

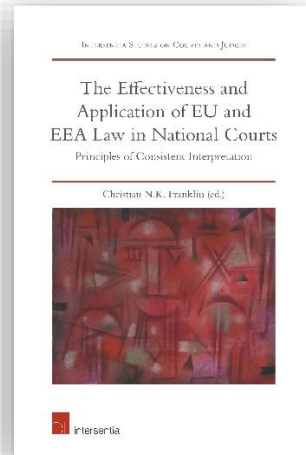


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## **The Effectiveness and Application of EU and EEA Law in National Courts**

**Christian N.K. Franklin (ed.)**

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LAW IN NATIONAL COURTS

Principles of Consistent Interpretation

*Edited by*  
Christian N.K. FRANKLIN



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# TOWARDS AN INTERNALISATION OF EU LAW IN CYPRUS

## The Effectiveness and Application of EU Law by National Courts

Stéphanie LAULHÉ SHAELOU and Katerina KALAITZAKI

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### 1. THE BIRTH OF THE CYPRIOT CONSTITUTIONAL LEGAL ORDER

The Republic of Cyprus is a relatively "young" Republic, since the small island only gained the status of an independent and sovereign state in 1960 after the Zurich and London Agreements. The Agreements, reached between Greece and Turkey, provided a plan for the establishment of an independent state. They comprised three treaties on the basis of which the Constitution of the newly created state was drafted. The three treaties were the Treaty of Guarantee,<sup>1</sup> the

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<sup>1</sup> Treaty of Guarantee between the Republic of Cyprus and Greece, the United Kingdom and Turkey of 16 August 1960.

Treaty of Alliance<sup>2</sup> and the Treaty of Establishment,<sup>3</sup> which collectively provided, *inter alia*, for Greece, Turkey and the UK to guarantee the independence, territorial integrity and security of the Republic, the establishment of Greek and Turkish military contingents in Cyprus, and the preservation of two British sovereign base areas in Cyprus.<sup>4</sup>

The Treaty of Establishment is incorporated into the 1960 Cyprus Constitution. The Treaty of Guarantee and the Treaty of Alliance, which are annexed to the Constitution (Annexes I and II respectively), have been given constitutional force by virtue of Art. 181 of the Constitution. The Cyprus Constitution was described “as the centrepiece of an intricate network of international agreements and undertakings, delicately but inextricably interwoven with one another and with the Constitution itself”.<sup>5</sup> Papasavvas gives five attributes to the 1960 Constitution, namely “imposed, rigid, complex, anti-democratic and dividing”.<sup>6</sup> Following the withdrawal of the Turkish Cypriots from the institutions of the Republic shortly after its birth in 1964, the Cypriot government has continued acting on the basis of the “law of necessity”.<sup>7</sup> It is within this framework that the Republic of Cyprus is an actor in international law.<sup>8</sup>

<sup>2</sup> Treaty of Alliance between the Republic of Cyprus, Greece and Turkey of 16 August 1960.

<sup>3</sup> Treaty of Establishment of the Republic of Cyprus between the UK, Greece, Turkey and Cyprus of 16 August 1960.

<sup>4</sup> For a comprehensive analysis of the constitutional history of Cyprus, including since independence see e.g. A. Emilianides, *Cyprus Constitutional Law* (Wolters Kluwer, 2013), pp. 13–21. For an in-depth legal analysis of the Cypriot legal order in an EU context, see S. Lahlé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (SEUR vol. 3, Martinus Nijhoff, 2010); see also C. Kombos, *The Impact of EU Law on Cypriot Public Law* (Sakkoulas, 2015). For a review of the constitutional structure of Cyprus, see C. Kombos and S. Lahlé Shaelou, “The Cypriot Constitution under the impact of EU law: An asymmetrical formation” in A. Albi (ed.), *National Constitutions in European and Global Governance: Democracy, Rights and the Rule of Law* (TMC Asser Press, 2017). For a detailed legal analysis of the SBAs in Cyprus, see S. Lahlé Shaelou, “The principle of territorial exclusion in the EU: SBAs in Cyprus – a special case of sui generis territories in the EU”, in D. Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Kluwer Law International, 2011).

<sup>5</sup> S.A. De Smith, *The New Commonwealth and its Constitutions* (Stevens, 1964), p. 285.

<sup>6</sup> S.S. Papasavvas, *La Justice Constitutionnelle à Chypre* (Economica, 1998), p. 258, (translated by the authors).

<sup>7</sup> In constitutional law, “necessity” justifies acts done or proceedings taken under legislation passed in violation of a constitutional provision due to the occurrence of “necessitous” circumstances. The doctrine of necessity justifies the enforcement of an otherwise invalid and unlawful law. See e.g. C. Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas, 2015).

<sup>8</sup> S. Lahlé Shaelou, “‘Back to reality’: the implications of EU membership in the constitutional legal order of Cyprus” in A. Lazowski (ed.) *Brave New World: Application of EU Law in the New Member States* (TMC Asser Press, 2010), pp. 471–84.

## 2. NATIONAL COMPLIANCE WITH INTERNATIONAL LAW AND CONSTITUTIONAL RULES ON INTERNATIONAL ORGANISATIONS

Cyprus is a hybrid system stemming both from civil law and common law traditions<sup>9</sup> and arguably drawing both from monism and dualism.<sup>10</sup> Treaties, conventions and international agreements need to be ratified by the relevant authorities of the Republic in accordance with Art. 169 of the Constitution, the latter remaining the supreme law of the Republic under Art. 179(1) of the Constitution.<sup>11</sup> The ratification of treaties in Cyprus,<sup>12</sup> and the transfer of powers to international organisations (IOs), need to be considered within the framework of the status of the Republic of Cyprus in public international law and, as already mentioned, the rigid nature of its Constitution, which influence Cyprus's membership in IOs.<sup>13</sup> The relationship the Republic maintains with IOs must also be examined in the light of the *de facto* division of its territory and in view of the several attempts (including those currently on-going) to find a solution to the Cyprus problem.<sup>14</sup>

The Council of Ministers has the power to conclude any international agreement by virtue of Arts. 50 and 54 of the Constitution. There is a difference between international agreements concluded with a foreign state or an IO falling under the scope of Art. 169(1) of the Constitution and relating to “commercial matters, economic co-operation and *motus vivendi*”, which are merely concluded under a decision of the Council of Ministers, and any other international agreement falling under Art. 169(2) of the Constitution, which requires them to be “negotiated and signed under a decision of the Council of Ministers” but will “only be operative and binding on the Republic when approved by a law

<sup>9</sup> See N. Hatzimihail, “Cyprus as a mixed legal system” (2013) 6(1) *Journal of Civil Law Studies* 37.

<sup>10</sup> For a legal analysis from a monist perspective, see S. Laulhé Shaelou (n. 8), p. 474. For a legal analysis from a dualist perspective, see Emilianides (n. 4).

<sup>11</sup> Cyprus Constitution available in the English language at <[http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/\\$file/CY\\_Constitution.pdf](http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$file/CY_Constitution.pdf)>.

<sup>12</sup> For a legal analysis of the reception of international legal agreements in the Cypriot national legal order, see Laulhé Shaelou, *The EU and Cyprus* (n. 4) 130–40.

<sup>13</sup> It should be noted that almost from the date of its creation up to its accession to the EU (1961–2004), the Republic of Cyprus was a member of the non-aligned movement. Cyprus is also the only EU Member State who is not a member of NATO or of the Partnership for Peace Programme.

<sup>14</sup> For a detailed review of the implications of the *de facto* division of the territory of the Republic of Cyprus on the application of EU law in Cyprus, see Laulhé Shaelou, *The EU and Cyprus* (n. 4).

made by the House of Representatives whereupon it shall be concluded". In accordance with Art. 169(3) of the Constitution, all such agreements 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". This Article of the Constitution, combined with Art. 179, appears to constitute the formal framework of hierarchical incorporation of international law into the Cypriot constitutional legal order.

In this respect, Emilianides argues that the Constitution has adopted a strictly dualist approach in regards to the relationship between national and international law, stating that:

It is only through publication in the Official Gazette that the international law instrument may be invoked before the Cypriot courts and applied in the Cypriot legal order. The international law instrument has superior force over any ordinary domestic legislation, not in the sense of repealing any inconsistent domestic law, but in the sense of having superiority and precedence in its application. International law, once incorporated in the national legal order and published in the Official Gazette, is superior to any other municipal law, irrespective of whether such law is prior or subsequent to the international law instrument; an international law instrument may obviously not be impliedly repealed through the enactment of conflicting subsequent municipal legislation.<sup>15</sup>

Moreover, in the hierarchy of norms, the international law instruments are placed above any other municipal legislation, provided that they also comply with the condition of reciprocity laid down by Art. 169(3). The Supreme Court has ruled, however, that due to the nature of certain international treaties and conventions (i.e. multilateral), the condition of reciprocity does not always apply.<sup>16</sup> International law instruments do not prevail over the Constitution, as the supreme law of the Republic does not fall within the definition of municipal law under Art. 169(3) of the Constitution.

It lies beyond the scope of this chapter to discuss the precise monist/dualist views adopted in Cyprus with respect to the relationship between national and international law (as it could be argued that there is a substantial difference between international agreements concluded under Art. 169(1) and (2), which appears to trigger a different approach to the incorporation of the given international agreement into national law). It would therefore be just to argue that the relationship is predominantly dualist and partly monist, since Art. 169(1) only covers international treaties concerning "commercial matters, economic co-operation and *modus vivendi*", while Art. 169(2) covers all the other matters stemming from international treaties. It remains, however, that

<sup>15</sup> Emilianides (n. 4), pp. 33–34.

