

**THE UNIVERSITY OF HULL**

**The Accession of the Republic of Cyprus to the European  
Union: Constitutional Problems and Complexities**

**being a Thesis submitted for the Degree of Doctor of Philosophy  
in the University of Hull**

**by**

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***To my parents***

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Article 10 (ex 5)	Article 136 (ex 117)	Article 234 (ex 177)
Article 12 (ex 6)	Article 137 (ex 118)	Article 249 (ex 189)
Article 19 (ex 8b)	Article 138 (ex 118a)	Article 281 (ex 210)
Article 25 (ex 12)	Article 139 (ex 118b)	Article 288 (ex 215)
Article 28 (ex 30)	Article 140 (ex 118c)	Article 302 (ex 229)



Article 29 (ex 34)	Article 141 (ex 119)	Article 303 (ex 230)
Article 39 (ex 48)	Article 142 (ex 119a)	Article 304 (ex 231)
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UN SC Res. 1250/1999.

UN SC Res. 1251/1999.

UN SC Res. 1303/2000.

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**TABLE OF ABBREVIATIONS**

AC	Appeal Cases
ACP	African, Caribbean and Pacific (Countries)
All ER	All England Law Reports
ALR	Australia Law Reports
APEC	Asian Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
Bull EC	Bulletin of the European Communities
BVerFG	Bundesverfassungsgericht
BYIL	British Yearbook of International Law
CA	Court Appeal
CEE	Central and Eastern Europe
CET	Common External Tariff
CFSP	Common Foreign and Security Policy
CLR	Cyprus Law Reports
CL Rev.	Cyprus Law Review
CLT	Cyprus Law Tribune
CMLR	Common Market Law Reports
CML Rev.	Common Market Law Review
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
EC Treaty	European Community Treaty
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European Journal of International Law
ELJ	European Law Journal
EL Rev.	European Law Review
EP	European Parliament

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EPL	European Public Law
EU	European Union
Euratom	European Atomic Energy Community
FO	Foreign Office
GA	General Assembly (of United Nations)
GATT	General Agreements on Tariffs and Trade
HL	House of Lords
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IGC	Inter-Governmental Conference
ILR	International Law Reports
JCMS	Journal of Common Market Studies
JEI	Journal of European Integration
JEPP	Journal of European Public Policy
LIEI	Legal Issues of European Integration
LQR	Law Quarterly Review
MEDSPA	Mediterranean Special Programme Action
MLR	Modern Law Review
NAFTA	North American Free Trade Agreement
Neth. Yb. Int. L.	Netherlands Yearbook of International Law
OJ	Official Journal of the European Communities
OJLS	Oxford Journal of Legal Studies
PCIJ	Permanent Court of International Justice
PIO	Public Information Office
SC Res.	Security Council Resolution
SEA	Single European Act
TAIEX	Technical Assistance and Information Exchange
TEU	Treaty on European Union
TFSC	Turkish Federal State of Cyprus
ToA	Treaty of Amsterdam
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations
UNFICYP	United Nations Force in Cyprus

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WTO	World Trade Organisation
Yale LJ	Yale Law Journal
YEL	Yearbook of European Law

*Cyprus' geographical position, the deep-lying bonds which, for two thousand years, have located the island at the very fount of European culture and civilisation, the intensity of the European influence apparent in the values shared by the people of Cyprus and in the conduct of the cultural, political, economic and social life of its citizens, the wealth of its contacts of every kind with the Community, all these confer on Cyprus, beyond all doubt, its European identity and character and confirm its vocation to belong to the Community.<sup>1</sup>*

## **INTRODUCTION**

The Republic of Cyprus today enjoys privileged relations with the European Union and is on the threshold of accession. The Association Agreement of 1972, the Customs Union in 1988 and finally the application for full membership of the EU in July 1990, are the key points in the progress of relations between Cyprus and the EU. However, the desired end of this relationship, that of full membership, is yet to come. Cyprus hopes to become a full member of the European Union within the next enlargement as noted by the European Councils

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<sup>1</sup> Commission of the European Community, *"The Challenge of Enlargement; Commission Opinion on the Application by the Republic of Cyprus for Membership"*, Bulletin of the European Communities, Supplement 5/93, para. 44.

in Corfu (24 June 1994) and Essen (9 December 1994).<sup>2</sup> It is, indeed, a great task to be achieved and justifiably the Government of the Republic of Cyprus has considered it as the main axis of its foreign policy.<sup>3</sup>

Compared to the accession of other Member States, Cyprus poses a completely new case, mainly due to the complexity of its legal and political order as it stands today, and it seeks a special approach. Apart from the common legal problems that other Member States faced during their accession to the EU, the Republic of Cyprus would have to face additional difficulties due to the complexity of its case.

Thus, the road to full membership might not to be considered an easy one and certain matters present certain difficulties to the accession of Cyprus to the EU. One of these areas, which Cyprus must thoroughly examine before accession, involves the Cypriot constitutional order. The rigid and peculiar character of the Constitution of Cyprus and its current functioning, as a result of the refusal of the Turkish Cypriots to fulfil their constitutional duties and the *de facto* division of the island, might pose a real problem to the accession of Cyprus to the EU. Indeed, Turkey and the so-called “Turkish Republic of the Northern Cyprus” insist that the accession of Cyprus to the EU is prevented by the present constitution.<sup>4</sup>

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<sup>2</sup> The European Councils in Corfu and Essen noted that the next phase of the Union’s enlargement will involve Cyprus (and Malta). This was, also, confirmed in June 1995 by the European Council in Cannes.

<sup>3</sup> “*The Course of Cyprus Towards the European Union*”, Speech by the ex Minister of Foreign Affairs, Mr. Alecos Michaelides before the House of Representatives, 22 February 1996.

<sup>4</sup> See, “Joint Declaration by the President of Turkey and the President of the Turkish Republic of Northern Cyprus”, 6<sup>th</sup> March 1995, as cited at <http://www.cypnet.com/.ncyprus/cyproblem/articles/bolum32.html>



The Constitution of Cyprus, as it was formed in 1960, was a result of the Zurich-London Agreements providing a compromise political solution to the opposing demands of the Greek Cypriot community for *enosis* (union with Greece) and of the Turkish Cypriot community for *taksim* (partition of the island). It is under this constitution that the Republic of Cyprus was established as an independent new state, and it is still operated as the constitution of the Republic of Cyprus.

However, due to its austere character, in the sense of limited possibility for amendment and its strong bicomunal provisions, it has been considered as one of the most rigid constitutions of the world. Apart from its rigid character, its current functioning has been severely influenced by the historical and political developments that have occurred in the island. In particular, in 1964, after a series of intercommunal conflicts, the officers of the Turkish Cypriot community refused to exercise their constitutional duties and the constitution itself was under threat since, according to its provisions Turkish Cypriot participation is vital for the functioning of the Republic. To enable the continuation of the functioning of the organs of the Republic, the law of necessity was introduced and since then it has become a basic part of the Cypriot legal order. In 1974, after Turkey's "invasion" (or "intervention") the island was divided. However, the *de facto* division of the island has been declared illegal by the international community, and the attempt to establish a new state in the north of Cyprus has been unsuccessful. In fact, the Republic of Cyprus remains the only internationally recognised state on the island and its territorial integrity is internationally

recognised. Since 1964, then, the constitution of Cyprus, even in a mutilated position, has continued to operate, with the assistance of the law of necessity.

The EU has repeatedly stated that the only recognised state on the island is the Republic of Cyprus and the latter has subsequently entered into negotiations for accession. The fact that the EU does not consider the solution of the political problem of Cyprus as a precondition for accession<sup>5</sup> and that the accession of the Republic of Cyprus under the current status is not excluded by the EU, implies that prior constitutional analysis of the accession implications is important for Cypriot EU membership.

Therefore, this thesis aims to examine several constitutional problems which might arise in regard to Cyprus' accession to the EU. Firstly, it will be examined whether the Constitution of Cyprus, as it functions today, provides the power and the possibility for the accession of Cyprus to the EU. Parallel to this, it will also be examined whether the Constitution presents any restrictions on Cyprus' full membership of the EU. Finally, other constitutional issues in regard to Cyprus' accession to the EU, like the constitutional mechanisms for the application of Community law in the Cypriot legal order and the harmonisation of the Cypriot Constitution with the Community legislation, will be examined.

This thesis opposes those who assert that the Constitution of the Republic of Cyprus prevents Cyprus attaining full membership of the EU, and it seeks to prove that whatever the constitutional difficulties, the Cypriot Constitution

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cannot be considered as an obstacle towards the accession of Cyprus to the EU. This thesis is also hoped to provide a useful tool for the Republic of Cyprus in its examination of the harmonisation of the Cypriot constitutional order to the EU legislation.

The issue of constitutional arrangements for the accession of Cyprus to the EU, is a crucial one, and probably the most difficult to deal with. This explains why this issue is one of the last to be examined before accession. Current developments in the political problem of Cyprus and the possibility of reaching a solution, would undoubtedly result in the drafting of a new constitution. However, this is beyond the scope of this thesis. This thesis simply examines the situation as it exists today, and seeks to prove that even under the current constitution and situation, Cyprus has the power to accede to the EU, and that the Community's legislation could by additions/amendments to the constitution and by wise judicial interpretation of constitutional provisions, be accommodated within the Cypriot legal order.

This thesis makes an original contribution to knowledge in that no similar publication so far exists and the role of the constitution of Cyprus in regard to the accession has not been fully examined to date. The thesis also makes a significant contribution in addressing the lack of a detailed analysis of the constitutional law of Cyprus.

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<sup>5</sup> See, Council Conclusions of the Helsinki Summit, 10<sup>th</sup> December 1999, para. 9.

Because of the lack of previous work in this area, certain difficulties faced the completion of the thesis. It was, indeed, a very difficult task to achieve, since both the lack of materials on the Constitutional law of Cyprus and the current situation in Cyprus presented certain difficulties. Several issues, such as the application of the Constitution in Cyprus today, and the introduction of the law of necessity as a useful means for the application of the constitution, and also the peculiar character of the Cypriot constitution itself, presented even more difficulties for the completion of the thesis.

To overcome the lack of books and articles related to the subject-matter of this thesis, published resources were supplemented by interviews and meetings with several officials of the Republic of Cyprus.<sup>6</sup> A Questionnaire was also sent to officials from the Republic of Cyprus, the EU, Greece, Turkey, the UK and the so-called Turkish Cypriot authorities.<sup>7</sup> In regard to the analysis of the European legislation, numerous books, articles and web-sites have been used.

The thesis, is divided into six chapters.

The first chapter deals with the constitutional background of Cyprus and seeks to analyse and provide useful information about the rigid character of the constitution. Also, the current functioning and application of the constitution since the introduction of the law of necessity is examined.

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<sup>6</sup> See, Annex III.

<sup>7</sup> See, Annex IV

In the second chapter, the evolution of the relations between the Republic of Cyprus and the EU and the legal impact of their mutual agreements are discussed. Also, several other pre-accession issues, as the participation of the Turkish Cypriots in the accession negotiations, the political problem of Cyprus, the status of the Turkish Cypriot participation in the accession negotiations and the benefits expected from accession are examined.

The third chapter deals with the constitutional procedure for allowing the application and implementation of the European legislation in the Cyprus legal order. It is examined whether the Constitution of Cyprus provides for the accession of Cyprus to the EU and how Community law would be applied in Cyprus, in the event of accession. Theoretical analysis is undertaken of the basic principles of Community law and their impact on their application on the Cypriot legal order. Also, examples of the ways other Member States apply Community law on their national legal order are examined, in order to determine whether a model exists in the practice of any other state(s) that may provide a means of guidance for Cyprus.

The basic provision of Community law, that of the supremacy of Community law, its conflict with the Cypriot constitutional provision for the supremacy of the Constitution and the possibility of accommodation of the supremacy of European Community law in the Cypriot legal order are analysed in Chapter Four.

In the fifth chapter, there is an analysis of Articles 170 and 185 (2) of the Constitution of Cyprus and Article I of the Treaty of Guarantee, which provide

the basic reasons for Turkey's objection for the Cyprus' EU membership. It is, therefore, examined whether the provisions of these Articles do, indeed, prevent Cyprus from joining the EU. For reasons explained in this chapter, however, it seems that those Articles cannot be considered as obstacles towards the accession of Cyprus to the EU.

Finally, Chapter Six deals with the issue of amendment of the constitution of Cyprus and the necessity for such an amendment for the accession of Cyprus to the EU. The rigid character of the Cypriot constitution imposes certain restrictions in regard to its amendment. Therefore, the compatibility of several constitutional provisions with the European legislation is examined, and the possibility and necessity for the amendment of those Articles is analysed. The aim of this chapter is to identify those constitutional provisions which might be in conflict with the Community legislation, to examine whether firstly their amendment is possible and, if not, to suggest methods of attaining compatibility.

The thesis ends with a short Conclusion, which highlights its main arguments and summarises the author's position on the issue of the legality and feasibility of Cyprus' accession to the EU, within the framework of the present Constitution.

## **CHAPTER ONE:**

### **THE CONSTITUTION OF THE REPUBLIC OF CYPRUS AS IT WAS FORMED IN 1960 AND ITS HISTORICAL BACKGROUND**

It is important, before examining any constitutional issues arising from the accession of Cyprus to the EU, to analyse and emphasise the peculiar character of the Cypriot Constitution and its main provisions. The Constitution of Cyprus was formed in 1960 and as a product of a political settlement has its own very special and unique character. A series of historical events influenced its functioning and gave more complexity to its already complex character. It is, therefore, very important to examine all those historical events which influenced both its creation and its evolution. The historical background of the Cypriot Constitution is an important starting point for anyone who seeks to study and realise its peculiar character.

#### **1.1 Background of Cypriot constitutional history.**

Cyprus is an island with a very long history and it has always been an attractive and an easy target for outsiders. It is the third largest island in the Mediterranean Sea and is situated at the north-eastern angle of the Mediterranean eastern basin. It is located five hundred miles from Greece and forty from Turkey. It has been described as the crossroads of the three continents, Asia, Africa and Europe, and the bridge between East and West. Unfortunately, this privileged geographical

position of Cyprus has resulted in the passing of many powers over its territory, as one conqueror succeeded another. As it was observed by the German archaeologist Hirschfeld, *he who would become and remain a great power in the east must hold Cyprus in his hands.*<sup>1</sup>

Excavations in the island have proved that Cypriot civilisation goes back to the sixth millennium BC.<sup>2</sup> This long history is full of conquerors who ruled Cyprus through the passage of the ages. It has been conquered by most of the major powers that had an interest in, or sought control of the Middle East. The Greeks, Phoenicians, Assyrians, Persians, Ptolemies, Romans, Byzantines, Franks, Lusignans, Venetians, Ottoman Turks and British were some of those who exercised their power over the island of Cyprus. Finally, in 1960 Cyprus became an independent State and gained its own constitution for the first time in its entire history.<sup>3</sup>

Usually, constitutions and constitutional law are the product of a particular history, including revolutions and struggles. In Cyprus, the birth of its constitution came as a form of political solution rather than as a revolutionary demand of the people. This is the reason why the constitution of Cyprus is considered as one of the most peculiar among the world's constitutions.

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<sup>1</sup> George Hill, *"A History of Cyprus"*, (4 Vols.), Cambridge University Press, 1940-1952, Vol.1, p. 1.

<sup>2</sup> Spiridakis A., *"A Brief History of Cyprus"*, Athens, 1963, p. 1.

<sup>3</sup> More information about the history of Cyprus can be found in the CD-ROM Edition *"The History of Cyprus"*, <http://www.otenet.gr/hoc/>. See also, *"The Great Cypriot Encyclopaedia"* Filokypros Ed. 1990. A full bibliography on Cyprus' history is provided in Crawshaw, N., *"The Cyprus Revolt"*, George Allen and Unwin, London, 1978.



As mentioned above, it is very important, for anyone who wants to study the Cypriot Constitution, to focus on the historical background, awareness of which is necessary to an understanding of the analytical synthesis, the formation, and some of the basic provisions of the constitution. Therefore, before analysing the constitution, it would be appropriate here to pay special attention to the events which led to its birth.

Of all the alien rulers mentioned above, only the Greeks and Turks had a demographic impact on the Cypriot society. The Mycaenean Greeks colonised the island during the second millennium BC, having come to the island as merchants and immigrants. They introduced the Greek language and culture, both of which have been preserved to this day. In 1571, Cyprus was conquered by the Ottomans and the Turkish-Muslim population settled on the island. Herein lies the origins of bicomunalism in Cyprus. Cyprus, together with mainland Greece and other Greek islands, remained under Ottoman rule for more than four centuries. In 1821, Greece started the liberation struggle, and gradually several parts of Greece attained independence. A similar struggle for liberation was attempted in Cyprus as well, without success. A number of Orthodox Bishops in Cyprus were hanged by the Ottoman authorities, having been accused of supporting the revolution. The question of the incorporation of Cyprus into the Greek State was raised soon after 1830, but it did not become possible and Cyprus remained under Ottoman rule until 1878.<sup>4</sup>

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<sup>4</sup> Ibid.

In 1878, the Convention of Defensive Alliance between Great Britain and Turkey with respect to the Asiatic Provinces of Turkey<sup>5</sup> was signed, in return for Britain's undertaking to defend Turkey against any attack by Russia. According to this Treaty, Cyprus was to be administered by Britain. In particular, on 4<sup>th</sup> June 1878, Turkey consented "to assign the Island of Cyprus to be occupied and administered by England" to enable her to make the necessary provision for executing her engagements under the Treaty. By an Annex to this Convention signed at Constantinople on 1<sup>st</sup> July 1878 between the same contracting parties, the conditions under which England would occupy Cyprus were laid down and a provision was made that *if Russia restores to Turkey Kars and other conquests made by her in Armenia during the last war, the Island of Cyprus will be evacuated by England and the Convention of 4<sup>th</sup> June 1878 will be at an end.* By an additional Article signed at Constantinople on 14<sup>th</sup> August 1878, the High Contracting Parties agreed that for the term of occupation and no longer, full powers were granted to Great Britain to make Laws and Conventions for the Government of the island and to regulate its commercial and consular relations and affairs.<sup>6</sup> Therefore, technically, Cyprus remained under Ottoman sovereignty, though administered by Britain as a sort of protectorate.

On 5<sup>th</sup> November 1914, Great Britain, by an Order-in-Council of that date, unilaterally annexed Cyprus because the Ottoman Empire had entered the First World War on the side of Germany against Great Britain. Following the war, Turkey signed the Treaty of Lausanne in 1923, whereby it accepted the status of

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<sup>5</sup> See Alastos, D., "Cyprus in History", Zeno Publishers, London, 1976, at p. 302.

<sup>6</sup> Tornaritis, C., "Cyprus and its Constitutional and other Legal Problems", Nicosia, 1968.

Cyprus as a Crown Colony of Great Britain. According to Article 20 of that Treaty, *Turkey hereby recognises the annexation of Cyprus proclaimed by Britain on the 5<sup>th</sup> of November, 1914.* Moreover, by Article 16, Turkey renounced any right or title over Cyprus and by Article 27 divested itself of the exercise of any power or jurisdiction in political, legislative or administrative matters over the nationals of Cyprus.

In 1925, Cyprus became a Crown Colony and by Letters Patent<sup>7</sup> and an Order-in-Council introduced a new administrative system. The first change was the substitution of the High Commissioner by a Governor and the creation of a Legislative Council as provided by clause VIII of the Letters Patent 1925, but power of legislation by Order in Council was reserved to the Crown. This sort of administration was suspended in 1931, after a violent uprising was harshly suppressed by the British, so that from then until 1960, Cyprus was governed by decree. Nevertheless, the inter-war period was marked by the rise of nationalist liberation movements in Cyprus, as in other colonies. Greek Cypriots, who constituted 81% of the island's population,<sup>8</sup> led the nationalist liberation movement in the name of *enosis*, or union with Greece.

As Kitromilides observes, *a movement of national consciousness-raising and national assertions grew that culminated in a political vision of national emancipation through union with Greece.*<sup>9</sup> Britain was obviously not willing to

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<sup>7</sup> *Cyprus Gazette*, 1<sup>st</sup> May 1925, Notification No. 252.

<sup>8</sup> According to the 1960 census the population of Cyprus was 577615, out of whom 448857 were Greeks (81.1%), 104350 were Turks (17.9%) and 24408 others. (Source: Public Information Office (PIO), Cyprus).

<sup>9</sup> Kitromilides, P., 'From Coexistence to Confrontation; The Dynamics of Ethnic Conflict' in Attalides, M. (ed.), *"Cyprus Reviewed"*, Nicosia, 1977.

give Cyprus to Greece; therefore, on 1<sup>st</sup> April 1955, an armed revolt begun in Cyprus, led by EOKA. At this point Britain invited both Greece and Turkey to a Tripartite Conference to attempt to solve the Cyprus problem, thus marking the beginning of Turkey's active participation. The Tripartite Conference failed but in 1959 another followed.

On 5<sup>th</sup> February 1959, negotiations were launched in Zurich between Greece and Turkey regarding a solution to the Cyprus issue. On 11<sup>th</sup> February 1959, the basic structure of a new state, that of the Republic of Cyprus, was laid down at Zurich by the Greek and the Turkish governments. These documents, drawn up in French, became known as the Zurich Agreement. The Zurich Agreement represented a compromise between the Greek Cypriot community which was aiming to unite with Greece, the Turkish Cypriot community which was pressing for the partition of the island, and Britain's sovereignty over certain parts of Cyprus.

The Agreement reached at Zurich was subsequently, on the 19<sup>th</sup> February 1959, incorporated in the London Agreement<sup>10</sup> signed by the Foreign Ministers of Great Britain, Greece and Turkey and Archbishop Makarios on behalf of the Greek Cypriot community and Dr. Kuchuk on behalf of the Turkish Cypriot community. A Memorandum was also signed by the Prime Ministers of Great Britain, Greece and Turkey.<sup>11</sup>

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<sup>10</sup> Conference on Cyprus, Cmd. 679. See also the statements made at the time in Cmd. 680.

<sup>11</sup> The documents annexed to the Memorandum are listed as: A-Basic Structure of the Republic of Cyprus (RC), B-Treaty of Guarantee, between the RC and Greece, the UK and Turkey, C-Treaty of Alliance between the RC, Greece and Turkey Known as Zurich Agreements, D-Declaration made by the Government of the UK on February 17, 1959, E-Additional Article to be inserted in the Treaty of F-Declaration made by the Greek and Turkish Foreign Ministers on Feb. 17, 1959,

The resultant Zurich-London Agreements<sup>12</sup> were composed of three Treaties. The Draft Treaty concerning the Establishment of the Republic of Cyprus recognised the independence of Cyprus and British strategic interests were safeguarded in the form of two sovereign bases. The Treaty of Alliance was a defence treaty between Cyprus, Greece and Turkey whereby the three parties undertook jointly to defend the Republic of Cyprus. To that effect, the Treaty of Alliance provided for the permanent stationing of Greek and Turkish troops in Cyprus. Finally, the Treaty of Guarantee was a pact between all four signatories whereby the UK, Greece and Turkey undertook to ensure the independence, territorial integrity and security of Cyprus and to prohibit any activity tending to *promote directly or indirectly either union ... or partition of the island* (Article I). It provided for consultation between the three guarantor powers in order to resolve any situation resulting from the non respect of the Agreements and, failing such consultation and concerted action, each guarantor power then had the right to act separately to restore the *status quo*. The Constitution of the Republic of Cyprus was actually based on these two Agreements.

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G-Declaration by the Representatives of the Greek and Turkish Cypriot communities on Feb. 19, 1959.

<sup>12</sup> See Alexandrakis, M., Theodoropoulos, V. and Lagakos, E., “*Το Κυπριακό, 1950-1974*” [The Cyprus Problem, 1950-1974], 2<sup>nd</sup> Edition, Athens, 1987. See also Papadimitri, P., “*Παρασκήνια Συμφωνιών Ζυρίχης-Λονδίνου*” [The Zurich-London Agreements: Behind the Scenes], Nicosia, March 1978. For further bibliography look at Chrysostomides, K., “*Το Κράτος της Κύπρου στο Διεθνές Δίκαιο*” [The State of Cyprus in International Law], Sakkoulas Ed., 1994, p. 472. A very interesting analysis of the historical events leading to the Zurich Agreement is provided by Christopher Hitchens, “*Hostage to History - Cyprus from the Ottomans to Kissinger*”, Verso, London-New York, 1998, pp 29-50 and by Ioannis D. Stefanides, “*Isle of Discord, Nationalism, Imperialism and the Making of Cyprus Problem*”, New York University Press, 1999.

That Constitution was drafted by an *ad hoc* Joint Constitutional Commission,<sup>13</sup> composed of representatives of the Greek and Turkish communities, the Greek and Turkish governments and was assisted by a neutral legal adviser, a Swiss professor of constitutional law in the University of Lausanne. The task of the Commission was to draft the Constitution of the Republic of Cyprus and it had *in its work to have regard to and scrupulously observe the points contained in the documents of the Zurich Conference and had to fulfil its task in accordance with the principles there laid down.*<sup>14</sup>

The Constitution was signed at Nicosia on 16<sup>th</sup> August 1960, by the then Governor of Cyprus on behalf of the British Government, Archbishop Makarios on behalf of the Greek Cypriot community and Dr. Kuchuk on behalf of the Turkish Cypriot community.<sup>15</sup> On 16<sup>th</sup> August 1960 the Queen of England declared Cyprus as an independent country and the constitution came into force the same day.<sup>16</sup>

On 21<sup>st</sup> September 1960 Cyprus became a member of the United Nations and on 24<sup>th</sup> May 1961 a member of the Council of Europe. Moreover, on 15<sup>th</sup> February 1961 the House of Representatives, after an agreement between the leaders of the two communities and the British Foreign Secretary, by 41 votes to 9 decided that the Republic of Cyprus should become a member of the Commonwealth.

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<sup>13</sup> It was created under Part VIII of the London Agreement.

<sup>14</sup> See Agreed Measures in Part VIII of Cmd. 679, at p. 15.

<sup>15</sup> By Order-in-Council S.I. 1368/1960 made under the Cyprus Act, 1960.

<sup>16</sup> Cyprus Act, 1960 section 1; Also, the Republic of Cyprus Order-in-Council S.I. 1368/1960 appointed the 16<sup>th</sup> day of August 1960, as the day for the day coming into operation the Constitution.

Compared to other Constitutions, the Constitution of Cyprus is considered to be amongst the most complicated, with 199 Articles and six Annexes. Most scholars supporting the Greek Cypriot position argue that the Constitution was inherently unworkable and that it was imposed upon Cyprus by outside powers. On the contrary those who support the Turkish Cypriot position believe that it was a fine Constitution and that it might have worked, had the two communities shown a greater willingness to co-operate.

## 1.2 Outline of the 1960 Constitution.

As Professor S.A. De Smith has observed:

*The Constitution of Cyprus is probably the most rigid in the world. It is certainly the most detailed and (with the possible exception of Kenya's Constitution) the most complicated. It is weighed down by checks and balances, procedural and substantive safeguards, guarantees and prohibitions. Constitutionalism has run riot in harness with communalism. The government of the republic must be carried on, but never have the chosen representatives of a political majority been set so daunting an obstacle course by the constitution makers.<sup>17</sup>*

The peculiarity of the Constitution of Cyprus is based on two leading principles which permeate the entire constitutional structure. The first principle is the

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<sup>17</sup> De Smith, S.A., *The New Commonwealth and its Constitutions*, Stevens, London, 1964, p. 285.

communal dualism in both the legal and political order.<sup>18</sup> The Constitution provided for the establishment of a bicomunal state and aimed at regulation and protection of the interests of the two communities with reference to their ethnic origin, language, cultural traditions and religion.

