven Greek ministers designated by the President and three Turkish ministers designated by the Vice-President. More importantly, the 1960 Constitution provided an absolute veto power to both the President and the Vice-President over decisions by the cabinet or the legislature in the fields of foreign affairs, defence and security.[7]

A seven-to-three ratio entailed a deliberate overrepresentation of the Turkish minority rather than strict proportionality, also affecting the composition of the legislature, which was unicameral. The House of Representatives was comprised of 35 Representatives belonging to the Greek community and 15 belonging to the Turkish one.[8] Laws were passed by simple majority, but any amendment to the electoral law, the passing of laws concerning municipalities, and any law imposing taxes or duties requires a separate majority among Greek and Turkish Cypriot Representatives present and voting in accordance with Article 78(2) of the Constitution. Additionally, the amendment of any non-basic constitutional provision[9] required a two-thirds majority of the representatives of each community voting separately.[10] The Constitution also guaranteed a great deal of autonomy for the two ethnic segments by setting up two separately elected communal chambers with exclusive legislative powers over religious, educational, cultural, and personal status matters.[11]

The judicial system was to consist of a Supreme Constitutional Court,[12] a High Court of Justice and lower courts.[13] The Supreme Constitutional Court was comprised of a Greek Cypriot

[3] According to the 1960 census, the Greek Cypriot segment comprised about 78% and the Turkish Cypriot about 18% of the population, the remaining 4% being the minorities of the Maronites, Armenians and Latins.
[4] See generally Pt 3 (Arts 36–60) of the Constitution of the RoC.
[5] Art 1 of the Constitution of the RoC.
[6] Art 46 of the Constitution of the RoC.
[7] Art 50 of the Constitution of the RoC.
[8] See generally Pt 4 (Arts 61–85) of the Constitution of the RoC.
[9] See section V.A. of the present chapter.
[10] Art 182(3) of the Constitution of the RoC.
[11] See generally Pt 5 (Arts 86–111) of the Constitution of the RoC.
[12] See generally Pt 9 (Arts 133–51) of the Constitution of the RoC.
[13] See generally Pt 10 (Arts 152–64) of the Constitution of the RoC.

judge and a Turkish Cypriot judge and was presided over by a neutral judge who was neither a Cypriot citizen nor a citizen of any of the guarantor states. Its jurisdiction ranged from constitutional issues arising from the interpretation of provisions of the Constitution[14] to the settling of conflicts or disputes regarding the extent of authority of legislative and administrative bodies.[15] The High Court of Justice, which consisted of two Greek Cypriot judges, one Turkish Cypriot judge and one foreign presiding judge, was the appellate court of civil and criminal jurisdiction. The composition of lower courts depended on the community of the disputants.[16]

In addition to that, several other constitutional provisions were designed to safeguard the bi-communal nature of the state. For example, Article 173 of the Constitution provided for the establishment of separate municipal councils in the five largest towns of the island.[17] At the same time, while the public service had to be composed in accordance with the aforementioned seven-to-three ratio,[18] a six-to-four ratio was set for the army and the police.[19] All those provisions and similar ones relied on the cooperation of the two communities but did little to encourage it.

Under those circumstances, and given that the cooperation of the two communities was a prerequisite for the smooth functioning of the RoC, it was inevitable that the internal stability of the new state would soon be at stake. Indeed in December 1963, the first, low-scale, inter-communal armed conflict broke out in Nicosia. That led to the break-up and the 'hellenisation' of the, until then, bi-communal RoC in 1964.

Since that moment the Turkish Cypriots have consistently rejected participation in the administration of the common state. Notwithstanding, RoC continued functioning mainly by invoking the 'doctrine of necessity'. This doctrine is considered a constitutional principle, which indirectly forms part of the 1960 Constitution. Its aim is to solve problems that were not foreseen by the drafters and which threaten the existence of the RoC.

The doctrine was spelled out for the first time in the emblematic *Mustafa Ibrahim* judgment of the Supreme Court.[20] In the aftermath of the resignation of Professor Forsthoff, the President of the Supreme Constitutional Court, the House of Representatives enacted the Administration of Justice (Miscellaneous Provisions) Law, 33/1964. According to this law, a newly established Supreme Court would exercise the jurisdictions and powers both of the Supreme Constitutional Court and the High Court 'until such time as the people of Cyprus may determine such matters'.[21] The allegation was that such law, which was merging two Courts into one Supreme Court, was not enacted in accordance with the Constitution.

The Court held that the doctrine of necessity should be considered to be implicit in the provisions of a strict and written constitution, and is, therefore, part of the constitutional order in Cyprus. It allows the country to safeguard its interests whenever the Constitution, due to its rigidity, one-sidedness and narrow ambit, contains no provisions giving satisfactory solutions to extraordinary situations 'of a public necessity of the first magnitude'.[22] Most importantly, the

[14] Art 149 of the Constitution of the RoC.
[15] Art 139 of the Constitution of the RoC.
[16] Art 159 of the Constitution of the RoC.
[17] Diana Markides, *Cyprus 1957–63: From Colonial Conflict to Constitutional Crisis. The Role of the Municipal Issue* (Minneapolis MN, University of Minnesota Press, 2001).
[18] Art 123 of the Constitution of the RoC.
[19] Arts 129–30 of the Constitution of the RoC.
[20] *Attorney General of the Republic v Mustafa Ibrahim* [1964] Cyprus Law Reports [hereinafter CLR] 195.
[21] Ibid, 201 and 225.
[22] Ibid, 234.