<sup>16</sup> *Malachtou v. Armefti and Another* [1987] 1 CLR 207.

respective arguments pointing towards a strictly/predominantly dualist/monist tradition in Cyprus have repercussions on the perception of the principle of supremacy of European Union (EU) law as an (autonomous) source of international law, and consequently on the extent of the duty of harmonious interpretation under EU law, both implicitly underlying the jurisprudence in Cyprus and lying at the core of this chapter. In particular, arguing along strict dualist lines can lead to the conclusion that EU law forms an integral part of and is subject in all instances to the constitutional framework through the triggering of Arts. 169 and 179 of the Constitution.<sup>17</sup> This view on the relationship between EU law and national law, to which the present authors do not entirely subscribe, does not seem to be supported by other scholars in Cyprus either.<sup>18</sup>

The above-mentioned provisions of the constitutional framework of the Republic of Cyprus were already at the centre of legal debates prior to Cyprus joining the EU in 2004.<sup>19</sup> It was recognised fairly early on by the Cypriot courts, before EU accession, that Community law, based on international treaties, forms “a distinct legal system which is capable of creating directly effective rights for those subject to it”, which must be regarded as “independent of national laws” and “superior to them”.<sup>20</sup> To this end, and in preparation for Cyprus’s EU accession, there were voices recommending amending the Constitution to “make space” for EU law supremacy,<sup>21</sup> pointing to the procedure to amend non-basic constitutional provisions such as Arts. 169 and 179, under Art. 182 of the Constitution,<sup>22</sup> despite the division of the island and through the application of

<sup>17</sup> Emilianides (n. 4), p. 34 and 37, where he classifies EU (and EC) law as an “intra-constitutional effect” and that it is the “Constitution itself which provides for the facilitation of [EU] law within the Cypriot legal order and its specific primacy”.

<sup>18</sup> C. Kombos and A. Pantazi Lambrou, “Cyprus” in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon* (Reports of the XXV FIDE Congress Tallinn 2012, vol. 1, Tartu University Press, 2012), pp. 303–54, 309: “the hierarchical rule resulting from Art. 179 does not apply to EU law”; see also C. Lycourgos, ‘Cyprus public law as affected by accession to the EU’ in C. Kombos (ed.), *Studies in European Public Law* (Sakkoulas, 2010), p. 101. For a detailed analysis, see also Laulhé Shaelou (n. 8).

<sup>19</sup> See Kombos and Laulhé Shaelou (n. 4).

<sup>20</sup> *Eracleous v. Municipality of Limassol*, No 5793, judgment of the Supreme Court, 14 December 1993 (translated by the authors); see N. Emiliou in TMC Asser Instituut, *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-)candidate Countries: Hopes and Fears* (TMCA Press, 2006), p. 305; see also F. Hoffmeister, *Legal Aspects of the Cyprus Problem. Annan Plan and EU Accession* (Martinus Nijhoff Publishers, 2006), p. 205.

<sup>21</sup> The example of the Irish Constitution, whereby the principle of Community law supremacy is incorporated into the Constitution, was brought forward in G. Bermann *et al.*, ‘Opinion: Implications of membership in the EU for a constitutional settlement in Cyprus’ of 29 March 2001 in A. Markides (ed.), *Cyprus and EU Membership: Important Legal Documents* (PIO, 2002) para. 44 and was said to provide a good precedent for Cyprus, see Emiliou (n. 20), p. 306.

<sup>22</sup> Under Art. 182, basic Articles of the Constitution cannot be amended, while a two third majority of both Greek Cypriot and Turkish Cypriot votes at the House of Representatives is necessary to amend the rest.

the law of necessity.<sup>23</sup> The express reference to European Community (EC) law supremacy should have been decided by the House of Representatives on the basis of Art. 182(2)–(3) of the Constitution, but the Attorney General’s office issued an opinion confirming that no amendment to the Constitution was necessary prior to ratification of the Treaty of Accession. The House of Representatives therefore ratified the Treaty on the basis of Art. 169 of the Constitution,<sup>24</sup> just like any other international treaty, with the “hope” that if and when subject to judicial review,<sup>25</sup> a situation of “tacit acceptance” of the supremacy of Community law, or at least, of “non-conflict between the two sets of legal norms”, would arise.<sup>26</sup> In other words, it was “hoped that the courts would enable the effective and efficient participation of the Republic in the EU by harmoniously construing the obligations arising from EU membership with national constitutional law”.<sup>27</sup>

Instead, the Supreme Court of Cyprus sent the matter back to the legislature by upholding the supremacy of the Cypriot Constitution on the first occasion provided by the challenge of the constitutionality of the European arrest warrant under Cypriot law,<sup>28</sup> pointing to the need for a formal constitutional amendment.<sup>29</sup> The measure challenged in this case concerned obligations imposed upon Member States to comply with a Framework Decision in criminal justice based on the old Third Pillar (the surrender of one of its nationals to another Member State in response to a European arrest warrant).<sup>30</sup> There were already clear signals at the time that the interpretation of Community law applicable during the judicial review process at national level should also apply to measures falling under the Third Pillar, including the competence of

<sup>23</sup> See A. Markides, “The constitutional impact of Cyprus’ accession to the EU” (speech, 21 May 2001, Nicosia), p. 6 (on file with the authors); see also Emiliou (n. 20), p. 307; *Contra* K. Chrysostomides, “Issues under constitutional and international law in the path of Cyprus towards accession to the EU” (speech, 29–30 June 2001, Nicosia) 5 as quoted in Hoffmeister (n. 20), pp. 205 and 150.

<sup>24</sup> Ratifying law No 35(III)/2003, *Official Gazette* No 3740, 25.07.2003.

<sup>25</sup> The Cypriot courts clarified through their case-law that an international treaty, being inferior to the Constitution, is subject to judicial review to the extent that the constitutional provisions prevail in case of conflict and within the framework of Arts. 169(3) and 179(1) of the Constitution.

<sup>26</sup> Laulhé Shaelou (n. 8), p. 475.

<sup>27</sup> Kombos and Laulhé Shaelou (n. 4), sections 1.2.1–1.2.4.

<sup>28</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

<sup>29</sup> *Attorney General of the Republic of Cyprus v. Costas Constantinou* [2005] 1 CLR 1356, [2007] 3 CMLR 42; see case note by A. Tsadiras (2007) 44 CML Rev 1515. In the present case, the Attorney General of the Republic had requested the delivery of Mr Constantinou to the UK authorities on the basis of a European Arrest Warrant issued against him.

<sup>30</sup> For a recent and comprehensive legal analysis of the case, see Kombos and Laulhé Shaelou (n. 4).

the European Court of Justice (ECJ) to hear such references by virtue of (old) Art. 35 of the Treaty on European Union (TEU).<sup>31</sup> Nevertheless, Cyprus had not at the time submitted to the jurisdiction of the Court regarding acts of the EU institutions in the area of police cooperation in criminal matters. Any attempt at judicial dialogue between the Supreme Court of Cyprus and the ECJ was therefore prevented, on formal grounds at least, to the detriment of the uniform interpretation of EU law (as it stood at the time).<sup>32</sup>

Instead, the main legal issue was dealt with by the Supreme Court within the ambit of the constitutional legal order, despite acknowledging the case-law of the ECJ on the supremacy of EU law and irrespective of the pleas made by the Attorney General to grant the EU law instrument superior force to the Constitution.<sup>33</sup> The Cypriot House of Representatives, like in other Member States, had to enact a law adopting the Framework Decision,<sup>34</sup> which was subject to judicial review. Based on a narrow understanding of judicial dialogue and of the duty of harmonious interpretation (which remained subject to the national court being able to interpret national law in accordance with Framework Decisions), any dispute before the national courts arising from the transposing law was found by the Supreme Court to be unconstitutional, since at that time Art. 11 of the Constitution did not provide for the extradition of Cypriot nationals with a view to the execution of a European Arrest Warrant.<sup>35</sup> The Supreme Court concluded that no provision in the law promulgated by the House of Representatives could be interpreted “in such a way so as to prevail and to be applied as regards the nationals of the Republic”.<sup>36</sup>

<sup>31</sup> “[J]urisdiction [under Art 35 EU] would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the member states”, Case C-105/03, *Pupino*, ECLI:EU:C:2005:386, para. 38.

<sup>32</sup> Laulhé Shaelou (n. 8), pp. 476–78.

<sup>33</sup> See para. 21, *Constantinou*, which reads as follows: “Thus, the main issue concerning the present case that remains to be discussed is the submission put forward by the [AG], namely that the Act which incorporated the [EAW] into the legal system of our country ranks higher than the Constitution and, consequently, it must be applied” (translation from Westlaw UK); see Tsadiras’ review of the Supreme Court’s ruling (2007) 44 CML Rev 1515, 1524–26.

<sup>34</sup> Law 133(1)/2004, *Official Gazette* No 3850, 30.04.2004.

<sup>35</sup> See Laulhé Shaelou (n. 8), p. 476. For a review of similar decisions of constitutional courts in other Member States at the time, see other contributions in Lazowski (n. 8). The review of this case-law illustrated a certain degree of reluctance at the time, including among some new Member States, to accept the supremacy of EC/EU law unconditionally, in particular when fundamental rights of a national nature and/or with a particular meaning in the national system were involved. Nevertheless, the legality of the European Arrest Warrant under EU law was confirmed by the ECJ, rejecting any idea of violation of human rights and of abuse of powers under (old) Art. 34 TEU (see Case C-303/05, *Advocatenoor de Wereld VZW*, ECLI:EU:C:2007:261).

<sup>36</sup> Para. 24, *Constantinou*.

This decision of the Supreme Court forced a formal legislative (re)action in Cyprus which had been deferred so far and led to the creation of positive law. Amendments to the Cyprus Constitution were finally tabled before and passed by the House of Representatives with the clear objective to remove the potential conflict between EC/EU law and the Constitution.<sup>37</sup> Art. 1A was therefore added, to the effect that the supremacy of EU law over the Constitution is *prima facie* established, providing that:

[n]o provision of the Constitution shall be deemed to annul laws enacted, acts done or measures taken by the Republic which become necessary by reason of its obligations as a member state of the European Union, nor does it prevent Regulations, Directives or other acts or binding measures of a legislative character, adopted by the European Union or the European Communities or by their institutions or competent bodies thereof on the basis of the Treaties establishing the European Communities or the Treaty on European Union, from having legal effect in the Republic.<sup>38</sup>

In addition to Art. 11 of the Constitution, which needed to be amended and supplemented for the purpose of the European Arrest Warrant,<sup>39</sup> Arts. 140,<sup>40</sup> 169,<sup>41</sup> and 179<sup>42</sup> of the Constitution were also amended and/or supplemented in order to give *a priori* full effect to the new Art. 1A of the Constitution. The precise impact of Art. 1A nevertheless remained unclear. In particular, while Art. 179(1) was made subject to Art. 1A, it still provided that the Constitution “remains the supreme law of the Republic”.<sup>43</sup> No direct reference to the supremacy of EC/EU law was made in the amendments, thereby avoiding addressing the very difficult question at the time of what legal order prevails over the Constitution, i.e. EC law or EU law. It was contended at the time that it should have been EU law. Cyprus (like Lithuania) would then have been considered at the forefront

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<sup>37</sup> Fifth Amendment to the Constitution Law 127(I)/2006, Official Gazette No 4090, 28.07.2006 available at <[http://www.olc.gov.cy/olc/olc.nsf/all/EC240D2A9413ABBB4225793A00403484/\\$file/The%20Fifth%20Amendment%20of%20the%20Constitution%20Law%20of%202006.pdf?openelement](http://www.olc.gov.cy/olc/olc.nsf/all/EC240D2A9413ABBB4225793A00403484/$file/The%20Fifth%20Amendment%20of%20the%20Constitution%20Law%20of%202006.pdf?openelement)>.

