National judges and supranational laws on the effective application of EC Law and ECHR: the case of Cyprus

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I. Introduction

The legal architecture of the Republic of Cyprus is both interesting and unprecedented. Although primarily based on the common law tradition, continental law characteristics form part of the existing legal regime. If one adds to this its strikingly rigid Constitution, the application of the doctrine of necessity and the parameter of the interplay of European and national law, one is faced with a legal patchwork.

The Republic of Cyprus was proclaimed as a sovereign and independent State by virtue of the Zurich-London agreements of August 1960 which comprised the Treaty of Establishment, the Treaty of Guarantee and the Treaty of Alliance.\(^1\) The Treaty of Establishment sets the foundation of human rights protection in Cyprus.\(^2, 3\) Article 5 of this Treaty provides that:


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\(^3\) (Council of Europe). The Treaty of Establishment was signed between the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Greece and the Republic of Turkey on the one part and the Republic of Cyprus on the other part.

\(^3\) The Supreme Court has declared that the Treaty of Establishment does not form part of the Constitution. (Ex parte Samuel N. Samuel, 1962).
Indeed, Part II of the Constitution of the Republic is modelled after the European
Convention on Human Rights (‘ECHR’).\footnote{(Council of Europe)} Articles 6 to 35 provide a list of human
dsidents are wider in scope and
tsents found in the latter.\footnote{(Pikis, 2006), p. 43: “To give but a few examples, the right to equality embodied in Article 28 goes beyond assuring enjoyment of human rights without discrimination, the subject of Article 14 of the European Convention on Human Rights, by positively guaranteeing equality under the law, before the law and equality treatment by every authority of the State. Article 30.3 confers by and large upon litigants in every judicial proceeding the rights acknowledged to the accused by Article 6.3 of the European Convention on Human Rights, also guaranteed by Article 12.5 of the Constitution.”} Section II of this paper presents the status of the ECHR in the domestic legal order, its reception and application in the case law of the Supreme Court of Cyprus (‘Supreme Court’) and the effect of the jurisprudence of the European Court of Human Rights (‘ECtHR’ or ‘Court’) in the Cypriot legal order.

Whereas human rights’ protection, as provided and interpreted by ECHR and the ECtHR respectively, had been entrenched in the domestic legal system since the first steps of the Republic, a development on the political plane occurred, which had significant legal repercussions; in 2004, Cyprus acceded to the European Union (‘EU’). A year later, a judgment of the Supreme Court found that the Framework Decision for the European Arrest Warrant did not prevail over the constitutional provision for the extradition of Cypriot citizens. This judgment prompted a constitutional amendment in order to provide for the supremacy of EU law within the domestic legal order. Section III presents this judgment and discusses the constitutional ranking of EU law, as well as other related legal issues that arise out of Cyprus’ accession to the EU.
II. **ECHR and the national legal order**

In 1962, the ECHR and its Additional Protocol were incorporated in the domestic legal order through Law 39/1962.\(^6\) Article 169 (3) of the Constitution resolves the monism – dualism distinction in favour of the first:

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

It follows from this provision that the ECHR, as an international convention, prevails over national law, in case of conflict between the two.\(^7, 8, 9\) However, it is ranked at a hierarchically lower position to the Constitution, which ‘shall be the supreme law of the Republic’, by virtue of Article 179 of the Constitution.

A ‘black-letter law’ reading provides for a fine and precise hierarchical structure within the domestic legal order, giving precedence to the Constitution, followed by international instruments and then domestic legislation lying at its’ lower level. Does the monist – dualist discourse with regard to the status of ECHR have any importance nowadays or is it just an exercise in legal archaeology?\(^10\) The answer very much depends on one’s reading of the case law of the ECtHR.\(^11\) In *Ireland v. the United Kingdom* the Court stated:

‘[…] the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States […]’. That

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\(^6\) (Official Gazette of the Republic of Cyprus, No. 157, 1962). Legislation cited in this paper was accessed through [www.leginet.eu](http://www.leginet.eu)

\(^7\) (Pikis, 2006), p. 44

\(^8\) (Emiliou, Cyprus, 2006), p. 304

\(^9\) (Loizou, 2001), p. 220

\(^10\) (Thomassen, 2009) at p. 115: ‘The difference between monistic systems and non-monistic systems […] may have lost some of its impact as in most cases as in most European states compliance with rules of international law can be achieved by interpreting rule of national law in the light of the particular treaty’