Court decided that there are four prerequisites in order to determine whether the said doctrine could be applied in a particular case:

1. There is an imperative and inevitable necessity or exceptional circumstance.
2. There is no other remedy.
3. The measure taken must be proportionate to the necessity.
4. The measure must be of a temporary character limited to the duration of the exceptional circumstances.[23]

The doctrine of necessity, as defined in the *Mustafa Ibrahim* case, has not only provided the necessary legal basis in order for the RoC to deal with the absence of the Turkish Cypriots in the Government and their subsequent substitution with Greek Cypriots,[24] but also has allowed the amendment of basic and non-basic Articles of the Constitution, as we will see in section V of the present chapter.[25]

Most importantly, one has to note that notwithstanding the break-up and the 'hellenisation' of the RoC, on 4 March 1964, the UN Security Council confirmed, albeit impliedly, the RoC's statehood by recognising the legitimacy of the Government of the RoC which was, at the time, comprised only of Greek Cypriots with the unanimous adoption of Resolution 186 (1964).

III. Constitutional Culture

Unsurprisingly, the dramatic political tensions and conflicts that have marked the history of the third largest island of the Mediterranean have also influenced its constitutional culture. In particular, we would like to highlight two important issues.

First, the Constitution, as initially designed in the Cyprus Agreements, is a typical example of a consociational arrangement that treats the two main ethno-religious segments as co-rulers of the island. This bi-communalism is evident in the fact that both the Greek-Cypriot President and the Turkish-Cypriot Vice-President had vetoes, in the strict ethnic ratios for the executive and legislature, and in the composition of the judiciary and the administration. This effort, however, to build, a culture of consensual constitutional politics in a post-conflict era was rather short-lived. After the break-up of the Government in 1964 and definitely after the Turkish invasion in 1974 that consolidated the territorial segregation of the two communities, the administration of RoC has been 'hellenised'. In that sense, since 1964, RoC has been a mono-national state.

More importantly, as we mentioned in the previous section, the fragility of the post-conflict arrangement urged the Constitution-makers to provide for a very rigid amendment procedure of the non-basic constitutional provisions.[26] According to Article 182(3) of the Constitution, any amendment of such provision required a two-thirds majority of the representatives of each community voting separately. However, following the break-up of the Government of the RoC in 1964 and the adoption of the doctrine of necessity, the Cypriot Parliament amended the Constitution in 15 instances without the consent of the Turkish Cypriot representatives, who

[23] Ibid, 265.

[24] For a more detailed account see generally Achilleas Emilianides, 'Accession of the Republic of Cyprus to the EU, the Constitution and the Cypriot Doctrine of Necessity', (2007) *The Cyprus Yearbook of International Relations* 65; Nikolas Kyriakou, 'Report on Cyprus' in G Martinico and O Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Constitutional Comparative Perspective* (Groningen, Europa Law Publishing, 2010) 151.

[25] *Nicolaou v Nicolaou* [1992] 1 CLR 1338.

[26] See section V.A. of the present chapter.

have not participated in RoC's political and constitutional life since the mid 1960s. To the extent that the Parliament has been able to amend the Constitution via the doctrine of necessity in the post-1964 era, it has become a permanent Constitution-maker.

IV. Constitutional Foundations of EU Membership

In 1990, the internationally recognised Government of the RoC presented an application for membership to the European Community in accordance with (then) Article 237 TEEC. This application was not legally based on any specific constitutional provision, given that the Constitution did not explicitly envisage the Republic's membership of the EU.

Interestingly enough, however, the regime in northern Cyprus challenged the RoC's application mainly on the ground that the Cypriot Government could not represent the whole of Cyprus and that the application was contrary to international and constitutional law. In a joint declaration, Turkey and the breakaway state of the Turkish Republic of Northern Cyprus (hereinafter 'TRNC') declared that Cyprus could not join 'international political and economic unions to which Turkey and Greece are not members'.[27]

This led to an interesting legal debate concerning the legality of the Cypriot application.[28] On the one hand, Turkey-hired Professor Mendelson published a legal opinion in June 1997, according to which the future EU accession of Cyprus would be illegal.[29] Professors Crawford, Hafner, and Pellet, commissioned by RoC, rebutted this opinion.[30] The debate concerned, inter alia, the interpretation of Article I(2) of the Treaty of Guarantee. According to it,

> The Republic of Cyprus undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited any activity likely to promote, directly or indirectly, either union with any other State or partition of the island.

The question was whether the aforementioned Article prevents RoC's EU membership as it could amount to an economic and political union with 23 (now 27) other states, and in particular with Greece.[31] Notwithstanding the legal merits of the debate, it suffices to note for the purposes of the current chapter, that the legal objections of Turkey and the internationally unrecognised TRNC did not stop RoC's accession to the EU.