<sup>38</sup> Translated by the authors.

<sup>39</sup> Art. 11(2)(f) was replaced with a new subpara. (f). For a comprehensive and up-to-date review of the various constitutional amendments made in the context of the European Arrest Warrant, see Kombos and Laulhé Shaelou (n. 4).

<sup>40</sup> For a comprehensive and up-to-date legal analysis of the amendments to Art. 140 of the Constitution and their constitutional importance, see Kombos and Laulhé Shaelou (n 4).

<sup>41</sup> A new para. (4) was inserted, to the effect that the Republic of Cyprus commits to act upon all the provisions deriving from EC and EU law, including when they amend national law.

<sup>42</sup> Express reference to Art. 1A was made in para. (1); para. (2) now refers to the obligations imposed on the Republic arising out of EU membership.

<sup>43</sup> It is clear, however, from Art. 4 of Law 35(III)/2003 that the rights and obligations of the Republic arising out of the Treaty of Accession prevail against contrary national rules and regulations.



of European integration by recognising such supremacy even before the ECJ. Should it have been merely EC law, then the conflict between the European arrest warrant and the relevant provisions of the Constitution would have remained.<sup>44</sup> The option was taken at the time to deal with the supremacy issue in a rather indirect or reverse way, by providing that no provision of the Constitution could be an obstacle to Cyprus complying with its obligations as a Member State of the EU. Thus, without expressly providing so, Art. 1A set out the principle of supremacy of EC and EU law,<sup>45</sup> in advance of the forthcoming “depillarisation” of the Union construct,<sup>46</sup> by treating the Community and intergovernmental spheres “uniformly”.<sup>47</sup> The broad scope of Art. 1A appeared justified (or not) also for reasons related to the difficulties associated with amending the Cyprus Constitution and in view of the doctrine of necessity.<sup>48</sup>

The legislative objective of removing the potential conflict between EC/EU law and the Constitution appeared to have been achieved. However, the relationship between EU law and national law is subject to continuous judicial scrutiny. With respect to this aspect, the somewhat burdensome legacy of the *Constantinou* ruling cannot be ignored. In the light of Art. 19(1) TEU and the case-law of the ECJ on the effectiveness of EU law, Cypriot courts, guided by the duty of harmonious interpretation, should normally evaluate on the merits of each case whether national law, including the Constitution as amended, provides an effective remedy, thus allowing for the full and correct implementation, application and enforcement of EU law and rights deriving there from in Cyprus. It appears that in Cyprus, however, the Supreme Court – through its decision in *Constantinou* – has placed EU law supremacy under the authority of the national legal order, as opposed to deriving it from the inherent nature of EU law as promoted by the Court of Justice. Following the 2005 constitutional amendments, the Cypriot legal order had nevertheless appeared potentially well-equipped to receive and accommodate the principle of the supremacy of EU law to its fullest extent. Ten years onwards, however, the nature or the validity of Art. 1A of the Constitution remains untested before the Supreme Court, which continues to focus on the national legal order and national principles equivalent to EU law principles, in a (rather broad and fluctuating) comparative perspective. A brief review of the court structure and legal tradition in Cyprus would assist in encapsulating court practice in Cyprus with respect to the principle of harmonious interpretation and appreciating the methodology of the present contribution.

<sup>44</sup> Laulhé Shaelou (n. 8), p. 479.

<sup>45</sup> C. Lycourgos, “Cyprus public law as affected by accession to the EU” in C. Kombos (ed.), *Studies in European Public Law* (Sakkoulas, 2010), p. 105.

<sup>46</sup> Burgorgue-Larsen describes Art. 1A as a “véritable profession de foi juridique européenne” in ‘Jurisprudence européenne comparée’ [2006] 4 *Revue du Droit Public* 1099, 1121.

<sup>47</sup> See Tsadiras (2007) 44 *CML Rev* 1515, 1527.

<sup>48</sup> On these last two points, see Kombos and Laulhé Shaelou (n. 4), section 1.2.

### 3. COURT STRUCTURE AND LEGAL TRADITION IN CYPRUS

#### 3.1. THE PRINCIPLE OF SEPARATION OF POWERS AND THE ROLE OF THE JUDICIARY

Another important characteristic of the Constitution is the principle of separation of powers as developed mainly in the case-law of the Supreme Court. The Constitution itself does not expressly set out such a principle, but its provisions clearly point to the separation of powers as the basic principle of the polity. Namely, Arts. 46–49 and 54 vest the executive power in the President of the Republic or the Council of Ministers; Art. 61 vests the legislative power in the House of Representatives; and Arts. 133–164 vest the judicial power in the Supreme Court (formerly Supreme Constitutional Court and High Court) and its subordinate courts.

The principle thus inherently set out by the Constitution, although appearing relatively strict, is not an absolute one. As such, the Council of Ministers may undertake preparatory legislative acts by drafting bills before they are introduced to the House of Representatives,<sup>49</sup> while the Minister of Finance can submit the budget.<sup>50</sup> Moreover, ministers are granted the right to make statements to, and to follow, the proceedings of the House of Representatives,<sup>51</sup> and the Council of Ministers is also vested with executive powers to issue subsidiary legislation<sup>52</sup> in certain circumstances.<sup>53</sup> The principle is deemed to have constitutional status: the Supreme Court has persistently ruled that if a law is contrary or inconsistent with the principle of separation of powers, it is rendered unconstitutional.<sup>54</sup> The full independence of the judiciary must also be emphasised. Finally, the principle of the separation of powers must also be interpreted in the light of the doctrine of necessity.<sup>55</sup>

Originally, the Supreme Court has exercised the first instance jurisdiction as a Supreme Constitutional Court. Pursuant to Art. 144 of the Constitution, the Supreme Court has exclusive jurisdiction to decide on the constitutionality of any law of the Republic and to resolve any power struggle between the Executive and the Legislature. Therefore, whenever such a question was raised

<sup>49</sup> Art. 54(f) of the Constitution of Cyprus.

<sup>50</sup> Art. 167 of the Constitution of Cyprus.

<sup>51</sup> Art. 79(2) of the Constitution of Cyprus.

<sup>52</sup> More specifically the Council of Ministers is granted the power to issue administrative regulations or orders in the form of secondary legislation.

<sup>53</sup> Art. 54(g) of the Constitution of Cyprus.

<sup>54</sup> See S. Laulhé Shaelou and K. Kalaitzaki, “Cyprus” in L. Burgorgue-Larsen (ed.), *The EU Charter of Fundamental Rights seized by the national judges/La Charte des Droits Fondamentaux de l’Union Européenne saisie par les juges en Europe* (Pedone, 2016); see also Emilianides (n. 4), pp. 55–57 for a detailed account of the principle.

<sup>55</sup> For a detailed account, see Emilianides (n. 4), pp. 22–24.

before any court, the latter should have reserved the question for the decision of the Supreme Court and stayed further proceedings until its determination. However, the events of 1964 in Cyprus resulted in the introduction of Law 33/64 on the Administration of Justice (Miscellaneous Provisions), adopted by the House of Representatives in the absence of Turkish Cypriot members of Parliament, which created a new Supreme Court and merged the jurisdictions of the constitutionally provided Supreme Constitutional Court and the High Court.<sup>56</sup> As a result, Art. 144 was no longer applicable. Since 1964, any court in the Republic therefore has jurisdiction to hear questions on the constitutionality of laws without having to resort to the procedure provided for in Art. 144 of the Constitution, or having to refer the question to the Supreme (Constitutional) Court.<sup>57</sup> The Supreme Court only has exclusive jurisdiction in relation to the constitutionality of family law matters and also to decide on the constitutionality of laws in connection with which the President of the Republic exercises the right for referral granted to him under the Constitution.<sup>58</sup>

Within the above framework, the Supreme Court exercises its powers in three different jurisdictions. First, the Supreme Court exercises the second instance jurisdiction as a Court of Appeal. Namely, the Supreme Court hears all appeals on decisions of first instance courts, which exercise jurisdiction in civil and criminal matters. As a rule, appeals are heard by three judges. When exercising its appellate jurisdiction the Supreme Court may confirm, differentiate or set aside the contested decision or order the retrial of the case.<sup>59</sup> Second, the Supreme Court exercises the revisional jurisdiction (judicial review) under Art. 146 of the Constitution, over which it, until recently, had exclusive jurisdiction, namely to hear applications in relation to the review of the legality of acts, decisions and omissions of any body, authority or person exercising executive or administrative authority.<sup>60</sup>

A new amendment to the Constitution was introduced in July 2015,<sup>61</sup> which changed the structure of the Supreme Court by establishing Administrative Courts in Cyprus, allegedly in order to help the Supreme Court to alleviate its workload. The amendments transferred the first instance jurisdiction of the Supreme Court under Art. 146 of the Constitution exclusively to the newly established Administrative Court. The Administrative Court started operations in January 2016, and even if the impact of its case-law on the court structure in Cyprus remains to be seen, a few points should be made for the purpose of the present discussion. The Cypriot legislator not only removed the exclusive

<sup>56</sup> Kombos and Pantazi Lambrou, "Cyprus" (n. 18), p. 308.

<sup>57</sup> For a detailed account, see Emilianides (n. 4), pp. 39–44.

<sup>58</sup> See generally Emilianides (n. 4), pp. 119–21.

<sup>59</sup> <[http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLSCourt\\_gr/DMLSCourt\\_gr?OpenDocument](http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLSCourt_gr/DMLSCourt_gr?OpenDocument)>.

<sup>60</sup> See generally Emilianides (n. 4), pp. 197–98.