The second principle, that of partial communal autonomy, aimed at ensuring the participation of each community in the exercise of government and avoiding the domination of the larger, Greek Cypriot community, in administrative matters.

The constitution institutionalised communal dualism in all spheres of government. Article 1 declares the State of Cyprus to be an independent and sovereign Republic, having a Greek President and a Turkish Vice President who are elected separately by their respective communities. The following Articles of Part I (General Provisions), Articles 1-5, go on to define the two communities. Under the Constitution the Greek Cypriot community is comprised of all citizens of Greek origin, including those whose mother tongue is Greek and those who share Greek cultural traditions or are members of the Greek Orthodox Church (Art. 2.1). The Turkish community is comprised of all citizens of the Republic who are of Turkish origin, whose mother tongue is Turkish, who share Turkish cultural traditions or who are Muslims (Art. 2.2). Citizens of the Republic who did not come under the above provisions were given three months to exercise the option of becoming, for constitutional purposes, members of the Greek or Turkish community. Moreover, Art. 3 provides equal status to the Greek and Turkish languages. According to this article, all executive, legislative and

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<sup>18</sup>Papademetriou, G., *“Το Συνταγματικό Πρόβλημα της Κυπριακής Δημοκρατίας”* [The



administrative acts and documents are to be drafted in both languages, while judicial proceedings are to be conducted and judgments drawn up in the language of the parties concerned.

Part II of the constitution, Articles 6-35, provides the Fundamental Rights and Liberties. In particular, Articles 6-28 enumerate the general rights and freedoms of individuals, whereas Articles 18-34 enumerate those rights and freedoms which are derived from membership in either of the two communities. Like Art. 5 of the Treaty of Establishment, Part II of the Constitution sets out a broad range of human rights provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its Protocols. Like many modern constitutions, that of the Republic of Cyprus provides for individual duties of citizens, such as the duty to contribute to the public burden (Art. 24.1) and the duty to perform military service (Art.10.3(b)) in addition to individual rights and liberties.

Part III, Articles 36-60, defines the Executive Branch. It provides the structure of the Council of Ministers and the powers given to the President and the Vice President of the Republic. The Council of Ministers is composed of seven Greek Cypriot Ministers and three Turkish Cypriot Ministers (one of whom is to hold one of the Ministries of Foreign Affairs, of Defence, or of Finance). The President is entitled to select and appoint (and terminate) the seven Greek Cypriot Ministers, whereas the Vice President is entitled to select and appoint (and terminate) the three Turkish Cypriot Ministers.

The President should be the Head of the State, enjoying the authority to receive the credentials of diplomatic envoys and to represent the Republic in all its official functions (Art. 37). The Vice President as Vice Head of the State, is entitled to be presented at all official functions (Art. 39). Although the President and the Vice President are not granted power, except on specific matters stipulated in Art. 47, 49, where they have a right to act either jointly or separately, they do not enjoy the right to wield the Executive power. For this reason they are responsible for establishing the Council of Ministers (Art. 46). Therefore, it is the Council of Ministers which enjoys all the residue of executive power other than that specifically reserved for the President and the Vice President of the Communal Chambers.

However, the President and the Vice President of the Republic each have the right of the final veto or to recommit Council decisions (as well as of laws or decisions of the House of Representatives). The veto provisions imply a dual Executive, again reflecting strongly the bicomunal structure of the Constitution.

Part IV and Part V of the Constitution, Articles 61-85 and 86-111, define the structure of the Legislative power of the Republic. The House of Representatives (Art. 61-85) and the two Communal Chambers (Art. 86-111) compose the Legislative Branch. The House of Representatives is bi-communal, based on a fixed ratio of 70:30 Greek and Turkish Cypriots respectively. It is elected by means of separate communal rolls. It is also bi-communalist in function, since committees also have to conform to the 70:30 fixed ratio. Most decisions of the

House require a simple majority but, in certain areas (such as electoral law, municipalities and taxes) the two communities are accorded separate communal majority votes.

The Communal Chambers exercise legislative powers with regard to all religious, educational and cultural matters, personal status and the courts dealing with civil disputes relating to personal status and religious matters; and with regard to the imposition of taxes to provide for the needs of the institutions dealing with these matters. Again the fixed numerical representation and the fragmentation of legislative powers demonstrate the strong bi-communal nature of the Constitution.

Parts VI, VII and VIII of the Constitution, Articles 112-151, cover the Public Service and Armed Forces. The numerical ratio 70:30 is applied to the composition of the public service as well. A ten-member Public Service Commission is to be set up to implement this provision. The ratio, of the composition of the Army, however, has to be 60% Greek Cypriot and 40% Turkish Cypriot. The Security forces are to be divided between the police and the gendarmerie in the ratio 70:30. These fixed numerical ratios illustrate further the strong bi-communal nature of the Constitution. In some instances, this strongly bi-communal concern is carried to what may be considered an extreme. For example, Art. 154(5) requires that in any coroner's inquiry, the coroner be of the same ethnic group as the deceased.

The administration of justice is exercised by the island's separate and independent judiciary. Part IX and Part X of the Constitution, Articles 133-164, deal with the Judicial Branch which consists of the Supreme Constitutional Court (Art. 133-151) of the High Court and the Subordinate Courts (Art. 152-164). The Supreme Constitutional Court is composed of a Greek Cypriot, a Turkish Cypriot and a non Cypriot judge, the *ex officio* president of the Court, who are appointed jointly by the President and the Vice President of the Republic. It adjudicates on all matters of constitutionality of legislation referred to it by the President of the Republic or arising in any judicial proceedings, including claims that any law or decision of the House of Representatives of the Budget is discriminatory. It adjudicates also on matters of conflict of power between state organs and questions of interpretation of the Constitution in cases of ambiguity. The Supreme Court is the final Appellate Court in the Republic and has jurisdiction to hear and determine appeals. It is also vested exclusively with Administrative Law judicial review powers.

The High Court - composed of a Turkish Cypriot, two Greek Cypriots and a non Cypriot judge - determines jurisdiction in matters concerning the two communities. If members of the two different communities are in civil or criminal dispute, the High Court must determine the composition of the Court to hear the case and it must include judges from both communities. Each Communal Chamber provides for the establishment, composition and jurisdiction of communal courts of original and appellate jurisdiction which deal separately with civil disputes relating to personal status and religious matters within each community.

Part XI, Articles 165-168, empowers the two communities to collect taxes as the Communal Chambers see fit. Part XII, Articles 169-178, covers miscellaneous provisions including International Treaties, the division of radio and television time between Greek and Turkish broadcasts, and the continuation of separate municipalities (Art 173-178). Each of the five largest towns had been divided into Greek and Turkish municipalities following the 1955 revolt and communal violence. The Constitution maintained the division, at least temporarily, until the President and the Vice President would *within four years, examine the question of whether or not this separation of municipalities shall continue*. This issue of separate municipalities proved to be one of the historical stalemates which led to the breakdown of the Constitution in 1963.

The last Part XIII, Articles 179-186, incorporates the Zurich-London Agreements so that they have constitutional force and cannot be altered without the agreement of all four parties. Article 182 enumerates some forty eight provisions known as the “basic Articles” which may not be altered either, including among others, the provisions relating to the executive final veto, the separate majority vote in the House of Representatives, the 70:30 ratio in the House of Representatives and in the Public Sector and the 60:40 ratio in the Army.

Finally, Articles 187-199 provide in detail for the transfer of sovereignty from the United Kingdom to the Republic of Cyprus by specifying that all former services, compensations and protection afforded by the government will be carried on without interruption. The first articles specify the time-limits and the inter-

transmission period provisions, for the smooth transition from a Crown Colony to the Republic of Cyprus. Furthermore, the last Articles provide for the continuation of services like public funds (e.g. the Widows' and Orphans Pension Fund) and the protection of the rights of those who were employed in the Public Service before 1960.

### 1.3 Constitutional Peculiarities.

The Constitution of Cyprus has been widely criticised as a problematic one, not only because of the manner in which the Constitution was granted, but also for some of its contents, notably those ruling out amendment, which seem to offend fundamental principles of public law.

Many academics and politicians agree that the 1960 Constitution was unsound and seriously defective in terms of political balance and functional capacity. Professor De Smith suggested that one who is unaware of the political background would justifiably wonder whether the Constitution of Cyprus is the product of a discussion between a constitutional lawyer and a mathematician.<sup>19</sup> Even the UN mediator called it an “*oddity*”.<sup>20</sup>

According to P. Polyviou :

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<sup>19</sup> Supra note 17. at p. 282.

<sup>20</sup> Report of the United Nations Mediator on Cyprus to the Secretary-General, UN Doc. S/6253.

*The 1960 Constitution failed to provide a sound framework for the government of the Republic, and is open to numerous objections...it is strikingly (and what is more important unnecessarily) undemocratic and inequitable, and not simply anti-majoritarian...<sup>21</sup>*

One of the first criticisms against the Constitution is the procedure of its creation. The criticism has been raised that its formation was against the democratic principle whereby the constituent power belongs to the people. It has been said that *the Constitution did not emanate from the will of its people. It became operative and was virtually forced upon the will of the people...<sup>22</sup>* The fact that during the Zurich negotiations there was no Cypriot representation, is the basis upon which one could support the proposition that the Constitution was a “*granted one*”, i.e. it was conferred upon the people of Cyprus rather than created by them. The ex-Attorney General of Cyprus called it a “*constitution octroyee*”<sup>23</sup>. The term “*constitution octroyee*” is an old one and it was used, as the well-appreciated ex-Attorney General explains, in order to describe a Constitution as *of the nature which in monarchical times of the past centuries the monarch condescended to grant his people, but is not consistent with the new prevailing democratic principles under which the constituent power is vested in, and is exercised by, the people.*<sup>24</sup> Professor De Smith also stated that, *the Constitution was in fact largely dictated by outside forces.*<sup>25</sup>

<sup>21</sup> Polyviou, P.G., “*Cyprus, Conflict and Negotiation, 1960-1980*”, Holmes & Meier Publishers, New York, 1980 at p. 21.

<sup>22</sup> Clerides, P., “*The Constitution of the Republic of Cyprus and the Provisions for the Review of the Laws by the Courts*” Nicosia, 1983, p. 1.

<sup>23</sup> Tornaritis, C., “*Cyprus and its Constitutional and Other Legal Problems*”, Nicosia, 1980, p. 39.

<sup>24</sup> *Ibid.*, at p. 39.

<sup>25</sup> De Smith, S.A., “*Constitutional and Administrative Law*”, Penguin Books, 4<sup>th</sup> Ed., Harmondsworth, 1981.

The fact that the constitution did not emanate directly from the people, and there was no opportunity for them to express an opinion through their *ad hoc* elected representatives, or to accept it by a referendum, lends further support to the view that the constitution of Cyprus is a conferred one. It has also been argued that since the President and the Vice President were not invested at the time when the Treaties were signed, they could not have treaty making power. However, it could be argued that *the authority of the President and the Vice President of the Republic to conclude these Treaties, was ex-post-facto recognised by the Treaties were considered as validly concluded and as operative and binding on the Republic as from the date on which they have been signed.*<sup>26</sup>

Even the leader of the Greek Cypriot community and the first president of the Republic of Cyprus mentioned that the Constitution which resulted from the Zurich-London Agreements was against the free will of the people of Cyprus. Notably, Archbishop Makarios stated:

*These Agreements, however, have not been the result of the free expression of the will of the people of Cyprus. They were imposed upon them from outside. Rejection of the Agreements would have meant denial of independence and increased bloodshed.*<sup>27</sup>

It follows from the above that there is a strong belief that this constitution was not a free one, but an imposed one. Strictly speaking, the 1960 Constitution was not the will of the majority of the people of Cyprus. However, bearing in mind

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<sup>26</sup> Supra note 23, at p. 40.

<sup>27</sup> Extracts from his speech at the Conference of non-aligned countries at Cairo on October, 9<sup>th</sup>, 1964, in Supplement No. 28 of *Cyprus Today*, at p. 6. The Archbishop had many reservations



that the formation of the Constitution was a part of a political solution, one can realise the reasons why the will of the majority was undermined.

The recognition of the existence of two communities and the strong bi-communal character of the Constitution, appears to be the cause of many political and legal problems. One could justifiably argue that the strong bi-communal character led to separatist rather than uniting sentiments between the two communities. P. Clerides comments:

*The Constitution of Cyprus was dominated by the concept of community. The executive, legislative and judicial authority was in a variety divided. Those who designed and laid the foundations of the Constitution share the blame for the after effects. The Turkish Cypriot leadership, supported in their intransigence by Turkey, misused the checks and balances provided in the Constitution with the sole aim of implementing a partitionist policy.*<sup>28</sup>

On the other hand, Professor Fortshoff stated that *the Greek Cypriots do not want the participation of Turks in the administration, and deem the status of an ordinary minority fitting for Turks.*<sup>29</sup>

The last two quotations illustrate the separatist notions of the two communities, which are the result of the strong bi-communal character of the Constitution. The lack of any unifying measures resulted in suspicion and mistrust between the two communities and as J. Joseph mentioned, *although the conflicting*

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before signing the Agreements, but he overcame them in a spirit of trust and goodwill towards the Turkish community and its leaders. See statement in IV of Cmd. 680 at p. 6.

<sup>28</sup> Supra note 22 at p. 2.

<sup>29</sup> The Turkish Cyprus Cultural Association, *"The Historical Background of Cyprus and the Turkish Republic of Northern Cyprus"* Ulus Offset, 1984, p. 23.

*ethnopolitical goals of enosis [union with Greece] and partition were ruled out, no measures were taken to promote integrative politics cutting across ethnic boundaries.*<sup>30</sup>

There have also been many arguments against some provisions of the Constitution and its functionality has been called into question. It has been argued that it limits the sovereignty and the independence of the state. According to Art. 1 of the Constitution the State of Cyprus is an independent and sovereign Republic. However, Professor Svolos supports the view that:

*So long as, in principle, the Constitution cannot emanate otherwise than from the free will of the bearer of the constituent power, and this is in every state its people, whenever by an International Treaty, the Constitution of any country is determined either wholly or basically by such Treaty or the Constitution is submitted to the prior approval of organs of a foreign state acting in the performance of international treaties, then there is a dependence of such state, to a greater or lesser extent, on a foreign power or generally there is a restriction of its independence.*<sup>31</sup>

Moreover, the Treaty of Guarantee could be considered as a limitation of the independence of the Republic of Cyprus. Article 181 of the Constitution (based on point 21 of the Zurich Agreement) provides constitutional power to the Treaty of Guarantee. According to Art. IV of the Treaty, the guaranteeing powers reserved the right to take action in case of disturbance of the state of affairs created by the Treaty, for the purpose of its restoration. By this provision,

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<sup>30</sup> Joseph, J., "Cyprus Ethnic Conflict and International Concern", MacMillan Press Ltd, 1997, p. 37.

<sup>31</sup> Svolos, A., "Συνταγματικό Δίκαιο" [Constitutional Law], Athens, 1971, p. 117, as translated in English by C. Tornaritis.

there is a certain limitation over the independence of Cyprus and as Tornaritis observes, *the provisions of that Treaty cannot be supported as reasonable restrictions of independence usually undertaken by international conventions freely entered into by, and not imposed on, a state as they not only restrict but practically destroy the independence of Cyprus.*<sup>32</sup>

In the case *Austro-German Customs Union*,<sup>33</sup> the International Court analysed the definition of the term “state’s independence”. In this case, reference was made to the independence of Austria and it was defined as the existence of a separate state which is not under the power of others or other States. The belief was also expressed that a state would not be, legally speaking, independent, if it was dependent on another power (state). Practically, the independence of a state is limited if other states reserve the right to intervene in its internal affairs and block by any means the function of its organs. According to this definition, then, one could rightly argue that the independence of Cyprus is limited by the power the Treaty of Guarantee provides to the guaranteeing powers.

Article 182 of the Constitution has also been criticised as a limitation of the sovereignty and the independence of the Republic. According to Art. 182 there are specific Articles of the Constitution (Basic Articles) which cannot, in any way, be amended, whether by way of variation, addition or repeal. This is a very strict provision which imprisons the will of the people or, better, of the constituent power, forever, no matter how obstructive and injurious to the

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<sup>32</sup> C. Tornaritis *“The Legal Aspects of the Question of Cyprus”*, Nicosia, 1971 Revision, at p.13.

<sup>33</sup> P.C.I.J. Series A/B 41 (1931).

normal functioning of the State such articles were proved to be. The term “Constitution” is defined by Cooley<sup>34</sup> as not the beginning of a community nor the origin of private rights; it is neither the foundation of law nor the incipient state of government; it is not the cause but consequence of political and personal freedom; it grants no rights to the people but is the creature of their power, the instrument of their convenience, designed for their protection in their enjoyment of their rights and powers which they possessed before the Constitution was made. The power, then, to create a constitution, i.e. the constituent power, derives and depends on the free will of the people.

*Moreover, in consequence of its internal independence and territorial integrity, a state can adopt any constitution it likes, arrange its administration in any way it thinks fit, enact such laws as it pleases, organise its forces on land and sea, build and pull down fortresses and opt for any commercial policy it likes and so on.*<sup>35</sup> Tornaritis also stated that Art. 182 is not only contrary to the accepted principles of public law and to current constitutional practice but also offends against the principles and purposes of the Charter of the United Nations.<sup>36</sup> According to Art. 1.2 of the Charter, one of the purposes of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self determination of the people.

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<sup>34</sup> Cooley, T.M., “*A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union*”, Union N.J, Lawbook Exchange, Reprinted edition, 1998, at pp. 68-69.

<sup>35</sup> Oppenheim’s International Law edited by H. Lauterpacht, “*International Law, A Treatise*”, 8th Vol., 1955-1962, p.87.

<sup>36</sup> Supra note 23 at p. 40.

The 1960 Constitution has also been criticised as unworkable. Much of the criticism has been directed towards the administrative structure and in particular the relationship between President and Vice President. Article 1 states that the State of Cyprus is a republic with a presidential regime. However, certain powers of the President are limited because of the Vice President's veto right. According to Art. 50, the President and the Vice President have a separate or conjoint right of final veto on any law or decision of the House of Representatives concerning foreign affairs, certain questions of defence and security. According to P. Polyviou, *the constitution supposedly establishes a presidential regime, but this must be viewed rather sceptically. Perhaps it would be more correct to describe it as a vice presidential one, so inflated are the powers of the Turkish Vice President and so great the obstructive potential of his prerogatives, the final and unqualified veto given to him in the vital areas delineated above being but the culmination of this unparalleled constitutional generosity.*<sup>37</sup>

Finally, the fixed ratio of 70:30 in the Public Service and 60:40 in the Army has been criticised by the Greek Cypriots as unfair. As mentioned above, the Greek Cypriots represented approximately the 80% of the population, while the Turkish Cypriots represented only 18%. However, one could argue that this is another separatist provision, rather than an unfair ratio, since it is definitely inconsistent with Art.21(2) of the Universal Declaration of Human Rights which provides for equal opportunities of admission in the Public Service. Justifiably,

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<sup>37</sup> Supra note 21 at p. 20.

then, one could argue that the legislator's attempt to protect the two communities in the island, separated them instead of uniting them.

Such are the peculiarities of the Constitution of Cyprus and as Professor De Smith writes:

*Unique in its tortuous complexity and in the multiplicity of the safeguards that it provides for the principal minority, the Constitution of Cyprus stands alone among the constitutions of the world. Two nations dwell together under its shadow in uneasy juxtaposition, unsure whether this precariously poised structure is about to fall crashing about their ears.*<sup>38</sup>

#### **1.4 The uneasy years; the 1963 constitutional crisis and the new status of 1974**

Soon after the establishment of the Republic of Cyprus and the application of its Constitution, huge problems and disputes arose between the two communities. There are several views about the reasons for these disputes. Some support the belief that it is because of the unworkability of the Constitution and others argue that it is because of lack of willingness for co-operation and coexistence between the two communities.<sup>39</sup> There is some justification for both views and both factors resulted in the tragic evolution of the events in Cyprus.

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<sup>38</sup> Supra note 17 at p. 285.

<sup>39</sup> The latter is strongly supported by John Reddaway, in his book, "*Burdened with Cyprus - The British Connection*", Weidenfeld & Nicolson, 1986. He supports the view that "*the responsibility for operating it and making it work rested with the Cypriot leaders*" (p. 140). However, it seems

The first issue to cause “*genuine difficulties*”<sup>40</sup> was the 70:30 ratio in the Public Service. The Greek Cypriots felt that this provision was arbitrary, unjust and discriminatory, whereas Turkish Cypriots argued that it was restoring equity in the Public Service which had been dominated by Greek Cypriots during the British administration.<sup>41</sup> During the period 1960-1963, a large number of appointments in the Public Service were disputed on communal grounds and the Constitutional Court failed to give a resolution due to its own paralysis by ethnic fragmentation and polarisation. Its neutral president, German jurist Ernst Fortshoff, found himself caught amidst ethnically polarised factions, and he resigned in May 1963.

After certain complaints by the Turkish Cypriot leader about mis-operation of this ratio in the Public Service, the Turkish members of the House of Representatives refused to vote for the budget and blocked the tax legislation by using their separate majority right. They justified their position by referring to a delay in the implementation of other constitutional provisions. Finally, the two Communal Chambers acted separately and they imposed their own taxes on their respective ethnic groups. That left the state without central control or regulation of public financial affairs in a very crucial period for its economy.<sup>42</sup>

Another source of tension between the two communities was the proposal for creating a Cypriot Army. This, actually, constituted a major crisis in the

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that he oversimplifies the situation, since, as a matter of fact, the rigid character of the Constitution itself might provide certain difficulties on its workability.

<sup>40</sup> Crawshaw, N., “*The Cyprus Revolt*”, George Allen and Unwin, London, 1978, at p. 365.

<sup>41</sup> See Joseph, J., *supra* note 30 at p. 46.

<sup>42</sup> *Supra* note 40 at p. 366.

executive branch. The question was whether this army, which was provided by the Constitution, was to be formed on a separate or a mixed basis. The Greek Cypriot Ministers and the President supported an integrated army. On the contrary, the Turkish Cypriot Ministers and the Vice President argued that a mixed army would not be possible, because of linguistic and religious differences. However, the Council of Ministers, in which Greek Cypriots constituted the majority, decided that there should be no separation. Then the Vice President exercised his veto right. The President reacted by questioning the applicability of the right of veto of the Vice President and therefore the plan to form a Cypriot Army was abandoned.

However, the issue which led to the constitutional breakdown of 1963 was the provision on separate municipalities. According to Art. 173 of the Constitution, separate municipalities were to be created in the five largest towns and the President and the Vice President had, within four years of the day of the entry into operation of the constitution, to examine the question whether or not this separation of the municipalities should continue. Art. 177 provided that each municipality should exercise its jurisdiction within a region (of the relevant town) the limits of which should be fixed by an agreement between the President and the Vice President. According to Archbishop Makarios, since in none of the towns concerned did the population live exclusively in ethnic areas, separation of municipalities was difficult to bring about without severe detriment to both communities. He also criticised the provision as a first step towards partition and resisted its implementation. The issue was brought to the Parliament where separate majority votes confirmed the deadlock. Each community then followed



its own way to implement its view. The President, backed by the Greek Cypriot majority of the Council of Ministers, issued an executive order for the appointment of unified municipalities. On the other hand the Turkish Cypriot Communal Chamber voted a communal law for the creation of separate Turkish Cypriot municipalities. Both actions were brought before the Supreme Constitutional Court which decided that both actions were unconstitutional and void *ab initio*.

The result of all these conflicts between the two communities was the inability of the state to function properly. By 1963, *partly because of the parties' mutual suspicion, hostility and absence of good will which made them adopt rigid and uncompromising conditions and partly because of the complexity of the constitutional arrangements which themselves proved a fertile source of disputes, key governmental operations had come to a virtual halt.*<sup>43</sup>

Under these circumstances the President of Cyprus, Archbishop Makarios, on 30<sup>th</sup> November 1963, proposed by a Memorandum<sup>44</sup> to the Vice President an amendment of certain provisions of the Constitution. He actually made 13 proposals for amending Articles which appeared to be problematic for the proper functioning of the state. The 13 proposals were:

1. The right of veto of the President and the Vice President to be abandoned.

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<sup>43</sup> Supra note 21 at p. 28.

<sup>44</sup> A copy of this Memorandum was given to the three guaranteeing powers for their information.

2. The Vice President of the Republic to deputise for the President in case of his temporary absence or incapacity to perform his duties.
3. The Greek President of the House of Representatives and its Turkish Vice President to be elected by the House as a whole and not, as at present, the President by the Greek members of the House and the Vice President by the Turkish members of the House.
4. The Vice President of the House of Representatives to deputise for the President of the House in case of his temporary absence or incapacity to perform his duties.
5. The constitutional provisions regarding separate majorities for enactment of certain laws by the House of Representatives to be abolished.
6. Unified municipalities to be established.
7. The administration of justice to be united.
8. The division of the Security Forces into Police and Gendarmery to be abolished.
9. The numerical strength of the Security Forces and of Defence Forces to be determined by law.
10. The proportion of the participation of Greek and Turkish Cypriots in the composition of the Public Service and the Forces of the Republic to be modified in proportion to the ratio of the population of Greek and Turkish Cypriots.

11. The number of members of the Public Service Commission to be reduced from ten to five.
12. All decisions of the Public Service Commission to be taken by simple majority.
13. The Greek Communal Chamber to be abolished.<sup>45</sup>

Immediately after the proposals, the government of Turkey reacted by rejecting any kind of amendment to the 1960 Constitution. The Vice President of the Republic, Dr. Kutchuk, in a subsequent memorandum, accused the Greek Cypriot side first of intentionally not implementing those parts of the Constitution which had favoured the Turkish community and then of attempting to overthrow it completely by the submission of sweeping amendments.<sup>46</sup>

Tragic events followed when communal fighting broke out. On 21<sup>st</sup> December 1963, bloody clashes occurred between the two communities and Turkey threatened armed intervention. Therefore a new Conference between the Republic of Cyprus, Greece, Turkey and the United Kingdom was held in London in January 1964, but the attempt to reach a settlement failed.

In the face of the Turkish threat to invade the island, the Republic of Cyprus took the matter to the United Nations. Both the Security Council and the General Assembly dealt with the matter. The first step was the formation of a Peace Keeping Force in Cyprus (UNFICYP) and the appointment of a Mediator, *for*

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<sup>45</sup> Supra note 23 at p. 46.

<sup>46</sup> Supra note 21 at p. 29.

*the purpose of promoting a peaceful solution and an agreed settlement of the problem confronting Cyprus in accordance with the Charter of the United Nations having in mind the well being of the people of Cyprus as a whole...*<sup>47</sup>

However, all the attempts, between 1963 and 1974, to negotiate a solution in terms of bi-communal constitutional arrangements failed.<sup>48</sup> During this period, certain constitutional developments occurred due to the abnormal situation which had been created.

After the events of 21<sup>st</sup> December 1963, the Turkish ministers, the Turkish members of the House of Representatives and the Turkish officers refused to exercise the duties and the functions of their respective offices. Nevertheless, the state could not paralyse its functions, so it carried on under new circumstances. The House of Representatives and the Council of Ministers continued to function in the absence of the Turkish Cypriots. The House of Representatives, as long as a quorum existed, continued to take decisions in accordance with the constitutional provisions, and the Ministers had to perform their duties under Art. 58. In any case where there was a doubt, the Ministers had to refer the matter to the Council of Ministers.

From July 1963, the Supreme Constitutional Court could not sit because of the resignation of its President. The High Court was condemned to inactivity due to the resignation of its President in May 1964. Moreover, the Turkish Cypriot

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<sup>47</sup> UN Resolution S/5575 of the 4<sup>th</sup> and the 13<sup>th</sup> March, 1964.