\(^11\) For a challenging discussion see (Lawson, 2009)
intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law’.\footnote{12}

Almost 20 years later, the Court went even further in finding the ECHR to be ‘directly applicable’,\footnote{13} a statement of categorical tone which was not ever repeated thereafter. The Court’s jurisprudence can be complemented with reference to \textit{Blečić v. Croatia}, where the Court backtracks:

‘[…] the Convention, which comprises more than mere reciprocal engagements between the Contracting States. It directly creates rights for private individuals within their jurisdiction’.\footnote{14}

One is inclined to conclude that the Court is still quite reluctant to provide a clear answer as to the basis of the legal effect of the ECHR in the domestic legal order and prefers to found the prevalence of the ECHR on its 47-country wide acceptance and incorporation.

Examining the issue from the other end, the Supreme Court’s case law provides more solid ground. As previously said, the human rights protection afforded by the constitutional provisions is similar to the one provided by the ECHR. In many instances the wording of the two texts is identical. To the extent that the two coincide or share common elements, the normative protection afforded to individuals is the same.

i) The jurisprudence of the Supreme Court of Cyprus

The Supreme Court reinforces the equal protection of rights and freedoms through long-standing case law. The first notable judgment was handed down as early as 1961, a time even before the ratification of ECHR. The Supreme Court was called in \textit{Attorney General v. Afamis}\footnote{15} to examine the (un-)constitutionality of a legislative act, providing for the arrest or detention of a citizen of the Republic for the purposes of taking proceedings against him under such act. Article 11 of the Constitution provides

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\footnote{12}{(Ireland v. the United Kingdom, 1978), par. 238. ECtHR’s case law cited in this paper was accessed through HUDOC Database at \url{http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en}}
\footnote{13}{(Ahmet Sadik v. Greece, 1996), par. 31}
\footnote{14}{(Blečić v. Croatia, 2006), par. 90}
\footnote{15}{(The Attorney General of the Republic and Andreas Costas Afamis, 1961). Supreme Court’s case law cited in this paper was accessed though \url{www.leginet.eu}}
\end{footnotes}
an exhaustive list of instances for the lawful detention of a person. One of these instances was found in paragraph (2) (f) of this Article: ‘the arrest or detention of a person to prevent him effecting an unauthorised entry into the territory of the Republic or of an alien against whom action is being taken with a view to deportation or extradition’. The Supreme Court referred to the ‘historical origin’ of Article 11 of the Constitution which was ‘modelled on paragraph (1) of Article 5 of the European Convention on Human Rights’. The crucial difference, which led to a declaration of unconstitutionality of the legislative act was the use of the word ‘alien’ in the Constitution, instead of the word ‘person’ in the said act (and the ECHR). This power of arrest or detention in view of a deportation or extradition was allowed in Cyprus only in the case of an alien and Afamis, being a citizen of the Republic, could not come under the provisions of the legislative act.

The judgment of the Supreme Court in Afamis is notable because of the reference to the ECHR, not yet incorporated in the domestic legal order, as a tool for interpreting a constitutional provision. Although the Supreme Court was not legally bound by the ECHR, it proceeded to compare the texts of the corresponding provisions in order to ascertain the meaning of a constitutional provision and subsequently to examine the constitutionality of a hierarchically inferior legislative act. It is this same provision of the Constitution, whose judicial interpretation linked the domestic legal order to the ECHR’s one, that was bound to play the opposite role with regard to the relation to the EU legal order 34 years later.

Since this judgment and following the ratification of the ECHR, the Supreme Court has maintained an unaltered position with regard to the effect of the ECHR and ECtHR’s jurisprudence in domestic cases. In its own words it perceives its own function as follows: ‘The Court has a duty towards the State and the people of the Republic of Cyprus to preserve human rights and freedoms’.16 In addition to the Supreme Court’s approach to founding its judgments on the jurisprudence of ECtHR, the Supreme Court has also taken the opportunity to clarify in stark terms its view on case law coming from the Strasbourg Court. In Andreas Kyriacou Panovits v Republic17 the Supreme Court was confronted with a claim by the lawyer of one of the defendants that the fact that one of the lawyers present before it was convicted by

16 (Andreas Nicolaou v. Nafiska Nicolaou, 1992)
17 (Andreas Kyriacou Panovic v Republic, 2003)
the first instance court for contempt of court, a judgment later confirmed by the Supreme Court, rendered the Supreme Court no longer an impartial one. The convicted lawyer had lodged an application with the ECtHR and at that time the case was still pending before it. The Supreme Court stated that: ‘Whichever the judgment of the ECtHR might be, it will be respected and implemented by our courts and the competent authorities of the Republic.’