<sup>61</sup> Eighth Amendment of the Constitution 2015 (130(I)/2015).

competence of the Supreme Court in cases of administrative law at first instance, but also made the Supreme Court a Court of Appeal only on legal grounds.<sup>62</sup> The formation and operation of the new Court is therefore bound to entail significant changes in the award of administrative justice in Cyprus, which, according to the Constitution, was defined as an exclusive competence of the Supreme Constitutional Court. The Administrative Court will also be involved in the internalisation of EU law in Cyprus. Instead of a solution deriving from the separation of the Supreme Court into two courts as provided by the Constitution itself, the adoption of an amending law creating the new Administrative Court was preferred. This will in turn also potentially impact on the legal reasoning of the Supreme Court, which would be expected to gain in substance and depth. Most importantly, however, some doubts can be expressed as to the legitimacy of the Administrative Court itself, in particular concerning the availability of an effective judicial remedy in administrative matters in Cyprus, given that the review of the legality of a controlled act or omission by the administration, which is now to be undertaken by the Administrative Court, has thereby been severed from the review of the substance of the matter which remains under the jurisdiction of the Supreme Court.<sup>63</sup>

Following the withdrawal of the Turkish Cypriot community from the government, the doctrine of necessity has been the cornerstone of the legal order. According to this doctrine, exceptional departures from constitutional provisions can take place under specific terms and requirements, when compliance with such provisions is rendered impossible owing to the withdrawal of the Turkish Cypriot community. Despite this rather extraordinary constitutional setting, the protection of fundamental rights in Cyprus, which lies at the core of a long legal tradition, has remained largely unaffected.

### 3.2. LEGAL TRADITION IN CYPRUS: FOCUS ON THE PROTECTION OF FUNDAMENTAL RIGHTS

With respect to the methodology of this chapter, the focus on the protection of fundamental rights is justified since such protection involves the application of not only constitutional provisions *per se* but also of relevant international and European instruments, as enshrined *inter alia* in the national legal order, thereby triggering *prima facie* the exercise of harmonious interpretation by the courts. As previously indicated, the balancing exercise pertaining to the

<sup>62</sup> Law on the Establishment and Operation of the Administrative Court 2015 (Law 131(I)/2015).

<sup>63</sup> The Administrative Court will however get involved in the substance of the matter in asylum and tax cases, so as to release the Supreme Court's workload in these two areas. It is to be hoped that the list of areas where the Court will be involved in substance will grow in the near future. See Laulhé Shaelou and Kalaitzaki, "Cyprus" (n. 54).

protection of constitutional and/or fundamental rights under national law must initially be considered with respect to the application of the doctrine of necessity.<sup>64</sup> In *Alloupas v. National Bank of Greece*,<sup>65</sup> a majority of the Supreme Court of Cyprus held that constitutional rights may only be restricted on the *express* basis of the Constitution and by applying the “strictest possible” criteria of necessity (i.e. does a state of necessity exist?) and of proportionality (i.e. are such restrictions proportionate to the necessity?).<sup>66</sup> It is worth noting at this stage the constitutional significance of proportionality which, although not a general principle deriving directly from the Constitution,<sup>67</sup> has been granted constitutional status as an “unwritten principle of law” and referred to by the Supreme Court very early on in its jurisprudence as an essential criterion in the application of the doctrine of necessity.<sup>68</sup> The application of the principle of proportionality is therefore dependent on the particular circumstances of each specific case and constitutes the cornerstone of judicial control. If the Supreme Court initially interpreted proportionality broadly, starting with the *Ibrahim* case,<sup>69</sup> this was where the application of the doctrine of necessity did not concern the exercise of legislative powers by the executive, or the restriction of fundamental individual rights.<sup>70</sup> Thus, it appears that the protection of constitutionally safeguarded fundamental rights in Cyprus has remained largely outside of the scope of the doctrine of necessity, leaving ample room for the courts to protect them to the highest possible level, and to balance the protection of such rights with other considerations whenever this was necessary.<sup>71</sup>

Having clarified the relationship between the doctrine of necessity and constitutional and/or fundamental rights and confirmed that such rights can only be restricted on the basis of an express provision of the Constitution, it is

<sup>64</sup> For this section of the Report, see also Kombos and Laulhé Shaelou (n. 4), sections 1.2 and 2.2.

<sup>65</sup> *Alloupas v. National Bank of Greece* (1983) 1 CLR 55.

<sup>66</sup> Emilianides (n. 4), p. 47.

<sup>67</sup> The principle of proportionality is only expressly mentioned in the Constitution in Art. 24 with respect to individual contributions towards the public burdens.

<sup>68</sup> In its landmark ruling *The A.-G. of the Republic v. Mustafa Ibrahim* [1964] CLR 195; see C. Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas, 2015).

<sup>69</sup> Emilianides (n. 4), pp. 42–44.

<sup>70</sup> *Ibid.*, p. 42.

<sup>71</sup> The relationship of the doctrine of necessity with fundamental rights in Cyprus however occasionally comes to the forefront in the case-law of the European Court of Human Rights; see Application No. 49247/08, *Kazali and Others v. Cyprus*, 6 March 2012 for the right to property of Turkish Cypriots and Application No. 69949/01, *Aziz v. Cyprus*, 22 June 2004 for their right to vote. See e.g. N. Kyriakou, “National judges and supranational laws on the effective application of EC law and the ECHR: the case of Cyprus” (EUI, 2010) available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1623560](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623560)>; see also more generally S. Laulhé Shaelou, ‘Market freedoms, EU fundamental rights and public order: views from Cyprus’ (2011) 30(1) *Yearbook of European Law* 298, 326–33.

then necessary to turn to the Constitution itself in order to assess the balancing of these rights, including in the context of EU/European law. It appears that it is the accumulation of several key characteristics of the Cypriot Constitution which gives the essence of constitutional and/or fundamental rights in Cyprus and their protection. First of all, the Constitution contains a detailed and extensive list of constitutionally safeguarded fundamental rights,<sup>72</sup> extending beyond the substantive provisions of the European Convention on Human Rights (ECHR) to a number of social and economic rights<sup>73</sup> (to be exercised “within the framework of public interest and common good”)<sup>74</sup> and also occasionally beyond the scope of the protection afforded by the Convention.<sup>75</sup>

The reader should also be reminded at this stage of the supremacy of the Constitution in the Cypriot legal order, to the effect that the ECHR cannot take precedence over constitutional provisions. As a result, the ECHR has been said to enjoy limited constitutional status in the Cypriot legal order,<sup>76</sup> even if its *prima facie* “weaker” constitutional status appears to be mitigated by the fact that the Convention is *in effect* part of the Constitution.<sup>77</sup> The subordinate constitutional status of the ECHR is also mitigated by the willingness of the Supreme Court of Cyprus to apply the Convention in its case-law, at least when the protection afforded under the Constitution and the ECHR “coincides” (many provisions are identical) or “shares common elements”,<sup>78</sup> perhaps also to the detriment of the direct relevance of EU law and of the EU Charter more specifically.<sup>79</sup> While EU law (all provisions) should take precedence over conflicting constitutional provisions as a result of Art. 1A of the Constitution, the use of EU law (and in

<sup>72</sup> In Part II, under the title “Fundamental Rights and Liberties” (Arts. 6 to 35). See further e.g. C. Tornaritis, *The State Law of the Republic of Cyprus* (Cyprus Research Centre, 1982) (in Greek).

<sup>73</sup> Social and economic rights include *inter alia* the right to decent existence and social security (Art. 9 of the Constitution), the right to work (Art. 25 of the Constitution), the right to enter into a contract (Art. 26 of the Constitution) or the right to strike (Art. 27 of the Constitution).

<sup>74</sup> C. Tornaritis, “The Social and Economic Rights under the Law of the Republic of Cyprus” in *Mélanges Bridel* (Lausanne, 1968) 533–56, available at <<http://www.kypros.org/Documents/Tornaritis/docs/social.html>>.

<sup>75</sup> As acknowledged in judgments of the Supreme Court of Cyprus such as *A-G v. Ibrahim* [1964] CLR 195, 225; *A-G v. Afamis* 1 RSCC 121, 125–26. The right to property as set out in Art. 23 of the Constitution would be such an example. It corresponds to Art. 1 Protocol 1 of the ECHR but is much more detailed and extensive, as this was confirmed again recently by the Supreme Court of Cyprus in *Joined Cases No. 740/2011-587/2012, Maria Koutselini-Ioannidou and Others v. The Republic*, 7 October 2014, in the context of the austerity measures taken in Cyprus to tackle the sovereign debt and financial crisis. See Kombos and Laulhé Shaelou (n. 4), section 2.2.

<sup>76</sup> Emilianides (n. 4), p. 149; see also Kombos and Pantazi Lambrou, “Cyprus” (n. 19), p. 309.

<sup>77</sup> Kombos and Pantazi Lambrou, “Cyprus” (n. 19), p. 309.

<sup>78</sup> N. Kyriakou, *National Judges and Supranational Laws on the Effective Application of EC Law and the ECHR: The Case of Cyprus* (EUI, 2010), p. 4. See also Emilianides (n. 4) 149.

<sup>79</sup> For an up-to-date legal appraisal of the application of the EU Charter in the national legal order, see Laulhé Shaelou and K. Kalaitzaki, “Cyprus” (n. 54).

particular the EU Charter) by the Supreme Court, even by way of interpretation, is far less developed than the (much older) use of the ECHR. This could be explained by looking at the overall practice of the supremacy of EU law by the courts in Cyprus, as instructed by the Supreme Court in the post-*Constantinou* era. As mentioned previously, despite the reference to Art. 1A in Art. 179 of the Constitution, and because the Constitution in Cyprus still provides expressly for its own supremacy, considerations of EU law and the exercise of judicial control arising as a result of the application of EU law appear *prima facie* to be encompassed within the fabric of the Constitution. This may be the subject of some academic debate in Cyprus, but in judicial and/or practical terms the overall approach of the Supreme Court can be described as inconsistent and as ignoring EU law on most occasions (or even the ECHR), to concentrate merely on the protection of fundamental rights in accordance with express constitutional or ordinary legal provisions.<sup>80</sup>

It is also worth noting that the protection of the rule of law has been said to be a “cardinal principle” of the Constitution.<sup>81</sup> This, combined with the supremacy (or rather primacy with the “non-dictatorial” nature) of the Constitution, means that any trial court not only has the power to declare unconstitutional a law which is contrary to the provisions safeguarding individual human rights as set out in the Constitution, but also that constitutionally safeguarded fundamental rights must be interpreted in favour of the individual rather than the state in case of doubt,<sup>82</sup> arguably as an expression of the duty of harmonious interpretation. Finally, it should be noted that the fundamental rights safeguarded under the Constitution are minimum rights. Rights may be further protected or new rights may be established through legislation, in which case these are not protected as constitutional rights but as ordinary rights.<sup>83</sup> This last point may have direct implications on the protection afforded to rights deriving from EU law and their implementation in the national legal order, depending on the judicial construct of the supremacy of EU law in the Cypriot legal order and on the extent of compliance with the duty of harmonious interpretation in this context.<sup>84</sup>

As a general rule, restrictions or limitations to constitutionally safeguarded fundamental rights, can only be contained in express provisions of the Constitution (Part II), by virtue of Art. 33(1) of the Constitution. Such restrictions or limitations may also be contained in legislation within the limits of the Constitution itself,<sup>85</sup> as introduced by the House of Representatives,

<sup>80</sup> See also *Kombos and Laulhé Shaelou* (n. 4), section 2.2.