<sup>48</sup> See Polyviou, *supra* note 21, at p. 34-102; See also Chrysostomides, *supra* note 12 at p.95-117.

Judges ceased to attend to their duties in District Courts in June 1964. Later, though, they resumed attending, although at a reduced rate. Therefore, the Administration of Justice (Miscellaneous Provisions) Law 1964 was enacted, in order to allow the continuation of the judicial branch. This stated, *Justice should continue to be administered unhampered by the situation created and it became necessary to make legislative provisions in respect of the exercise of the judicial power hitherto exercised by the Supreme Constitutional Court and by the High Court until such time as the people of Cyprus may determine such matters.*<sup>49</sup>

According to the above Law, a new Court was established, the Supreme Court, which replaced the Supreme Constitutional Court and the High Court, and which would exercise their jurisdiction. It consists of between five to seven members and at that time included all the existing members of the previous two Courts, under the presidency of its senior member, who at that time happened to be a Turk. Future vacancies could be filled by a new appointment of a person having the necessary qualifications, by the President of the Republic.

A new Supreme Council of Judicature was also established for replacing the functions of the High Court concerning appointments, promotions, transfers and disciplinary control over the lower judiciary. Members of this Council are the Attorney General of the Republic, the President and two Senior Judges of the Supreme Court, the senior President of a District Court and the senior District Judge and a practising advocate of at least twelve years' standing, elected ad hoc by the Cyprus Bar Association every six months.

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<sup>49</sup> Tomaritis, C., supra note 23 at p. 51.

The case of *The Attorney General of the Republic v Mustafa Ibrahim*<sup>50</sup>, examined the validity of the Administration of Justice (Miscellaneous Provisions) Law. The argument was the unconstitutionality of the Law upon the ground that it amended the Constitution in contravention of Art. 182. However, it was decided that the Law was justified under the law of necessity, in view of the abnormal situation prevailing in Cyprus.<sup>51</sup> However, since 2<sup>nd</sup> June 1966, the Turkish Cypriot Judges have refused to attend to the performance of their functions.

Based again on the doctrine of necessity, the transfer of the exercise of the competence of the Greek Communal Chamber and the establishment of the Education Law of 1965, abolished the Greek Communal Chamber and a Ministry of Education was created to be in charge of educational matters concerning the Greek community until such time as the people of Cyprus will have the opportunity to express their opinion on such matters.

Furthermore, to enable the smooth running of the functions of the Public Service which had been paralysed as well, the Public Service Law 1967 was enacted by the House of Representatives. According to this, a new Commission was established to exercise the Public Service Commission's functions, as provided by the Constitution. The new Commission consisted of five members appointed by the President of the Republic.

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<sup>50</sup> (1964) CLR 195.

<sup>51</sup> For an extent analysis for the introduction of the law of necessity in the Cypriot legal order, see Chapter 1.5.

By these means the government of the Republic managed to continue its functions in spite of the crisis which had arisen in all the organs of the Republic and which threatened the collapse of the state.

However, the situation in Cyprus was exacerbated by the events of 1974. On 15<sup>th</sup> July 1974 a military coup engineered by the Greek junta and its representatives in Cyprus, attempted to assassinate Archbishop Makarios and managed to take power. Following that, Turkey made use of its right under Art. IV of the Treaty of Guarantee and intervened (according to the Turkish view) or invaded (according to the Greek view) on 20<sup>th</sup> July 1974. Shortly thereafter, the junta in Athens fell, and the coup in Cyprus failed. Therefore, the Greek Cypriot leader of the House of Representatives became acting President. However, on 14<sup>th</sup> August, Turkey launched a second “intervention” or “invasion” acting against the Security Council Resolutions calling for a cease-fire and troop withdrawal (Resolution 353 of 20<sup>th</sup> August 1974)<sup>52</sup>. As a result, Turkey proceeded to occupy Northern Cyprus.

Turkey justified its action as a peace operation which, as it claimed, was a military intervention to consolidate the Turkish Cypriot enclaves into a unified Cypriot zone in Northern Cyprus.<sup>53</sup> On the other hand, the Greek view is that

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<sup>52</sup> See also the Geneva Declaration on the 30<sup>th</sup> July 1974, signed by the Foreign Ministers of Greece, Turkey and the United Kingdom, and provided *inter alia* for the cease-fire.

<sup>53</sup> It has been widely argued whether Turkey as a guarantor power had the power to “intervene” in such way. Nevertheless, the strongest argument against the Turkish claims for “peace intervention” is the duration of the occupation of the North Cyprus. If it was, indeed, an intervention, Turkey should have intervened to restore the order and to leave. However, no restoration of the order in the island has since been achieved. For more discussion about the illegality of Turkey’s “intervention”, see, Christopher Hitchens, “*Hostage to History, Cyprus from*

Turkey launched an invasion to divide the island and achieve its long-planned aim of partition, and that it performed an illegal occupation of 37% of the Cypriot territory. According to Thomas Farr:

*The position of the Greek side on the Turkish invasion in 1974, argued successfully in European and American capitals, is that it was clearly illegal. In the event of a breach of the provisions of the Treaty of Guarantee, Article IV enables each guarantor power (Britain, Greece, Turkey) to take action with the sole aim of re-establishing the state of affairs created by the present Treaty, i.e. the independence, territorial integrity, security and constitution of the Republic. Any ambiguity regarding Turkey's desire to re-establish the status quo in its initial invasion of July 20 was swept away by its second military push to the Attila line in August, after Sampson had abdicated in favour of Clerides and the Greek junta (responsible for Sampson and the coup) had been overthrown. Partly as a result of this argument, the United Nations and most capitals have continued to recognise the Greek Cypriot administration as the legitimate government of Cyprus, and have honoured the economic embargo of the north.<sup>54</sup>*

During its 29<sup>th</sup> Session, in November 1974, the UN General Assembly adopted unanimously resolution 3212 which provided the framework for a solution to the Cyprus problem. In its key provision it calls for the respect of the sovereignty, independence, territorial integrity and non alignment of the Republic of Cyprus, the speedy withdrawal of all foreign armed forces from the Republic, the cessation of all foreign interference, and the taking of urgent measures for the return of the refugees to their homes in safety. The resolution of the General Assembly was endorsed by the Security Council in its resolution 365(1974) of

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*the Ottomans to Kissinger*", Verso Publishing, 5<sup>th</sup> ed., 1998, pp. 101-120. See also, Chrysostomides, K., op. cit., pp. 95-151.

<sup>54</sup> Farr, T.F., "Overcoming the Cyprus Tragedy: Let Cypriots be Cypriot", <http://www.erols.com/mqmq/farr.htm>, p. 10.



13<sup>th</sup> December 1974, and thus its implementation became mandatory. Turkey, although voted for the resolution, did not comply with any of its provisions.

On 13 February 1975, the establishment of the Turkish Federal State of Cyprus (TFSC) was announced. The Security Council by its resolution 367(1975) after recalling its previous resolutions and particularly resolution 365(1974), regretted this unilateral action and affirmed that such action should not prejudice the final political settlement of the Cyprus problem. The resolution also called for the urgent and effective implementation of all parts and provisions of General Assembly resolution 3212(XXIX) endorsed by Security Council resolution 365(1974). However, again, this resolution was not respected.

On the contrary, on November 15<sup>th</sup>, 1983, the Turkish Cypriot leader declared an independent state calling itself the “Turkish Republic of Northern Cyprus” (TRNC). The international community condemned this action, describing it as null and void and calling for its immediate withdrawal (UN resolution 541/83). The lack of international status of the “Turkish Republic of Northern Cyprus” has been consistently reaffirmed by the Security Council,<sup>55</sup> as well as by the General Assembly,<sup>56</sup> by the European Court of Human Rights,<sup>57</sup> and national courts.<sup>58</sup>

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<sup>55</sup> See, especially, Security Council Resolutions 541 (1983) and 550 (1985).

<sup>56</sup> See, GA Res 37/253, 16 May 1983.

<sup>57</sup> See, *Loizidou v Turkey* (Preliminary Objections) ECHR Ser. A Vol. 310 (1995) 18; *Loizidou v Turkey* (Merits) (1996) 108 ILR 443. For more information see <http://kypros.org/Loizidou>.

<sup>58</sup> In the UK, see, *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508, 73 ILR 9; *R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd* [1994] 100 ILR 510; *Polly Peck International plc v Nadir (No2)* [1992] 4 All ER 769, 773; *Caglar v Billingham* [1996] STC (SCD) 152, 108 ILR 510.

The European Court of Justice, in the *Anastasiou I* and *II* cases,<sup>59</sup> refused to recognise documents produced by the “TRNC authorities” as legal, since as it mentioned, the only officially recognised Government on the island is that of the Republic of Cyprus. In *Anastasiou I* the Court held that any necessary certificates for imports from Cyprus, shall not be issued by other than the competent authorities of the Republic of Cyprus. Therefore the ECJ refused to accept as legal any phytosanitary certificates issued by the “TRNC authorities”. In *Anastasiou II* the arising question referred as to whether necessary phytosanitary certificates for products exported from the North of Cyprus could be issued by Turkey. In this case, although, the Court decided that under certain circumstances certificates issued by countries other than the country of origin of the product might be accepted, it reconfirmed that in regard to Cyprus the only recognised authorities are those of the Republic of Cyprus.

Up to today, many attempts by many countries and, above all, the United Nations’ efforts, have not yet provided a solution to the problem of Cyprus. Bicomunal negotiations and resolutions adopted by many international organisations have not resolved the problem.<sup>60</sup> However, the Republic of Cyprus continues to exist and is recognised by the whole international community as the only legal government on the island. According to international law principles, the occupant may exercise military power on such territory but does not acquire sovereignty over it, so the recognised Republic of Cyprus continues to have

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<sup>59</sup> *R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou I (Pissouri) Ltd* [1994] ECR I-3087; 100 ILR 510; *R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou II (Pissouri) Ltd, C-219/98, Judgment of 4 July 2000.*

<sup>60</sup> See, *inter alia*, the UN, the Council of Europe, the Commonwealth, the Non Aligned Movement and the EU. For more information about the EU position, see Chapter 2.3.3.

sovereignty over the occupied area, though it may be temporarily prevented from exercising its powers.<sup>61</sup>

In the Republic of Cyprus, neither the form nor the structure of government has changed. It is still based on a presidential regime and a Council of Ministers still operates as the main executive organ. The President is elected by the majority of the people and the position of Vice President is temporarily vacant. However, in the Council of Ministers, all the posts are filled in the interest of the effective functioning of the State.

The House of Representatives exists and operates under the 1960 constitutional provisions, despite the absence of the Turkish Cypriots. As Tornaritis states:

*The present Government of the Republic has no unlawful origin as it is based on the constitutional provisions adapted to the circumstances as evolved in Cyprus. The wilful absence of the Turkish Cypriots from the administration of the Republic cannot wreck its proper functioning, which has to be carried out on the application of the principle *salus rei publicae suprema lex*, with the unavoidable deviation from the strict letter of the Constitution, under the law of necessity. Such law was considered by the Supreme Court to be engrafted on the Constitution of Republic...So, from the international law point of view, there can be no doubt that the present government of the Republic, controlling its public services, performing effectively the usual functions of political power and enjoying the confidence of the vast majority of the people of the Republic, is the government of the Republic of Cyprus and is recognised as such by all the other states, except Turkey, and by all international organisations.<sup>62</sup>*

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<sup>61</sup> Supra note 23 at p. 60.

<sup>62</sup> Ibid., at p. 61.

### 1.5 The introduction of the Law of Necessity in the legal order of Cyprus.

As mentioned above, the Republic of Cyprus has, since 1964, based its legal continuation and existence on the law of necessity. In the case *Mustafa Imbrahim*, which established the doctrine of necessity in the Cypriot legal order, the Supreme Court held that *the proper discharge of the administration of justice constitutes a necessity, especially in times of upheaval, such as the present, which cannot reasonably be disputed.*<sup>63</sup>

The law of necessity derives from the principle “*salus populi, suprema lex est*” which means the safety of the people is the supreme law, and is applied in many fields of law. In public law it is considered as the doctrine which in exceptional cases is applied in order to avoid the strict application of an existing law, for the sake of equity, functionability, continuity and safety of a state. According to Professor Manesis’ definition, it is the set of founding rules of law, according to which those who exercise the executive power are exceptionally entitled to act against the ordinary procedure by applying rules necessary for the safety of the state. These rules can be set only on a temporary basis, as long as the situation remains critical, and they enjoy the same legality as the equivalent rules of the appropriate organs, considering that such organs are unable to act properly.<sup>64</sup>

Commenting on this definition, Papafilippou supported the view that Manesis’

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<sup>63</sup> Supra note 50.

<sup>64</sup> Manesis, A., “*Περί Αναγκαστικών Νόμων, Αι Εξαιρετικά Νομοθετικά Αρμοδιότητα της Εκτελεστικής Εξουσίας*” [Laws of Necessity, The Exceptional Legislative Competence of the Executive Power], Athens, 1953, p. 134.

definition is a narrow one because it does not include the actions of the legislative power. According to him, the definition of the law of necessity should cover the cases where, under exceptional circumstances, the legislative power is liable to apply amending rules to the Constitution, even if they are against its provisions.<sup>65</sup> He also states that the principle of *salus populi suprema lex est* is actually the supreme principle of the constitutional law,<sup>66</sup> so in cases where necessity demands action, deviation from certain provisions of the Constitution should be accepted.

The doctrine of necessity has been internationally recognised and it has been adapted in the most states' legal order. In Germany, for example, the doctrine has been accepted and was embodied in the first democratic Constitution (Weimar Constitution) in 1919. According to Art. 48 of this Constitution, the President of the State could take any necessary measures for the restoration of the order in cases of serious danger to the State, without any consultation by the Parliament.<sup>67</sup> This was in fact the provision which helped Hitler to abolish the constitutional liberties when he was in power. Therefore, stricter provisions concerning the operation of the doctrine of necessity have been applied in the 1949 Constitution of West Germany. In this constitution, the doctrine has been accepted bearing the form of necessary legislation. According to Articles 68 and 81 during the period where the Parliament does not provide a confidential vote to the Government (that may last only for six months), the Government is able

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<sup>65</sup> Papafilippou, L., "Το Δίκαιο της Ανάγκης και η Συνταγματική Τάξη στην Κύπρο" [The Law of Necessity and the Cypriot Constitutional Order], Nicosia, 1995, p. 3.

<sup>66</sup> Ibid., p. 4.

<sup>67</sup> Ibid., p. 9.

to oblige the Parliament to vote for a certain law (described as urgent law) in cases where the Federation Council supports this law as well.

In France, the doctrine of necessity is known as the theory of exceptional circumstances. It is founded on the predominance of the concept of public interest and the superiority of the safety of the State. According to Conseiller d'Etat, Raymond Odent, *when the life of the country is threatened the exigencies of the moment prevail over the juridical scruples of legality.*<sup>68</sup> Moreover, in the case *Syndicat National des Chemins de Fer de France* (18<sup>th</sup> July, 1913, Rec. 875)<sup>69</sup> it was stated that the doctrine of necessity is *the superior law of the nation to ensure its existence, to defend its independence and security.* This doctrine, although it did not exist in the 1875 Constitution, became a judicial precedent in order to ensure the state's functioning not only in time of war but in periods of riots, floods, and grave epidemics as well. Therefore, a provision incorporating the doctrine into the French legal order was made under Art. 11 of the 1958 Constitution.

In Britain, the doctrine of necessity is accepted as well. Although, there is no written Constitution, there are principles which recognise this doctrine. A. V. Dicey argues that the executive branch shall have the power to act against the law in cases of defence of the state and he states that *for the sake of legality itself the rules of law must be broken.*<sup>70</sup> Moreover, L. Wolf-Philips stated that

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<sup>68</sup> See, Josephides J, Judgment in Imbrahim Mustafa Case, supra note 50.

<sup>69</sup> Ibid.

<sup>70</sup> Dicey, A. V., *An Introduction to the Study of the Law of the Constitution*, Mcmillan Press, 10<sup>th</sup> Ed., London, 1960, pp. 411-414.

this principle was also accepted when the State was threatened by factors other than war referring to *Chitty's example of Parliament acting in an illegal manner by assembling without Royal summons (the necessity of the case rendered it necessary for the Parliament to meet as they did, there being no King to call them together and necessity supersedes all law)*.<sup>71</sup> In Britain also, the Government would revert to the prerogative power of the Crown for national security and in times of emergency if legal power were not otherwise present.

In the case of *Madjimabuto*,<sup>72</sup> however, the British Privy Council refused to apply the principle of necessity for recognising the validity of laws passed by the Rhodesian regime, justifying its decision on the fact that the status of the Rhodesian regime was not recognised and its activities were considered as a revolution against the British sovereignty over Rhodesia. Nevertheless, it is important to emphasise that in the above case, the Council did not reject the existence of the law of necessity, but simply decided that its application was not justified. On the contrary, the Council stated that in general there might be a principle based on necessity.<sup>73</sup>

The doctrine of necessity is also accepted by the Italian Constitution in certain provisions. For example Art. 77 provides:

*1. The Government may not, unless properly delegated by the Chambers, issue decrees having the value of ordinary laws.*

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<sup>71</sup> Wolf-Philips, L., "*Constitutional Legitimacy; A study of the doctrine of necessity*" as cited in Chrysostomides, *supra* note 12 at p. 109.

<sup>72</sup> *Madjimabuto v Larder Burke* (1968) 3 All ER 561.

<sup>73</sup> *Ibid.*, p. 577.

*2. When, in exceptional cases of necessity and urgency, the Government issues, on its own responsibility, provisional measures having force of law, it shall on the same day submit them for conversion into law to the Chambers which, even if they have been dissolved, are expressly summoned for that purpose and shall meet within five days...*

Moreover, special reference must also be made to the successful application of the law of necessity by Canadian Courts. Particularly, in the cases of *Reference re Language Rights under the Manitoba Act 1870*<sup>74</sup> and *Bilodeau v Attorney General of Manitoba*,<sup>75</sup> the law of necessity was described as a basic foundation of the constitution.<sup>76</sup>

In the Australian case *Laws v Australian Broadcasting Tribunal*<sup>77</sup> the Australian High Court stated that *there are, however, two prima facie qualifications of the rule [of necessity]. First, the rule will not apply in circumstances where its application involves positive and substantial injustice since it cannot be presumed that the policy of either legislature or the law is that the rule of necessity should represent an instrument of such injustice. Secondly, when the rule applies, it applies only to the extent that necessity justifies.*

The application of the law of necessity, therefore, must be very exceptional and in cases when, and only when, there is a serious danger for the state and its constituents. Such a danger might be a very unpredictable natural disaster (earthquakes, floods, epidemics) or social situation (war, sudden economical

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<sup>74</sup> (1985) 19 DLR (4<sup>th</sup> Ses) 1.

<sup>75</sup> (1986) 27 DLR (4<sup>th</sup> Ses) 39.

<sup>76</sup> Supra note 74, at p. 35.

<sup>77</sup> (1990), 93 ALR 435.



crisis, famine, etc.). Its application must be very strict because its misuse constitutes a serious danger to the democratic principles. This point has been emphasised by all the scholars who have dealt with the issue.<sup>78</sup> All the definitions given of the law of necessity are accompanied by a number of provisions which emphasise the belief that the law of necessity must be applied only in extremely exceptional cases.

In Cyprus, the application of the law of necessity was justified, as it has been stated above, in *Attorney General of the Republic v Mustafa Imbrahim*<sup>79</sup> in 1964. This is the most important case in Cyprus and deserves particular study since all the following cases and legal evolution in Cyprus are based on it. The case dealt with the constitutionality of the Law 33/1964, which provided for the abolition of the Supreme Constitutional Court and of the High Court, and the creation of a new Supreme Court instead. It was challenged by the respondents that the Law 33/1964 was not adopted according to the 1960 Constitutional provisions; therefore it was unconstitutional and void. The Attorney General, in his reply, expressed the view that, although he could not doubt the fact that Law 33/1964 had not been ratified according to the constitutional provisions, its legality was justified by the doctrine of necessity. The decision was held unanimously in favour of the appellant, i.e. the Attorney General.

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<sup>78</sup> See, particularly, Papafilipou, *supra* note 65, at pp. 4-8 and pp. 52-58.

<sup>79</sup> *Supra* note 50.

In justifying the application of the doctrine of necessity in the Cypriot legal order, the Judges explained the abnormal situation in Cyprus whereas, according to Vassiliades, J.:

*Greek Judges, lawyers, litigants and public could not have access to courts situated within areas held by the armed forces opposing the state; and Turkish Judges, lawyers, litigants and public had great difficulty in obtaining permission from commanders to move out from areas controlled by Turkish armed forces in order to have access to courts or other places situated within the areas controlled by the state government. The causes which produced this result, and which prevented or obstructed Judges, Greeks and Turks, from regularly attending their courts, do not form part of the issues for decision in this case. They are causes which the state government, in fact, unable to remove, during several months which had elapsed between the outbreak of this emergency, in December 1963, and the enactment of the new Law, in July 1964.<sup>80</sup>*

The Court, after giving examples of the application of the doctrine of necessity in other countries, decided that the Law 33/1964 was justifiably enacted according to the principle *salus populi suprema lex est*. Josephides J. mentioned the necessary preconditions for applying the doctrine of necessity:

*In the light of the principles of the law of necessity as applied in other countries and having regard to the provisions of the constitution of the Republic of Cyprus (including the provisions of Articles 179, 182 and 183), I interpret our constitution to include the doctrine of necessity in exceptional circumstances, which is an implied exception to particular provisions of the constitution; and this is in order to secure the very existence of the state. The following prerequisites must be satisfied before this doctrine may become applicable;*

- a) an imperative and inevitable necessity or exceptional circumstances;*
- b) no other remedy to apply;*

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<sup>80</sup> Ibid. at p. 212.

- c) *the measure taken must be proportionate to the necessity; and*  
 d) *it must be of a temporary character limited to the duration of the exceptional circumstances*  
*A law thus enacted is subject to the control of this court to decide whether the aforesaid prerequisites are satisfied, i.e. whether there exists such necessity and whether the measures taken were necessary to meet it.*<sup>81</sup>

Finally, Triantafylides J. explained the reasons for the application of the law of necessity in the Cypriot legal order:

*Even if any of the provisions concerned of Law 33/64 were to be found to be repugnant to or inconsistent with any provision of the constitution, I would again pronounce for their valid applicability, in view of necessity which has arisen and the temporary nature of Law 33/64, which has not been enacted to meet it, at any time when such necessity could not have been met by operation of the relevant provisions of the Constitution. In such a case necessity renders validly applicable what would otherwise be illegal and invalid.*

*If the position was that the administration of justice and the preservation of the rule of law and order in the State could no longer be secured in a manner which would not be inconsistent with the Constitution, a constitution under which the sovereign will of the people could not be expressed so as to regulate through an amendment of the fundamental law such a situation, then the House of Representatives, elected by the people, should be empowered to take necessary steps as are warranted, by the doctrine of necessity, in the exigencies of the situation. Otherwise the absurd corollary would have been entailed, viz. that a state, and the people, should be allowed to perish for the sake of its constitution; on the contrary a constitution should exist for the preservation of the state and the welfare of the people.*<sup>82</sup>

Following the reasoning used for the support of the above case, many cases have subsequently been decided, introducing, thereby, the doctrine of necessity as the

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<sup>81</sup> Ibid. at pp. 264-265.

<sup>82</sup> Ibid. at pp. 238-239.

most basic constituent of the new legal order in Cyprus. Especially after the 1974 events, the introduction of the law of necessity in the Cypriot legal order has been vital for the continuation of the form of the state as it was prescribed by the 1960 Constitutional provisions, without the need for the absolute abolition of the 1960 Constitution which would actually cause the fall of the Republic of Cyprus and its complete disintegration.

The *Imbrahim Mustafa* case has been internationally recognised as one of the best examples of the application of the doctrine of necessity at a wider level. In the Pakistan case *Begum Nusrat Bhutto v The Chief of the Army Staff and the Federation of Pakistan*<sup>83</sup> the President of the Supreme Court mentioned that *this summing up of the law of necessity by one of the learned judges of the Cyprus Supreme Court embodies the true essence of the doctrine, and provides useful practical guidelines for its application*. Also, the case of *Imbrahim Mustafa* has been discussed in the case of *Mitchell and others v Director of Public Procecutions and Another*<sup>84</sup> (in the State of Grenada) and in the case of *Mokotso & Others v His Majesty King Moshoeshoe II & Others*<sup>85</sup> in the High Court of Lesotho.

Rightly then, one could support the view that the doctrine of necessity has been successfully applied in the Cypriot legal order and has become a basic part of the Cypriot legal order. That was probably the only way to achieve the legal survival of the Republic of Cyprus, especially bearing in mind the strict provisions of the

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<sup>83</sup> PLD 1977 SC 710.

<sup>84</sup> 45 (1986) LRC (Const.).

<sup>85</sup> CIV/APN/384/87.

1960 Constitution. It could be said that since the withdrawal of the Turkish Cypriots from all State activity and the events of 1974, the Republic of Cyprus owes its legal existence to the wide application of the doctrine of necessity in all the branches of the State. The Constitutional Court of Cyprus has, indeed, applied the law of necessity in numerous cases in order to justify the potential departure from the dictates of the Constitution, resulting from the refusal of the Turkish Cypriots to exercise their constitutional duties. As a matter of fact, the law of necessity is an element of great importance in the Cypriot legal order, and this can be observed by the deep and detailed analysis of the doctrine and its application in the cases where the principle of the necessity has been involved.<sup>86</sup>

The non application of the law of necessity in Cyprus, would cause not only serious legal problems but political ones as well. The absolute paralysis of the

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<sup>86</sup> A detailed analysis of the law of necessity and its application in the Cypriot legal order can be found in the judgments of the following cases; *Andreas HadjiGeorghiou v The Republic* (1966) 3 CLR 504, *Pantelis Papapantelis and Others v The Republic* (1966) 3 CLR 515, *Constantinos Chimonides v Evanthia K. Manglis* (1967) 1 CLR 125, *Yervant Bagdassarian v The E. A. C. and Another* (1968) 3 CLR 763, *Ioannis Iosif v CYTA* (1970) 3 CLR 255, *Vincent Poutros v CYTA* (1970) 3 CLR 281, *Rita Mesaritou v C.B.C* (1972) 3 CLR 100, *Polycarpos Ioannides v Police* (1973) 2 CLR 125, *The Republic v Djahit Souleiman* (1973) 5 JSC 624, *D. Theodorides and Others v S. Plousiou* (1976) 3 CLR 319, *The Republic v. Nicolaos Sampson* (1977) 2 CLR 1, *David Christou and Others v. The Republic* (1982) 3 CLR 365, *Georghios Apostolides and Other v The Republic* (1982) 3 CLR 928, *Georghios Hadjianastasiou v The Republic* (1982) 3 CLR 1173, *Re Georghiou* (1983) 2 CLR 1, *Andreas Aloupas and Another v National Bank of Greece S.A.* (1983) 1 CLR 55, *Yiannakis Louca v The President of the Republic* (1983) 3 CLR 783, *Mamas Koumi v Mikkos Kotari and Another* (1983) 1 CLR 856, *Omiros Aristides and Others v The Republic* (1983) 3 CLR 1507, *Costas Makrides v. The Republic* (1984) 3 CLR 677, *Ioannis Solomou v The Republic* (1984) 3 CLR 533, *Michael Pastellopoulos v The Republic* (1985) 2 CLR 165, *Anastasios Kofteros v The Cyprus Electricity Authority* (1985) 3 CLR 394, *President of the Republic v The House of Representatives* (1985) 3 CLR 1466, *President of the Republic v The House of Representatives* (1985) 3 CLR 2224, *President of the Republic v The House of Representatives* (1985) 3 CLR 2202, *Andreas Petroudes v The Electricity Authority of Cyprus* (1985) 3 CLR 2245, *President of the Republic v The House of Representatives* (1985) 3 CLR 2801, *Loukis Kritiotis v The Municipality of Paphos and Others* (1986) 3 CLR 322, *Krinos Hadjigeorghiou v The Cyprus Tourism Organisation* (1986) 3 CLR 1110, *Andreas Pavlides and Others v The Cyprus Broadcasting Corporation* (1986) 3 CLR 1332, *President of the Republic v The House of Representatives* (1986) 3 CLR 1439, *Agni Hadjidemetriou v The Cyprus Tourism Organisation* (1986) 3 CLR 1956, *Soteris Anastasiades and Another v EAC* (1987) 3 CLR 790, *The Republic v Kyriakos Kyriakou* (1987) 3 CLR 1189. See also the following decisions of the Cyprus Supreme Court: 4/90, 89/89, 98/89, 17/90, 24/90.