The ECHR is almost invariably invoked by litigating parties along with the corresponding constitutional provision and the Supreme Court adjudicates upon claims explicitly citing ECtHR’s case law. The Supreme Court considers that its ‘case law is in absolute harmony with that of the European Court of Human Rights’. 18 Drzemczewski’s comment is not surprising:

‘It is remarkable how often both the case-law of the European Court of Human Rights and that of the European Commission of Human Rights have been cited. The principal reason for the apparent readiness of domestic courts to invoke not only the Convention’s provisions but also the decisions of its organs probably stems from the fact that a part of the Cypriot Constitution of 1960 is with slight modifications and additions, an actual adaptation of the Convention’s substantive provisions.’ 19

Constant reference to and consistent application of ECtHR’s case law brings domestic case law in conformity with the overarching legal regime of ECHR. The Strasbourg Court’s case law has attained a de facto ‘erga omnes’ effect, as Opuz v. Turkey 20 illustrates: ‘[...]the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States.’

One of the most common type of cases reaching the Supreme Court relates to the violation of Article 6 ECHR and the corresponding Article 30 of the Constitution of Cyprus. In Loucas Stylianou v. Skyra Lima 21 the Court stated that the right to be heard

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18 (Suresh Chrishantha v. Police, 2005)
19 (Drzemczewski, 1983), 279
20 (Opuz v. Turkey, 2009), par. 163
21 (Loucas Stylianou v. Skyra Lima, 2003)
must be exercised in conjunction with the requirement for the conduct of a trial to be held within reasonable time, as case law of the ECtHR requires. In this instance, the Supreme Court cited in the body of the judgment two relevant authorities on the matter from ECtHR. 22, 23

In *G. Iosifides v Republic* 24 the Supreme Court was faced with a claim of a violation of the right to a fair trial and in particular the legal aid that the appellant was claiming that he was not afforded. The Supreme Court referred to the principles emanating from ECtHR’s case law:

‘an accused person cannot validly complain if he does not afford himself of the legal aid scheme which is in place, a finding reached by the ECtHR in Biondo v. Italy [...]. Furthermore, the same person does not have a right to choose the lawyer who will represent him through the legal aid scheme, as the same Court had found in X v. Netherlands, X v. UK, and F v. Switzerland’.

In *Andreas Konstantinou v. Republic* 25 the applicant had been dismissed from the civil service and sought legal aid in order to challenge his dismissal in Strasbourg. In domestic law such dismissals come under the ‘revisionary jurisdiction’ of the Supreme Court and not under the civil one, as the ECtHR considers. The Supreme Court acknowledged this incompatibility and resolved the matter in favour of the ECtHR approach:

‘In domestic law, the issue of the dismissal of a civil servant comes within the ambit of the revisionary jurisdiction, and not within that of the civil jurisdiction. However, we could not insist on our taxonomy where there is a different interpretation of Article 6(1) ECHR by the ECtHR, in relation to the protection of civil rights as in the cases of Azinas v. Cyprus, ECHR, No. 56679/00, 20 June 2002 and Mavronichis v. Cyprus ECHR, No. 71, 1998-II 944.’