In fact, on 1 May 2004, a week after the Greek Cypriots rejected the UN's 'Plan for The Comprehensive Settlement of the Cyprus Problem', the RoC became an EU Member State. The terms of the Republic's accession are described inter alia in Protocol No 10 on Cyprus of the Act of Accession 2003.[32] According to Article 1(1) of this Protocol, the application of EU law is suspended in northern Cyprus – an area where RoC's internationally recognised Government

[27] Joint Declaration of the Republic of Turkey and the 'Turkish Republic of Northern Cyprus' of 28 December 1995, para 5.

[28] For a comprehensive analysis of the debate see Nikos Skoutaris, *The Cyprus Issue. The Four Freedoms in a Member State under Siege* (Oxford, Hart Publishing, 2011) 32–38.

[29] Maurice Mendelson, *The Application of the 'Republic of Cyprus' to Join the European Union*, Opinion of 6 June 1997 (reprinted in Maurice Mendelson, *Why Cyprus' Entry into the European Union Would be Illegal. Legal Opinion, by Professor M. H. Mendelson QC* (London, Embassy of the Republic of Turkey, 2001) 33).

[30] James Crawford, Gerhard Hafner and Alain Pellet, 'Republic of Cyprus: Eligibility for EU Membership, Opinion of 24 September 1997' (reprinted in A Markides (ed), *Cyprus and European Union Membership. Important Legal Documents* (Nicosia, 2002) 13).

[31] Mendelson, Opinion of 6 June 1997 (n 28) 36.

[32] For a comprehensive analysis of Protocol No 10 see Skoutaris, *Cyprus Issue* (n 28) 44–48.

does not exercise effective control. Such suspension can be lifted if the Council decides so unanimously, on the basis of a proposal from the Commission.[33] Until such withdrawal of the suspension takes place, Article 2 of the Protocol allows the Council to decide unanimously how EU law would apply to the 'Green Line' ie the 'border' between the Government-controlled areas and northern Cyprus. Indeed, a week before RoC became officially an EU Member State, the Council passed the 'Green Line Regulation' which regulates how people and goods can cross this de facto border.[34] More importantly, in the event of a settlement, Article 4 of the Protocol allows the Council of the EU to decide unanimously on the adaptation concerning the Turkish Cypriot community. Indeed, if the April 2004 referendum had approved the new state of affairs envisaged in the Annan Plan, the Council of the European Union, having regard to that Article, would have unanimously adopted the Draft Act of Adaptation of the Terms of Accession of the United Cyprus Republic to the European Union as a Regulation.[35]

V. Constitutional Limits to EU Integration

A. Limits to EU Integration

The Constitution of the RoC does not contain any express limitations to EU integration or to the delegation of competences to international organisations.[36] At the time of its establishment, in 1960, participation in international organisations was associated with the classic form of participation in regional and universal international organisations. From the early years of the Republic's life, it became a full member of the United Nations, the Council of Europe and also acceded to a number of multilateral conventions and treaties. Thus, the keystone characteristic of the Constitution is that the idea of national constitutionalism as a guarantee against the possible concentrations of power from European constitutionalism is absent.[37]

In 2004, at the time of accession to the EU, it was considered that no amendment to the Constitution would be necessary in order to give precedence to the application of EU law, as in the case of Ireland.[38] The change to and challenge for the Cypriot legal system was obvious. Cyprus was entering 'a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals'.[39]

On the basis of the legal understanding that no amendment to the Constitution was necessary, the House of Representatives promulgated Law 35(III)/2003, which essentially ratified the

[33] Protocol No 10, Art 1(2).

[34] Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Art 2 of Protocol No 10 of the Act of Accession 2003 [2004] OJ 206/51. For a comprehensive analysis of the Green Line Regulation regime see Nikos Skoutaris, 'The application of the acquis communautaire in the areas not under the effective control of the Republic of Cyprus: The Green Line Regulation', (2008) 45 *CML Rev* 727.

[35] Appendix D of The UN Plan for a Comprehensive Settlement of the Cyprus Problem.

[36] Constantinos Kombos, 'Report on Cyprus' in J Czuczai et al (eds), *Division of Competences and Regulatory Powers between the EU and the Member States. FIDE XXVII Congress Proceedings Vol. 3* (Budapest, Wolters Kluwer, 2016) 282.

[37] Leonard Besselink et al, *National constitutional avenues for further EU integration* (Brussels, European Parliament, 2014) 207.

[38] Nicos Emiliou, 'Cyprus', in A Kellerman et al (eds), *The impact of EU Accession on the legal orders of new EU Member States and (pre-) candidate countries, Hopes and Fears* (The Hague, TMC Asser Press, 2006) 303, where an interesting comparison of Cyprus and Ireland is made with regards to their constitutional capacity to receive EU law.

[39] ECJ 05.02.1963 26/62 (*Van Gend en Loos/Administratie der Belastingen*) ECLI:EU:C:1963:1.

accession treaty of the 10 new Member States to the EU. The legal foundation of this ratifying law was Article 169 of the Constitution, which regulates the conclusion, ratification and entry into force of international treaties, conventions and agreements. Article 169(3) of the Constitution resolves the monism–dualism distinction in favour of the first:

> Treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto.