State's functioning and the potential demand for a new Constitution would cause the fall of the 1960 Agreements and consequently the political status of Cyprus as it was prescribed by the 1960 Constitution would be changed completely. This is an aspect which will be treated with particular sensitivity, since any proposal for the replacement of the 1960 Constitution with a new one, more functionable and suitable for the current situation prevailing in Cyprus, would jeopardise the whole existence of the Republic of Cyprus and could potentially result in the *de jure* recognition of the *de facto* partition of the island.

However, in regard to the application of the law of necessity, there is always a danger in resorting too easily and readily to necessity. The overuse or misuse of the doctrine would result in the demolition of the whole legal system; therefore, special care must be exercised when the doctrine is applied. The safeguards introduced in the above mentioned cases must be highly respected. The law of necessity must be always treated as a temporary measure, applied in exceptional cases where the state's functioning is in danger. Its application is not intended to replace the Constitution, but simply to enable its functioning under exceptional necessary circumstances.

## CHAPTER TWO:

### THE FRAMEWORK OF LEGAL AND POLITICAL RELATIONS BETWEEN CYPRUS AND THE EU; PRE-ACCESSION ISSUES

This chapter focuses on the development of the relationship between the Republic of Cyprus and the European Union, as begun in 1972 by the Association Agreement and analyses some important pre-accession issues. The legal analysis of the historical evolution of their relations constitutes the basis for any examination of their current and future relations.<sup>1</sup> The development of their relations, also reflects the position of the EU towards Cyprus' accession, which appears to be important for analysing various constitutional issues that are going to be examined in the following chapters. Also, several other issues, regarding the accession of Cyprus to the EU, such as the role of the political problem of Cyprus in regard to its accession to the EU, the participation of the Turkish Cypriots in the negotiations for accession and the mutual benefits from Cyprus' membership, are important to be examined.

#### 2.1 Historical Analysis.

Soon after the independence of Cyprus, in 1962, the Republic of Cyprus applied for an Association Agreement with the European Economic Community, almost

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<sup>1</sup> For a detailed analysis of the evolution of the relation between Cyprus and the EU, see, Ifestos, P. and Tsardanides, C., "*Οι Σχέσεις της Κύπρου με τις Ευρωπαϊκές Κοινότητες, 1972-1990*" [The relation between Cyprus and the European Communities, 1972-1990], Papazisis Press, Athens, 1991; and Kranidiotis, Y., "*Προτάσεις για μια Ευρωπαϊκή Πολιτική*" [Proposals for a European Policy], Sakkoulas Publications, Athens-Komotini, 1993.

simultaneously with the British application for full membership. The main reason for this early application was the fact that the British market, on which Cyprus' trade depended due to the Commonwealth preferences system, would not have been as easily accessible with Britain's entry to the Community. However, with the freezing of the British application for full membership, the Cyprus application remained dormant until 1971 when Britain again applied to join the EEC. Therefore, Cyprus entered into negotiations with the EEC in 1971 and finally, on 19<sup>th</sup> of December 1972, an Association Agreement was signed between the two parties. However, although the most important reason which led Cyprus to seek the Association Agreement with the EEC was the special economic benefits *vis-a-vis* Britain (i.e. the British Commonwealth preferential tariffs) which would be jeopardised by the accession of Britain to the EEC, there were other reasons for which Cyprus entered into the Association Agreement. Firstly, there were political considerations, since the EEC had started to have political weight in the international scene, which would help in further improving and upgrading Cyprus' international relations and standing. Also, a new trade horizon appeared, which would definitely help Cyprus to deal with a new important economic entity.

The Association Agreement came into force on the 1st of June 1973 and Cyprus was actually the third country in the world to conclude such an agreement with the EEC. The Agreement provided for the gradual abolition of trade taxes and restrictions by both sides, leading ultimately to a complete Customs Union. The



Agreement provided for two successive stages. The first was due to end in mid 1977, while the second was to last, in principle, for five years thereafter.<sup>2</sup>

The first stage of the Association Agreement expired on the 30<sup>th</sup> June 1977, but due to the 1974 serious economic upheaval, the second stage could not proceed and the normal implementation of the Agreement was delayed.<sup>3</sup>

Therefore, after successive extensions of the first stage, a protocol for the second stage of the Association Agreement was signed in Luxembourg on 19<sup>th</sup> October 1987, creating the way towards the progressive realisation of a Customs Union between the two parties. Under the provisions of the 1987 protocol, which came into force on 1<sup>st</sup> January 1988, the Customs Union between the two parties shall be completed by the year 2001 or 2002 at the latest.<sup>4</sup>

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<sup>2</sup> The main provision of the first stage consisted of a reduction by the Community of the Common Customs Tariff by 70% on Cypriot industrial products subject to the Community's rules of origin, by 100% on carobs and by 40% on citrus fruit. At the same time, Cyprus was permitted to continue to benefit from the preferential regime enjoyed in the UK and Irish Republic markets. On its part, Cyprus undertook, with some exceptions, mainly due to revenue purposes, gradually to reduce its import duties on EEC products by 35% at the start of the fifth year.

<sup>3</sup> Nevertheless, Cyprus signed two financial protocols with the EEC in 1977 and 1985. Both protocols were intended for financing the economic and social development of Cyprus. It is important to mention that at this stage negotiations were underway between the Commission and Cyprus, in order to conclude a third financial protocol which was to be used for financing Cypriot productive sectors, to facilitate their adjustment to the new competitive conditions arising from the protocol signed for the second stage of the Association Agreement. Since 1977, Cyprus and the EEC have signed four protocols on financial and technical co-operation providing for a financial aid of a total amount of 210 million ECU. (The first and the second protocol were of a total amount of 30 and 44 million ECU respectively, the third was 62 million ECU and the fourth, covering the period 1994-1998, is for 74 million ECU. This aid includes loans, grants, special loans and contributions to risk capital formation. Cyprus also benefited from funds totalling 600000 ECU from the Community programme "MEDSPA" (Mediterranean Special Programme Action) which was used for the financing of three environmental projects in the coastal area. Also, it is important to note that part of the resources of the above mentioned financial protocols was also used in joint projects, which benefited to the Turkish Community also. (Source: Cyprus Public Information Office).

<sup>4</sup> Moreover, the main provisions of this protocol provided for the mutual elimination of all tariffs and quantitative restrictions on all manufactured goods and a number of agricultural products; mainly potatoes, citrus fruits, vegetables and wine. Besides, Cyprus was progressively to adopt the Common Customs Tariff (CCT) of the ECC in order to bring its own customs tariff in line with those of the ECC by the end of 1997.

Meanwhile, on 4th July 1990, the Government of the Republic of Cyprus submitted its application for full membership of the EC. The Government of Cyprus was encouraged by the Association Agreement and the close relationship developed with the EC and applied for accession to the EC regarding it as the core of its foreign policy. This is obvious from the fact that the decision for the application for accession to the EC was agreed by all the political parties in Cyprus. The accession of Cyprus to the EC was also considered as a catalyst for the solution of the political problem of Cyprus and a significant factor for further developments related to the political future of Cyprus. On 2<sup>nd</sup> March 1993, when the then Minister of Foreign Affairs of Cyprus was assumed his duties, he stated the following:

*The main axis of our foreign policy is what we call our European orientation. By this, we not only mean the promotion of our application for accession to the European Union and the harmonisation of the structures existing in Cyprus with those of Europe, in order to become a full member to the European Union, but also the activation of the European factor in the efforts to find a solution to the Cyprus problem.*<sup>5</sup>

Also, when President Clerides addressed the House of Representatives on 28<sup>th</sup> February 1993, he stated that:

*We shall give priority to actions which aim at promoting the accession of Cyprus to the European Union. We shall undertake every effort to persuade the European Union that progress in Cyprus' accession assists in the efforts to solve the Cyprus problem.*

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<sup>5</sup> "The Course of Cyprus Towards the European Union" Speech by the Minister of Foreign Affairs Mr Alecos Michailides before the House of Representatives, 22<sup>nd</sup> February 1996.

Therefore, when the Council of Ministers of the EC received the application, at its meeting on 17<sup>th</sup> September 1990, it noted the application and decided to set in motion the procedures laid down in Article 98 of the ECSC Treaty, 237 of the EEC Treaty and 205 of the EAEC (Euratom) Treaty, asking the Commission to draw up an opinion, as required by these provisions. In June 1992 the European Council in Lisbon concluded that relations with Cyprus and Malta would be developed and strengthened by *building on the Association Agreements and their application for membership and by developing the political dialogue*. Moreover, the European Council during its summit in Edinburgh (12<sup>th</sup> December 1992) requested the Council to continue developing appropriate and specific links with Malta and Cyprus, following the lines set out in Lisbon. Later, in June 1993, the Council in Copenhagen, considering again the applications of Malta and Cyprus, expressed its satisfaction with the Commission's intention to present its opinion and emphasised that these opinions would be examined promptly by the Council.

On 30<sup>th</sup> June 1993, the Commission issued its Opinion on Cyprus' application.<sup>6</sup> The Commission expressed its recognition of the European character and identity of Cyprus and its desire to be a member of the Community, and concluded that Cyprus was eligible to be part of the Community. The Commission also added through its Opinion that it was ready to start the process leading to the island's accession as soon as the prospect of a settlement of its

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<sup>6</sup> See Bulletin of the European Communities, Supplement 5/93, "*The Challenge of Enlargement. Commission Opinion on the Application by the Republic of Cyprus for Membership*".

problem was surer. It also undertook to reassess the situation in January 1995, should the intercommunal talks fail to produce a settlement.

After three months, on 4<sup>th</sup> October 1993, the Council endorsed the Commission's Opinion and welcomed its positive message, thus reconfirming unequivocally that Cyprus is eligible to become a member of the European Union. According to its conclusions, the Council stated that:

*The Council supported the Commission's approach which was to propose, without awaiting a peaceful, balanced and lasting solution to the Cyprus problem, to use all the instruments offered by the Association Agreement to help, in close co-operation with the Cypriot Government, with the economic, social and political transition of Cyprus towards integration into the European Union. To that end the Council invited the Commission to open substantive discussions forthwith with the Government of Cyprus to help it prepare for the accession negotiations to follow later on under the best possible conditions, and to keep it regularly informed of the progress.*

In accordance with the Council's conclusions, substantive talks between the Government of Cyprus and the Commission began in November 1993, and were successfully completed in February 1995. The major purpose of these talks was to allow the Cypriot authorities to familiarise themselves with all the elements that constitute the *acquis communautaire* and to help Cyprus to harmonise its legislation and its policies to those of the Community.

Cyprus has also developed close relationships with the European Parliament. In early 1992 the decision was taken for the establishment of the Joint Cyprus-EC Parliamentary Committee. This Committee plays a significant role in the closer

relations between Cyprus and EU and creates a special link between the Cypriot House of Representatives and the European Parliament. This Committee not only deals with and discusses issues concerning the relations between Cyprus and the EU, but it also adopts recommendations addressed to the European Parliament. These recommendations are usually related to the peaceful solution of the Cyprus problem and the accession of Cyprus to the EU. The Committee is composed of 31 members, 19 of whom are members of the European Parliament and 12 are members of the House of Representatives of Cyprus. Its inaugural meeting took place in Brussels on 17<sup>th</sup> March 1992 and, since then, it has held several meetings.

Two of the most important decisions defining the relation between Cyprus and the EU were decided during the European Council meetings at Corfu and at Essen. During the Council's meeting in Corfu in June 1994 the Council concluded that *an essential stage in Cyprus' preparations for accession could be regarded as completed* and it also decided that *the next phase of enlargement of the Union will include Cyprus and Malta*. The European Union Summit in Essen on the 19<sup>th</sup> December 1994 confirmed the Corfu conclusion. These two conclusions are important not only for the reaffirmation of the Cyprus' eligibility for membership, but also for the clear disassociation between Cyprus' integration into the EU and the solution of its problem. The political problem of Cyprus is not mentioned in either conclusion as a precondition for the accession of Cyprus to the EU.

On 6<sup>th</sup> March 1995, the EU General Affairs Council re-examined the application of Cyprus for membership. Based on the reassessment of the situation in Cyprus and taking into consideration the latest developments, including the Conclusions of the Observer's report, the Council:

- a) reaffirmed the suitability of Cyprus for accession to the European Union and confirmed the will of the European Union to incorporate Cyprus in the next stage of its enlargement;
- b) decided that accession negotiations with Cyprus will start six months after the conclusion of the Intergovernmental Conference of 1996;
- c) confirmed the intention of the EU to continue supporting with all means at its disposal, the efforts of the UN for a comprehensive settlement of the question of Cyprus;
- d) decided also to approve concrete proposals for a specific strategy in preparation for accession including a structured dialogue between Cyprus and the EU.

The decision for the commencement of accession negotiations six months after the end of the IGC was reaffirmed in the European Council meetings in Cannes, Madrid and Florence. The decision of 6<sup>th</sup> March 1995 is considered to be extremely important for the progress of the relations between Cyprus and the EU, since for the first time a specific date was set down for the beginning of the procedures for Cyprus' accession to the EU.

The 16<sup>th</sup> Association Council meeting between Cyprus and the EU, following the conclusions of 6<sup>th</sup> March, adopted a Common Resolution on the establishment of a structured dialogue between the EU and Cyprus and prepared on certain elements the strategy for the accession of Cyprus to the EU.<sup>7</sup>

According to the provisions of the structured dialogue, the President of Cyprus was invited by the French Presidency to participate in a meeting with the leaders of the Fifteen in the Cannes European Council (15-16 December 1995). This invitation was welcomed by the Government of Cyprus as a recognition by the EU of the special status of Cyprus as a future member of the EU.

The President of Cyprus has subsequently been invited to all meetings of the European Council and participated in meetings concerning the enlargement of the EU. Moreover, several other meetings were held between Cypriot Ministers and their European counterparts for several issues concerning the accession of Cyprus to the EU.

Almost six months after the end of the IGC, on 31<sup>st</sup> March 1998, the accession negotiations between Cyprus and the EU formally started. These negotiations

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<sup>7</sup> On 17<sup>th</sup> July 1995, the General Affairs Council defined the level, frequency and other modalities of the structured dialogue between Cyprus and the EU, which are as follows:

- a) meetings between the Heads of State or of Government, on the occasion of the European Council;
- b) meetings and talks on ministerial and other levels on issues falling within the Common Foreign and Security Policy;
- c) meetings and talks on ministerial and other levels (including Committee and Working Party levels) on issues of justice and home affairs;
- d) meetings and talks on ministerial or other levels on other subjects of common interest.

encompass three stages. The first stage is known as the *acquis screening* which is the analytical examination of the *acquis communautaire*. The second stage is the negotiation itself and the third will be the Treaty of Accession and its signing. Of course, before the accession, the ratification of the Treaty will take place, but this is not considered as a part of the accession negotiations.

During the *acquis screening*, the preparation of substantive negotiations will be completed and the following shall be prepared:

- a) Detailed analysis of the *acquis communautaire* on behalf of the EU, in order for the interested parties in accession to know exactly their duties as members of the EU;
- b) Presentation by the States interested in accession of the degree of their success in harmonisation with the EU legislation and standards, and the exact timetable for the completion of the harmonisation;
- c) Notification from the interested states of the sectors where special difficulties are faced related to the harmonisation and which are not expected to be harmonised completely up to the day of the accession. These sectors will constitute the main subjects of the future negotiations and the state would be eligible to ask for transitional periods and other special regulations.



Finally, on 10<sup>th</sup> November 1998 the EU announced the commencement of the substantive negotiations, which constitute the second stage of the accession negotiations.

## **2.2 The legal impact of the Association Agreement and the Customs Union.**

The Association Agreement between the Republic of Cyprus and the EEC was actually the first step towards today's privileged relationship between the two parties. As mentioned above, Cyprus faced the necessity for closer relations with the EEC, especially after the British Application for Accession in 1962. The loss to the Cypriot economy would have been tremendously serious after any potential accession of Britain to the EEC, since that would result in the abolition of the Commonwealth preferential system on which the Cypriot economy was highly dependant. In the light of this evolution, the Government of Cyprus decided to enter into economic relations with the Community so that the unfavourable repercussions from the accession of Britain to the Community could be avoided and the normal carrying on of its exports in accordance with its economic development could be secured.

The above aims could not be achieved by the conclusion of a single trade agreement with the Community, whilst the accession to the EEC was not possible since the status of the Cypriot economy did not fulfil the requirements for accession as provided by the Treaty (Article 237). Therefore, the Cyprus Government chose the form of association with the Community under Article

238 of the Treaty. As a result of the exploratory talks, the Commission submitted in July 1971 a report to the Council recommending the commencement of negotiations with Cyprus for the purpose of conclusion of an Agreement of Association by virtue of Article 238. The negotiations were carried out in Brussels in three stages in January, April and December 1972.

It is important to mention that the internal constitutional crisis in Cyprus led the Turkish Cypriot side to question the legality of the Cyprus Government and its competence to conclude such an Agreement. However, these allegations were refuted by the Cyprus Government. Moreover, it was affirmed that the Government was the only internationally recognised Government of the Republic of Cyprus and that the Turkish Cypriot side by its deliberate abstention from, and its failure to take part in, the administration could not wreck the very existence of the Republic of Cyprus. It was also emphasised that the life of the state had to continue and its government to be carried out within the framework of the Constitution through the organs provided thereby, even without the participation of the Turkish Cypriots, so long as the functioning of such organs could be achieved in accordance with the constitutional provisions. In case this could not be achieved, then the government ought to be conducted by parallel organs created for the purpose, in accordance with the requirements of the law of necessity.<sup>8</sup>

The Community, though, recognised the competence of the Government of Cyprus to bind the Republic of Cyprus on the international plane, so the

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<sup>8</sup> See Chapter One.

Agreement could be concluded and be applied. However, it was emphasised during the negotiations and was accepted that the advantages derived from the Agreement would be for the benefit of the Cypriot people, without any discrimination against any of its sections. But as pointed out by the Cyprus Government, any discrimination is prohibited by Article 28 of the Cyprus Constitution of the Republic. The negotiations, then, were concluded on the 6<sup>th</sup> December 1972, and the agreed draft of texts had to be approved by the Cyprus Government and the EEC, respectively.<sup>9</sup>

Finally, the Agreement was signed at Brussels on 19<sup>th</sup> December 1972 by the Minister of Foreign Affairs of the Republic of Cyprus and the Permanent Representative of the Republic to the European Communities on behalf of the Republic of Cyprus and by the President of the Council and the President of the Commission on behalf of the European Economic Community.

The Minister of Foreign Affairs of Cyprus emphasised at the signing ceremony of the Agreement that the paramount aim of Cyprus in entering into an

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<sup>9</sup> The signed agreed texts consist of:

- a) The Agreement establishing the Association between the Republic of Cyprus and the European Economic Community, which determines the general framework of the relations of the contracting parties together with two Annexes thereto which define the mutual concrete concessions on the commercial sector;
- b) The Protocol concerning the definition of the concept of originating products and methods of administrative co-operation;
- c) The Final Act and six Declarations set out in the Annex thereto;
- d) The Protocol laying down certain provisions relating to the Agreement establishing an Association between the Republic of Cyprus and the European Community consequent on the accession of new member states to the EEC and regulating the relations of the Government and of the new member states that is to say the United Kingdom, Ireland and Denmark together with three Annexes annexed thereto;
- e) The final Act and three declarations in the Annexes thereto.

association with the EEC was to promote a closer and dynamic relationship with the Community. Specifically, he stated that:

*For Cyprus such a course was natural because of history, culture and trade; for although geography has placed Cyprus at the periphery of continental Europe, she shares with Europe centuries of common civilisation, traditions and ideals. In fact, Cyprus has been part of the region of the Mediterranean, where European civilisation and culture were born. The people of Cyprus have always followed closely and with great interest the various efforts for strengthening of the European ideals and for the achievement of European union.*

Moreover, the President of the Commission, in his address, pointed out that Cyprus by the signing of the Agreement *takes the place that belongs to her thanks to the permanence of the cultural ties and faith in the same civilisation which unite her with Europe* and he emphasised that the purpose of the association is to turn the European character of Cyprus into a reality of structures and relations by progressive and continued action. *The means for this will be co-operation between partners equal de facto, though unequal de jure, thanks to a contract which has the merit of fully respecting the individuality of the signatories.*

In the meantime, however, the then Vice President of the Republic and the purported President of the so-called "Turkish Administration" raised the same questions in connection with the competence of the Cyprus Government. Nevertheless, those representations were not taken into consideration.

Concerning the Cypriot legislation, the Association Agreement and the negotiations before its signing were made after a decision of the Council of Ministers taken by virtue of paragraph (1) of Article 169 of the Constitution which is as follows:

1. *Every international agreement with a foreign State or International Organisation relating to commercial matters, economic co-operation (including payments and credit) and modus vivendi shall be concluded under the decision of the Council of Ministers.*

The agreement was finally approved by the Council of Ministers by a decision published under Notification No. 921 in the official gazette of the Republic on the 22<sup>nd</sup> of May 1973 and was put into operation on 1<sup>st</sup> June 1973.

The Agreement was concluded for an indefinite period, in contrast with the normal trade agreements, which are entered for a definite period being renewable on their expiration. The main purpose of the Agreement was to consolidate and extend the existing economic and commercial relations between the Republic of Cyprus and the EEC.

The substance of the Agreement was the progressive elimination of obstacles regarding the main body of trade both for industrial and agricultural products that eventually would lead to a complete Customs Union. A Customs Union would be the achievement of the Association Agreement and the wanted

conclusion. As rightly observed by Colombo<sup>10</sup>, *taking into consideration that the Economic Community is based on a customs union, an agreement of association may be based at the beginning in such union as it was done in the case of the first two associations, that of Greece on the Agreement of Athens of the 9<sup>th</sup> July 1961 and that of Turkey on the Agreement of Ankara of the 19<sup>th</sup> September 1963.*

This aim would be achieved after a ten-year period that was divided into two successive stages. The first one was to be concluded by 30<sup>th</sup> June 1977 and the second one would, in principle, be of a five year duration. During the first stage, according to the Association Agreement, certain mutually undertaken obligations must be achieved, which actually constituted the preparatory phase for further progress towards the final aim. During the second stage, further measures which would lead to the further elimination of the obstacles to the trade between Cyprus and the Community must be adopted, along with the adoption by the Republic of Cyprus of the common tariff system of the Community. The contents of the second stage would be negotiated soon after the expiration of the first stage.

The Association Agreement also referred to the establishment of a Council of Association. This Council, was to be responsible for the administration of the Agreement and to supervise its proper administration. It was to consist of the members of the Council and members of the Commission of the European Community on the one hand, and members of the Government of the Republic

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<sup>10</sup> See Tomaritis, C., *"The Agreements of Association and the Association of Cyprus with the*

of Cyprus on the other. It is important to mention that the establishment of a Council is provided only in Agreements of a wider context in which provision is made and on the political plane (as in the Agreement of Association of Greece, Turkey and Malta) and not in ordinary trade agreements. This emphasizes the status of the Association Agreement of 1972 .

Furthermore, according to the Agreement, during the first stage of the Agreement, the United Kingdom and Ireland were to continue applying towards Cyprus the tariffs in force which would become, so to say, static. If, however, the commonwealth preference tariffs were higher than those of the Community, Cyprus would enjoy in the UK and Ireland the more favorable tariffs of the Community, subject to the application of the Community rules of origin. As regards the temporary restrictions, the UK and Ireland were to continue applying the status in force or the one applicable by the Community, if the latter was more favourable to Cyprus.

Although the Agreement provided (Article 5.3) that during the eighteen months immediately preceding 30<sup>th</sup> June 1977, negotiations would start for the purpose of determining the second stage, in spite of the repeated representations of Cyprus to this end, the Community took no steps in this direction until 30<sup>th</sup> May 1977, when the Council gave the Commission directives to enable it to enter into negotiations with Cyprus to determine trade arrangements between the Community and Cyprus beyond 30<sup>th</sup> June 1977.

However, due to certain disagreements which arose during the negotiations, the whole procedure lasted until 1987. The actual reason for the delayed commencement of the second stage was the events of 1974, which caused severe damage to the Cypriot economy and created a new *de facto* situation in Cyprus. Therefore, the Protocol for the second stage of the Association Agreement came into force on 1<sup>st</sup> January 1988 and provides for two phases, the first for a duration of ten years (1988-1998) and the second for five years (1998-2003) that would be reduced to four. The final aim of this Protocol was the progressive implementation within a period of 15 years of a Customs Union between the two parties.

The first phase of this Protocol provides for the progressive abolition by both parties of tariffs and quantitative restrictions to trade (with some exceptions) and the gradual adoption by Cyprus of the Common External Tariff (CET) for the products included in the Protocol. Existing customs duties will be abolished at a rate in principle of 9% per annum although for certain products the initial rate will be lower and will progressively increase. Agricultural products with the exception of temperate products, were included in the Protocol.

Moreover, Cyprus is committed to abolish its duties on Community industrial products, subject to certain exceptions relating to petroleum and other sensitive products. The Community, for its part, has already abolished the duties on Cypriot industrial products for which duties were applied during the first stage of the Association Agreement.



The second phase of the Protocol provides for the elimination of all remaining restrictions to trade for products included in the Customs Union. Cyprus will apply the relevant agricultural policies and mechanisms of the Community for those products included in the Protocol and other accompanying policies such as competition rules, taxation of products and approximation of laws.

Although the political significance and importance to Cyprus of the Customs Union has to be emphasised, a wider field of activities will be developed which will bring Cyprus and the Community closer together. This will become an imperative necessity when Cyprus begins preparing itself for the adoption of those policies measures and regulations to be applied in the second phase of the Customs Union and which will have to be discussed closely with the Community. These will be, mainly, as mentioned above, in the areas of agricultural policy, competition policy and approximation of Laws.

It could be argued that Cyprus will be a special case in that respect, as harmonisation will inevitably have to take place within the Customs Union. Regardless that the harmonisation procedure is the most important activity on behalf of the Republic of Cyprus for its accession to the EU, the evolution of the relationship between Cyprus and the EU will be radically transformed during the progress to the Customs Union as compared to the period of the first stage of the Agreement.

There are also two other areas that will bring Cyprus into a complex and close relationship with many countries around the world on account of the Customs

Union. The application by Cyprus of Community trade policies for the abolition of rules of origin and the application of preferential agreements now existing between the EU and third countries (ACP countries, EFTA countries, ASEAN) will, undoubtedly, result in a closer and interwoven triangular working relationship between the Community and 90 odd countries, with consequential political ramifications of importance to Cyprus.