<sup>81</sup> *Emilianides* (n. 4), p. 53; see also A. Loizou, *The Constitution of Cyprus* (2011) (in Greek).

<sup>82</sup> *Fina (Cyprus) Ltd v. Republic* (1962) 3 RSCC 26; see *Emilianides* (n. 4), p. 146.

<sup>83</sup> *Emilianides* (n. 4), p. 146.

<sup>84</sup> See also *Kombos and Laulhé Shaelou* (n. 4), section 2.2.

<sup>85</sup> See more recently *President of the Republic v. House of Representatives* (2000) 3 CLR 238 (in Greek); see also *President of the Republic v. House of Representatives (No. 2)* (1992) 3 CLR 165 (in Greek).

or “deemed to be part of Cypriot law under Art. 188 of the Constitution”,<sup>86</sup> or deriving from EU law,<sup>87</sup> subject to the general principles of *inter alia* reasonableness and proportionality, encompassing also *a priori* an expression of the duty of harmonious interpretation. Art. 33(2) of the Constitution expressly provides that such restrictions or limitations must be interpreted strictly and cannot be applied “for any purpose other than those for which they have been prescribed”. This provides a strict framework of necessity and/or proportionality to the restriction/limitation to constitutionally safeguarded fundamental rights, potentially leaving little room for the expression of the duty of harmonious interpretation under EU law, unless enshrined in the necessity/proportionality test itself. This provision must be read in conjunction with Art. 35 of the Constitution, which casts a vertical duty on the state and its various branches of government (within the limits of their respective competence) to ensure the efficient application of Part II of the Constitution *vis-à-vis* the beneficiaries of these fundamental rights.<sup>88</sup> In addition to the vertical direct effect of constitutionally safeguarded fundamental rights, including as protected under the ECHR and EU law, the Supreme Court of Cyprus provided in the same case for the horizontal effect of such rights.<sup>89</sup> In the subsequent case of *Yiallourous v. Nicolaou*,<sup>90</sup> the Supreme Court clearly provided for the horizontal direct effect of such provisions, thereby effectively extending the exercise of the right to compensation by persons whose constitutional fundamental rights have been infringed by interference by other private persons.<sup>91</sup> The vertical duty imposed on the State under Art. 35 of the Constitution, as well as the Supreme Court’s finding in *Yiallourous v. Nicolaou*, effectively mean that the principle of harmonious interpretation should be relevant to all types of legal disputes.

In view of all of the above, the protection of constitutionally safeguarded fundamental rights in the Cypriot legal order has always been at the core of the case-law of the Cypriot courts, independently of the supremacy of EU law and of the application of the duty of harmonious interpretation within the meaning of EU law. As such, the protection of such rights, as well as their balancing with other considerations, can be said to amount to a “routine” exercise for Cypriot courts within the fabric of the Constitution, arguably encompassing harmonious interpretation in the necessity/proportionality test, to which EU law merely added one more – albeit fundamental – dimension, thereby increasing in theory

<sup>86</sup> *Police v. Hondrou and Another* (1962) 3 RSCC 82.

<sup>87</sup> See Emilianides (n. 4), p. 146.

<sup>88</sup> *Police v. Georghiadis* [1983] 2 CLR 33, 66; see Emilianides (n. 4), p. 147.

<sup>89</sup> *Ibid.*

<sup>90</sup> [2001] 1 CLR 558 (in Greek).

<sup>91</sup> This ruling was said to be a landmark ruling, progressive even today and participating to the building of the European legal order; see Kombos and Pantazi Lambrou, “Cyprus” (n. 18), p. 337; see also Emilianides (n. 4), pp. 147–48. See also Kombos and Laulhé Shaelou (n. 4), sections 2.1 and 2.2.



the likelihood of fundamental issues arising. Drawing some general trends from this protection and balancing exercise can prove useful, both for the content and the methodology of this contribution,<sup>92</sup> as they outline the courts' overall approach to consistent interpretation. It usually involves a strict (but careful and delicate) construction of the restrictions/limitations to such rights on the basis of Arts. 33 and 35 of the Constitution, and/or in accordance with the case-law of the ECHR (in the case of collision between classic rights).<sup>93</sup> With respect to EU law, there could however appear to be potential areas of conflict, for instance given the attachment to social rights of the Cypriot Constitution,<sup>94</sup> and to free movement and economic rights under EU law. Moreover, in a wider framework, the courts have also tried to safeguard rights under directives through the effective application of the principle of consistent interpretation. An example of this would be the (unanimous) Opinion of the Supreme Court in relation to the latest law amending the basic law on the protection of beaches (Chapter 59 of the laws of Cyprus) and transposing Directive 2006/123/EC on services in the internal market into national law. The President of the Republic, through exercising his right of reference to the Supreme Court under Art. 140 of the Constitution,<sup>95</sup> returned the bill voted by the House of Representatives to the Supreme Court to examine its compatibility with the corresponding EU Directive. The arguments of the House of Representatives based on the general public interest as an exception to the selection process, including under Art. 12(3) of the Directive and Art. 25 of the Constitution, were rejected by the Court, on the basis that the principles of free competition and of impartiality, as set out in EU law and in the Directive more specifically, should prevail.

It is, however, suggested that the overall protection and balancing exercise currently taking place in the Cypriot legal order, whereby the Supreme Court "advances its own perception" in the event that the standard of protection granted under the ECHR is lower, usually in the absence of any meaningful consideration of the case-law of the ECJ, will have to change in the near future, so that EU law considerations are also brought to the core of the exercise.

<sup>92</sup> For a detailed review of the collision between classic rights and/or socio-economic and cultural rights, including within these sub-categories of rights, see Kombos and Pantazi Lambrou, "Cyprus" (n. 18), pp. 338–46.

<sup>93</sup> *Ibid.*, p. 344.

<sup>94</sup> In *Apostolides Georgios & Others v. the Republic of Cyprus through the Ministry of Labour and Social Insurance & Others* (1982) 3 CLR 928, the Supreme Court ruled that social rights are on an equal footing with political rights but that the economic situation and capacity of the country must be taken into account when assessing compliance of a measure with Art. 9 of the Constitution (right to decent existence and social security); see Kombos and Pantazi Lambrou, "Cyprus" (n. 18), pp. 314–15.

<sup>95</sup> Art. 140 of the Constitution was one of the provisions of the Constitution amended in 2006 to reflect the supremacy of EU law, to the effect that the right of reference now expressly includes the review by the Supreme Court of the compatibility of national law with EU law, in the form of the Services Directive in the present instance.

This could perhaps result in a lowering (or at least alteration) of the standard of protection offered to certain rights in the Cypriot Constitution,<sup>96</sup> but such rights should in any case remain remediable through protection afforded under EU law and the principle of harmonious interpretation. In the meantime, and until any conflict arises, with respect to social rights in particular, what could be said is that the test to be satisfied for the protection of social rights “within the framework of public interest and common good” can appear in effect to be even higher than for other constitutionally protected fundamental rights, away from EU law considerations.<sup>97</sup>

With respect to the lower courts, the direct influence of EU law post-EU accession, with respect in particular to the protection of fundamental freedoms and the principle of non-discrimination, is not always clearly visible in their case-law. Issues of concern relate *inter alia* to the right of entry and residence for same-sex partners and/or third-country national spouses of EU citizens, the free movement of workers, social assistance, detention or expulsion orders of EU nationals,<sup>98</sup> including in the context of the recent financial crisis.<sup>99</sup> Issues of a more elevated nature, based on the Constitution, are not usually raised in their EU context. Even when they are raised, they are not really addressed in such cases, as legal actions brought before the courts normally fall within the (narrow) ambit of the judicial control of administrative acts under Art. 146 of the Constitution. These actions constitute administrative recourses, which until very recently fell under the exclusive revisionary jurisdiction of the Supreme Court, strictly limited to the review of the legality of an administrative act, a decision or an omission, and thereby excluding any review of the case on its merits. However, a new Constitutional amendment was introduced in July 2015,<sup>100</sup> which changed the structure of the Supreme Court by establishing Administrative Courts in Cyprus in January 2016, allegedly in order to help the Supreme Court to decongest from the workload and award justice faster. The said Law amended paragraphs 1, 4, 5 and 6 of Art. 146 and added paragraphs 1A, 4(d) and 5A to Art. 146 of the Constitution, in order to transfer the first instance jurisdiction of the Supreme Court under Art. 146, to the newly established Administrative Court, to be exercised exclusively by the latter. The amending Constitutional Law was also a transposing measure for paragraphs 1, 2 and 4 of Art. 46 of

<sup>96</sup> Kombos and Pantazi Lambrou, “Cyprus” (n. 18), p. 345.

<sup>97</sup> This seems to be confirmed by the recent case-law of the Supreme Court of Cyprus related to austerity measures put in place in response to the sovereign debt crisis; see Kombos and Laulhé Shaelou (n. 4), section 2.2.

<sup>98</sup> See in particular N. Trimikliniotis, *Cyprus National Report 2012–2013* (Network on free movement of workers, 2013) available at <[http://works.bepress.com/nicos\\_trimikliniotis/41](http://works.bepress.com/nicos_trimikliniotis/41)> for a review of recent domestic case-law related to these issues, pp. 121–40.

<sup>99</sup> See eg N. Trimikliniotis, “Migration and freedom of movement of workers: EU law, crisis and the Cypriot States of exception” (2013) 2 *Laws* 440.

<sup>100</sup> Law of the Eighth Amendment of the Constitution 2015 (130(I)2015).