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22 (Stogmuller v. Austria, 1969)
23 (H. v. France, 1989)
24 (G. Iosifides v. Republic, 2000)
When compared to ECtHR, the Supreme Court affords enhanced protection against self-incrimination, as the case of *Republic v. Avraamidou, Georgiou and Haralambous* illustrates, where the issue was the right of the defendant not to incriminate himself. Judge Artemidis stated in his concurring opinion that the acceptance of evidence which is collected in breach of an accused person’s constitutional right comes under stricter scrutiny by the Supreme Court, as a comparison between the case law of the two Courts suggests. Indeed, the Supreme Court of Cyprus has not accepted that evidence collected by means of an electronic device, without knowledge of the persons recorded, can be adduced in criminal proceedings. By contrast, ECtHR has found that ‘the use […] of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1.’

ii) The reverse side of the coin: law of necessity

In contrast to the positive image described above, the prevalence of the doctrine of necessity in the Cypriot legal order distorts the application of ECHR and diminishes the protection of human rights. A key element of the Cypriot Constitution is its bi-communal character: the political system, public institutions, recruitment to the civil service, citizenship and enjoyment of civic rights require a delicate balancing exercise and fixed quotas to be allocated between the two communities residing on the island, Greeks and Turks. Following the withdrawal of the Turkish community members from all public offices and branches of state, in the aftermath of the inter-communal conflict of 1963, the functioning of the Republic came to a standstill. Its continuation was rendered possible by the exercise of all state functions solely by the Greek members of all institutions, that is, even without the participation of the Turkish community that the Constitution required.

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26 (Republic v. Avraamidou, Georgiou and Haralambous, 2004)
27 (Police v. Andreas Georgiades, 1983)
28 (Khan v. the United Kingdom, 2000), par. 40
29 (Bykov v. Russia, 2009), paras. 99 - 105
The doctrine of necessity appeared in the case law of the Supreme Court in 1964 and is based on the maxim “salus populi suprema lex est”. The Supreme Court in *Mustafa Ibrahim*[^30] went to great lengths to explain that the:

> ‘constitution include[s] the doctrine of necessity in exceptional circumstances, which is an implied exception to particular provisions of the constitution; and this in order to ensure the very existence of the State. The following prerequisites must be satisfied before this doctrine may become applicable:

1. an imperative and inevitable necessity or exceptional circumstances;
2. no other remedy to apply;
3. the measure taken must be proportionate to the necessity; and
4. it must be of a temporary character limited to the duration of the exceptional circumstances.’

*Mustafa Ibrahim* is since then a cornerstone of the legal order and stands until today as the leading authority. The devastating repercussions of the Turkish invasion in Cyprus in 1974 led to the passing of the Debtors Relief (Temporary Provisions) Law[^31], which sought to alleviate debtors of their debts for a fixed period of time, by suspending their obligation to repay. This law was challenged as unconstitutional in *Aloupas v. The National Bank*.[^32] It was submitted that its provisions were contravening articles of the Constitution which protected the right to property, the right to practice any profession or to carry on any occupation, trade or business, the right to enter freely into any contract and the principle of equality. The Supreme Court found that

> ‘when the State is faced with a calamity which has surpassed the remedial scope of a Proclamation of Emergency under Article 183 of the Constitution, the State can resort to measures entailing the

[^30]: (The Attorney General of the Republic v. Mustafa Ibrahim and others, 1964)
[^31]: (Official Gazette of Republic, No. 1509, 1979)
[^32]: (Andreas Aloupas and another v. The National Bank, 1983)
limitation or restriction or even deprivation of the fundamental rights and liberties [...] and that it can do so by virtue of the "law of necessity".

The principle enshrined in *Aloupas* was reaffirmed in subsequent judgments of the same Court and the “law of necessity” is still considered to be in place. One of its consequences was examined in *Ibrahim Aziz*, where the applicant, a Cypriot citizen belonging to the Turkish community, requested his registration in the electoral roll for the election of the members of the House of Representatives. The Constitution provides for separate electoral rolls for the two communities and consequently his application for registration in the Greek roll (due to the lack of a Turkish one) was rejected by the competent Ministry and later by the Supreme Court. The latter stated that it could not grant the remedy sought because this would entail the exercise of legislative power by the Supreme Court itself. The case reached ECtHR which found a violation of article 3 of Protocol 1 and of article 14 ECHR and stated that:

‘despite the fact that the relevant constitutional provisions have been rendered ineffective, there is a manifest lack of legislation resolving the ensuing problems. Consequently, the applicant, as a member of the Turkish-Cypriot community living in the government-controlled area of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives.’