The second political implication is related to the Cyprus problem itself; it is of paramount significance and has great significance for this thesis. The signature of the Agreement in October 1987 and its application on the 1<sup>st</sup> January 1988 signifies the political support of the Community to Cyprus and its Government to go ahead with the Customs Union on account of the division of Cyprus caused by the 1974 incidents. This can be considered as a reaffirmation of the EU's support to the Republic of Cyprus and its recognition of the Government of Cyprus as the only legitimate one with jurisdiction over all the territory of Cyprus and all its people.

The gains expected to accrue to Cyprus by the Customs Union Agreement will apply, as stated by the EEC, to its entire population. That implies that the Turkish Cypriot Community will be benefited too. Finally, the signing of the Customs Union Agreement was accompanied by the Third Financial Protocol for Cyprus on 30<sup>th</sup> November, 1989. This Protocol amounted to ECU 62 million extended over five years. The Agreement was warmly welcomed by the huge majority of the political parties in Cyprus and in fact it was considered as a preliminary to full admission.

## **2.3 The Application for Accession and several general pre-accession issues.**

### **2.3.1 The Application for Accession and developments to date.**

The Government of the Republic of Cyprus on 4<sup>th</sup> July 1990 submitted its application for full membership of the EU. This application came shortly after Malta's application for full membership and the Opposition criticised the Government for delaying the application, reflecting the huge interest and desire of the political parties in Cyprus for the earliest possible accession of Cyprus to the EU. It is important to mention that although in Malta, interest in accession had declined, in Cyprus it is still the cornerstone of Government's foreign policy and is supported by all the political parties.

The reason for this strong support is the benefits expected to accrue to the Republic of Cyprus from accession to the EU in both political and economic spheres.<sup>11</sup> However, just before the official application, preoccupation with the subject resulted in extensive analysis on whether entry should be sought. The main arguments for the application were: firstly, that Cyprus is at such a stage of development that it can withstand shocks from an incorporation to the EU; secondly, that the political and social practices prevailing in Cyprus, as well as Cypriot civilisation, historical traditions and values, are in concordance with European culture and thought, therefore, since Cyprus belongs to Europe it

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<sup>11</sup> For a more detailed analysis of those benefits, see [http://www.cypruseu.org.cy/eng/05\\_benefits/questions1.htm](http://www.cypruseu.org.cy/eng/05_benefits/questions1.htm)

should belong and to any European Union. On the economic side it was argued that full entry to the EU would be more advantageous to Cyprus than remaining at the level of customs union. Indeed, the latter was argued to be of value only in acts as a stepping stone towards eventual membership. It was also argued that full admittance to the EU would in the long run benefit the Cypriot economy also, by forcing it to overcome its structural inefficiencies. Finally, on the political side, it is hoped that entry to the EU will facilitate a just solution of the Cyprus problem. The rules and principles regulating political conduct in Europe are expected to lead to a solution in harmony with the principles of democracy and justice, which would ultimately benefit both Turkish and Greek Cypriots. Moreover, Cyprus will be more secure as a member of the EU and its political role in the area will be upgraded.

The Council of Ministers noted the application at its meeting on 17<sup>th</sup> September 1990 and decided to set in motion the procedures laid down in article 98 of the ECSC Treaty, 237 of the EEC Treaty and 205 of the EAEC (Euratom) Treaty, asking the Commission to draw up an opinion, as required by these provisions.

The Commission's Opinion on the application of Cyprus was issued on June 30, 1993. In the Commission's view, Cyprus' geographical position, the deep-lying bonds which, for two thousand years, have located the island at the very fount of European culture and civilisation, the intensity of the European influence apparent in the values shared by the people of Cyprus and in the conduct of the cultural, political, economic and social life of its citizens, the wealth of its contacts of every kind with the Community, all these confer on Cyprus, beyond

all doubt, its European identity and character and confirm its vocation to belong to the Community.<sup>12</sup> Thus the Commission concluded that Cyprus was eligible to become a full member of the EEC.

The EU Council of Ministers decided that the accession negotiations would start six months after the Intergovernmental Conference (IGC) of 1996, taking into account the results of the Conference. It was also declared that the accession of Cyprus to the EU should bring security and prosperity to both communities on the island.<sup>13</sup> In addition, a pre-accession strategy was formulated. This included the establishment of a “structured dialogue”, conducted through several meetings of ministers, political directors and experts on several issues such as Social Policy, Justice and Home Affairs, Financial and Monetary Affairs etc. Between 1995 and 1997 many meetings took place. Apart from the useful exchange of ideas, this dialogue assisted Cyprus to harmonize its legislation policies and practices with the *acquis communautaire* and be prepared for accession.<sup>14</sup>

On 30<sup>th</sup> October 1995 the Fourth Financial Protocol was signed which aimed to promote the development of Cyprus’ economy and the objectives of the Association Agreement, to support participation of Cyprus in certain EU programmes and to support efforts to promote a general settlement of the Cyprus

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<sup>12</sup> Commission of the EC, “*The Challenge of Enlargement; Commission Opinion on the Application by the Republic of Cyprus for Membership*”, Bulletin of the European Communities, Supplement 5/93, para. 44.

<sup>13</sup> “*Cyprus-European Union; A Brief History*” as cited in [http://www.cyprus-eu.org.cy/eng/brief\\_history.htm](http://www.cyprus-eu.org.cy/eng/brief_history.htm)

<sup>14</sup> Ibid.

problem.<sup>15</sup> The protocol amounted to 74 million ECU.<sup>16</sup> It was agreed that 12 million ECU in grants would be used for bi-communal projects or projects for the benefit of the Turkish-Cypriot community and generally for the unity of the island. However, to date, because of the *de facto* division of the island by the Turkish forces, the development of such projects has proved impossible, notwithstanding the submission by the government of Cyprus of a number of suggestions.<sup>17</sup>

On 15 July 1997, the European Commission issued a study of the impact of enlargement on both the EU and the applicant countries. The document, known as *Agenda 2000*, contains useful proposals in relation to the future development of the Union policies.<sup>18</sup> According to the “Agenda”, the timetable agreed for accession negotiations between Cyprus and the EU would allow their commencement before the attainment of a settlement of the Cyprus problem. It is also stated that *if progress towards a settlement is not made before the negotiations are due to begin, they should be opened with the government of the Republic of Cyprus, as the only authority recognised by international law.*<sup>19</sup>

Based on the Commission’s proposals included in “Agenda 2000” and the results of the IGC, the European Council at Luxembourg (December 1997) initiated the enlargement process with the ten applicant countries of Central and

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<sup>15</sup> Ibid.

<sup>16</sup> 50 million ECU in loans from the EIB, 22 million ECU in grants from the European Community Budget and 2 million ECU in risk capital from the European Community Budget.

<sup>17</sup> “*Fourth Financial Protocol*” as cited in

[http://www.cyprus-eu.org.cy/eng/08\\_eu\\_assistance/fourth\\_financial\\_protocol.htm](http://www.cyprus-eu.org.cy/eng/08_eu_assistance/fourth_financial_protocol.htm)

<sup>18</sup> “*European Commission: Agenda 2000*” as cited in

[http://www.cyprus-eu.org.cy/eng/07\\_documents/document003.htm](http://www.cyprus-eu.org.cy/eng/07_documents/document003.htm)

<sup>19</sup> Ibid.

Eastern Europe (CEE) and Cyprus.<sup>20</sup> In the enlargement process a special pre-accession strategy is provided for Cyprus, encompassing the latter's participation in certain programs, projects and agencies. Emphasis is placed on the efforts to improve Cyprus' judicial and administrative capacity. The pre-accession strategy also includes the provision of technical assistance by TAIEX (Technical Assistance Information Exchange Office).

The Council also decided to convene a European Conference which would bring together the EU member states and states which shared its values and external and internal objectives and are candidates for accession.<sup>21</sup> The participating states must accept certain principles which are contained in the Luxembourg conclusions. These include commitment to peace, good neighbourliness and security, respect for other countries' sovereignty, the integrity and inviolability of external borders and the jurisdiction of the International Court of Justice (ICJ) in the Hague.

During the European Conference in London, the President of the Republic of Cyprus, Mr. Clerides, on behalf of Government, invited the Turkish-Cypriots to appoint representatives and to join the Cypriot negotiating team. However, the Turkish-Cypriot leadership immediately rejected the invitation and refused to participate.<sup>22</sup>

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<sup>20</sup> Supra note 12.

<sup>21</sup> "The Republic of Cyprus: An Overview" PIO, Nicosia 1999, at p. 7.

<sup>22</sup> Supra note 12.

The President of the Council of Ministers, Mr. Robin Cook, stated that: *the Union believes that Cyprus' accession to the EU should benefit all communities, including the Turkish-Cypriot community and help to bring about civil peace and reconciliation of the island.*<sup>23</sup>

The first stage of the accession negotiations was initiated on 3<sup>rd</sup> April 1998 and involves the analytical examination of the *acquis communautaire*. The *acquis* today consists of the content, principles and objectives of the Treaties, the legislation adopted pursuant to the Treaties and the case law of the European Court of Justice (ECJ), statements and resolutions, joint actions, common positions, declarations and conclusions within the framework of the Common Foreign and Security Policy (CFSP), joint actions and positions, conventions signed, resolutions and statements within the framework of Justice and Home Affairs, International Agreements concluded by the Community and those concluded between the member states concerning the Union activities.<sup>24</sup>

The Union's opinion on the eligibility of Cyprus and the decision that the accession negotiations will be continued with the only recognised government of the Republic of Cyprus indicate that the Cyprus problem should not be considered as an obstacle to the final accession. However, an issue of great importance is the one concerning the participation of the Turkish Cypriots in the whole process. The refusal of the Turkish Cypriots to participate in the accession

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<sup>23</sup> Ibid.

<sup>24</sup> "Acquis communautaire" as cited in

[http://www.cyprus-eu.org.cy/eng/04\\_negotiation\\_procedure/acquis\\_communautaire.htm](http://www.cyprus-eu.org.cy/eng/04_negotiation_procedure/acquis_communautaire.htm)



negotiations, apart from its political nature, is also of great legal interest, especially in the light of the Turkish Cypriot arguments.<sup>25</sup>

### **2.3.2 The issue of the Turkish Cypriot participation in the accession negotiations.**

The Union's position with regard to the Cyprus application has been that the accession of Cyprus should benefit all communities, including the Turkish Cypriots. On this principle, the Republic of Cyprus always favoured the participation of the Turkish Cypriot Community in the accession negotiations, considering the Turkish Cypriots as citizens of the Republic. As mentioned above, the President of the Republic of Cyprus, Mr. Clerides, issued an invitation to the Turkish Cypriot community at the first European Conference which was held in London on 12<sup>th</sup> March 1998. President Clerides stated that the issue of Cyprus' accession is a historic challenge, emphasising that the enlargement of the European Union will shape the future of Europe. He expressed confidence that the accession of Cyprus will greatly benefit both the Greek and the Turkish Cypriot communities. Finally, he pledged that, should the Turkish Cypriots join the Cyprus team, their positions on all issues would be discussed freely, seriously and in good faith and they would be a very important

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<sup>25</sup> Additionally, it has to be stated that the Turkish Cypriot Community would also be highly benefited from such an accession. The benefits to the Turkish Cypriot Community by the accession of Cyprus to the EU, might be an additional catalyst for the solution of the political problem of Cyprus. See, Kadritzke, N., Turkish Cypriots Dream of Europe, "*Le Monde Diplomatique*", September 1998.

element in formulating the positions of the Cyprus team.<sup>26</sup> However the invitation was immediately rejected by the Turkish-Cypriot leadership. The EU stated that it regretted the Turkish Cypriot community's negative response to this offer. It reiterated the importance that it attached to associating the Turkish Cypriots with the accession process, in accordance with the conclusions of the Luxembourg European Council and affirmed that the Presidency and the Commission will pursue the necessary contacts.<sup>27</sup>

The main reason for the Turkish Cypriots' refusal to participate is the recognition of the Republic of Cyprus as the sole legitimate government on the island.<sup>28</sup> They consider the Cyprus' application as a unilateral one made by the "*Greek Cypriot administration*". They also point out that their economy is regarded by the Union as no-existent and that there is no interest on the part of the Union in preparing and aligning the Turkish Cypriot economy with the EU.<sup>29</sup>

The answer to the above argument, that lies on the fact that the EU cooperates with the official Government of Cyprus. The "TRNC" is not considered as a legal entity and thus, the international community recognises only one state in

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<sup>26</sup> Statement by President Clerides relating to Turkish Cypriot participation, 12<sup>th</sup> March 1998, as cited in [http://www.cyprus-eu.org.cy/eng/07\\_documents/document005.htm](http://www.cyprus-eu.org.cy/eng/07_documents/document005.htm). Further invitations to the Turkish Cypriot Community to participate in the accession negotiations, have been made by several other officials of the Cyprus Republic and Greece. See particularly, interviews of the Greek Minister of Foreign Affairs, G. Papandreou in "*Σημερινή*" [Simerini], Cypriot daily newspaper, 26/11/1999 and of Mr. G. Vasiliou, Head of the Cypriot Accession Negotiations Team, "Simerini", 18/7/1999. The same invitation has repeatedly been made by Mr Y. Kranidiotis, ex Deputy Minister of Foreign Affairs of Greece. See, Kranidiotis, Y., "Προοπτική και Πορεία προς Ευρωπαϊκή Ολοκλήρωση" [Dimension and Process towards European Integration], "*Ο Φιλελεύθερος*" [O Fileleftheros], Cypriot daily newspaper, 12/3/1998.

<sup>27</sup> Supra note 12.

<sup>28</sup> M. Ergun Olgun, "*European Union for Cyprus?*" as cited in <http://www.cypnet.com/.ncyprus/cyproblem/articles/bolum3.html>

<sup>29</sup> Ibid.

Cyprus which consists of two communities. The repeated secession moves by the Turkish Cypriots (1963 and 1983) did not have any legal effect on the Republic of Cyprus, since secession was not recognised as an exercise of the right to self-determination. As a result, under international law and practice, the Turkish Cypriots are still regarded as citizens of the Republic of Cyprus. Thus, the Union does not directly enter into negotiations with them.

Nevertheless, it has to be noted that the invitation made to the Turkish Cypriots in participating to the negotiations, must, by no means, be considered as an indirect recognition of the "TRNC". The legal status of their participation in any of the negotiations' stages, must be under the status of representing the Turkish Cypriot Community of the internationally recognised Republic of Cyprus.

### **2.3.3 The political problem of Cyprus in relation to the accession of the Republic to the EU.**

As far as the Cyprus problem is concerned, the EU has taken a clear position in support of a solution that respects the sovereignty, independence, territorial integrity and unity of the country, in accordance to the UN resolutions and the High Level Agreements of 1977 and 1979. According to the EU position, the *status quo* imposed by the Turkish military forces in 1974 is unacceptable, as well as the military occupation of 37% of the territory of the Republic of Cyprus. This was highlighted in the Dublin European Council Declaration (26 June, 1990) and the Lisbon European Council Conclusions (27 June, 1992) and

repeated on several occasions.<sup>30</sup> Also, in a case concerning the 1977 Protocol to the 1972 Association Agreement between the EC and Cyprus, the ECJ said:

*While the de facto partition of the territory of Cyprus, as a result of the intervention of the Turkish armed forces in 1974, into a zone where the authorities of the Republic of Cyprus continue fully to exercise their powers and a zone where they cannot in fact do so raises problems that are difficult to resolve in connection with the application of the Association Agreement to the whole of Cyprus, that does not warrant a departure from the clear, precise and unconditional provisions of the 1977 Protocol on the origin of products and administrative cooperation... Article 5 cannot in any event confer on the Community the right to interfere in the internal affairs on Cyprus. The problems resulting from the de facto partition of the island must be resolved by the Republic of Cyprus, which alone is internationally recognised.*<sup>31</sup>

In addition, the European Parliament has adopted several resolutions concerning the Cyprus issue. A resolution adopted on the 15<sup>th</sup> November 1995 is in favour of a just and lasting solution of the Cyprus problem and condemns the illegal occupation of the territory of Cyprus.<sup>32</sup> Moreover, since the Turkish actions were in direct conflict not only with the UN Resolutions, but also with the letter and the spirit of the EU-Turkey Customs Union Agreement, the EP called on the Commission to block immediately all the credits provided by the EU-Turkey Financial Regulation in the framework of the MEDA programme.<sup>33</sup>

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<sup>30</sup> Supra note 21 at p. 7.

<sup>31</sup> *R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd* [1994] ECR I-3087, 3131, 3133-4; 100 ILR 258, 297-9.

<sup>32</sup> Supra note 28, at p. 37.

<sup>33</sup> *Ibid.*, at p. 38.

In the Commission's opinion on the application of Cyprus and in the Commission's "Agenda 2000", it is clearly stated that the timetable agreed for accession negotiations means that these negotiations could start before a solution is found. At the same time, the Union's position is that the solution to the Cyprus problem should be a bi-communal, bi-zonal federation, but it is also determined to play a positive role in order to promote a peaceful settlement.<sup>34</sup>

However, the most important statement on behalf of the EU regarding the Cyprus' problem was taken in the Helsinki European Council.<sup>35</sup> Paragraph 9 of the Presidency Conclusions, reads:

- (a) *The European Council welcomes the launch of the talks aiming at a comprehensive settlement of the Cyprus problem on 3 December in New York and expresses its strong support for the UN Secretary - General's efforts to bring the process to a successful conclusion.*
- (b) *The European Council underlines that a political settlement will facilitate the accession of Cyprus to the European Union. If no settlement has been reached by the completion of accession negotiations, the Council's decision on accession will be made without the above being a precondition. In this the Council will take account of all relevant factors.*

Paragraph 9(b), then, is of paramount importance for the accession of Cyprus to the EU, since it clearly states that the solution of the political problem of Cyprus should not be considered as a precondition. This decision should be considered as a "historic" one in regard to the Cyprus accession to the EU.<sup>36</sup> It is a decision

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<sup>34</sup> Supra note 17.

<sup>35</sup> Helsinki, 10<sup>th</sup> and 11<sup>th</sup> December 1999.

<sup>36</sup> For more discussion about the importance of the Helsinki Conclusions see, *O Fileleftheros* (Cypriot daily newspaper) 19/12/1999, Interview with the Greek Minister of Foreign Affairs, Mr.

that was taken in a very crucial period, since many arguments were developed, during that period, supporting the view that Cyprus could not join the EU with its political problem unsolved.<sup>37</sup>

The question, though, is whether the political problem of Cyprus could present as an obstacle towards Cyprus' EU membership. It is, indeed, an issue that impedes the smooth accession of Cyprus to the EU, but it cannot be considered as an excuse for Cyprus not joining the EU. As the ex British Secretary of State for Foreign and Commonwealth Affairs, Malcom Rifkind has stated, no third party should have a veto on whether Cyprus would join the European Union, though if a solution was found to the Cyprus problem, it would make negotiations easier.<sup>38</sup> The spirit of the statement of Mr. Rifkind is clear, that a prior solution should not be considered as a prerequisite for Cyprus' accession. On the other hand, no one seems to disagree that a prior solution would make things easier.

The Turkish position, though, as it was expressed by Mr. Karayalcin, is that Turkey will continue to be politically and legally opposed to the membership of the EU of Cyprus, in whole or in part, before her own accession to the EU as a

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G. Papandreou. See also various articles and reports on the following newspapers' issues: *Ethnos* (Greek daily newspaper) 11/12/1999, *Eleftheroyfia* (Greek daily newspaper) 11/12/1999, *O Fileleftheros* 11&12/12/1999, *To Vima* (Greek weekly newspaper) 12/12/1999, *Politis* (Cypriot daily newspaper) 11/12/1999.

<sup>37</sup> Before the Helsinki conclusions, officials from France, Holland, Italy and Germany signed a common declaration mentioning that the accession of Cyprus to the EU, with its political problem unsolved, would pose several problem to the EU and especially in regard to the application of the Common Foreign and Security Policy. This declaration has been expressed as a reservation, on behalf of those countries, in regard to the accession of Cyprus to the EU without the prior solution of the political problem. See, "*Politis*", Cypriot daily newspaper, 04/04/2000, at p.5.

<sup>38</sup> Pace, R., "*The European Union's Next Mediterranean Enlargement: Challenges and Uncertainties*" as cited in <http://www.fscpo.unict.it/vademec/jmwp06.htm>, pp. 12-13.

full member and that the Council's decision on the membership of Cyprus is an unfortunate step which could lead to the permanent division of the island.<sup>39</sup>

However, if a prior solution becomes a prerequisite for Cyprus' accession to the EU, Turkey will have an important reason to block efforts towards a solution. It seems that the accession of Cyprus to the EU could be a catalyst for a solution to the problem and not vice versa. As the Cypriot Minister of Foreign Affairs, Mr. I. Kassoulides, declared, the best way the EU can contribute to the solution of the Cyprus problem is to offer Cyprus an unhindered path towards membership. Only the context of membership of Cyprus can provide the necessary inducements to all sides, including most importantly the Turkish side, to work for an early solution. This may thus provide the "missing link" by giving Turkey an incentive to work for a solution.<sup>40</sup> The Cyprus Government's position is that, if a prior solution is not possible, Cyprus should not be prevented from joining the Union. In the event of joining without finding a solution, a higher margin of security will be provided, since Cyprus will be a full member of the EU.<sup>41</sup> Taking into consideration, thus, all the EP resolutions and the official documents and conclusions in regard to the Cyprus issue, the position of the Cyprus Government seems to be quite reasonable.

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<sup>39</sup> Dodd, C., *The Cyprus Issue: A Current Perspective* Huntingdon, Eothen Press, 2<sup>nd</sup> Ed., 1995 at p.20. Also Turkey's ex Prime Minister Necmettin Erbakan stated to journalists in Ankara that *the south of Cyprus cannot join the EU without the permission of Turkey*. Europe News Bulletin, No 6882, Brussels, December 24<sup>th</sup> 1996.

<sup>40</sup> Kasoulides, I., *Cyprus on the way to European Union membership*, Lecture given at the Swedish Institute of International Affairs, Stockholm, 18 May 1999.

<sup>41</sup> Kadritzke, N., *Cyprus: Harmonisation with the acquis communautaire in view of the accession* Nicosia, Ermogenis Publications, 1997, at pp 8-9.

Thus, the Union's position should be considered as the right one as well. Accession of Cyprus to the EU before solution could be a basic component in the efforts for a solution to the Cyprus problem. This is also supported by three recent UN Security Council Resolutions (1062, 1092 and 1117). And by this implication it can be concluded that the political problem of Cyprus cannot be considered as an obstacle towards Cyprus' EU membership.

Concerning the legal point of the issue, it must be emphasised that accession must be the result of a decision taken by the only state competent to do so, i.e. the Republic of Cyprus. Allowing Turkey to interfere in this matter would also be inconsistent with Article 2(7) of the UN Charter which prohibits interference in issues which are within the domestic jurisdiction of another state. Also, since the EU does consider the occupation of the northern part of Cyprus as illegal, it must not legalise this by not permitting Cyprus to join the Union.

Of course, referring to a potential accession of Cyprus to the EU with the political problem unsolved, it is commonly accepted that many problems, will be faced especially regarding the application of Community law. Under these circumstances, it seems impossible that implications arising from the Cypriot membership of the EU would be applicable to the occupied territory of Cyprus. However, bearing in mind, that the Republic of Cyprus would be accepted in the EU as the only recognised state over the island of Cyprus, it implies that there must be a recognition of the sovereign power of the Republic of Cyprus over its whole territory including the occupied area. In other words, it must be clearly stated that Cyprus would join the EU as a whole, but due to the illegal



occupation of its northern part, any EU membership implications would not have effect on this part.

If this is the case, it is, indeed, the first time where a state with an occupied area would join the EU. Thus, the whole issue has to be tackled in a very distinctive way so as not to cause political problems which enable the transfer from the *de facto* illegal occupation to a *de jure* one.<sup>42</sup> This could be achieved by a statement, firstly, on behalf of the EU, emphasising the fact that the occupied area of North Cyprus is recognised as sovereign territory of the recognised Republic of Cyprus and that due to the present situation the application of Community law should not have effect on this area. This statement could bear the form of a derogation in regard to Cyprus' accession.

Of course, such a derogation should not be considered as similar to previous cases of accession involving derogation.<sup>43</sup> The acceptance of Finland, for example, with the exception of the Aland Islands<sup>44</sup> constitutes a quite different

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<sup>42</sup> The accession of Cyprus should by no means result either to an indirect recognition of the occupied area or to the legalisation of the political *status quo*. Referring to the German membership, international practice proves that application of an international agreement only to certain territory of a State, does not automatically mean recognition or acceptance of partial sovereignty of the other part of its territory. Before the conclusion of the Fundamental Treaty between East and West Germany, in 1972, the 1957 West Germany's membership of the Community, had not automatically constituted to the international recognition of the Federal Republic of East Germany. See, Chrysostomides, *op. cit.*, at p. 266.

<sup>43</sup> See, among other cases those of Denmark and Greenland, Britain and British Military Bases in Cyprus and Finland and Aland Islands.

<sup>44</sup> The autonomous region of the Aland islands lies between Sweden and Finland. When Finland declared independence from Russia in 1917 the Swedish speaking people of the Alands were attributed by the League of Nations to Finland but a series of principles was established governing their autonomy. These were enshrined in the 1921 and subsequent Acts of Autonomy on Aland adopted by the Finnish Parliament. Since this date, the status of Aland has often required special treatment in Finland's international negotiations, including the EEA agreement. Finland's goal in the negotiations, therefore, was that its membership in the EU would also cover the autonomous region of the Aland islands. The relations between Aland and Finland are currently regulated by the 1991 Autonomy Act. This Act gives to the Aland Assembly extensive legislative powers on

case, since the Aland Islands' autonomous status and their exclusion from the territory of the Union at the time of the accession of Finland are based on international law and therefore are legitimate. The exclusion of the north part of Cyprus at the time of the accession would be inconsistent with international law, since the current division has been declared illegal by the international community.

Moreover, it is, also, important to mention that according to Community legislation there is not any principle implying that the boundaries of territorial sovereignty of a Member State shall befall within the territory of application of Community legislation. On the contrary, it is possible, as mentioned above, that the application of Community legislation to be excluded from certain parts of the sovereign area of Member States. Such an exclusion, however, might have a temporary effect. Therefore, any future solution of the Cyprus problem would end the non application of the Community law on the northern part and would permit its application over the whole territory of Cyprus.<sup>45</sup>

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several fields including the organisation of the Aland Assembly and regional government. The Act of Autonomy did not give any treaty making competence to Aland.

The results of the negotiations are now incorporated in Protocol No. 2 of the Act of Accession. This lays out that the provisions of the EC Treaty shall not preclude the application of the special status of the islands as relating to the restriction of non Alanders to hold real property without permission of the authorities and on the right of the establishment. Aland is moreover considered as a third country in relation to certain EU taxation directives. The aim of the measures is clearly stated to the maintenance of a viable local economy in the islands but it must not have negative effects on the interests of the Union, nor on its common policies. (See James Pond, "*EU accession negotiations: how they work and what they can do*" Seminar on the European Union and Cyprus, Nicosia 1-2 June 1995) See also M. Jorna "The Accession Negotiations with Austria, Sweden, Finland and Norway: A Guided Tour" (1995) 20 *ELRev* 131.

<sup>45</sup> It has to be noted that this is not similar to the case of German unification. The unification of Germany constituted by two internationally recognised states whereas in regard to Cyprus would merely be the end of an illegal occupation of its territory.