It follows from this provision that, as an international convention, the Treaty of Accession prevails over national law in case of conflict between the two.[40] However, Article 179 of the Constitution provided at the time that the Constitution 'shall be the supreme law of the Republic'. Thus, any treaty, convention or agreement was ranked at a hierarchically lower position to the Constitution. A 'black-letter law'-reading provided for a fine and precise hierarchical structure within the domestic legal order, giving precedence to the Constitution, followed by international instruments and then domestic legislation lying at its lower level. Clearly, this hierarchy of norms did not correspond to the doctrine of supremacy of EU law within the national legal systems and was an overt and general limit to EU integration, since it subjected the full application and effectiveness of EU law to the authority of the Constitution itself.

To add to the already complicated legal situation, Article 4 of Law 35(III)/2004, having the side-title 'Direct effect and supremacy' provided as follows: 'The rights and obligations that the Treaty [of accession] imposes, have direct effect in the Republic and prevail over any contrary legislative or regulative provision'.

Article 4 was drafted to ensure the direct effect and supremacy of EU law within the national legal order. However, it was at least paradoxical to provide for the supremacy of EU law 'over any contrary legislative or regulative provision' in the text of a national law. As was explained above, such laws had a hierarchical inferior status to the Constitution and, accordingly, cannot override the Constitution. In essence, Article 4 pursued a legitimate aim with untenable means.

One year after Cyprus's accession to the EU, a judgment of the Supreme Court of Cyprus found that the Framework Decision for the European Arrest Warrant (EAW)[41] did not prevail over the constitutional provision for the extradition of Cypriot citizens. This judgment prompted a constitutional amendment in order to provide for the supremacy of EU law within the domestic legal order.

The doctrine of supremacy, as devised and applied by the Court of Justice of the European Union (CJEU) in cases such as Van Gend and Loos and Costa[42] seemed to provide sufficiently safe ground for the proper reception and application of EU law within the domestic legal order. However, this did not prove to be the case because the Supreme Court of Cyprus indirectly challenged the judicially established hierarchy of norms. In Attorney General v Kostas Konstantinou[43] the legislation transposing the Framework Decision for the EAW was challenged as unconstitutional.

[40] Georghios Pikis, *Constitutionalism – Human Rights – Separation of Powers* (Leiden, Brill, 2006) 44; Emiliou, 'Cyprus' (n 38); Andreas Loizou, 'Cyprus', in R Blackburn and J Polakiewicz (eds), *Fundamental rights in Europe: The ECHR and its Member States. 1950-2000* (Oxford, Oxford University Press, 2001) 220.

[41] 2002/584/JHA, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

[42] ECJ 26/62 (n 39); ECJ 15.07.1964 6/64 (*Costa v E.N.E.L.*) ECLI:EU:C:1964:66.

[43] Supreme Court of Cyprus, 07.11.2005, *Attorney General v Kostas Konstantinou*, Civil Appeal No 294/2005.

The fifth amendment of the Constitution was an inevitable repercussion of this judgment. Law 127/06 amended four of the Constitution's Articles in order to provide expressly for the precedence of EU and EC law in the domestic legal order.[44] This amendment intended to settle in a definite manner the hierarchy of norms in Cyprus, by setting EU and EC law at the top of the hierarchy, followed by the Constitution and then ordinary legislation. Article 1A of the Constitution now reads:

> No provision of the Constitution is deemed to invalidate laws which are promulgated, acts effected or measures taken by the Republic which are rendered necessary due to its obligations as a member state of the European Union, nor does it prevent Regulations, Directives or other acts or binding measures of legislative character promulgated by the European Union or by the European Communities or by their institutions or competent bodies on the basis of the treaties founding the European Communities or the European Union from having legal force in the Republic.

This wording is strikingly similar to the counterpart provision of the Irish Constitution, which served as a blueprint for the amendment of the relevant Cypriot provision.[45] In addition, two further constitutional amendments were introduced: (a) Article 169(4) of the Constitution was inserted, providing 'The Republic may exercise every option and discretionary power provided for by the Treaties establishing the European Communities and the Treaty on the European Union and any treaties amending or substituting them, concluded by the Republic' and (b) Article 179 of the Constitution, formerly providing that the Constitution is the supreme law of the Republic, was changed to: 'Provided the dispositions of Article 1A are abided by, the Constitution is the supreme law of the Republic'.

This set of amendments was considered necessary to unequivocally resolve the issue of supremacy of EU law. The only explicit discussion of constitutional limits to EU integration in the case law of the Supreme Court of Cyprus can be found in the dissenting opinion of Judge Erotokritou on a case concerning the legality of the bail-in measures adopted during the economic crisis in Cyprus. While this dissenting opinion raises interesting issues relating to the constitutional limits to EU integration and the constitutional identity of the RoC, it fails to flesh out in detail the full extent of the reasons for dissent. In addition, the very fact of it being a dissenting opinion accords it with little normative power.