As the above cited judgment demonstrates, the doctrine of necessity and its interplay with the application of the ECHR is problematic in several perspectives. First, it carves out a legal hole in the overall legal regime by overriding Article 183 of the Constitution which provides for declaration of a state of emergency. It is beyond the scope of the present paper to engage in an analysis from a constitutional point of view of the fallacy of the doctrine; suffice it to say that the Constitution provided an available legal route, that of declaring a state of emergency, which was not followed.

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33 *(Ibrahim Aziz v. Republic, 2001)*
34 *(Aziz v. Cyprus, 2004), par. 29*
Second, rejecting the application of human rights on the premise that the State is faced with a calamity of such magnitude that it is permissible to limit or even deprive individuals of them without abiding by Article 15 ECHR is highly problematic with regard to the application of ECHR. Actually, it creates a judicially sponsored situation which justifies derogation from or non-application of human rights without following the prescribed legal path. This is an approach that defeats the object and purpose of Article 15 ECHR and undermines the effective application of ECHR.

The application of the doctrine of necessity in Cyprus can be traced in many domains that can potentially affect the exercise and enjoyment of many rights, amongst them the right to the peaceful enjoyment of property. Law 139/91\(^{35}\) was promulgated in order to regulate the matter of Turkish Cypriot properties which are in the areas in which the government of Cyprus exercises effective control and have been abandoned by their owners as a result of the Turkish invasion and the transfer of Turkish Cypriots to the occupied northern part. This law assigns the protection and administration of the properties to the Minister of Interior, as their ‘Custodian’. Ownership, however, remains with the original owner. The application of this law prompted a wave of applications to be lodged with the Supreme Court by owners wishing to challenge the constitutionality of the provisions therein, alleging a violation of the right to property. The Supreme Court has consistently rejected these applications, the underlying reason for this being the abnormal situation created by the Turkish invasion which called for the application of extraordinary measures, amongst them the contested legislation. In other words: doctrine of necessity.

Several applications have been submitted to the ECtHR by aggrieved persons and at the present they stand at the stage where they have been communicated to the government of Cyprus. Two of the questions put to the latter are: 1) whether this constitutes an interference with the peaceful enjoyment of possessions, within the meaning of Article 1 of Protocol No. 1 and 2) whether the afforded remedies sufficiently address the applicants’ situation.\(^{36}\) It is submitted that herein lays the heart

\(^{35}\) (Official Gazette of the Republic, no. 2598, 1991)

\(^{36}\) (European Court of Human Rights), cases 49247/08 KAZALI, lodged on 8 October 2008; 49307/08 MUSTAFA and Others, lodged on 8 October 2008; 30792/05 NOURI, lodged on 2 August 2005; 30565/04 HALIT and Others, lodged on 27 August 2004; 4080/06 DURMUS, lodged on 30 December 2005; 34776/06 OSMAN, lodged on 14 August 2006; 1545/07 CHAKARTO and Others, lodged on
of the issue: the interference with property rights stands on a legal justification, i.e. the doctrine of necessity, which is at odds with the ECHR. In addition, the law is manifestly discriminatory as it regulates property issues on the criterion of ethnic origin.

iii) A look from ECtHR

In its nearly 50-year presence within the realm of ECHR, Cyprus was found to be in violation in 44 cases out of a total of 54 judgments. The most common violation is the one of Article 6 (35 findings), Article 13 (8 findings) and Article 8 (6 times). Thus, a systemic problem appears to emerge; the violations found by the ECHR more often than not, relate to the excessive length of proceedings that Cypriot courts need to provide a final adjudication upon a case. The seriousness of the problem is also acknowledged by the reaction to it; the Law Office of the Republic has prepared a draft law the purpose of which is to resolve the problem.

Further to the above, seven of ECtHR’s judgments have generated a legislative amendment or the introduction of new laws, thus illustrating a responsive attitude on the part of the Republic. In this regard, the cases of Modinos, Larkos, Egmez, Selim, Aziz, Kyprianou and Kafkaris must be mentioned.

Based on the above comparative examination of selected case law of the Supreme Court and ECtHR, it may well be said that human rights protection, as envisaged in ECHR and the case law of ECtHR, is well embedded in the Cypriot legal system. Human rights’ protection stands firmly on the constitutionally protected rights, the content of which is constantly informed by the jurisprudence of ECtHR and the normative supremacy of ECHR within the domestic legal system over national law,
other than the Constitution. However, two thorny issues remain: the repeated violation of Article 6, which reveals a problem with the function of the judiciary, still persists as highlighted also by the President of ECtHR in his last visit to Cyprus. Second, the application of the doctrine of necessity seriously undermines the effective application of the ECHR in several circumstances.