One could rightly argue, then, that the EU, on the one hand, should not consider the political problem of Cyprus as an obstacle for the Cyprus' membership, but on the other hand, it should exercise its power for a solution.<sup>46</sup>

Finally, special reference should be made to the repeated statements of ex Commissioner Hans van de Broek that Cyprus cannot remain a hostage. During his Presentation on Regular Reports to the European Parliament, Mr. Van de Broek emphasised that the Commission shares the Council's view that progress towards accession and towards a just and viable solution of the Cyprus problem will naturally reinforce each other.<sup>47</sup> Equally clear was the answer of the Alternate Foreign Minister of France and Acting President of the Council, Mr. Michael Barnier, during a press conference at the conclusion of the Association Council in June 1995. Answering a question on what would happen if the Cyprus problem was not solved, Mr. Barnier said, *the train has left the station, it cannot be stopped.*<sup>48</sup>

### **2.3.4 Benefits to the EU from the Cyprus' accession; A Challenge to the CFSP.**

*The Union's environment is changing fast, both internally and externally. It must set about adapting, developing and reforming itself. Enlargement represents a historic turning*

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<sup>46</sup> According to several recent statements made by the Commissioner dealing with the Enlargement of the EU, Mr. Gunter Verheugen, it seems that this is the official position of the EU too. See, "Politis", Cypriot daily newspaper, issues 20/3/2000 and 24/3/2000.

<sup>47</sup> Presentation on Regular Reports to the European Parliament, Brussels 4<sup>th</sup> November 1998 as cited in

[http://europa.eu.int/comm/dg1a/enlarge/docs/speeches/speech\\_98\\_236.htm](http://europa.eu.int/comm/dg1a/enlarge/docs/speeches/speech_98_236.htm)

<sup>48</sup> Supra note 3, at p. 11.

*point for Europe, an opportunity which it must seize for the sake of its security, its economy, its culture and its status in the world.*<sup>49</sup>

The above statement was made by Jacques Santer and it declares the general benefits of the next EU enlargement. A stronger and a wider Union remains a certain goal for the future development of the European Union. This is a goal to be achieved by the next enlargement but also for the Union of the Fifteen the benefits of an enlargement will be enormous, not only in terms of prosperity within a growing internal market, but also in terms of stability and security.<sup>50</sup>

Concerning Cyprus' accession, the Union could gain some certain geopolitical benefits and even some minor economic benefits. Upon membership of the European Union, Cyprus will become the EU's key outpost in the eastern Mediterranean, serving as a bridge to the Middle East, an area which is becoming an increasingly important market. The Middle East is, indeed, an area of enormous significance to Europe. Its oil-rich soil, coupled with the prospects that a wealthy market holds for the European business in the region, provides magnificent opportunities. The geographical proximity of Cyprus to the Middle East will become a factor creating a mutual partnership between Europe and the Middle East, two different regions of the world that are bound by mutual interests. Numerous prospects will lie ahead in such a partnership. In this context, Cyprus, a stable prosperous, democratic and reliable European country,

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<sup>49</sup> Statement made by J. Santer, President of the Commission, Strasburg, July 16, 1997, for the establishment of the Agenda 2000.

<sup>50</sup> "Implications of the next EU-enlargement" by Dr. Franz Fischler, Member of the European Commission with responsibility for Agricultural and Rural Development. Philip Morris Institute Brussels, 14 October 1998.

geographically in an ideal position to serve as a bridge between Europe and the Middle East, can become a springboard to this important market.

However, Cyprus' membership of the EU could also be considered as a challenge for the new role that the EU has decided to play in the future. According to Prof. Romano Prodi, President of the Commission, in the coming years there are several principal and most pressing reasons for raising the profile of the European presence in the world. Firstly, there is a major responsibility for ensuring monetary stability and stimulating growth; secondly, there must be an enhancing of the international dimension of the EU activities in order to restore equilibrium to the development of Europe as an economic entity by means of Europe as a political entity.<sup>51</sup> Also, the Common Foreign and Security Policy (CFSP) of the EU is one of the tasks that seeks for better development and establishment in the recent future.

As mentioned above, it appears that the EU has decided to push forward the accession of Cyprus, despite the Turkish Cypriot resistance and refusal to participate in the negotiations and despite the political problem as well. Not only would a potential accession of Cyprus to the EU bring benefits to the Cypriot side but it can also be considered as a unique challenge on behalf of the EU for proving the existence of the Union's CFSP (Common Foreign and Security Policy).<sup>52</sup> The political problem of Cyprus should not be treated as an obstacle

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<sup>51</sup> Speech by Prof. Romano Prodi, Strasbourg, 4<sup>th</sup> May 1999, as cited in [http://europa.eu.int/comm/dg1a/daily/05\\_99/bio\\_99\\_191.htm](http://europa.eu.int/comm/dg1a/daily/05_99/bio_99_191.htm)

<sup>52</sup> Since 1950 several attempts have been made to develop European integration in the fields of defence and foreign policy. These attempts collapsed in 1954 when the French National Assembly rejected the European Defence Treaty. Like the European Political Cooperation (EPC) before it, the Common Foreign and Security Policy of the Union is mostly a codification of existing

towards Cyprus' EU membership by arguing that by excluding Cyprus from the next enlargement, the Union could easily separate itself from the problem and avoid it. It is important for the Union's CFSP development not only to deal with regional problems but to confront and solve them as well.

It has been argued that the CFSP of the Union seems to lack plausibility and that there is a strong need for centralisation of the policy, given the change in the structure of international relations, especially in Europe.<sup>53</sup> It is true that the effectiveness of the CFSP and consequently the role of Europe in international affairs has not met expectations.<sup>54</sup> However, this does not mean that the CFSP does not actually exist, nor that it should continue to be undermined. There is certainly much room for improvement in the years to come. Progress has already been made towards institutional developments concerning the future structure of the CFSP.<sup>55</sup>

Besides, as Ginsberg rightly observed, the EU enlargement itself is a foreign policy action which will lead to further activities, since the EU will have to deal

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practice, since the political co-operation among the EU member-states has evolved over more than twenty years. (See Eaton, M.R., "Common Foreign and Security Policy" in O'Keeffe, D. & Twomey, P. (Eds.), "Legal Issues of the Maastricht Treaty", Chichester, Chancery Law, 1994, at p. 215) Article 30 of the SEA created an institution structure for EPC. Later the CFSP established in the Maastricht Treaty and constitutes the 2<sup>nd</sup> Pillar. According to Art. J.1(4) of the TEU (new Art. 11) there is an obligation to the Member States to support it actively and unreservedly in a spirit of loyalty and mutual solidarity. The CFSP is to be promoted by systematic co-operation and joint action (Art. J. 2(3) TEU (new Art. 12)). For more discussion about the development of the CFSP, see, Chapter Six at footnote 32.

<sup>53</sup> Rummel, R., "Beyond Maastricht: Alternative Futures for a Political Union", in Rummel, R., (Ed.) "Towards Political Union: Planning a Common Foreign and Security Policy in the European Community", Boulder, Westview Press, 1992, at p. 297.

<sup>54</sup> Jannuzi, G., "Scope and Structure of the Community's Future Foreign Policy", in Rummel, R., (Ed.), *ibid.*, at p. 289.

<sup>55</sup> Peers, S., "Common Foreign and Security Policy 1997", (1997) 17 *YEL* 539, at p. 539.

with the outside world more actively.<sup>56</sup> The European Union appears to be the only organised expression of the European will and ability in the field of foreign policy. This will must be empowered, though, for more efficient results. The promotion of European foreign policy initiatives would be an answer to those undertaken by the United States of America which almost led to an American monopolisation in the field of international foreign policy and security.<sup>57</sup>

In this respect, the Cyprus case provides an opportunity to promote and improve the Union's status in international politics. The EU may achieve greater coherence in its foreign and security policy with respect to the Mediterranean region and the Cyprus problem specifically. This opinion is expressed in a report which has been drawn up on behalf of the European Parliament's Political Affairs Committee.<sup>58</sup> According to this report, the Foreign Ministers are called on to take steps to promote the resumption of the inter-communal negotiations under the auspices of the United Nations Secretary General and to achieve a positive influence on the Turkish Government.

The direct involvement, then, of the EU to the solution of the Cyprus problem by accepting the Republic of Cyprus as a member, irrespective of whether or not a prior solution of the problem is reached, might be considered as a great challenge for the effective establishment of the Union's CFSP.

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<sup>56</sup> Ginsberg, R., "The impact of enlargement on the role of the European Union in the world", in Redmont, J. and Rosenthal, G. (Eds.), *The Expanding European Union: Past, Present, Future*, London, Lynne Rienner, 1998, at p. 213.

<sup>57</sup> For more discussion about the international effect of the CFSP, see, Sjursen, H., *The Common Foreign and Security Policy: New Voice in International Politics?*, Arena Working Papers, No. 99/34.

<sup>58</sup> Theophylactou, D., *Security, Identity and Nation Building*, Aldershot, Avebury, 1995, at p. 115.

**CHAPTER THREE:****THE CONSTITUTIONAL POWER FOR THE ACCESSION OF CYPRUS  
TO THE EU AND THE ACCOMMODATION OF THE EU  
LEGISLATION IN THE CYPRIOT LEGAL ORDER**

One of the most important issues that all Member States had to deal with was the question on how to implement and give effect to European Community legislation within their domestic legal order. This is a problem that Cyprus would have to arrange before or during the signing of the Treaty of Accession to the EU. Therefore, this chapter focuses on the legal mechanisms provided by the Constitution of Cyprus which will permit the accession of the Republic of Cyprus to the European Union (i.e. signing of a Treaty of Accession) and the enforcement of Community legislation by the domestic legal order. Thus, it is important to examine whether the Cypriot Constitution provides the power for Cyprus to access to the EU and how the relevant European legislation would be introduced into the Cypriot legal order. In this connection, special reference is made to the general principles of Community law and to the legal effect of Community acts on the domestic legal order of its members. Also, special reference is made to the absence of the Turkish Cypriots and its consequences on the signing of the Accession Treaty.



### **3.1 Article 169 of the Constitution of Cyprus; the legal basis for the accession of Cyprus to the EU.**

The starting point for examining whether the Constitution provides the power for the Cyprus' accession to the EU is to examine whether there is any specific constitutional provision with a direct reference providing for the accession of Cyprus to the EU or prohibiting it. In fact, there is no specific article of the Constitution referring to the EU, neither providing for, nor excluding, the accession of Cyprus to the EU.

However, Art. 169 of the Constitution provides the power to the Republic of Cyprus to conclude international agreements with other states and international organisations. Therefore, the analysis of Art. 169 of the Constitution of Cyprus is very important since it could provide the legal basis for the accession of Cyprus to the EU.

In particular, Art. 169 reads:

*Subject to the provisions of Article 50 and paragraph 3 of Article 57-*  
*every international agreement with a foreign state or any International Organisation relating to commercial matters, economic co-operation (including payments and credit) and modus vivendi shall be concluded under a decision of the Council of Ministers;*  
*any other treaty, convention or international agreement shall be negotiated and signed under a decision of the Council of Ministers and shall be operative and binding to the Republic when approved by a law made by the House of representatives where upon it shall be concluded;*

*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.*<sup>1</sup>

According to Art. 169, then, the treaty making power of the Republic of Cyprus is vested in the Council of Ministers of the Republic. Besides, according to the provisions of the Art. 54(b) the Council of Ministers exercises executive power on all matters relating to foreign affairs which under Art. 50.1(a)(ii) includes the conclusion of international agreements, conventions and treaties.<sup>2</sup> Therefore, it is for the Council of Ministers of the Republic to take any decision concerning the accession of Cyprus to the EU and to conclude the relevant Treaty of Accession.<sup>3</sup>

Besides, Art. 169 makes a distinction between two types of international agreements. According to Art. 169(1) international agreements related to “commercial matters”, to “economic operation” and “*modus vivendi*” are concluded under a decision of the Council of Ministers without the need of any

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<sup>1</sup> Article 50 of the Constitution of Cyprus provides for the right of the final veto of the President and the Vice-President of the Republic on any law or decision of the House of Representatives on certain issues (including foreign affairs). Article 57 (3) of the Constitution provides for the right of veto of both the President and the Vice-President for decisions related to foreign affairs, defence or security, as they are set out in Art. 50, and that this right shall be exercised within four days of the date when the decision has been transmitted to their respective office.

<sup>2</sup> The formal procedure provides that international agreements are negotiated and signed under a decision of the Council of Ministers by a special delegate or delegates appointed *ad hoc*, under Art. 54, by the Council whose credentials are signed by the President of the Republic as Head of the State in accordance with Art. 37(c)(I).

<sup>3</sup> According to Wildhaber, “Traditionally it is said that international law, by way of a ‘renvoi’ to municipal law, leaves it to the states to determine which of its organs or agents shall have the power to enter into international agreements. This is portrayed as an emanation of the larger principle that states are free to organise themselves however they wish. In terms of traditional theory, the ‘renvoi’ can be explained monistically or dualistically. Monistically, international law delegates to the states authority freely to organise their treaty-making power. Dualistically, states determine their internal structure themselves, and international law is concerned only with interstate relations.” Wildhaber, L., “Treaty-Making Power and Constitution”, Helbing & Lichtenhahn, Basel und Stuttgart, 1971, at p. 3.

further formality. This type of international agreements which can be concluded and come into force without the need for any further implementation might be considered as “executive agreements” or “agreements in simplified form”.<sup>4</sup>

On the other hand, according to Art. 169(2) any other treaty, convention or international agreement is not considered as concluded unless it is approved by a law made by the House of Representatives. As Tornaritis rightly observed,<sup>5</sup> the drafters of the Constitution used the word “approval”, instead of the word “ratification” on purpose, to emphasise the fact that this “approval” is a prerequisite for the conclusion of the treaty in international law and not a purely enabling formality. Therefore, it is after such approval that the letter transmitting the instruments of ratification, if and when required, is signed by the President of the Republic as Head of the State and sent.<sup>6</sup>

Publication in the official Gazette of the signed international treaties and agreements remains a constitutional element of the binding force of the treaties. This is clearly set out in Art. 169(3) which also provides that such treaties will have superior force to any municipal law.<sup>7</sup> The question arising, therefore, is whether the “municipal law” refers only to laws made by the legislature or under its delegation, or includes the Constitution also.

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<sup>4</sup> See Tornaritis, C., *The Treaty Making Power Especially Under The Law of The Republic of Cyprus*, Nicosia 1973, p. 14. According to Tornaritis the “executive agreements” concluded with a relaxation of the traditional rules owing to the urgency and the variety of matters of the ever expanding field of international intercourse.

<sup>5</sup> Ibid. at p. 15.

<sup>6</sup> Article 37(c)(ii) of the Constitution.

<sup>7</sup> On the condition, of course, that these treaties are applied by the other party thereto.

The answer is that the Constitution is not included. As the ex Attorney-General of the Republic of Cyprus pointed out, *a treaty, convention or international agreement concluded and published as provided in Art. 169 shall have superior force to any law in force at the time of such publication or enacted subsequently but it cannot have superior force to the supreme law, that is to say, the Constitution.*<sup>8</sup> This is applied, of course, to “self executing treaties”, that is, treaties which prescribe by their own terms a rule for the executive or for the courts or which create obligations for individuals enforceable without legislative implementation. With respect to non self executing treaties, such treaties should be implemented by an ordinary law having the same force as any other law.

However, even with respect to self executing treaties which are concluded under the provisions of Art. 169(2), the law approving such treaties is an ordinary law and therefore is subject to review by the Supreme Court whether it is repugnant to or inconsistent with the Constitution, *though the Supreme Court in such case will no doubt, as the Supreme Court in USA, be very slow to interfere with a matter having serious repercussions on the international plane and it will tend to reconcile any inconsistency by a restrictive interpretation...*<sup>9</sup>

Referring to the Accession of Cyprus to the EU, it is obvious that the Treaty of the Accession of Cyprus to the EU will be concluded under the provisions of Art. 169(2) since it is not just a treaty relating to commercial matters, economic cooperation and *modus vivendi*. In other words, Art. 169 provides the

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<sup>8</sup> Supra note 4 at p. 17.

<sup>9</sup> Ibid., p. 19.

constitutional basis for accession and the power for concluding a treaty with the EU. Moreover, in order for the Treaty to be binding on the Republic of Cyprus, it is important to mention that such a treaty must be properly concluded in accordance with the relevant provisions of Art. 169.

*As Professor Evrigenis has argued, the fundamental issue arising for a State willing to become a Member of the Communities is, of course, that of the constitutionality of its accession. To be legally binding both upon and within the State concerned, the decision to join the Communities must be properly taken in accordance with domestic law. Like any international commitment, accession, too, is subject to conditions and procedures laid down in the law of the interested State with respect to ratification of international agreements and their validity on the national level.<sup>10</sup>*

The question that arises, then, is whether the present functioning of the Republic of Cyprus (with the absence of the Turkish Cypriots from both the Executive, the Legislature and the Judicial Bodies) could constitute a problem for concluding a Treaty providing for Cyprus' accession to the EU according to the procedures laid down by its Constitution. This is the issue which will be examined below.

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<sup>10</sup>Evrigenis, D., 'Legal and Constitutional Implications of Greek Accession to the European Communities', (1980) 17 *CML Rev.* 157 at p. 159.

### **3.2 The absence of the Turkish Cypriots from the relevant bodies of the Republic of Cyprus in relation to the conclusion of a Treaty providing the accession of Cyprus to the EU.**

It is indeed very important to examine whether the Republic of Cyprus under its present formation has the constitutional power to enter into agreement with the EU given that the Turkish Cypriots are not exercising their duties as provided by the Constitution. One could possibly argue that since, according to the relevant provisions of the Constitution, the Turkish Cypriots must participate in the Council of Ministers and in the House of Representatives, any decision made by the Council itself and any approval made by the House of Representatives might be void because of the Turkish Cypriots' absence.<sup>11</sup> However, this is not the case because, as it has been explained in the first chapter of this thesis, the Republic of Cyprus as it is formed today, has the capacity and the power, based on the law of necessity, to act even in the absence of the Turkish Cypriot Community.

The argument supported by the Turkish side is that the administration in Southern Cyprus is only the Government of the Greek Cypriots and they also regard as unlawful the assumption by the Greek Cypriots of the role of the Republic of Cyprus.<sup>12</sup> This argument in connection with certain provisions of the

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<sup>11</sup> The legality of the application of the Republic of Cyprus has been challenged by Ergun Olgun on the ground that an administration composed entirely of Greek Cypriots cannot be considered to be the Government of Cyprus given the bi-communal character of the 1960 Constitution. Therefore, according to this position, the Greek Cypriot Community by itself has no legal capacity or authority to make a valid application for membership. Olgun, E., "European Union for Cyprus?" as cited at <http://www.cypnet.com/ncyprus/cyproblem/articles/bolum3.html>

<sup>12</sup> Statement of the Turkish Government Regarding the Luxembourg Summit (Accession Negotiations with Greek Cypriots), 14 December 1997. This view has also been supported by Rauf Denktas on the Turkish Cypriot Memorandum Addressed to the Council of Ministers of the EC in Respect of an Application for Membership by the Republic of Cyprus (12 July 1990). See

Cypriot Constitution, providing for the participation of the Turkish Cypriots in the administration, leads to the potential conclusion that the Republic of Cyprus, as it is formed today, can neither enter into accession negotiations with the EU nor conclude any treaty. According to this assumption then, the conclusion of a treaty between the Republic of Cyprus and the EU would be unconstitutional, since the procedures laid down by the Cypriot Constitution would be violated.

According to Art. 1 of the Constitution, the State of Cyprus is a sovereign Republic with a presidential regime where the President is a Greek Cypriot and the Vice President is a Turkish Cypriot. The Vice President's rights are laid down in Art. 38 and according to Art. 46 the executive power is ensured by the President and the Vice President whereas it is exercised by the Council of Ministers which is composed of seven Greek Ministers and three Turkish. The Council of Ministers shall exercise executive power as provided by Art. 54. Also, Article 57(3) provides for the right of final veto on the decisions of the Council of Ministers to be exercised by the President or the Vice President or even both if a decision relates to foreign affairs, defence or security. Moreover, according to Art. 50 the President and the Vice President of the Republic, separately or conjointly, shall have the right of the final veto on any law or decision of the House of Representatives or any part thereof, concerning several issues which according to Art. 50(ii) include the conclusion of international treaties, conventions and agreements.

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also, statement by Murat Karayalhin, foreign minister of Turkey, on Greek Cypriot application for membership to the EU (Turkish Association Council in Brussels) as cited at: <http://www.cypnet.com/.ncyprus/cyproblem/articles/bolum31.html>.

and also, "*Intercommunal Negotiations and the EU Membership of Cyprus*" Section on EU of the talking points presented by Rauf Denktas to US Congressman Mike Bilirakis on 29<sup>th</sup> August 1995.

Furthermore, referring to the composition of the House of Representatives, Art 62(2) provides that seventy per cent of the number of the Representatives shall be elected by the Greek Cypriot Community and thirty per cent by the Turkish Cypriot Community.<sup>13</sup>

As it can be observed from the above, the presence of the Turkish Cypriots seems to be vital for the functioning of both the Council of Ministers and the House of the Representatives. However, since 1963 the Turkish Cypriots have refused to fill their posts; the Republic has therefore had to function without their presence. The present functioning of the Republic is based on the law of necessity; according to its provisions, as they have been interpreted in the Cypriot Courts,<sup>14</sup> the Republic of Cyprus reserves the legal capacity to act and function, even in the present absence of the Turkish Cypriots. As it has been widely explained by the Cypriot Courts, the Turkish Cypriot decision to secede from the government did not have any impact on the legal status of the Republic of Cyprus under international law. The refusal of the Turkish Cypriots to participate in the government through its representatives cannot be a reason for which the Republic of Cyprus should not legally exist. In fact, the Republic of Cyprus and its present government is the only one recognised as the official government of the island by all the international organisations including the EU. As the European Commission stated in its opinion:

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<sup>13</sup> Article 63 provides that the members of the Greek Community shall only be registered in the Greek electoral list and the members of the Turkish Community shall only be registered in the Turkish electoral list.

<sup>14</sup> For more details about the adoption of the law of necessity in the Cypriot legal order see Chapter 1.5.



*When presenting its application for accession, the Government of the Republic of Cyprus, recognised by the European Community and its Member States as the only legitimate government representing the Cypriot people, addressed the Community on behalf of the whole of the island. The application was strongly challenged by the de facto authorities of the northern part of the island. While acknowledging that it would be in the interest of the Turkish Cypriot community to form part of the European Community, these authorities rejected the right of the Government of the Republic of Cyprus to speak for the whole of Cyprus in such an approach. They based their position on the Guarantee Treaty and the wording of the 1960 Constitution, which grants the President and Vice-President (a Turkish Cypriot) a veto over any foreign policy decision, particularly any decision on joining an international organisation or alliance that does not count both Greece and Cyprus among its members. They consider, accordingly, that in the prevailing circumstances the Community should not take any action on the application. The Community, however, following the logic of its established position, which is consistent with that of the United Nations where the legitimacy of the Government of the Republic of Cyprus and non recognition of the "Turkish Republic of the Northern Cyprus" are concerned, felt that the application was admissible and initiated the procedures laid down by the Treaties in order to examine it.<sup>15</sup>*

Referring to Art. 50, Professor Mendelson supported the view that the Vice-President's veto was but the mechanism by which the Turkish community could be assured that the Republic would not join an organisation unless both communities agreed. The fact, then, that the "TRNC" expressed its opposition to such an accession implies that the Turkish Cypriot community indeed objects.<sup>16</sup> By this implication, it seems that Prof. Mendelson attempts to interpret the

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<sup>15</sup> Commission of the European Communities, 'The Challenge of Enlargement. Commission Opinion on the Application by the Republic of Cyprus for Membership', *OJEC Supp.* 5/93, at pp 7-8.

<sup>16</sup> "Opinion on the Application of the Republic of Cyprus to Join the European Union" as it was drafted by Professor M. H. Mendelson (6 June 1997).

“TRNC” opposition as the legitimate Vice-Presidential right of veto on the conclusion of international treaties, agreements and conventions.

However, this does not seem to be the case. Focusing on Art. 50 one could firstly note, as a matter of form, that the President’s and the Vice President’s right of veto cannot be exercised in advance of its consideration by the House of Representatives. Moreover, as a matter of fact, the provisions of the 1960 Constitution dealing with the Vice Presidency, along with other provisions for Turkish Cypriot representation in the Government of Cyprus, are presently inoperative. Despite this, as it has been mentioned above, the international community continues to recognise that the Government of Cyprus has the normal capacity to represent Cyprus and conduct its foreign affairs. Furthermore, Art. 50 provides a procedural veto to be cast by the Vice President who obviously must have been elected and be effectively performing his functions under the Constitution. In this case there is no Vice President but his office remains vacant because of the Turkish Cypriots’ refusal to participate in the Government. Under Art. 50, the right of veto is specifically vested in a Vice President duly elected and effectively performing his duties under the Constitution and not generally on behalf of the Turkish Cypriot Community. Thus, one could rightly argue that since there is no such person as a Vice President, Art. 50 is simply inapplicable.

The argument, supported by Professor Mendelson, then, appears to be inapplicable as well. Since the Turkish Cypriots refused to fill the post of the Vice President according to the constitutional procedures, how could one claim that the rights of the Vice President, as they are provided by the constitution,

could be transferred as general rights of the Turkish Cypriot Community (a Community that does not respect and does not exercise its constitutional rights and duties)? Such an assumption could simply be described as an irony.

At this point, it is worth mentioning that, while the Turkish Cypriots and Turkey are invoking the provisions of the Art. 50 of the Constitution as a legal obstacle to the Cyprus' EU membership, they themselves violated the Constitution by refusing to participate in the government in 1963, by proclaiming the "TRNC" in 1983 and by creating another "constitution"<sup>17</sup> in 1985. These acts of the Turkish Cypriots are a clear evidence that they do not recognise the Constitution of the Republic of Cyprus. If this is so, why do they pose legal arguments based on these provisions? The Turkish Cypriot side cannot stress one legal point while ignoring the other.

Concerning Art. 50, particular reference should also be made to Articles 27 and 46 of the Vienna Convention on the Law of Treaties. Article 27 of the Vienna Convention provides that a party may not invoke the provisions of the internal law as justification for its failure to perform a treaty and accordingly this rule is without prejudice to Art. 46. In particular, Art. 46 provides:

*1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of provision of its internal law regarding competence to conclude treaties as invalidating its consent unless the violation was manifest and concerned a rule of its internal law of fundamental importance.*

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<sup>17</sup> On 7<sup>th</sup> May 1985 the "TRNC" created the so called "Constitution of the TRNC".

*A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”*

As a general rule, then, a breach of internal law is not an excuse for failure to comply with international obligations. The basis for challenging the validity of a treaty concerns the breach of an internal law as a valid argument only in exceptional cases. Only in a case of manifest violation may the state whose constitutional rules have been breached rely on the breach to challenge the validity of a treaty. As it has been mentioned above, the power of veto, according to Art. 50 of the Cypriot Constitution, is vested in a Vice President and not in the Turkish Cypriot Community and therefore the absence of the Turkish Cypriot Vice President from the present function of the Government of the Republic of Cyprus, cannot be considered as a “manifest” violation of Art. 50. This was also the position of the EU since the Association Agreement was concluded in 1972 without considering Art. 50 as an obstacle<sup>18</sup> and again in its consideration of Cyprus’ application for membership there was no negative reference concerning Art. 50.<sup>19</sup> It seems that this is also the position of the UN, since there has never been any reference to Art. 50 of the Constitution in any of the resolutions that have been based expressly on the agreement of the Government of the Republic of Cyprus.<sup>20</sup>

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<sup>18</sup> OJEC No L 133/1 (1973).

<sup>19</sup> Supra Note 15. The ECJ referred to the Government of Cyprus as the only official Government on the island and recognised its international capacity and powers in the case *R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd* [1994] ECR I3087; 100 ILR 258. Also, see Chapter Two.