Despite the aforementioned caveats, there is merit in addressing some parts of the dissenting opinion the case *Myrto Christodoulou v Central Bank of Cyprus*.[46] In this opinion, Judge Erotokritou admitted that

> national sovereignty undoubtedly gives way to the supremacy of European law … But it seems that the further erosion of that national sovereignty and the parallel erosion of fundamental rights, often through informal procedures, should at some stage be scrutinized by the CJEU, albeit indirectly through Article 267, as to whether it is compatible with the primary law of the European Union.

He also added that

> in the EU legal system, the supremacy of the rule of law and of the legal protection, which form a fundamental principle of the European Union and which are inextricably intertwined with the

[44] Official Gazette of the Republic of Cyprus, no 4090, 2006. Arts 1, 140, 169 and 179 of the Constitution were amended.

[45] Art 29(10) of the Irish Constitution provides: 'No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State'.

[46] Supreme Court of Cyprus, 07.06.2013, *Myrto Christodoulou v Central Bank of Cyprus, The Governor of the CBC and the Minister of Financial Affairs*, Recourse no 551/2013.

> Republic, cannot be eliminated through the creation of exemptions from judicial administrative control, each time for various reasons national governments are in trouble and take decisions which violate basic human rights that are derived from the legal order of the European Union and generally from the European *acquis communataire*. The legal restrictions imposed by the Constitution on the exercise of state power must be maintained even in critical and difficult conditions such as those that exist today, in order to ensure the supremacy of the rule of law and of the principle of legality.[47]

What is interesting in these excerpts is that Judge Erotokritou puts forward, albeit tacitly, two arguments that fit neatly within the context of the constitutional limits to EU integration. The first is that the transfer of competences may result in the erosion of national sovereignty, which in turn may affect the protection of fundamental rights. Judge Erotokritou is not opposed to the diminution of national sovereignty and the transfer of competences to the EU. He seems to accept that joining the EU has as a necessary corollary this alteration in the character of national sovereignty. He further seems to call for limits to be placed in case fundamental rights are affected by this erosion of sovereignty.

The second argument appears to reach out to the notion of preservation of the constitutional identity. For Judge Erotokritou, the rule of law and legal protection are of paramount importance and, according to his understanding, inextricably linked with the Republic itself. Coupled with the primordial importance accorded to fundamental rights in the same dissenting opinion, one may conclude that these three elements constitute the core trinity of the constitutional identity of the Republic.

B. EU Law and the Constitution: Starting on the Wrong Foot

The issue of supremacy of EU law within Cyprus's legal order arose in the context of a case involving the implementation of the Framework Decision for the EAW. In *Konstantinou* the defence challenged the national legislation transposing the EAW as unconstitutional.

As defined in the text of this Framework Decision, an EAW is

> a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

The transposing legislation was found by the Supreme Court to be incompatible with Article 11(2)(f) of the Constitution. This Article prohibits the arrest or detention of a person to prevent him from unauthorised entry into the territory of the Republic or of an *alien* against whom action is being taken with a view to deportation or extradition. Deportation or extradition was constitutionally permissible only for aliens, and not for citizens of the Republic.

The main issue in *Konstantinou* was the surrender of a person having dual nationality (Cypriot and British) under the terms of the legislation transposing EAW. The Supreme Court considered and acknowledged the CJEU case law on the supremacy of EU law, but based its own judgment on different premises. It found that the case before it was not related to a 'European provision having direct effect'. The EAW was binding upon Cyprus as to the result to be achieved, but it was up to the state's national authorities to choose the form and methods to achieve such result.[48]

[47] The translation of the excerpts is taken from Kombos, 'Report on Cyprus' (n 36) 284 f.

[48] Art 34(2) (b) TEU provides: '(b) [the Council may] adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.'

Choosing to transpose the EAW Framework Decision by means of ordinary legislation was found to be incompatible with Article 11(2)(f) of the Constitution. Thus, the surrender of the Cypriot citizen on the basis of an EAW was not allowed. The Supreme Court could not find an interpretation of national law, which would conform to the requirements of EU law, as the CJEU had already indicated in *Pupino*.[49] In the latter judgment the CJEU stated that: 'It is for the national court to determine whether … a conforming interpretation of national law is possible'.

Konstantinou stands as a missed opportunity for the Supreme Court to determine the relationship between EU and national law in favour of the former.[50] With due respect to the Supreme Court, we consider that its approach to the matter at hand was overly legalistic and suffers from internal inconsistency.[51] The Supreme Court's analysis remained only at the level of identifying the conflict between the transposing law and the Constitution, without providing any convincing reasoning as to how it reached its decision. An option that was available to the Supreme Court was to give precedence of EU law over the conflicting national law, even if this was of constitutional rank. Had this been the case, no amendment of the Constitution would have been necessary and the matter could have been resolved through the Court's interpretation of the relevant provisions. In hindsight, the amendment of the Constitution was not of genuine significance as the same result could have been achieved were the Supreme Court to adopt a different interpretative approach.