Directive 2013/32/EU,<sup>101</sup> paragraph 1 of Art. 26 of Directive 2013/33/EU,<sup>102</sup> as well as paragraph 1 of Art. 27 of Regulation (EU) No. 604/2013.<sup>103</sup>

As a result, the protection and balancing exercise established within the fabric of the Constitution for the protection of constitutionally safeguarded fundamental rights, as based, for example, on the principle of harmonious interpretation, cannot be easily triggered in such administrative nature cases.<sup>104</sup> Some situations concerning, for example, the right of residence of a third-country national spouse of a Cypriot citizen, or the rights of Cypriot workers in Cyprus, have also been considered by the courts as internal situations, thereby giving little role to EU law and to fundamental rights protected as such under EU law, as well as potentially raising issues of reverse discrimination.<sup>105</sup> It has been suggested that the national courts appear “unwilling” to properly check on the immigration authorities, limiting their control to mere administrative grounds arising under Art. 146,<sup>106</sup> technical and procedural in nature and limited to a review of legality.<sup>107</sup> More generally, although this corresponds to a (strict and literal) reading of the Constitution based *inter alia* on the principle of the separation of powers, it could be said that courts appear to hide behind the limitations inherent to the judicial review of administrative acts under the Constitution, and rarely adopt a more holistic or teleological approach to the rights of Cypriot citizens and other EU citizens and their family members under EU law.<sup>108</sup> In a wider framework, it is undeniable that there have been some

<sup>101</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

<sup>102</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96.

<sup>103</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.

<sup>104</sup> Most cases are brought on the basis of Law 7(I)/2007, as amended, which transposes the Citizenship Directive 38/2004 and the Aliens and Immigration Law, Chapter 105 of the laws of Cyprus, as amended by Law 8(I)/2007, and challenge administrative acts, decisions or omissions falling within the ambit of this legal framework.

<sup>105</sup> See Trimikliniotis, *Cyprus National Report 2012–2013* (n. 98); see also N. Trimikliniotis, *Free Movement of Workers in Cyprus and the EU* (PRIO, Fundamental Rights in Cyprus Series 1/2010) 59.

<sup>106</sup> See Trimikliniotis, *Cyprus National Report 2012–2013* (n. 98).

<sup>107</sup> As of July 2015, the Supreme Court is expected to decide asylum cases on merits.

<sup>108</sup> In limited instances, the Supreme Court has proceeded with the annulment of a detention/deportation decision, thereby opening the way for an EU citizen to claim compensation before the courts under Art. 146(6) of the Constitution; see Case No. 1726/2010, *Robert Harvey v. The Republic of Cyprus*, 17 January 2012 (in Greek). Compensation however occurs within the narrow framework of the judicial review of an administrative act, decision or omission under Art. 146, since the annulment of such an act or decision or the ordering of the performance of an omission under Art. 146(4) is a pre-requisite to seek compensation before the District court under Art. 146(6).

gradual adjustments in the protection and balancing of fundamental rights including free movement rights, in the framework of EU law and/or in favour of economic freedoms as arising mainly from directly applicable instruments of EU law and their implementation in Cyprus, thus in a narrow EU law setting encompassing some role, albeit not all its potential role, for the principle of harmonious interpretation.

#### 4. THE DUTY OF HARMONIOUS INTERPRETATION IN CYPRIOT CASE-LAW

The remaining sections of this contribution will be devoted to the principle of harmonious interpretation *per se*, through a focus on specific case-law. The methodology to be followed in this second part of the contribution appears to unfold quite logically from the first part. Court decisions are the focus, given the principle of separation of powers, the strong independence of the judiciary and the tight control it exercises on administrative acts. Such court decisions are easily accessible via online databases (in Greek)<sup>109</sup> but it is not possible to effectively isolate all the decisions involving the principle of harmonious interpretation. The reason for this is that the application of the principle forms part of a long established legal tradition in the country, pre-dating EU accession, and is very often not explicitly referred to in the decisions. Given the wide scope of the principle as set out in the sections above, it would appear more efficient to focus on specific cases from the perspective of the relevance, analysis and/or the application of the principle of harmonious interpretation arising under EU law – whether express or not; successful or not; or correct or not – not only by the Supreme Court, but also by lower courts, as may be applicable. The court decisions set out in the following have been selected primarily as they have been previously the focus of academic literature and arguably give a fair account of the evolution of the principle as applied by the courts in Cyprus from EU accession until today, while at the same time usefully setting out the backbone of the application of EU law in Cyprus. In this respect, the relevance of preliminary references to such case-law is quite relative, since opportunities for judicial dialogue arising under Art. 267 of the Treaty on the Functioning of the European Union (TFEU) used to be limited and are now gradually developing.<sup>110</sup> As such, preliminary references are not

<sup>109</sup> <<http://www.cylaw.org>>. There is no consistent manner to refer to the principle of harmonious interpretation in Cypriot case-law, neither to the duty arising under EU law. The following expressions are usually used in the case-law of the courts: “ενιαία ερμηνεία”, “ομοιόμορφη ερμηνεία” or “καθήκον εξασφάλισης της ομοιόμορφης ερμηνείας”. There has been no explicit attempt to refine the principle in an EU context.

<sup>110</sup> For an up-to-date and detailed account of preliminary references in Cyprus in the first 10 years of Cyprus’s EU membership, C. Lycourgos, *Preliminary reference to the Court of Justice of the European Union – Law and Practice in Cyprus Ten Years After Accession to the EU*

always representative of the overall application of EU law in Cyprus, including of the principle of harmonious interpretation itself.<sup>111</sup> Due to the non-systematic – yet increasing – use of the preliminary reference mechanism,<sup>112</sup> it is believed that the focused review of the use/compliance with the principle of harmonious interpretation by the Cypriot courts in its EU context may actually offer an adequate alternative and a more comprehensive overview of the application of EU law in Cyprus.

The courts in Cyprus had long recognised the principle of harmonious interpretation of national law in the light of international treaty provisions, at least as far as the treaties concerned show an intention of promoting the “values and the protection of human rights”.<sup>113</sup> As explained in the sections above, EU membership does not seem to have changed this vision much, even if the principle came again to the forefront of the national court’s jurisprudence upon EU accession, explicitly so in the field of immigration, and continues to be an important companion of the modern jurisprudence of the courts in Cyprus, including in the practice of preliminary references and in the application of the principle of proportionality.

#### 4.1. CYPRUS’S EU ACCESSION: THE PRINCIPLE OF HARMONIOUS INTERPRETATION AS A “SUBSTITUTE” FOR PRELIMINARY REFERENCES

In *Nebojsa Micovic*, Judge Nicolaides ruled on the basis of the case-law of the Court of Justice<sup>114</sup> that a directive for which the deadline for implementation

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(March 2014, unpublished study) (on file with the authors); see also C. Lycourgos, ‘Building Intra-Judicial Dialogue: the relationship between the ECJ and Cypriot National Courts’ (2016) 41 *EL Rev* 623–37.

<sup>111</sup> Only a minority of preliminary references can be said to have involved directly the application of the principle of harmonious interpretation so far. On the other hand, there are many instances whereby a national court may have used the principle of harmonious interpretation to reject a request for a preliminary reference (see below).

<sup>112</sup> According to the Annual Report of the Court of Justice of the European Union, by the end of 2014, Cyprus had submitted *seven* references for preliminary ruling. The first two were submitted in 2009. In 2013 three more references were submitted and another two in 2014; see Court of Justice of the European Union Annual Report 2014 (Luxembourg, 2015) 80. Out of the seven references for preliminary ruling submitted, four were submitted by the Supreme Court of Cyprus and three by other courts or tribunals. The number of references for preliminary ruling submitted by the Cypriot courts is one of the lowest in the EU (along with Malta). Despite the low number of preliminary references to the ECJ, there is nevertheless a growing number of cases, either before the Supreme Court or lower courts, where the possibility of a preliminary reference is invoked, usually following the request of one of the parties, but all too often not submitted to the ECJ by the national court, usually acting without sufficient justification for doing so. See also Kombos and Laulhé Shaelou (n. 4).

<sup>113</sup> *Shipowners Union v. The Registrar of Trademarks* (1988) 3 CLR 457.

<sup>114</sup> Specifically see: Judgment of 10 April 1984, Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153; Judgment of 13 November 1995, Case C-106/89, *Marleasing v. La Comercial Internacional de Alimentación*, ECLI:EU:C:1990:395.

into national law had not yet passed was nevertheless capable of indirect effect in the national legal order.<sup>115</sup> As a result, the Director of the Migration Services in Cyprus was ordered to interpret the relevant provisions of national law with respect to the right of permanent residence in Cyprus of a citizen of the Former Republic of Yugoslavia “in the spirit” and “in accordance with the objective” of Directive 2003/109/EC.<sup>116</sup> In the joined cases of *Vera Joudine*,<sup>117</sup> the Supreme Court reiterated the approach of Judge Nicolaides to the principle of indirect effect and harmonious interpretation, by recalling the obligation of the Member States to take all measures necessary to achieve the result prescribed by the Directive during the period for transposition into national law.<sup>118</sup> Yet the Court found it “irrelevant” in these two cases, as the applicants did not to meet the “necessary criteria” to benefit indirectly from the provisions of Directive 2003/109/EC in national law. The applicants did not meet the criteria under Art. 4(1) of the Directive concerning legal and continuous residence within the territory of the Member State for five years immediately prior to the submission of the relevant application. The time calculation in this case started on 31 August 2005, when the disputed decrees were issued. It is important to note that at the time of the rulings, the deadline for the implementation of the Directive into national law had passed without the Republic of Cyprus taking appropriate measures to ensure its full implementation into Cypriot law.<sup>119</sup> However, the disputed administrative decisions of the Migration Department had been taken before the expiry of the implementation deadline. The parties were therefore not able to rely on direct effect of the Directive, or on a potential failure of the Republic of Cyprus to implement the said instrument of (then) Community law into national law.

In the *Motilla* case,<sup>120</sup> yet another decision of the Migration Department rejecting the acquisition of the long-term resident status for a third-country national was challenged before the Supreme Court of Cyprus, this time following the expiry of the implementation deadline of Directive 2003/109/EC into national law.<sup>121</sup> The Interior Minister’s decision was based on

<sup>115</sup> Supreme Court, Administrative Case No. 1012/2005, *Nebojsa Micovic v. the Republic* [2005] 4 CLR 890.

<sup>116</sup> Of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44.

<sup>117</sup> Supreme Court, Administrative Case No. 1632-3/2005, *Vera Joudine v. the Republic* [2006] 4 CLR 430.