<sup>20</sup> See for example the periodic resolutions extending the mandate of UNFICYP. From the first SC Res. 186/1964 to the latest SC Res. 1303/2000.

Finally, it has to be said that in the absence of a validly exercised veto according to Art. 50, the constitutional authority of the Government of the Republic of Cyprus to carry on the foreign affairs of Cyprus is unquestionable. If the argument to the contrary was valid, it would definitely be contradicted by the fact that since 1963 the Republic of Cyprus has entered into numerous treaties with many other States and International Organisations, the validity of which has never been challenged, despite the impossibility of applying Art. 50.

### **3.3 The accommodation of Community law into the Cypriot legal order.**

#### **3.3.1 The *sui generis* legal order of the EU and the general principles of Community law.**

It is vital, before examining the procedure for the accommodation of Community law into the Cypriot legal order, to examine the nature of the EU legislation and the effect that would have on the Cypriot legal order. Although it is beyond the scope of this thesis to provide a detailed analysis of the Community legislation, which would be impossible to be achieved in the length of one thesis anyway, the basic principles of the Community law must be examined in order to realise the impact of the effect of the introduction of European legislation into the Cypriot legal order. A rather general, but useful, analysis of the basic principles of the Community legislation is necessary, for explaining both the effect and the consequences from the introduction of Community legislation into the Cypriot legal order. Those basic principles must be firstly introduced to the Cypriot legal

order by relevant constitutional arrangements and secondly their effect must also be justified by the Constitution. Moreover, it is also important to examine the position of the Member State within the Union and the effect of its membership on its national legal order.

From a formalistic point of view, it could be argued that Community law belongs to international law since it is to some degree based on treaties concluded between sovereign states. Therefore, it could be argued that the conclusion of the Treaty of Accession to the EU should follow international law principles. However, as regards its content, Community law is a common internal law in the Member States, rather than a law between these states,<sup>21</sup> and therefore its effect on the member states national order would be significantly different from the effect of the signing of usual international treaties. As the ECJ has explained, Community law constitutes a new legal order, different from traditional international law.<sup>22</sup> The treaties establishing the Communities are characterised by the creation of permanent common institutions invested with sovereign legislative, executive and judicial powers transferred to them from member States in those areas which the latter placed under Community competence. This system, according to former Judge of the ECJ, Pescatore, P., is the first attempt, on a wider and more systematic scale, to introduce into the structure of an inter-state complex new principles of 'representativity' apart from the principle of representation of States.<sup>23</sup>

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<sup>21</sup> Kapteyn, P.J.G. and Van Themaat, P.V., *Introduction to the Law of the European Communities* 3<sup>rd</sup> Ed., edited and further revised by Laurence W. Gormley, Kluwer Law International, 1998, at p. 77.

<sup>22</sup> Case 26/62, *Van Gend en Loos* [1963] ECR 1, p. 12.

<sup>23</sup> Pescatore, P., *The Law of Integration*, Leyden, 1972. For more discussion about the relation between International Law and Community Law, see also, Pescatore, P., *International Law and*

In general, as it has been stated in the Preamble to the Treaty establishing the EEC, the purposes of the Community are to achieve an even closer union among the people of Europe, to promote the economic and social progress of their countries by common action, to eliminate the barriers which divide Europe, continually to improve the living and working conditions and to meet the perceived need for concerted action in order to guarantee steady expansion, balanced trade and fair competition. Also, the Preamble calls for a contribution to the progressive abolition of restrictions on international trade. The objectives of the EU as laid down by the TEU<sup>24</sup> mark a new stage in the process of European integration and highlight the historic importance of the ending of the division of the European Continent. They reflect a desire to enhance further the democratic and efficient functioning of the EU institutions and to deepen the solidarity between the people of Europe. It is stated that the EU aims to establish a citizenship common to nationals of the countries and to strengthen their economies by establishing an economic and monetary union including a single and stable currency. It also aims to promote economic and social progress of its people within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that these advances are accompanied by parallel progress in other fields and the implementation of a common foreign and security policy is also envisaged. Finally, the TEU reaffirms the objective of facilitating the free

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Community Law - A Comparative Analysis', (1970) 7 *CML Rev.* 167; and De Witte, B., 'Rules of Change in International Law: How Special is the European Community?', (1994) 25 *Neth. Yb. Int. L.* 299.

<sup>24</sup> As stated in the Preamble of the Treaty on European Union.

movement of persons, while ensuring the safety and security of people, by including provisions on justice and home affairs.

All those purposes mentioned above, must also be adopted as common purposes by the Republic of Cyprus in the event of accession. To achieve this, the Republic of Cyprus should adjust its domestic law to serve towards those ends as well. It is, therefore, well understood that to achieve that would not be a simple task and constitutional arrangements have to be made.

Also, the scope of the Community law can be investigated by special reference to particular Articles. According to Art. 2 EC, the Union has as its task the establishment of a common market and of an economic and monetary union and the implementation of common policies and activities. By these means, it is intended to promote a harmonious, balanced and sustainable development of economic activities throughout the Union, a high level of employment and social protection, sex equality, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the environment, improved standards of living and quality of life, and economic and social cohesion and solidarity among the Member States.

To achieve these purposes, provision is made in Art. 3 EC for several activities. These include the elimination, as between the Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect, an internal market characterised by the



abolition, as between Member States, of obstacles to the freedom of movement of persons, services and capital, and a system to ensure that competition in the internal market is not distorted. At the same time the pursuit of social and economic policies is envisaged. Further developed economic policies have also been included in Art. 4 (ex 3a). However, more importantly, Art 3(1)(h) EC provides for the approximation of laws of the Member States to the extent required for the proper functioning of the common market (legislative harmonisation) to take place. According to this provision, then, the differences between the laws of the Member States are to be reduced.

Community solidarity could be considered as one of the fundamental principles of the Treaty. According to Art. 10 EC (ex. 5), Member States have a general duty of loyalty in consequence of which they are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the Union's institutions. They are called upon to facilitate the achievement of the tasks established by the Treaty and to abstain from any measure that could jeopardise the attainment of its objectives. Art. 10 EC (ex. 5) has been extensively referred to by the ECJ in its interpretations in many areas of Community law. Consequently, it has become the legal justification for the doctrine of effectiveness of the Community law.<sup>25</sup>

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<sup>25</sup> The doctrine of effectiveness is a general interpretative principle which enables the ECJ to determine the content of particular provisions of Community law. See, Temple Lang, J., 'Community Constitutional Law: Article 5 EEC Treaty', (1990) 27 *CML Rev.* 645.

With a view to the attainment of the objectives laid down by the Treaties,<sup>26</sup> a wide range of competence is conferred on the common institutions, amounting to a transfer of sovereign powers in specified fields from the Member States to the EU institutions. This leads to a gradual loss of the sovereignty of Member States in favour of the Union or, more precisely, a participation of Member States in a gradually developing Union sovereignty. This transfer of sovereignty constitutes the objective of integration, which actually determines the level of the relations between the Union and the Member States.<sup>27</sup> However, from a strict legal point of view, the Member States continue to define the existence of the Treaties and of the Union and also the development towards a more advanced stage of integration.<sup>28</sup> Nevertheless, in the framework of these marginal decisions, the Member States do not define but co-define the course of the Union.<sup>29</sup>

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<sup>26</sup> The general objectives of the first three Treaties might be considered as identical (Arts. 2 ECSC, 2 EC and 1 Euratom). For these reasons, and because the institutional structure and the legal order display so many common features, it is justifiable to treat the Communities as a whole. Also, the Merger Treaty of 8<sup>th</sup> April 1965, established single institutions which were to exercise the powers and jurisdiction conferred upon them by each of the three Treaties. According to the evolution of the EU the term Treaties is often used to refer to the primary Community Law which covers the law set up by the ECSC, EC and Euratom Treaties and agreements and Community decisions modifying these three Treaties, such as the decisions on the Community's own resources, the First and Secondary Budgetary treaties and the Decision and Act on direct elections to the European Parliament; it embraces the Single European Act and the Treaty on European Union in so far as they modify earlier Treaties. Under the same conditions, it also embraces the Treaty of Amsterdam. It also embraces the decisions and Treaties concerning the accession of the UK, Denmark and Ireland, Greece, Spain and Portugal and Austria Finland and Sweden, as well as the Acts of Accession appended thereto in so far as they modify or supplement the earlier Treaties. Finally, primary law also covers the Annexes as well as the conventions and protocols appended to the Treaties. (See, supra note 20 at pp. 73-75)

<sup>27</sup> For an analysis on how other Member States managed to adapt their policies and systems to the demands for European Integration, see, Hanf, K. and Soetendorp, B., (eds), *Adapting to European Integration: Small States and the European Union*, Longman, 1998. See, also, Llorente, F.R., *Constitutionalism in the Integrated States of Europe*, The Jean Monnet Working Papers, No 5/98, Harvard Law School, 1998, at p. 19-20.

<sup>28</sup> Of course, every Member State reserves the power to decide whether it wishes to continue its membership in the Union.

<sup>29</sup> According to Kirchhof, *the Member States of the European Union need the Union to carry out certain of their tasks, but continue to be the political units which alone legitimate this association of States. They each claim a sovereignty of their own, but exercise a part of their sovereignty jointly. Such States lay down binding criteria for European integration in their constitutions, while they also 'open up' their legal systems to a European law that is, in part, displacing their own law.* See, Kirchhof, P., 'The Balance of Powers Between National and European Institutions' (1999) 5 *ELJ* 225.

The distinction between Member State and Member State also lies in the mode of decision making. In the first case the Member State decides according to its constitutional rules (approval of a treaty for example) but in the second case the Member State co-decides in the framework of the Union's institutions.

Thus, membership in the EU would definitely imply transfer of sovereign powers or limitation to national sovereignty as it is traditionally conceived. This transfer or limitation of sovereignty is clearly understood from the Union's legal order, according to which the legislative, executive and judicial powers are exercised not only by national but also by Union institutions. The transfer of powers from the Member States to the Union could also be characterised as being of an irreversible nature.<sup>30</sup> As it has been stated in the case *Commission v France*<sup>31</sup>, the Member States agreed to establish a Community of unlimited duration, having permanent institutions invested with real powers, stemming from limitation of authority or transfer of powers from the states to that Community. The powers thus conferred could not, therefore, be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the Member States alone, except by virtue of an express provision of the Treaty.

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<sup>30</sup> Case 7/71, *Commission v France* [1971] ECR 1003 at 1018. See also Usher, "European Community Law and National Law: The Irreversible Transfer", University Association for Contemporary European Studies, London 1981.

<sup>31</sup> *Ibid*, Case 7/71.

It is therefore well understood, that in case of Cyprus certain sovereign power shall be transferred to the EU institutions. The constitutional mechanisms for transferring those powers to Community institutions is going to be examined in the following section.

Also, as mentioned above, the Community is provided with its own institutions and has legal personality, legal capacity and right of international representation.<sup>32</sup> These institutions, as it was stated in the *Van Gend en Loos* case,<sup>33</sup> are to exercise sovereign rights derived from the States. The EU institutions are vested with real powers arising from the limitation of competence or delegation of certain powers from the national institutions in a way that is without precedent in the law of international organisations.

Of course, referring to the EU field of competence, Art. 5 EC (ex. 3b) provides that *the Community shall act within the limits of the powers conferred upon it by this Treaty and the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.* The recently introduced

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<sup>32</sup> See, Mortelmans, K., 'Community Law: More Than a Functional Area of Law, Less Than a Legal System', (1996) 1 *LIEI* 23 and Lachmann, P., 'International Legal Personality of the EC: Capacity and Competence', (1984) 1 *LIEI* 3.

<sup>33</sup> *Supra* note 22, p.12.

principle of subsidiarity seeks to manage the lack of clarity and predictability in the division of competences between the Community and the national legislatures. However, there is not yet an agreement, when the principle is applied to the Community, as to its scope of application, and to what extent it ties the hands of the Community institutions.<sup>34</sup> It is also well argued that there are actually two general approaches towards the principle of subsidiarity, one centralising and one decentralising.<sup>35</sup> In fact, it could be argued that even the recently introduced *Protocol on the Application of the Principles of Subsidiarity and Proportionality* which was attached to the Treaty of Amsterdam, has not achieved to eliminate the diversity of the approaches towards the principle, since the principle of subsidiarity is still under dispute in regard to its application.<sup>36</sup>

However, although the application of the principle of subsidiarity is still not clear, its existence is important for realising the actual existence of the transfer of powers (or sovereignty) from the Member States to the Union. It is, generally, to be applied where the powers of national institutions and those of the Union overlap and their competence is disputable.

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<sup>34</sup> Charlesworth, A. and Cullen, H., "*European Community Law*" Pitman Publishing 1994, p. 48.

<sup>35</sup> Emiliou, 'Subsidiarity: An Effective Barrier Against the Enterprises of Ambition?', (1992) 17 *EL Rev.* 383, at p. 384. *Ibid.*, at footnote 60 p. 48.

<sup>36</sup> For more discussion about the principle of subsidiarity as developed and applied within the EU, see, Duff, A., "*Subsidiarity Within the European Community*", The Federal Trust for Education and Research, London, 1993; Toth, A.G., 'A legal analysis of subsidiarity', Steiner, J., 'Subsidiarity under the Maastricht Treaty', and Emiliou, N., 'Subsidiarity: Panacea or fig leaf', all included in "*Legal Issues of the Maastricht Treaty*", edited by O'Keefe, D. and Twomey, P.M., Chichester: Chancery Law, 1994; Schilling, T., 'Subsidiarity as a rule and principle', (1994) 14 *YEL* 203 ; De Burca, G., 'Subsidiarity and ECJ as institutional actor', (1998) 36 *JCMS* 217 ; Toth A. G., 'Principle of Subsidiarity in the Maastricht Treaty', (1992) 29 *CML Rev.* 1079; Emiliou, N., 'Taking subsidiarity seriously ? The view of Britain', (1995) 1 *EPL* 564; Palacio, J., 'The principle of subsidiarity (Guide for lawyers with a particular Community orientation)', (1995) 20 *EL Rev.* 355; Harrison, V., 'Subsidiarity in Article 3b of the EC Treaty - Gobbledegook or Justiciable Principle ?', (1996) 45 *ICLQ* 431.

As mentioned above, there is a significant difference between the Union and other international entities, based on the fact that within the Union there is a legal structure that cannot be found in ordinary international treaties.<sup>37</sup> As also mentioned above, the treaties establishing the European Communities are characterised by the creation of permanent common institutions, invested with sovereign legislative, executive and judicial powers transferred to them from the Member States in those areas which the latter placed under Union competence.<sup>38</sup> Additionally, even before the establishment of the EEC, Advocate General Lagrange, in the *Fedechar*<sup>39</sup> case argued that the European Court of Justice was not an international court but the court of a Community created by six States in a model which is more closely related to a federal than to an international organisation. More significantly, the distinction between Community law and international law was highlighted in the case of *Commission v Luxembourg and Belgium*<sup>40</sup>, where the Court rejected an argument based on international law, that a default by the Commission in its obligations to a Member State had the effect of suspending the reciprocal obligations of the latter, and in the cases of *Defrenne*<sup>41</sup> and *Commission v France*<sup>42</sup> where the Court subsequently rejected the proposition that a default by one Member State suspends the reciprocal obligations of other Member States.

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<sup>37</sup> Pescatore, P., 'International Law and Community Law - A Comparative Analysis', (1970) 7 *CML Rev.* 167. Also, see Schermers, H.G., 'Community Law and International Law' (1975) 12 *CML Rev.* 77.

<sup>38</sup> Case 6/64 *Costa v ENEL* [1964] CMLR 425 at p. 455, Case 17/67 *Neuman v Hauptzollant Hof/Saale* [1967] ECR 441, Case 48/71 *Commission v Italy* [1972] CMLR 699.

<sup>39</sup> Case 8/55 [1954-56] ECR 245.

<sup>40</sup> Cases 90 & 91/63 [1964] ECR 625.

<sup>41</sup> Case 43/75 *Gabrielle Defrenne v SA Belge de Navigation Aérienne (Sabena)* [1976] ECR 455.

<sup>42</sup> Case 232/78 [1979] ECR 2729.

Besides, the establishment of a common market implied by the EEC Treaty did more than simply create a system of mutual rights and obligations for the contracting parties.<sup>43</sup> The participation of individuals in the common market was envisaged, since individuals have the opportunity of participating in the Union through representation in the European Parliament or the Economic and Social Committee. More significantly, in addition to creating mutual rights and duties among the Member States (which often happens in traditional international law) the EU confers certain rights on individuals as well. Community law regulates a conglomerate of mutual rights and duties between the Community and its subjects, both Member States and private persons, and among these subjects themselves.<sup>44</sup> The Member States, then, have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.<sup>45</sup> For this reason the Court has held that the Community cannot be understood as just another international organisation, created by a treaty which was a contract between states; rather, it is to be seen as a relationship between the Community, the Member States and individual persons and undertakings.<sup>46</sup>

In consequence of the above, where a Member State fails to comply with its obligations imposed by the EU legislation, then, either the Commission or another Member State may give rise to an action before the Court of Justice.<sup>47</sup> At the same time, EU legislation is intended to give rights to individuals, which national courts are bound to safeguard. As a result, the concepts of “direct

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<sup>43</sup> For more information on the development of the legal order within the EU, see Schwarze, J., ‘Concept and Perspectives of European Community Law’, (1999) 5 *EPL* 227.

<sup>44</sup> *Supra* note 21, p. 78.

<sup>45</sup> Case 6/64, *supra* note 38, at p. 455.

<sup>46</sup> *Supra* note 22.

<sup>47</sup> Articles 226 and 227 EC (ex. 169 and 170).

applicability” and “direct effect” have been developed within the framework of the EU legislation. The development of those principles within the EU margins the measure of the effect of EU legislation into national legal systems.<sup>48</sup> Their effect on Member States’ domestic legislation is very important and therefore it is essential to analyse them, to realise the effect that are going to have on the Cypriot legal order.

*“Direct effect” describes a provision endowed with sufficient clarity and precision to bestow a legal right on a natural or legal person, as against another natural or legal person, or a Member State. Establishing direct effect is a matter of interpretation, and it is clear that specific provisions of the Treaty, as well as specific provisions of regulations, directives or decisions, may be endowed with this quality.<sup>49</sup> On the other hand, “direct applicability” is the attribute of a regulation which ensures its access, in its entirety, to the national legal order, without the need for specific incorporation.<sup>50</sup>*

These concepts are often rather confusing. However, a distinction may be made between direct effect and direct applicability, in that the former relates to specific rights, while the latter refers to an entire legislative act. Direct effect of a Community law provision does not mean that the provision becomes part of national law. Rather, it means that the rights created by the provision are

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<sup>48</sup> A broad analysis of the effect of Community Law and its enforcement by Member States, is provided by Bell, A., ‘Enforcing Community Law Rights Before National Courts - Some Developments’, (1994) 1 *LIEI* 111.

<sup>49</sup> Wyatt & Dashwood, “*European Community Law*”, Sweet & Maxwell, 3<sup>rd</sup> Ed., 1993, at p. 53.

<sup>50</sup> *Ibid.*, p. 53. For a further analysis of the two concepts see, Winter, ‘Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law’, (1972) 9 *CML Rev.* 425. For a critical analysis of the principle of direct effect, see, Sebba, I., ‘The Doctrine of Direct Effect: A Malignant Disease of Community Law’, (1995) 2 *LIEI* 35.



invocable in national law. Although there is little difference in practice, the distinction is important in terms of the special status of regulations under Art. 249 EC (ex. 189).

The problem of the direct effect of Treaty provisions is a classic one in traditional international law. *According to a well established principle of international law...*, the Permanent Court of International Justice has pronounced, *an international agreement cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts.*<sup>51</sup> In other words, in international law the absence of direct effect of Treaty provisions is the general rule from which the contracting parties may, however, deviate.

As a matter of fact, the European Treaties contain such *self-executing*<sup>52</sup> provisions to a much larger extent than the classical treaties. Moreover, they are

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<sup>51</sup> Permanent Court of International Justice, Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, Series B, No. 15, pp. 17-18. Also, in regard to the effect of Treaties under international law, F. G. Jacobs explained that: *the effect of international law generally, and of treaties in particular, within the legal order of a State will always depend on a rule of domestic law. The fundamental principle is that the application of treaties is governed by domestic constitutional law. It is true that domestic law may, under certain conditions, require or permit the application of treaties which are binding on the State, even if they have not been specifically incorporated into domestic legislation. But this application of Treaties as such is prescribed by a rule of domestic constitutional law. It is not a situation reached by the application of a rule of international law, since such a rule, to have effect, itself depends upon recognition by domestic law. Indeed international law is generally uninformative in this area since it simply requires the application of treaties in all circumstances. It does not modify the fundamental principle that the application of treaties by domestic courts is governed by domestic law.* Jacobs, F.G., in Jacobs, F.G., and Roberts, S., (eds.), *"The Effect of Treaties in Domestic Law"*, Sweet & Maxwell, 1987, at p. xxiv (Introduction).

<sup>52</sup> Often, the introduction of terms of ratified conventions in internal law has the advantage of giving effect on the internal plane to international obligations foreseen by the conventions or treaties. It is not, however, always sufficient to assure total execution. The problem of clauses

unique in the fact that direct effect is attributed not only to the self executing provisions of the treaties themselves, but also (indeed, mainly) to the provisions of certain acts of the Union's institutions, without any need for the national authorities to intervene in order to render them applicable within the internal order.<sup>53</sup>

The principle of direct effect, rightly, has been described as *one of the essential characteristics of the Community legal order*.<sup>54</sup> It is, therefore, well understood that in the case of the accession of Cyprus to the EU, the principle of direct effect of Community legislation must be constitutionally established within the Cypriot legal order.

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which are not *self executing* is familiar to all systems which follow the rule of automatic introduction within the internal order. In fact, treaties are often written in general terms and the mere incorporation of the text in the national law would not be sufficient to give them effect if it is not accompanied by the adoption by the States concerned of appropriate measures to make concrete the norms which could be regarded as incomplete. The automatic incorporation of treaties within the internal law is, therefore, on its own, efficient only for *self executing* norms which are called "complete" because they can be transposed as they are on the internal level and can be directly applied by national judges. As the Cypriot Constitutional Court stated in the case *Malachtou v Armefti*, (1987) 1 CLR 210, *For a treaty to be applicable it must be self-executing. Only such provisions of a convention are self executing which may be applied by the organs of the State and which can be enforced by the Courts and which create rights for the individuals; they govern or affect directly relations of the internal life between the individuals, and the individuals and the State or the public authorities. The question whether or not treaties are self-executing is influenced by the wording of the convention, its provisions and the relevant constitutional law in a given country.* Cypriot Courts, then, like those in other countries, apply the rule of law embodied in the treaty if certain requirements are satisfied or, in other cases, they only recognise a legal situation created by the treaty without applying the rule of law it lays down. If a treaty provision is not formulated in a way ensuring its direct application in the domestic law, detailed legislative acts have to be introduced and more concrete measures to be taken.

<sup>53</sup> Easson stated that *provisions contained in the Treaty and in secondary legislation, in addition to imposing obligations upon the member States, may confer rights and in some cases obligations upon individuals which are enforceable at law*, 'The Direct Effect of EEC Directives', (1979) 28 *ICLQ* 319, at p. 319.

<sup>54</sup> Opinion 1/91, *Draft Agreement relating to the creation of the European Economic Area*, (1991) ECR I-6079, para. 21.

Furthermore, the ECJ saw the principle of direct effect as a valuable means of ensuring that Community law was enforced uniformly in all member States. Thus, in a series of cases, the ECJ held that many of the Treaty articles, including, Art. 28 and 29 (ex. 30-34), on the free movement of goods; Art. 39-43 (ex. 48-52), on the free movement of persons; Art 141 (ex. 119) and 142 (ex. 119a) on equal pay; and Art. 81 and 82 (ex. 85 and 86) on Competition law have direct effect.

The question of the direct effect of Treaty Articles was first raised in *Van Gend en Loos*<sup>55</sup> when a Dutch administrative tribunal in a reference under Art. 234 (ex.177), asked whether Art. 25 (ex. 12) was capable of an internal effect. It was held, then, that the Treaty could, indeed, confer legal rights on individuals. In this *ground-breaking judgment*,<sup>56</sup> the Court, however, set out three criteria for direct effect of articles of the Treaty. Thus, in order for a Treaty provision to have direct effect, it must be clear and precise, it must be unconditional or legally perfect, and it must not depend on further implementation by the Community institutions or the discretion of Member States.

In later decisions, the principle of direct effect of articles of the Treaty was further developed. In the *Lutticke* case<sup>57</sup>, the Court indicated that it was ready to

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<sup>55</sup> Case 26/62, supra note 22. The principle of direct effect of Treaty Articles also upheld in the cases 57/65, *Alfons Lutticke GmbH v Hauptzollamt Saarluis*, [1966] ECR 205; *Defrenne v Sabena*, supra note 44; *Waggrave and Koch v Association Union Cycliste Internationale*, 36/74, [1974] ECR 1405; *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia*, 236/92, [1994] ECR I.

<sup>56</sup> Graig P. and de Burca G., “*EU Law, Text, Cases and Materials*”, Oxford University Press, 2<sup>nd</sup> Ed., 1980, p. 165.

<sup>57</sup> Supra note 55.

consider direct effect of a Treaty provision imposing a positive duty on the member States, in that case, to adjust any tax or imported products to the lower rate applicable to domestic products. However, in order for such a provision, imposing an obligation to act, to have direct effect, the obligation must not be *subject in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the member States*. In other words, as stated by the Court in later decisions,<sup>58</sup> it must appear that no discretion is left to the Community institutions or to the member States leaving room for alternative decisions. A Treaty provision which gives such a discretion has no direct effect since it implies *the interposition between the rule of Community law and its implementation of legal acts implying a discretion*.<sup>59</sup> Furthermore, for a provision to have direct effect, it should not be made subject to the expiration of a period of time. This further condition is obviously of great importance in view of the many obligations provided in the Treaty which had to be fulfilled at the end of the transitional period. The Court has made it clear that by the end of the transitional period, such provisions will have direct effect, provided, as said before, that no freedom of action or discretionary power is given to the Community institutions or member States as to their implementation or the manner in which they are put into effect.<sup>60</sup>

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<sup>58</sup> *Molkerei - Zentrale*, 28/67, [1968] CMLR 187; *Salgoil SpA v Foreign Trade Ministry of the Italian Republic*, 13/68, [1969] CMLR 181.

<sup>59</sup> *Ibid.*, Case 28/67.

<sup>60</sup> *Van Binsbergen v Board of Trade Association of the Engineering Industry*, 33/74, [1975] CMLR 298; *Pacemakers Case* 36/74 [1976] 1 CMLR 320; *Reyners v Belgian State*, 2/74, [1974] CMLR 324; *Manghera Case* 59/75 [1976] ECR 91.

As mentioned above, though, not only Treaty provisions, but also EU secondary legislation may have direct effect. This is obvious, of course, for a regulation which according to Art. 249 EC (ex. 189) *shall be binding in its entirety and directly applicable in all member States.*<sup>61</sup> Thus, it was not difficult for the Court to decide that regulations *have direct effect on account of their nature and of the function in the system of Community sources of law and as such can give rise to private rights which national courts are bound to safeguard.*<sup>62</sup>

Concerning the direct effect of directives,<sup>63</sup> though, several problems have been raised. The main problem with directives is that they are binding only upon Member States and (to give them the flexibility which is necessary to accommodate the wide diversity of the Member States within the Community) there is considerable discretion allowed to the national authorities in achieving the desired result stipulated by the directive. In effect, Member States are given a time limit by which they must have transposed a Community directive into their national legislation such that individuals can then rely upon that national legislation for the rights intended to be conferred by the directive. Complications arise when Member States fail to transpose directives or fail to implement them correctly. As individuals are, then, unable to rely upon the directive, it would

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<sup>61</sup> The expression direct applicable, used in Art. 249 (ex.189 (2)), is not synonymous with having direct effect in the sense of the Courts decisions under review, and the two expressions do not cover each other entirely. See the Opinion of the Commission in *Grad Case*, 9/70, [1975] ECR 825. See also Winter, *supra* note 50, at p. 425.