Joseph Weiler suggested in one of his early writings that supremacy has a bi-dimensional connotation. On one side there is the CJEU's well-known case law, which has not gone uncontested by Member States and national courts. On the other side, 'its full reception … depends on its incorporation into the constitutional orders of the Member States and its affirmation by their supreme courts'.[52] It is this second dimension that was the source of tension in the case of Cyprus. The Supreme Court's stance was ambivalent. Although it explicitly recognised the supremacy of EU law in general, it did not inquire deeper into the legal significance of the notion in the area of the third pillar, and by consequence, in the case before it. This superficial approach led to the inconsistency mentioned above. The Supreme Court took cognisance of supremacy, but did not make any use of it thereafter. Rather, it found that it was not confronted with an instrument having direct effect. It is evident that the Supreme Court confused the notions of 'supremacy' and 'direct effect'.

The Supreme Court's decision can also be explained by the circumspect reception of the EAW in courts of other EU Member States, such as France, Germany, Greece and Poland. Had the Supreme Court not aligned itself with the stance adopted by these other courts, it could have been the sole court to take the decisive step in advancing the interpretation of third pillar EU law.

It is interesting to note that the Supreme Court recognised that, as a matter of principle, both Community law (as it was at the time) and EU law enjoyed precedence over the

[49] ECJ 16.06.2005 C-105/03 (*Pupino*) ECLI:EU:C:2005:386.

[50] For a critique of the implementation of the EAW in Cyprus see: Elias Stefanou and Antros Kapardis, 'The first two years of fiddling around with the implementation of the European Arrest Warrant (EAW) in Cyprus', in E Guild (ed), *Constitutional challenges to the European arrest warrant* (Nijmegen, Wolf Legal Publishers, 2006) 75.

[51] Kombos is also critical of this judgment, considering that the Court failed to establish and clarify the limits of the relationship of the principle of supremacy of EU law with the national constitution. The same author considers the judgment to be an open-ended invitation to amend the Constitution without defining the limits of would be acceptable. See Constantinos Kombos, *The impact of EU law on Cypriot Public law* (Athens, Sakkoulas Publications, 2015) 80.

[52] Joseph Weiler, 'The Community System: the dual character of Supranationalism', (1981) 1 *Yearbook of European Law* 267, 275 f.

Constitution. This was a far-reaching statement going even beyond the CJEU's case law, which never explicitly acknowledged that acts under the third pillar had indeed precedence over national constitutions.

In any case, as explained in the previous section, this judgment prompted the fifth amendment of the Constitution by which four articles were amended and a new one was introduced. These amendments were all-encompassing, in the sense that they were drafted so as to ensure Cyprus's full integration in the EU's legal architecture and to remove any potential doubts as to the supremacy of EU law. The amendments did not spark a debate on issues relating to Cyprus's constitutional identity and to the preservation of core competences for the state. The exclusive focus was on the technicalities of the amendments and the safeguarding of human rights-related standards (ie, the extradition and surrender of Cypriots to other jurisdictions). But even this last concern on human rights standards was seen through the lens of ensuring an overall and unequivocal reception of EU law in the domestic legal order and establishing, in the clearest terms possible, its supremacy.

C. Limits to EU Integration Outside the EU Legal Order

The recent financial crisis has also tested RoC's constitutional order and in particular its limits to further EU integration.[53] The flexibility that characterises that constitutional order has meant that crisis management measures have been transposed without adopting any constitutional amendments thus far. All crisis management measures have been transposed into the national legal order by means of ordinary legislation. The great majority of the instruments were adopted under Article 169(2) of the Constitution on 'treaties, conventions and international agreements', which requires a simple majority in Parliament.

In particular, the European Financial Stability Facility (hereinafter EFSF) was implemented in Cyprus through Law 13 (III) of 2010 with the title 'The law on the participation of the Republic of Cyprus in the European Financial Stability Facility'. The amendment of Article 136 TFEU was approved by Law 13 (III) of 2012; the 'Six-Pack' was implemented through Law 194 (I) of 2012 on the Medium Term Budgetary Framework and the Fiscal Rules. The Treaty on the European Stability Mechanism (hereinafter ESM) was ratified through Law 14 (III) of 2012. Even the Memorandum of Understanding and the Financial Assistance Facility Agreement through which Cyprus received financial support were ratified through Law 1 (III) of 2013.

The only exception so far has been the Fiscal Compact, which was adopted under Article 169(1) of the Constitution by an Act of the Council of Ministers (governmental decree) on 20 April 2012 without a vote in the Parliament. It was later ratified and published in the Official Journal of the Republic of Cyprus upon the Cypriot Council of Ministers' decision, in accordance with Article 169(3) of the Constitution, in Greek and in English.[54] The ratification was completed by the notification to the Council of the EU on 3 July 2012.

[53] For a comprehensive analysis see Nikos Skoutaris, 'Cyprus' in S Griller and E Lentsch (eds), *EMU Integration and Member States' Constitutions* (Oxford, Hart, 2021) 361.

[54] Official Journal of the Republic of Cyprus 4157/ 29 June 2012.