### III. EC Law and the national legal order

On the 16th of April 2003, the accession treaty of ten states to the EU was signed in Athens. It was ratified by the House of Representatives of the Republic of Cyprus the same year, and on the 1st May 2004, Cyprus acceded to the Union. The ratification of the Treaty of Accession was effected through the legal route of Article 169 of the Constitution, as the case would be for any other international treaty. At the time, it was considered that no amendment to the Constitution would be necessary in order to give precedence to the application of EU law, as in the case of Ireland.

The change to and challenge for the Cypriot legal system was obvious: Cyprus was entering

‘a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals’.

The doctrine of supremacy, as devised and applied by the European Court of Justice (‘ECJ’) in cases such as Van Gend and Loos and Costa seemed to provide sufficiently safe ground for the proper reception and application of EU law within the domestic legal order.

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47 (Costa), p. 4 of his speech  
49 (Official Gazette of the Republic of Cyprus, No. 3740, 2003)  
50 (Emiliou, Cyprus, 2006), p. 306 where an interesting comparison of Cyprus and Ireland is made with regards to their constitutional capacity to receive EU law  
51 (NV Algemene Transport - en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, 1963)  
52 (Flaminio Costa v. ENEL, 1964)
However, this did not prove to be the case because the Supreme Court of Cyprus indirectly challenged the judicially established hierarchy of norms. In *Attorney General v. Kostas Konstantinou* the legislation transposing the Framework Decision for the European Arrest Warrant (EAW) was challenged as unconstitutional. As defined in the text of this Framework Decision an EAW is:

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

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

In *Konstantinou* the surrender of a person having dual nationality (i.e. Cypriot and British) was sought under the terms of the legislation transposing EAW. The Supreme Court considered and acknowledged ECJ’s case law on the supremacy of EC law but based its own judgment on different premises. It found that the case before it was not related to a “European provision” having direct effect. The EAW was binding upon Cyprus as to the result to be achieved, but it was up to the state’s national authorities to choose the form and methods to achieve such result. Choosing to transpose the EAW Framework Decision by means of ordinary legislation was found to be incompatible with the aforesaid Article of the Constitution and thus the surrender of a Cypriot citizen on the basis of an EAW was not allowed. The Supreme Court could

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53 *Attorney General v Kostas Konstantinou, 2005*

54 (European Union, EUR-Lex)

55 Article 34(2) (b) TEU provides: ‘(b) [the Council may] adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;’
not find an interpretation of the national law which would conform with the requirements of EU law, as the ECJ had already indicated in *Pupino*.\(^{56}\) In this judgment the ECJ stated that: ‘It is for the national court to determine whether […] a conforming interpretation of national law is possible’.

Could the Supreme Court have reached a different pronouncement? *Prima facie* no, since the antithesis of the constitutional provision with the stipulation of the EAW appears to be irreconcilable. However, it can be validly supported that the Supreme Court could have interpreted the constitutional provision in conformity with the EAW Framework decision, thus accommodating the latter’s reception and application in the domestic legal order. This ‘harmonious interpretation’ approach could have been achieved through the distinction between the notions of ‘deportation and extradition’, as they appear in the text of the Constitution, and ‘surrender’, as it appears in the Framework Decision. More specifically, the Supreme Court could have accepted the surrender of a Cypriot citizen to another Member State within the terms of the EAW, which bears different legal characteristics and repercussions when compared to deportation and extradition. Suffice it to say that the legal regime applicable in the EAW instance is solely the one found in the Framework Decision itself, which also provides that respect for fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union shall remain intact.

Alternatively, it is submitted that the Supreme Court could have followed a different legal reasoning which would accommodate this conflict of norms by reverting back to the basics of EU law. It has been argued that the principle of primacy is equally applicable in the second and third pillar (to which the EAW belongs):

> ‘It appears from *Costa* that the real concern is consistency: to the extent that a national measure is inconsistent with EC law, it cannot be allowed to apply over EC law. But if we take consistency seriously there is no need for identifying whether a provision confers rights on individuals. The only thing that matters is that EC law, and by extension EU law, puts forward an identifiable result which cannot be

\(^{56}\) (Maria Pupino [Reference for a preliminary ruling], 2005), paras. 47- 48
thwarted by incompatible national measures. [...] When it comes to precedence the only question is whether a conflict can be identified. In principle, if that is the case the conflicting provision of national law has to yield. This also means, however, that the exclusion only applies to the extent of the conflict.  