<sup>118</sup> Supreme Court, Administrative Appeal No. 55/06, *Vera Joudine v. the Republic* [2006] 3 CLR 500.

<sup>119</sup> Directive 2003/109/EC as well as Directive 38/2004/EC *inter alia* were implemented belatedly into Cypriot law in early 2007 in Laws 8(I)/2007 and 7(I)/2007 respectively (*Official Gazette* No 4110, 09.02.2007).

<sup>120</sup> Supreme Court (full bench), Administrative Case No. 673/2006, *Cresencia Cabotaje Motilla v. the Republic* [2008] 3 CLR 29.

<sup>121</sup> Law No 8(I)/2007 transposes Directive 2003/109/EC and amends the Aliens and Immigration Law Cap 105 of the laws of Cyprus as a result. This law was enacted in February 2007, whereas

Art. 18Z(2) of the Aliens and Immigration Chapter 105 of the laws of Cyprus (as amended), on the ground that the applicant's successive residence permits were "limited as to their duration" and that the applicant was therefore excluded from the scope of the law. The applicant applied to the Supreme Court to set aside the said decision. The Court proceeded to review the case in accordance with the Directive and with the Cypriot implementing legislation, by first attempting to interpret the disputed provisions under EU law (i.e. the Directive), before moving on to interpret the transposing national law in the light thereof. This method adopted by the Court – i.e. examining whether an interpretation in light of EU law is possible before interpreting national law – is usually more geared towards achieving consistent interpretation in practice, than before.

The central issue concerned the way that Art. 18Z(2)(c) of the implementing legislation transposed Art. 3(2)(e) of the Directive and whether this transposition affected the essence of the Directive. The provision of the implementing legislation excluded applicants whose residence permits had been limited "in time", whereas the Directive merely excluded "formal" limitation, arguably relating to the nature of the status or the sector of employment of the person concerned. In a majority decision (9–4), the Supreme Court rejected the challenge on the grounds that the fixed-term duration of the applicant's visas fell within the exceptions of Art. 18Z(2), and that the addition of the phrase "as to its duration" did not detract from the Directive's effectiveness. The Court also ruled that the fixed-term nature of the residence visas granted to the applicant could not create a reasonable expectation "that the person has put down root in the country", as per Recital 6 of the Directive's Preamble.<sup>122</sup>

In the dissenting judgment in the same case, however, it was argued that the phrase at issue fundamentally transformed the essence of the exception provided for in Art. 3(2)(e) of the Directive. The dissenting judges recalled the ECJ's decision in *Ratti*, establishing the principle that a Member State cannot rely on its own wrongdoing to frustrate the rights of individuals under a directive which it has failed to implement.<sup>123</sup> Pursuant to Art. 4(1) of the Directive, Member States should grant long-term resident status to third-country nationals when they have been residing "legally and continuously" within their territory for five years immediately prior to the submission of the relevant application, with no

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the deadline for the implementation of the Directive ended in January 2006. The applicant was a female migrant who lived and worked lawfully as a housemaid in Cyprus for six years and applied to the Interior Minister as soon as the deadline for transposition expired.

<sup>122</sup> See N. Trimikliniotis, *Cyprus Report 2007* (Network on the free movement of workers within the EU, 2009), pp. 31–32; see also C. Demetriou and N. Trimikliniotis, *Cyprus Update of the Data Collection Report on Ethnic and Racial Discrimination* (RAXEN National Data Collection Report 2007 – Cyprus, February 2008), pp. 16–22.

<sup>123</sup> Case 148/78, *Pubblico Ministero v. Tullio Ratti*, ECLI:EU:C:1979:110.

further conditions being imposed regarding the issue, nature or duration of the residence permit. While recognising the exclusive competence of the ECJ to interpret the Directive as an instrument of EU law, the judges interpreted the notion of “formal limitation” set out in Art. 3(2)(e) of the Directive as having a specific meaning common to the immigration policy of all Member States, as formulated in particular at a conference of experts held in Brussels on 7–8 July 2005. They recalled the recommendations of the Summit that the implementation of the Directive does not require the issue of a residence permit, but the mere legality of the residence; and that any formal limitation on residence permits should remain an exception to be interpreted strictly (*ejusdem generis*) and in line with the examples provided in Art. 3(2)(e) of the Directive (i.e. seasonal workers, volunteers, posted workers, etc.). As a result, the mere fact that the residence permit is limited in time but renewable does not make it fall under the exceptions set out in the Directive, which are the only ones which by their nature can constitute “formal limitations”. Based on the above and on the principle of legitimate expectation, the dissenting judges found the drafting of the specific provision in the implementing law not only incorrect, but also in violation of the substantive meaning of the Directive, hence leading to improper implementation.

It does not clearly appear from this case to what extent the Court considered the direct effect of the Directive and/or the liability of the Republic of Cyprus arising out of the late/improper transposition of the Directive into national law in order to reach its decision. The Court appears to have merely applied the Directive indirectly, in order to interpret the implementing legislation which – albeit in existence at the time of the ruling – was enacted subsequently to the application made by the plaintiff. She could not therefore rely on provisions of national law when enforcing her rights initially, but only on rights deriving from Directive 2003/109/EC directly and/or indirectly. The fundamental disagreement between the majority and the dissenters in the Supreme Court did not appear to prompt any discussion as to the possibility of making a reference to the ECJ under (then) Art. 234 EC so as to clarify the meaning of the relevant provision of the Directive. While the interpretation of a Directive in the national legal order is left at the discretion of the national courts which are subject to a duty of harmonious interpretation,<sup>124</sup> the exercise of this discretion by the national courts also involves the possibility of making preliminary references to the ECJ regarding the interpretation of provision(s) of EU law, including directives deemed of relevance to the national proceedings at stake. This becomes an obligation for a court of last instance, as in the present case. For matters falling under (then) Title IV of Part Three of the EC Treaty on visa, asylum, immigration and other policies related to free movement of persons, however,

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<sup>124</sup> Case C-212/04, *Konstantinos Adeneler et al. v. Ellinikos Organismos Galaktos (ELOG)*, ECLI:EU:C:2006:443, para. 116.



(former) Art. 68 EC provided that a reference could be brought by the final court or tribunal, at its own discretion. The Supreme Court did not refer to these provisions of the EU Treaties. The Court did not find it necessary either to refer questions of interpretation to the ECJ, despite the uncertainty surrounding the provisions of EU law at stake.

The decision of the Supreme Court to reject the recourse for administrative review in the *Motilla* case was eventually explained by the geographical location, the small size and the limited population of Cyprus as underlying features of its immigration policy. As noted by Trimikliniotis, the vast majority of migrant workers are, “as a matter of policy”, issued with fixed-term visas in Cyprus.<sup>125</sup> This decision had therefore the effect of intentionally restricting in law and/or in fact the right to long-term residence provided by Directive 2003/109/EC, arguably in breach of EU law and of the principle/duty of harmonious interpretation,<sup>126</sup> as concluded in the dissenting judgment of the case as well. This approach was subsequently upheld by the Supreme Court in the *Rawuttar* case,<sup>127</sup> where Judge Erotokritou referred to the judgment reached by the Full Chamber of the Supreme Court in the *Motilla* case as a precedent where the relevant provisions of EU law had already been examined.<sup>128</sup>

The facts in the *Rawuttar* case are similar to the facts in the *Motilla* case, but for one important point: the applicant’s entitlement to lawful residence had expired before the end of the deadline provided for the transposition of Directive 109/2003/EC into national law. The status of the applicant during the period running from the expiry of her work permit/right of residence up to the expiry of the deadline for implementation of the Directive (at which point in time no transposing legislation had been enacted) was therefore at stake in this case, given the new legal environment created by the Directive. In this respect, the applicant’s lawyer requested the judge to exercise his discretion to refer to the ECJ as it was a clear case of interpretation of (then) Community law. Referring to Art. 8 of the Court’s Guidance on References by National Courts for Preliminary Rulings, Judge Erotokritou expressly noted that for matters falling under Title IV Part III of the (then) EC Treaty, the right to

<sup>125</sup> N. Trimikliniotis, *Cyprus Report 2007* (Network on the free movement of workers within the EU, 2009), p. 32.

<sup>126</sup> Points of interpretation of Art. 3(2)(e) of Directive 2003/109/EC subsequently reached the ECJ, who confirmed that “the concept of ‘residence permit [which] has been formally limited’ does not include a fixed-period residence permit, granted to a specific group of persons, the validity of which may be extended indefinitely without however offering any prospect of a residence permit of indefinite duration where such a formal limitation does not prevent the long-term residence of the third-country national in the Member State concerned, that being a matter for the referring court to ascertain”, see Case C-502/10, *Staatssecretaris van Justitiev v. Mangat Singh*, ECLI:EU:C:2012:636, para. 56.

<sup>127</sup> Supreme Court, *Shahajan Mohamed Rawuttar v. The Republic*, Administrative Case No. 742/06, 24 September 2008.

<sup>128</sup> See S. Laulhé Shaelou (n. 8), pp. 480–84.

refer to the ECJ was limited to final courts of law, at their own discretion. He concluded that the court did not satisfy the requirements set out in (old) Art. 68 EC in the present case, as it was not acting as a court of last instance. He then proceeded with the judicial review of the decision, based on the principle of harmonious interpretation of national law in the light of (then) Community law. It was held that given the unlawfulness of her residence for a period of 11 days between the expiry of her residence permit and the expiry of the deadline for implementation of the Directive into national law, the applicant fell outside the scope of the Directive.<sup>129</sup> The judge then added that even if the applicant had had a lawful right of residence upon the expiry of the deadline for implementation of the Directive into national law, her application would have been subject to the precedent created by the Supreme Court in the *Motilla* case (with no possibility to refer to the ECJ as a first instance administrative court), and she would therefore also have fallen outside the scope of the Directive as transposed into Cypriot law.<sup>130</sup> The decision of the Supreme Court acting at first instance, including the issue of non-referral to the ECJ, was subsequently appealed before the Supreme Court.<sup>131</sup> On the basis of Art. 267 TFEU, post-Treaty of Lisbon, it held that the Court acting at first instance was not under an obligation to refer questions of interpretation to the ECJ and that the rejection of the application was not based on matters related to the interpretation of the Directive at stake.