VI. Constitutional Rules and/or Practice on Implementing EU Law

With the exception of the EAW case, there were no further serious cases challenging the application of EU law in the Cypriot legal order. The Supreme Court recognised in several judgments the primacy of EU law and the obligation for EU regulations and directives to be applied without impediments. This application has been fairly unproblematic. Examples of this jurisprudential line are identified already in the aforementioned *Konstantinou* judgment, where the Court stated:

> We are well aware of the constant and aligned case-law of the Court of Justice of the EU, according to which EU law prevails over the law of the Member States. We appreciate this case-law and with all due respect we consider that it could not have been different, since if Member States did not abide by their obligations, as these arise out of the Treaty, that they themselves had signed, this Treaty would collapse.[55]

More recent instances include *Karkotis*, where the Supreme Court stated that '[t]he principle of supremacy of EU law over national law has already been jurisprudentially recognised (see, *Attorney General v Konstantinou*) and is applied according to the provisions of the Fifth Amendment and the added constitutional provision of Article 1A'.[56]

In *Sigma Radio TV Public Ltd*, the Court dealt with the application of an EU Directive in the national legal order and stated that

> the principle of supremacy of EU law … is expressed in the case of Directives by the obligation of national courts to interpret national legislation in conformity with a Directive that has the same object even in the case where the national law predated the Directive as was the case in *Marleasing SA v La Comercial International de Alimentacion SA* (Case C-106/89) [1990] ECRI – 4135, where such an obligation was unequivocally recognised.[57]

One of the techniques employed for the transposition of secondary legislation, especially directives, is the designation of competent authorities for the implementation of the substantive provisions either in the main text of the transposing law or by promulgating special laws to this effect and/or to provide for sanctions in the event of non-compliance. On this latter point, a typical legal provision will usually provide that 'Whoever infringes article X of regulation Y is liable to a fine of Z amount of euro and/or a sentence of imprisonment that does not exceed N years'.[58]

One illustrative example is the law on the recognition of agricultural products and foodstuffs as traditional specialities guaranteed, L 43(I)/2011, which sought to give effect to some aspects of Regulation (EC) No 1216/2007.[59] In this law, the Minister of Agriculture, Environment and Natural Resources is designated as the competent authority for the implementation of the

[55] Supreme Court, *Konstantinou* (n 43).

[56] Supreme Court of Cyprus, 14.07.2009, *Karkotis manufacturing and trading public limited v Republic*, Recourse no 1187/2007.

[57] Supreme Court of Cyprus, 03.04.2015, *Sigma Radio TV Public Ltd v Cyprus Radiotelevision Authority*, Appeal 56/2010.

[58] Constantinos Lycourgos, 'Cyprus Public Law as affected by accession to the European Union' in C Kombos (ed), *Studies in European Public Law: Thematic, national and Post-National Perspectives*, (Athens, Sakkoulas Publications, 2010) 109.

[59] Regulation (EC) No 1216/2007 of 18 October 2007 laying down detailed rules for the implementation of Council Regulation (EC) No 509/2006 on agricultural products and foodstuffs as traditional specialities guaranteed.

Regulation. In addition, Part X of that law provides for the penal law aspects of the implantation setting out the relevant offences and providing for the penalties and fines. Most importantly, an umbrella law was passed in 2007 in order to address those situations where EU law obliged Member States to ensure through penal and administrative means and penalties the effective application of EU law. The Law on the Application of Community Regulations and Community Decisions, L 78(I)/2007 covers all those situations where no other specific national legislation applies and creates a set of penal and administrative procedures and penalties relating to failure to abide by EU Regulations and Decisions.

There are no specific rules in the Constitution or in primary national legislation that regulate the transposition and implementation of EU law in Cyprus' legal order. The Ministry of Finance issued a guide in which the necessary steps for the legislative drafting and process are described. However, this is merely best practices' guide intended to assist desk officers in the competent Ministries in their day-to-day discharge of their duties.[60] In short, the competent Ministry is tasked with monitoring EU's legislative activity and preparing the draft bills in the areas falling under its competence. The draft bills must undergo a stage of consultation with the public and they must later be submitted to the Law Office of the Republic, accompanied by two documents: (a) an impact assessment report, (b) a table of correspondence between the provisions of EU and national law. The Law Office of the Republic is responsible to check that the draft bill fully and correctly transposes the provisions of EU law. Once the Law Office clears the draft bill, the Ministry submits it to the Council of Ministers and after receiving its approval, to the House of Representatives.

A positive aspect of Cyprus's accession to the EU and the application of EU law was that new bodies, institutions and independent authorities were established pursuant to relevant pieces of EU legislation, thus changing the modus operandi of the Cypriot public administration. The main change relates to the introduction of a decentralised system of overseeing the application of EU law. This system broke away with the centralised oversight entrusted to ministries and governmental departments and introduced in practical terms transparency and multiple checks between stakeholders in the implementation of EU law.

A final and peculiar characteristic of the application of EU law relates to the prevailing political circumstances on the island. While the application of the *acquis communataire* is suspended in the areas which are not under the effective control of the Republic, it is important to note that national laws are not. However, a growing percentage of national law is promulgated in order to implement EU law, mainly directives. This legislation continues to have effect throughout the island per national legislation. To give but one example, the right to free movement accorded to EU citizens is granted in relation to the whole of the island, but the right of residence[61] and the status of third country nationals[62] are applicable solely to the areas where the Republic exercises effective control.