Konstantinou stands as a missed opportunity for the Supreme Court to determine the relation between EC and EU law, on the one hand, and national law, on the other, in favour of the former. With due respect to the Supreme Court, I consider that its approach to the matter at hand was overly legalistic and suffers from an internal inconsistency. The Supreme Court’s analysis remained only at the level of identifying the conflict between the transposing law and the Constitution, without providing any convincing reasoning as to how it reached its decision. An option that was available to the Supreme Court was to give precedence of EU law over the conflicting national law, even if this was of constitutional rank, for the reasons Lenaerts and Corthaut explain in the above cited excerpt. Had this been the case, no amendment of the Constitution would have been necessary.

It has been suggested that supremacy has a bi-dimensional connotation; on the one hand, stands ECJ’s well-known case law which has not gone uncontested by Member States and national courts. On the other, ‘its full reception [...] depends on its incorporation into the constitutional orders of the Member States and its affirmation by their supreme courts.’ It is this second dimension that was the source of tension in the case of Cyprus. The Supreme Court’s stance was ambivalent. Although it explicitly recognized the supremacy of EU law in general, it did not enter into a deeper inquiry into the legal significance of the notion in the area of the third pillar, and by consequence, in the case before it. This superficial approach led to the inconsistency mentioned above: the Supreme Court took cognizance of supremacy, but did not make any use of it thereafter. Rather, it found that it was not confronted with an instrument having direct effect. It is evident that the Supreme Court confused the notions of ‘supremacy’ and ‘direct effect’.

57 (Lenaerts & Corthaut, 2006), p. 289
58 For a critique of the implementation of the EAW in Cyprus see: (Stefanou & Kapardis, 2006), pp. 75 – 88.
The Supreme Court’s decision can also be explained by the circumspect reception of the EAW in courts of other Member States, such as France, Germany, Greece and Poland. Had the Supreme Court not aligned itself with the stance adopted by these other courts, it could have been the sole court to have taken the decisive step in advancing the interpretation of third pillar EU law.

i) **Amending the Constitution**

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

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

This wording is strikingly similar to the counterpart provision of the Irish Constitution which served as a blueprint for the amendment of the relevant Cypriot provision. Article 29(10) of the Irish Constitution provides:

‘No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or

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60 (Official Gazette of the Republic of Cyprus, No.4090, 2006). Articles 1, 140, 169 and 179 of the Constitution were amended.
prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.’

Furthermore, Article 179, formerly providing that the Constitution is the supreme law of the Republic, was changed to: ‘Provided the dispositions of Article 1A are abided by, the Constitution is the supreme law of the Republic.’

ii) References for preliminary rulings

Finally, the issue of references for preliminary rulings will be addressed in the following paragraphs. The application of the procedure provided for in Articles 68 EC and 234 EC by the Supreme Court will complement the foregoing discussion on the reception and application of EU law in the Cypriot legal order.

More than five years after the accession of the central and eastern European States to the EU, the references for a preliminary ruling by the new Member States’ courts or tribunals remain rare. Cypriot courts are no exception to this. Until today only two such requests have been submitted to the ECJ under the terms of Article 234 EC. 61, 62, 63 Other requests by litigating parties have been rejected by the Supreme Court on the grounds that although a request for a preliminary reference under Article 234 EC would be helpful, it was not considered necessary for the purposes of reaching a judgment. 64

The Supreme Court has hesitated also in other instances to seek guidance from the ECJ. In Motilla v Republic 65 the applicant, a third-country national, sought to avail herself of the protection and benefits afforded by Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents. 66 The case was

61 (European Court of Justice), p. 105
65 (Cresencia Cabotaje Motilla v Republic, 2008)
within the Supreme Court’s second instance jurisdiction, against whose decisions there is no judicial remedy under national law. The crucial legal point was the interpretation of Article 3(2) (d) of the said Directive and the difference in the wording of the transposing legislation. The former provides that the Directive does not apply to third-country nationals who:

‘reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited.’