The above case-law is obviously based on a narrow (even probably erroneous, as far as the Supreme Court acting as a final instance jurisdiction is concerned) understanding of the practice of preliminary references, complemented by an equally strict perception of the duty of harmonious interpretation as limited primarily to the interpretation of EU secondary legislation in specific instances. A few years into EU membership, it is interesting to note the increasingly strong correlation developing in the case-law of the courts in Cyprus between preliminary references and the principle of harmonious interpretation.

#### 4.2. THE PRINCIPLE OF HARMONIOUS INTERPRETATION AS A “COMPANION” TO PRELIMINARY REFERENCES AND PROPORTIONALITY

As already explained above, a handful of judgments from national courts in Cyprus in recent years pertaining to preliminary references can be correlated

<sup>129</sup> Judge Erotokritou referred to other recourses in administrative control where similar decisions were reached by the Supreme Court, as a first instance administrative court, and therefore with no possibility to refer to the ECJ in this context.

<sup>130</sup> See S. Laulhé Shaelou (n. 8), pp. 493–94.

<sup>131</sup> Supreme Court, Administrative Appeal No. 159/2008, *Shahajan Mohamed Rawuttar v. The Republic* [2011] 3 CLR 508.

directly to (a strict approach of) the principle of harmonious interpretation. Either because the relevant court sought guidance from the ECJ on matters of interpretation of EU law, or on the contrary ruled against requesting such guidance from the Luxembourg Court, again based on the principle of harmonious interpretation.<sup>132</sup> Beyond this immediate correlation between harmonious interpretation and preliminary references, the principle has recently also been used explicitly, and in the context of the sovereign debt and financial crisis more implicitly, as a source of inspiration in the name of effective judicial protection, embodied in the principle of proportionality.

In *Alpha Bank Cyprus Ltd*,<sup>133</sup> the Supreme Court found that the case was dependent on the interpretation of the Regulation (EC) No. 1393/2007 on the Service in Member States of Judicial and Extrajudicial documents in Civil and Commercial matters, and therefore referred three questions to the ECJ. This ruling was preceded by a first ruling in the case, where the Supreme Court had held that all issues pertaining to the service of the documents at stake could be remedied under national law.<sup>134</sup> This meant that the only legal issue pending in the case pertained to the interpretation of the EU law instrument, which was seen by the Court as having implications on the “implementation of EU law in all the territory of the Union” and which was subsequently referred to the ECJ. This case represented an early attempt to interpret national law in the light of EU law by preference of relying on the preliminary reference mechanism, in order to preserve the principle of consistent interpretation.

In the case of *Thomas Kaoulla and Eleni Kaoulla*,<sup>135</sup> a preliminary reference was requested in relation to the interpretation of the EU Charter. The applicants requested *inter alia* to submit a question regarding the equality in tax schemes of refugee and non-refugee citizens of the Republic of Cyprus. This request for a preliminary reference was part of the grounds for appeal, challenging the decision of the first instance court. The Supreme Court indicated that the appellant could not invoke issues before the appeal court that had not been invoked or disputed before the lower court. Therefore, since no issues of violations of rights stemming from EU Law (including the Charter) were raised in the first instance decision, they could not be raised for the first time at the appeal stage. The Supreme Court concluded that for the reasons stated, a possible preliminary reference would just be an “academic exercise” and that this is not the purpose of a preliminary

<sup>132</sup> There are more such examples, both from the Supreme Court and lower courts.

<sup>133</sup> Supreme Court, Joined Civil Appeals E23/2013-29/2013, [2013] 1 CLR 1935; Case C-519/13, *Alpha Bank Cyprus*, ECLI:EU:C:2015:603.

<sup>134</sup> Supreme Court, *Cypra Ltd v. The Republic*, Administrative Appeal 78/2009, 5 June 2013. See Lycourgos, *Preliminary reference to the Court of Justice of the European Union* (n. 110), p. 28.

<sup>135</sup> Supreme Court, *Thomas Kaoulla and Eleni Kaoulla v. The Republic, through the Attorney General*, Civil Appeal No. 77/2012, 13 February 2013.

reference. Proceeding to interpret the provisions of the Charter itself, the Court added further that:

in any case, the notions of Art. 20 and 21 of the Charter are largely identical with the corresponding notions of the Constitution [of Cyprus], which have been fully clarified by the Cypriot case-law and therefore there would be no reason for a preliminary reference, even if the issue could be raised on appeal.<sup>136</sup>

Unlike the above examples which arguably entail a narrow understanding of the scope of the duty of harmonious interpretation on the national courts, the principle and the duty deriving there from appear to have inspired directly or indirectly certain other (more EU acquainted) judges, both at the lower courts and the Supreme Court. Judge Pantazi Lambrou in the *Constantinos Oikonomou* case<sup>137</sup> referred to the duty of harmonious interpretation imposed on national courts with respect to the interpretation of national law, irrespective of whether the issue at stake is a cross-border dispute falling within the scope of EU law and whether direct effect can be triggered or not. The case concerned a dispute between two individuals, where the claimant was requesting damages for breach of a motor vehicle purchase contract. Specifically, Judge Pantazi stated that when applying provisions of national transposing laws – in this case-law 7(I)/2000 – the Court is bound to interpret it when possible, in the light of the wording and purpose of the applicable Directive (1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees), in order to achieve an outcome consistent with the objective pursued. If the national law was not interpreted in the light of the Directive's wording, it would possibly affect the rights of the claimant in obtaining the benefit of the disputed guarantee, since the status of the defendants as “sellers” was contested. The Court cited relevant case-law of the ECJ to illustrate the argument and follow it in practice.<sup>138</sup>

Judge Erotokritou, in his landmark dissenting judgment in *Myrto Christodoulou* dealing with the bail-in measures taken by the Cypriot authorities and affecting thousands of depositors in Cyprus during the financial crisis,

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<sup>136</sup> Ibid, (translated by the authors).

<sup>137</sup> District Court of Nicosia, Civil Case No. 1449/2009, 29 June 2015.

<sup>138</sup> Case C-497/13, *Froukje Faber v. Autobedrijf Hazet Ochten BV*, ECLI:EU:C:2015:357, para. 33: It must be pointed out at the outset that the dispute in the main proceedings is between two individuals. It is true that in such an action neither of the parties may rely on the direct effect of Directive 1999/44. However, it is also settled case-law that a national court, when hearing a case exclusively between individuals, is required when applying the provisions of domestic law to consider the whole body of rules of national law, and to interpret them, so far as possible, in the light of the wording and purpose of the applicable directive in order to achieve an outcome consistent with the objective pursued by that directive (see, *inter alia*, judgment in Case C-565/12, *Crédit Lyonnais*, ECLI:EU:C:2014:190, para. 54 and the case-law cited).

developed a test of proportionality and reasonableness, encompassing EU law instruments with special reference to the EU Charter and to the free movement of capital.<sup>139</sup> He added that such a “compatibility test” could be undertaken by a national court directly applying EU law, including general principles, and referring questions of interpretation or of validity to the ECJ in the event of uncertainty. He recalled that judicial dialogue is available to all national courts, including the lower civil courts, provided that the measures at stake do not escape the scope of review by being classified as “acts of government”, which is for the Supreme Court under its exclusive administrative revisional jurisdiction to determine. In the latter cases, the full essence of the test is thereby effectively restricted to application by the Supreme Court. Judge Erotokritou warned against political decisions being taken overnight under extreme pressure (including at the EU level), allegedly in the interest of the state, escaping the test and undermining the rule of law and the principle of legality common to both the national and the supranational legal orders. He then concluded that the compatibility test includes a review of the balance between the public interest and the restrictions on individual rights within the framework of the Constitution and of the EU Treaties, which can only be undertaken by the Supreme Court within its exclusive administrative revisional jurisdiction, and which must be maintained at all times, including during crisis time. Despite being a dissenting judgment, this arguably constitutes a powerful plea to all national courts to not only interpret national law in the light of EU law by fully embracing the core principles and values of EU law, but also to make use of the judicial dialogue route in every possible instance, including in times of crisis. With respect to the specific legal dispute, it should be noted that numerous civil actions are still pending before the District Courts in Cyprus, while the door to the Supreme Court through an administrative recourse remains closed after the *Myrto Christodoulou* case.<sup>140</sup>

In conclusion, in general terms the EU principle of consistent interpretation seems to have impacted the Cypriot method of statutory interpretation towards an internalisation of EU law in Cyprus. However, as explained above, the overall approach of the Cypriot Supreme Court can be described as inconsistent and as sometimes ignoring EU law (and even the ECHR),<sup>141</sup> when it comes to applying provisions of fundamental rights focusing on the protection of fundamental rights within the framework of the Cypriot Constitution. Moreover, it would appear that the Cypriot courts had initially been more willing in the past to achieve harmonious interpretations where conflicts arose between Cypriot and

<sup>139</sup> *Myrto Christodoulou et al* [2013] 3 CLR 427 (dissenting judgment).

<sup>140</sup> See also S. Lahlé Shaelou and P. Athanassiou, “Cyprus Report”, in G. Bändi *et al.* (eds.), *European Banking Union* (Congress Proceedings, vol. 1, Wolters Kluwer, 2016), pp. 294–96.

<sup>141</sup> Interview with Dr. Demetrios Hadjihambis, former President of the Supreme Court of Cyprus (June 2013–July 2014) and judge at the Supreme Court (1999–2013), 9 January 2015.

ECHR law, than between Cypriot and EU law. A notorious example is the case of *Constantinou*, discussed above, where the Court had relied on the *contra legem* limitation to avoid achieving conformity with EU law in practice. In particular, the judges would use the principle of consistent interpretation to apply EU law only where no conflict arose with the national law. However, the Courts have moved a long way since the *Constantinou* case, especially after the amendment of Art. 1A of the Constitution, which grants legal and judicial supremacy to EU law. The Courts are now even trying to apply and interpret EU law when there is no such formal requirement.<sup>142</sup>

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<sup>142</sup> See e.g. District Court, Case No. 4602/14, *Institute of Archbishop Makarios III and others v. CBC, Bank of Cyprus Plc, Resolution Authority, Attorney General of the Republic, Antri Antoniadis (in her capacity as special administrator of Laiki) and Cyprus Popular Bank Public Co. Ltd*, 26 August 2014, where Judge Annie Pantazi Lambrou made multiple references to the EU Directive on Bank Resolution and Recovery as soon as it was published in the Official Journal of the EU and well before its implementation into national law, relying on the principle of indirect effect as developed in the case-law of the ECJ, paras. 14–15.