The Cypriot courts have proved extremely hesitant to submit requests for preliminary references to the CJEU.[63] Although the accession took place in 2004, the first reference was

[60] www.reform.gov.cy/en/better-regulation/simplification-of-legislation.

[61] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

[62] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44.

[63] Lycourgos, 'Cyprus Public Law' (n 57) 112. This author concurs with our assessment.

submitted only in 2008. In total, the CJEU's statistics show that the Cypriot courts submitted in total nine such requests in nearly 18 years of EU membership.[64] We consider that the low number of preliminary references is a token of the lack of a judicial dialogue between the Cypriot courts and the CJEU. These statistics may be explained by the lack of familiarity on the part of the Cypriot courts both with the procedural and substantial aspects of EU law and by the additional time that will inevitably be required for the resolution of a case should a case reach the CJEU through a preliminary reference.

VII. Resulting Relationship between EU Law and National Law

The internationalisation of law and the judicialisation of international law, in the broad sense, are factors conducive to the constant transformation and adaptation of the role of national courts. In-depth knowledge of a wide array of sources of law is nowadays a *sine qua non* condition for the enterprise of comprehensive and just adjudication. It is in this 'brave new world' that the Supreme Court of Cyprus is called on to operate and to engage in a continuous judicial discourse with international adjudication bodies.

This chapter has shown that the engagement of the Supreme Court of Cyprus with the fundamentals of EU law had an uneasy start. This Court indirectly challenged the hierarchy of norms within the EU when it adjudicated in *Konstantinou* that the EAW provisions were running counter to a constitutional provision and that, thus, the latter should prevail. The Court's analysis is open to criticism because it conflated the notion of 'direct effect' with that of 'supremacy' of EU law and their respective operation within the Cypriot legal order. In our view, the handful of requests for a preliminary reference made by Cypriot courts to the CJEU is an indicator that allows us to conclude that Cypriot courts still remain hesitant, if not suspicious, towards active interaction with the CJEU. Cypriot courts have been increasingly resorting to and citing the case law of the CJEU. In our opinion, this trend is yet to consolidate to the same level as the extended use of the case law of the European Court of Human Rights (hereinafter ECtHR) made by the same courts.[65] This difference may be explained by the fact that there is a 50-year long interaction between the ECtHR and the domestic courts, whereas there is just a 18-year congruent period for EU law. Nevertheless, since 2004, Cypriot courts are EU courts, which are obliged to apply EU law correctly.

VIII. Conclusion

Cyprus's historical itinerary since the 1960s presents a rare blend of EU, public international, and national law issues. The carefully designed consociational arrangement in the Constitution

[64] Court of Justice of the European Union, 'Annual Report 2020', 233.

[65] Constantinos Kombos and Annie Pantazi, 'Human Rights post Lisbon – Cypriot Report', in J Laffranque (ed), *The protection of fundamental rights post-Lisbon: the interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions: FIDE XXV Congress Proceedings Vol 1* (Tallinn, Tartu University Press, 2012) 302, 327 f: 'the Constitution is modelled on the Convention and that structural connection has been strengthened by the remarkable willingness of the Supreme Court to rely on the jurisprudence of the ECtHR in order to construe properly the constitutional provisions on fundamental rights. However, such an approach is definitely not dynamic in nature in the sense of combing external sources of rights and deriving a common higher denominator, simply because the Supreme Court has not yet shown a willingness to be comparably extrovert, as it has been towards the convention, with the body of EU law'.

proved to be short-lived and failed to accommodate the antagonistic relations between the two communities, while a reverse reading suggests that the two communities lacked faith in these arrangements and sought revision to their exclusive benefit. Either reading points to the direction that consociational arrangements are not in themselves sufficient to resolve historic and political tensions. Instead, they require genuine political commitment by all stakeholders to produce the result for which they were initially drafted. In the first part of this chapter we also attempted to present the evolution of the initial bi-communal arrangements from the 1960 Constitution to the Annan Plan and focused on the issue of Cyprus's accession to the EU. This accession was fiercely embattled by lawyers on both sides and eventually resulted in Cyprus becoming an EU Member State without solving the long-standing problem of division.

Becoming an EU Member State brought Cyprus's domestic legal order within the ambit of a brave new world. At the initial steps of the post-accession period, the supremacy of EU law over the Constitution yielded to the Supreme Court giving precedence to the constitutional provisions and prompted an amendment to the Constitution in order to provide explicitly for the supremacy of EU law. This initial resistance from the Supreme Court was not unusual, taking into account the reaction of senior courts of other EU Member States. However, it has to be pointed out that given the existence of the doctrine of necessity the Cypriot constitutional order has proved quite flexible in absorbing the tensions that EU membership often raises.

The somewhat anomalous constitutional trajectory of the RoC can only be amended within the environment of a new comprehensive settlement of the conflict. However, for the time being, such a prospect seems distant.

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