Law 8(I)/2007 which transposed the Directive, adopts the same wording with the addition of the phrase ‘with regard to its time duration’ at the end. The Supreme Court considered that this addition was altering in a fundamental way the essence of the exception. In explaining its reasoning the Supreme Court relied on the conclusions of an experts’ meeting that took place in Brussels. The legal matter that was fundamental to the resolution of the case had not been resolved previously by the ECJ and the Supreme Court had to weigh two competing interpretations of Community law. Even when confronted with such a situation, and although it acknowledged that a legally binding interpretation of the Directive could only be provided by the ECJ, it chose not to submit a request for a preliminary reference pursuant to Article 68 EC.

It is submitted that this is another illustration of the Supreme Court’s hesitation, to say the least, to open up the domestic judicial system to a meaningful and productive interaction with the Luxembourg Court. Relying on an experts’ meeting can sometimes be helpful in examining complex legal issues and can provide inspiration and guidance with regard to the reflection upon legal issues. However, it cannot be considered as a method of adjudication that conforms with the standards of Community law or those prescribed in the founding treaties. Having regard to the fact that no further judicial means were available to the parties, the Supreme Court should have seized the opportunity to seek a ruling from the ECJ on a matter which in itself acknowledged to have serious implications in the domestic sphere as well as the consistent application of EU law across the whole Union.
By contrast to the conclusions reached in the previous section, it must be observed here that the effective application of EU law in the domestic legal system is still to come. The Supreme Court appears to misconceive certain fundamentals of the EU legal order, thus leading to judgments like Konstantinou. Further, by avoiding making use of the 234 EC procedure, it fences itself up in splendid isolation. Two major problems arise out of this situation: first, the Cypriot legal order is not “integrated” in the EU legal order and practically remains outside the current developments in EU. Second, avoiding systematically making any requests for a preliminary reference by the ECJ may entail the initiation of a 226 EC procedure against Cyprus.

IV. CONCLUSION

The role of national courts has been transformed radically in the era of internationalization of law and of a multilevel judicial world. In-depth knowledge of divergent sources of law is a sine qua non condition for fair and correct adjudication to be achieved. It is in this ‘brave new world’ that the Supreme Court of Cyprus is called on to operate and to engage in a continuous judicial discourse. If the story of the application of the ECHR and EU Law in Cyprus were to be represented by a symbolic figure, this would be the mythical figure of Janus, having his two heads facing opposite directions.

On a positive note, the Supreme Court of Cyprus is fully in line with the Strasbourg Court. Based on a constitutional bill of rights which reproduces to a great extent the provisions of the ECHR, it has constantly referred to the latter’s case law to illuminate the meaning and extend the protection of human rights in the domestic legal order. This was so even at a time when the ECHR was not yet incorporated formally in the domestic legal system. In other words, when one speaks of the judicial protection of human rights in Cyprus, one is in essence speaking of constitutional rights. On the judicial level, no problems of principle exist as to the consistent interpretation of human rights in Cyprus compared to that of the overall realm of protection of the Council of Europe countries. A fundamental problem is, however, the application of the doctrine of necessity which is at odds with the ECHR.
The Supreme Court turns in the opposite direction when it encounters EU law questions. It indirectly challenged the hierarchy of norms within the EU when it adjudicated in *Konstantinou* that the EAW provisions were running counter to a constitutional provision and thus the latter must prevail. It missed the point when it confused the notion of ‘direct effect’ with that of ‘supremacy’ of EU law in the domestic legal order. It remains until today hesitant towards active interaction with the ECJ and has made only two requests for a preliminary reference to that court. Although it takes notice, and even applies EU law, in cases pending before it, it has not yet shown that it can accommodate EU law in a fashion similar to that of the ECHR. This can be explained to a certain degree when the fact that there is an almost 50-year long interaction between ECtHR and the domestic courts is considered and solely a 5-year congruent period for EU law. Nevertheless, since 2004 the Supreme Court has been a Community court which is expected and obliged to apply EU law correctly. Judging from the overview of its jurisprudence provided in Section III, I believe that there is still some way to travel for the Supreme Court to find its place in the constellation of national courts applying Community law.
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