<sup>62</sup> *Politi SAS v Ministero delle Finanze* 41/71 [1972] CMLR 60.

<sup>63</sup> For more discussion about direct effect in regard to directives, see, Schermers, H.G., 'No Direct Effect for Directives', (1997) 3 *EPL* 527; Pescatore, P., 'The Doctrine of Direct Effect: An Infant Disease in Community Law', (1983) 8 *EL Rev.* 155; De Burca, G., 'Giving Effect to European Community Directives', (1992) 55 *MLR* 215; Curtin, D., 'The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context', (1990) 15 *EL Rev.* 195; Tridimas, T., 'Horizontal Effect of Directives: A Missed Opportunity', (1994) 19 *EL Rev.* 621; Lackhoff and Nyssens, 'Direct Effect of Directives in Triangular Situations', (1998)

appear that they have no redress. However, following the *Van Gend en Loos* decision, and primarily in the *Grad*<sup>64</sup> case, the ECJ ruled that in situations where Member States have breached their obligations, such directives may indeed be relied upon. The ECJ, therefore, in understanding the vital importance of correct implementation of directives to the effectiveness of the Community, established in the *Van Duyn*<sup>65</sup> judgement that directives could be and would be held directly effective where possible, even though it could still be considered arbitrary whether directives indeed impose a clear, precise and complete obligation.

However, the decision appeared to be unpopular among the Member States since they felt that directives were specifically intended to leave them with choices as to how to enact a particular Community obligation and that the Court should not allow this to be overridden by individuals pleading the provision of the directive itself. Thus, in the next case regarding the issue, that of *Ratti*<sup>66</sup>, the Court added a more specific line of reasoning which stated that the provisions of the directives could not be pleaded directly by individuals before the time limit for implementation of the directive had expired. However, after that date, the Member States would automatically forfeit any discretion awarded and would be *estopped* from relying on any conflicting national law that would prevent the Member State recognising the binding effect of Community law. It is the Member States' responsibility to ensure directives are transposed within their

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23 *EL Rev.* 397; Kinley, D., 'Direct effect of Directives: stuck on vertical hold', (1995) 1 *EPL* 79.

<sup>64</sup> *Grad v Finanzamt Traunstein*, 9/70, [1970] ECR 825.

<sup>65</sup> *Van Duyn v Home Office*, 41/74, [1974] ECR 1337, [1975] 1 CMLR 1.

<sup>66</sup> *Publico Ministero v Tuillio Ratti*, 148/78, [1979] ECR 1629, [1980] 1 CMLR 96.

allotted time limit and they will have to endure the consequences if they fail in their actions.

So far, these cases had only concerned the issue of vertical direct effect; that is of individuals enforcing rights against the State. The issue of horizontal direct effect was raised in the *Marshall*<sup>67</sup> case where the Court held that a directive could not be invoked horizontally; that is, by one individual against another. There are various explanations for this restriction upon review for individuals, the primary reason being that to allow horizontal effect would remove any distinction between regulations and directives. Besides, this restriction could also be seen as a lack of care on the part of the ECJ for the rights for individuals as, if one is of the view that the main motivating factor behind the ECJ's decision is that of Member States compliance, then redress for individuals against individual has no effect upon this.<sup>68</sup>

Certainly, then, the establishment of the principle of direct effect within the EU legal order, as Charlesworth and Cullen argue, *moves Community law into a whole new category of international organisation, because it integrates international law passed by the Community into national legal systems. This means that the ECJ has a role and status which other international courts do not*

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<sup>67</sup>*Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, 152/84, [1986] ECR 723, [1986] 1 CMLR 688.

<sup>68</sup> Also to allow horizontal direct effect could increase the ECJ's workload with a massive increase in litigation. This could probably reduce the effectiveness of the Community, a principle the ECJ appear to put before many other issues. For the denial of horizontal effect, see also *Faccini Dori v Recreb Srl*, 91/92, [1994] ECR I-3325, [1995] 1 CMLR 665.

*have. Without direct effect, it is arguable that the development of the Community would have been much slower.*<sup>69</sup>

However, after the *Marshall* case, another important issue was raised concerning the interpretation of national law in accordance with obligations arising under Community law. Since the ECJ decides whether the provisions of a particular directive are capable of direct effect, this could be translated as an exercise of interpretation. Moreover, it is up to the ECJ to interpret national law in the light of the Community law and to decide whether a Member State has adequately implemented Community law. The ECJ also recommended that in any reference procedure, national courts should follow that interpretation which will be in conformity with Community law. One may, however, with justification, wonder to what extent interpretation can be used as a method of Community law penetration into national legal systems.<sup>70</sup>

The *interpretative obligation*, or so called indirect effect, was primarily discussed in the cases of *Marshall*<sup>71</sup>, *Von Colson*<sup>72</sup>, and *Harz*<sup>73</sup>. Instead of focusing on the vertical and directive effects of the directives, the Court turned to Art. 10 EC (ex. 5) which requires that states should take all appropriate measures to ensure fulfilment of their Community obligations. They must, therefore, interpret national law in such a way as to ensure that the objectives of the directives are achieved. The existence of an interpretative obligation, then, is there to safeguard

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<sup>69</sup> See, Charlesworth, A. and Cullen, H., *supra* note 34, p. 95.

<sup>70</sup> *Ibid.*, p. 88.

<sup>71</sup> *Supra* note 67.

<sup>72</sup> *Von Colson v Land Nordrhein-Westfalen*, 14/83, [1984] ECR 1891.

<sup>73</sup> *Harz v Deutsche Tradex GmbH*, 79/83, [1984] ECR 1921.



the Community rights of those who might be unable to rely on such rights because of the limitation on the direct effect of directives as laid down in *Marshall* case. However, in the later case of *Luciano Arcaro*<sup>74</sup> the ECJ did not leave it to the national court to decide how far it wished to go in interpreting national law in the light of directives. That limit was intended to restrict any attempt at gaining benefits of horizontal direct effect.

Another innovation concerning the effect of Community law, is the principle of state's liability for failure to implement Community law. That innovation concerned the results of a Member State's failure to implement or fulfil obligations deriving from Community law. According to Art. 226-228 EC (ex. 169-171) an action could be brought before the ECJ by the Commission or a Member State against a Member State that had failed to implement Community legislation. Under the provisions of these Articles, though, the non-implementation of Community legislation by a Member State is dealt in a Community inter-state level (i.e. the ECJ could fine the Member State for the non-implementation) and on the national level it is not provided any remedy. Also, in the past, a potential liability of Member States for non-implementation was a matter of national law.<sup>75</sup> In 1991, though, the ECJ adopted the principle that Member States could be held liable for breach of Community law. That was the new principle introduced by the *Francovich*<sup>76</sup> where it was held that individuals should receive compensation from the State when the Member State

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<sup>74</sup> Criminal Proceedings Against *Luciano Arcaro*, 168/95, [1996] ECR I-4705. See, also the decision on the recent case of *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft*, 355/96, [1998] ECR I-4799, [1998] 2 CMLR 953.

<sup>75</sup> See, *Humblet v Belgium*, 6/60, [1960] ECR 5592043; *Comet v Procukschap voor Siergewassen*, 45/76, [1976] ECR; *Russo v AIMA*, 60/75, [1976] ECR 45.

<sup>76</sup> *Francovich et al. v Italy*, 6 and 9/90, [1991] ECR I-5357.

had breached its Community obligation (i.e. liability upon the State for failure to implement).<sup>77</sup> The Court based its judgement on Art. 10 EC (ex 5) (duty of solidarity) and its doctrine of effectiveness. As the ECJ explained, effectiveness requires that individuals must be able to obtain compensation for a breach of Community law attributable to a Member State, especially where the full effect of Community law is conditional on Member State action.<sup>78</sup> The ECJ, though, applied three conditions for the validity of this principle; firstly, the directive must confer rights on individuals; secondly, the content of rights must be identifiable by a reference to the directive; and lastly, there must be a causal link between the breach of a state's obligation and the damage suffered by the person affected. Additionally, the Court in the cases of *Brasserie du Pêcheur*<sup>79</sup> and *Factortame (III)*<sup>80</sup> held that compensation is available in cases of breach of Community law even where there is a discretion as to the manner of transposition of Community norms, provided that the rule of Community law infringed must be intended to confer rights on individuals and the breach must be sufficiently

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<sup>77</sup> Although the judgment deals only with liability for breach of directives, one could support the view that liability would result and for breach of other Community law as well, by basing its view on the same reasoning the Court gave in this case. See, Ross, 'Beyond Francovich', (1993) 56 *MLR* 55. For more discussion, see also, Craig, P., 'Once more unto the breach; the Community the State and damages liability', (1997) 113 *LQR* 67; Smith, F. & Woods, L., 'Causation in Francovich: the Neglected Problem', (1997) 46 *ICLQ* 941; Tridimas, T., 'Member State Liability in Damages for Breach of Community Law: An Assessment of the Case Law', Oliver, P., 'State Liability in Damages following Factortame III: A Remedy Seen in Context', and Eechout, P., 'Liability of Member States in Damages and the Community System of Remedies', all included in Beatson, J. and Tridimas, T., (Eds), "*New Directions in European Public Law*", Hart Publishing, Oxford, 1998. Also, for an even more detailed analysis regarding the principle of State Liability, see, Lee, I.B., "*In search of a theory of State Liability in the European Union*", as cited in [http://www.law.harvard.edu/programs/Jean Monnet/papers/99/990902.html](http://www.law.harvard.edu/programs/Jean_Monnet/papers/99/990902.html)

<sup>78</sup> *Supra* note 34, p. 93.

<sup>79</sup> *Brasserie du Pêcheur SA v Germany*, 46/93, [1996] ECR I-1029, [1996] 1 CMLR 889.

<sup>80</sup> *R v Secretary of State for Transport, ex parte Factortame Ltd. & others (Factortame III)*, 48/93, [1996] ECR I-1029, [1996] 1 CMLR 586. See, also recent cases, *R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd*, 5/94, [1996] 2 CMLR 391 and *Commission v. Belgium*, 11/95, [1996] ECR I-4115, [1997] 2 CMLR 289, *R v HM Treasury, ex parte British Telecommunications plc*, 392/93, [1996] ECR I-1631, [1996] 2 CMLR 217, *R v Secretary of State for Social Security, ex parte Sutton*, 66/95, [1997] ECR I-2163, [1997] 2

serious and there must also be a causal link between the state's breach and the injured party's loss. Nevertheless, it has to be mentioned that the remedy of reparation is subject to national law, even though the conditions of liability are provided by Community law. Thus, it is for the domestic legal system to decide the criteria and the extent of reparation.<sup>81</sup>

The above brief outline of the legal order of the European Union and the brief analysis of the legal effects of Community law aim to illustrate the *sui generis* status of the Community legal order, on the one hand, and the effect that has on the Member States' national legal order, on the other. This distinctive character of Community's legal order demands, as mentioned above, certain limitation or transfer of national sovereignty. There is, then, a general obligation on a new State when joining the EU to ensure that it can meet the requirements of Community law. *In particular, it must make provision for the application of Community law within its territory.*<sup>82</sup> Thus, special arrangements must take place, in order for a new Member State to apply the Community law in its own legal order

### 3.3.2 The introduction and implementation of Community law in the Cypriot legal order.

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CMLR 382, *Palmisani v INPS*, 261/95, ECR I-4025, [1997] 3 CMLR 1356, *Bonifaci and Others and Berto and Others*, 94 & 95/95, [1997] ECR I-3969.

<sup>81</sup> See, Tridimas, T., 'Member State Liability in Damage for Breach of Community Law: An Assessment of the Case Law' in Beatson, J. and Tridimas, T., (Eds), "*New Directions in European Public Law*", Hart Publishing, Oxford, 1998, pp. 27-30.

<sup>82</sup> Hartley, T.C., "*The Foundations of European Community Law*", 1<sup>st</sup> Ed., 1981, at p. 224.

The application of Community law in the member States is not merely a problem of legal theory. It is rather a practical problem of fundamental importance. The fact that *Community constitutes a new legal order, for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and subjects of which compromise not only the Member States but also their nationals,*<sup>83</sup> demands such arrangements, on behalf of the Member States, so that the whole effect of the Community's legal order can be applied within the national legal order. In other words, joining the EU means a large scale and largely irreversible transformation of a nation's substantive law, governmental structure and international status.<sup>84</sup> It also means that states merge their identity into a larger legal whole, where their law must give way to the law of the Union, their legislative body must yield to the legislative machinery of the Union and their courts must respect and apply the rulings of the ECJ and the Community law as a whole.

The EU has not, however, specified how Member States should act to achieve these goals. As mentioned above, the procedure of accommodating and implementing the effects of Community law within the domestic legal order, lies upon the Member State itself and its own domestic legal procedures. Thus, each Member State, to give effect to the legal implications of its membership in the EU, acted according to its own legal rules and procedures and accordingly made all the relevant arrangements. In fact, all Member States based their accession to

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<sup>83</sup> *Firma Molkerei-Zentrale Westfalen Lippe GmbH vHauptzollamt Paderborn*, 28/67, [1968] ECR 143, at 152.

<sup>84</sup> Regarding the impact of EU institutional structures on Member States, see, Vivien A. Schmidt, "The EU and its Member States: Institutional Contrasts and their Consequences", MPIfG Working Paper 99/7, May 1999, as cited in

the EU and its implications, on special provisions provided by their Constitutions.<sup>85</sup>

In this case then, Cyprus must rely on its own legal system to give effect to Community law and to implement the demands of its accession to the EU. However, a brief analysis of the basis on how other Member States dealt with the issue, could provide helpful guidance.<sup>86</sup>

In the absence of a written constitution, in the United Kingdom, Community law takes effect by virtue of an Act of Parliament (The European Communities Act 1972).<sup>87</sup> In particular, direct effect of Community law in the UK is made by section 2(1) of the European Communities Act, which reads: *All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United*

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[http://www.mpi-fg-koeln.mpg.de/publikation/working\\_papers/wp99-7.html](http://www.mpi-fg-koeln.mpg.de/publikation/working_papers/wp99-7.html)

<sup>85</sup> Generally, the application of EU law in the domestic legal order has been achieved according to the *monist* or *dualist* conception of international law by the Member State. However, because of the special demands of Community law and its distinctive *sui generis* character, in the most of the cases, Member States made further arrangements. In fact, in several cases, special references to the EU have been introduced as amendments to the national Constitutions.

<sup>86</sup> English translation of the following national Constitutions is cited in; <http://www.uni-wuerzburg.de/law/home.html>.

<sup>87</sup> See, Barnard, C. and Greaves, R., 'The Application of Community Law in the United Kingdom, 1986-1993', (1994) 31 *CML Rev.* 1055. See also, Collins, L., "European Community Law in the United Kingdom", Butterworths, 4<sup>th</sup> Ed, 1990; Birkinshaw, P., 'European Integration and United Kingdom Constitutional Law', (1997) 3 *EPL* 57. It has to be emphasised that Britain is a strictly dualist country and therefore the Community Treaties could have no effect in the British legal system, unless they were introduced by an Act of Parliament. Lord Denning made that clear, in *McWhirter v Attorney General* [1972] CMLR 882, a case decided after the EC Treaty had been signed but before the Act of Parliament. He stated that *even though the Treaty of Rome has been signed, it has no effect, so far as these Courts, are concerned, until it is made an Act of*

*Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly...*

In Ireland, the *Third Amendment* to the Constitution, in the form of an addition to Article 29 of the Irish Constitution, allowed the country to enter the European Union. Art. 29 reads as follows: *The State may become a member of the European Coal and Steel Community (established by the Treaty signed at Paris on the 18<sup>th</sup> day of April, 1951), the European Economic Community (established by the Treaty signed at Rome on the 25<sup>th</sup> day of March, 1957), and the European Atomic Energy Community (established by Treaty signed at Rome on the 25<sup>th</sup> day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevent laws enacted, acts done or measures adopted by the Communities institutions thereof, from having the force of law in the State.* In Italy, Article 11 of the Italian Constitution made possible the application of Community law in Italy. It reads as follows, *Italy agrees, on conditions of equality with other States, to the limitations of her sovereignty necessary to an organisation which will assure peace and justice among nations, and promote and encourage international organisations constituted for this purpose.* Similarly, in Greece,<sup>88</sup> Article 28(2) of the Constitution reads: *Powers provided by the Constitution may by treaty or agreement be vested in agencies of international organisations, when this serves an important national interest and*

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*Parliament. Once it is implemented by an Act of Parliament, these Courts must go by the Act of Parliament.*

<sup>88</sup> For more information, see, Skandamis, N., “*Ευρωπαϊκό Κοινοτικό Δίκαιο & Ελληνικό Δίκαιο Προσαρμογής*” [European Community Law & Greek Law of Adaptation], Sakkoulas Edition, Athens-Komotini, 1992.

*promotes co-operation with other States. A majority of three-fifths of the total number of members of Parliament shall be necessary to vote the law sanctioning the treaty or agreement.*

In France, the Preamble to the Constitution of 4<sup>th</sup> October 1958 refers to *the limitations of sovereignty necessary for the organisation and defence of peace.*

Also, the constitutional amendment of 1992 made a clear reference to the EU in Title XV.<sup>89</sup> More specifically, one of the provisions of Title XV, Article 88(2) contains a reference to *transfer of competences* to a permanent international organisation.

In the Netherlands,<sup>90</sup> the provision regulating external relations is made in Art 90 of the Constitution which provides that *the Government should promote the development of the international rule of law.* Also, Articles 93 and 94 of the Constitution, which were introduced in 1953, make special references to the possibility of conferring powers on international organisations. It was argued, therefore, that the introduction of those provisions aimed to facilitate the European integration.<sup>91</sup> In Belgium, also, there is a special constitutional provision for transfer of sovereignty. Article 34 of the Belgian Constitution provides that *the exercising of determined power can be attributed by a treaty or a law to international public institutions.* Similarly, in Luxembourg, according to

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<sup>89</sup> Article 88(1) states that the French Republic participates in the European Community and the European Union, and has chosen to exercise certain competences in common with other Member States.

<sup>90</sup> Besselink, L.F.M. and Swaak, C.R.A., 'The Netherlands' Constitutional Law and European Integration', (1996) 2 *EPL* 34.

<sup>91</sup> However, as Besselink and Swaak stated that, *many constitutional lawyers in the Netherlands uncritically state that Arts. 93 and 94 of the Constitution do not apply to EC law.* Ibid, p.36.

the Luxembourg Constitution (Art. 49 bis), *the exercise of the powers reserved by the Constitution to the legislature, executive and judiciary may be temporarily vested by treaty in institutions governed by international law.*

In Germany,<sup>92</sup> Article 24 (I) (now Art. 23 (I)) of the Basic Law of the Federal Republic of Germany was held to be the lever of integration. This Article provides that *the Federation may, by legislation, transfer sovereign powers to international institutions.*<sup>93</sup>

In Austria,<sup>94</sup> according to Article 9(1), *the generally recognised rules of international law are regarded as integral parts of federal law and according to Art. 9(2), legislation or a treaty requiring sanction in accordance with Article 50(1) can transfer specific federal competencies to intergovernmental organisations and their authorities and can within the framework of international law regulate the activity of foreign states' agents inside Austria as well as the activity of Austrian agents abroad.*

The constitutional basis for the Spanish accession is embodied in Article 93 of the Spanish Constitution which provides: *By means of an organic law, authorisation may be granted for concluding treaties by which powers derived*

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<sup>92</sup> See, Kokott, J., 'German Constitutional Jurisprudence and European Integration', Parts I and II, (1996) 2 *EPL* 237 and (1996) 2 *EPL* 413. See, also, Wulf-Henning Roth, 'The Application of Community Law in West Germany', (1991) 28 *CML Rev.* 137.

<sup>93</sup> Referring to Germany, it is important to mention that the Court's jurisdiction played a significant role in the application of EU law, since Germany's dualistic concept of international law (Art.59.2 of the Basic Law of the Federal Republic of Germany).

<sup>94</sup> See, Seidl - Hohenveldern, H.C.I., Austria and the EEA', (1992) 1 *LIEI* 29. Also, according to Austrian Constitutional law for an overall amendment of the Constitution a referendum is necessary. Therefore, a referendum was held in connection with Austria's accession to the EU.



*from the Constitution shall be vested in an international organisation or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organisations upon whom the powers have been conferred.*<sup>95</sup> In Portugal, the Constitutional Laws Nos. 1/89 and 1/92 which are contained in Article 7(5) and (6), regulate the Portuguese membership of the EU.<sup>96</sup> Accordingly, Art. 7(5) provides: *Portugal shall strive to reinforce the European identity and strengthen the European states' actions in favour of democracy, peace, economic progress and justice in relations between states* and Art. 7(6) reads: *Portugal may, under conditions of reciprocity, while respecting the principles of subsidiarity and taking into account the achievement of economic and social cohesion, agree to the common exercise of the powers needed to build the European Union.*

In Finland,<sup>97</sup> according to Chapter IIIa (Section 22a), added in 1987 (no. 570/1987) to the Finnish Constitution, a consultative referendum may be held on the basis of an Act of Parliament. Finland, then, based its membership of the EU on a referendum (No. 578/1994) and an Act of Parliament (No 1540/1994) incorporated the accession Treaty into the Finnish domestic legal order. Finally, the basis for the implementation of EU law in the Danish legal order is laid down

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See, Christoph Herbst, 'Austrian Constitutional law and Accession to the European Union', (1995) 1 *EPL* 1.

<sup>95</sup> For more discussion, see, De Noriega, A.E., 'A Dissident Voice, The Spanish Constitutional Court Case Law on European Integration', (1999) 5 *EPL* 269.

<sup>96</sup> For more information about Portugal's membership of the EU, see, Carlos Bothelo Moniz, 'The Portuguese Constitution and the Participation of the Republic of Portugal in the European Union', (1998) 4 *EPL* 465.

<sup>97</sup> See, Rosas, A., 'Finland's Accession to the European Union: Constitutional Aspects' (1995) 1 *EPL* 166. Also, see, Aalto, P., 'Accession of Finland to the European Union: First Remarks', (1995) 20 *EL Rev.* 618.

by the Danish Constitution (Grundloven, i. e. the Basic Law) in Section 20 (1) which provides that *powers vested in the authorities of the Kingdom under this Basic Law can by an Act to a more specified extent be handed over to international authorities set up by mutual agreement with other states in order to promote international law and co-operation.*<sup>98</sup>

Finally, in Sweden,<sup>99</sup> Chapter 10 of the Instrument of Government, which regulates foreign relations, includes the treaty-making power and provides concern for the transfer of national decision making powers to international organisations (Art. 5). However, although this provision for a transfer of power to international organisations pre-dated the accession of Sweden to the EU, it was not considered enough to allow such an accession and therefore an amendment with a specific reference to the EU was made (Articles 2-5). Accordingly, then, the basic Treaties, acts, agreements and other decisions made before the accession of Sweden to the EU have been incorporated as a part of the Swedish law under Articles 2 and 4 and all other acts adopted by the EU after the accession shall be governed by Art. 3.

The above-mentioned examples constitute just the basis on which Member States placed the introduction of Community law in their national legal order. However, it is important to mention that such introduction was not an easy task in all cases.

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<sup>98</sup> For more information about issues concern Denmark and the EU, see, Hegh, K., 'The Danish Maastricht Judgement' (1999) 24 *EL Rev.* 80.

<sup>99</sup> See, Lysen, G., 'Sweden; National Constitutional Law and European Integration', 17 *F.I.D.E. (International Federation for European Law) Kongress*, Berlin 1996.

Further legal mechanisms, mainly judicial intervention, were necessary for the successful application of Community law in the domestic legal order.

Nevertheless, from the above examples, the following important remarks could be noted. Firstly, a distinction can be made between Constitutions that provided for a transfer of power to international organisations, before their accession to the EU and those Constitutions which by an amendment made such a provision after their accession to the EU; secondly, a distinction can also be made between those Constitutions which make special reference to the EU and those which make a general reference to international organisations; thirdly, it should also be noted, that some Member States did not just base the implementation of Community law on Constitutional provisions, but they had to pass further national Laws or Acts, to achieve that; and finally, it can be argued that the common ground of all these mechanisms is the existence of a national provision enabling the limitation (or transfer) of national sovereignty.

Referring to Cyprus, then, similar methods might be used for implementing Community law into the Cypriot legal order. The signing of the Treaty of Accession of Cyprus to the EU and the other Treaties establishing the EU, and their incorporation in the Cypriot legal order, could be achieved by the procedure as described by Art. 169 of the Cypriot Constitution.

The Treaty of Accession, then, should be negotiated and signed under a decision of the Council of Ministers and would be operative and binding on the Republic when approved by a law made by the House of Representatives. As Pikiş J.

stated, *ratification by the legislature incorporates the treaty or convention, as the case may be, into domestic law by virtue of the legislative power vested in the House of Representatives (Art. 61); and if its provisions are self-executing they acquire the force of law quite independently of para. 3 of Article 169 or its impact on domestic legislation.*<sup>100</sup> In this way, the self-executing provisions of the Treaties would become incorporated into the Cypriot legal order. Of course, as it is provided by Art. 169(3) these provisions will have superior force to any municipal law.<sup>101</sup>

Concerning the effect of secondary legislation of the EU (and the non self-executing provisions of the Treaties), no reference is made under the Cypriot Constitution. As observed above, a mechanism of transfer of national power to the institutions of the EU could be the basis for the implementation of Community law into the national legal order. In fact, no mechanism for transfer of power is provided by the Cypriot Constitution. Following the example of other Member States whose constitutions also did not provide for transfer of power, an amendment to the Constitution could make the necessary provision.<sup>102</sup>

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<sup>100</sup> Case *Malachtou v Armefti*, supra note 52, at p. 211.

<sup>101</sup> In this case, the Constitution of Cyprus is not included in municipal law and therefore it still might be considered as superior. The issue of "Supremacy of Cypriot Constitution v Supremacy of EU law", is concerned in the next Chapter. The issue of publication of treaties is another constitutional requirement under Art. 169(3). From a constitutional law perspective the obligation of publication of treaties provides either a means of transformation of treaties into internal law (i.e. dualist approach) or a formal requirement (i.e. monist approach). In Cyprus, this is considered merely as a formal requirement. (See, Pikis J., *Ibid*).

<sup>102</sup> The procedure of amending the Constitution of Cyprus is a complicated one. In fact, some Articles of the Constitution are considered as basic and cannot by any way be amended (Art. 182). This issue is analysed in Chapter Six.

An amendment by addition providing for the transfer of powers could be made in Art. 169.<sup>103</sup> This addition might include a general provision for transfer of powers to international organisations or a specific reference for transfer of powers to the EU.

Additionally, one could argue that by following the example of Ireland, another procedure might be the enactment of a Law providing for a referendum before the addition to Art. 169. Normally, it could be argued that by this procedure, since a more democratic step (that of a referendum) is required, less argument about a violation of the constitutional procedures would result. Nevertheless, the referendum-solution might not be considered as the most successful procedure in regard to Cyprus, since the current application of the law of necessity (basic element for amending the Constitution as it functions today) is not based on referendum results.<sup>104</sup>

However, whatever the constitutional procedures, the role of the Judiciary, for establishing the implementation of the European Community law into the Cypriot legal order, would be vital. As it has been experienced in the other Member States, the will of the national Courts to give effect to the Community law is necessary. Cypriot Courts, then, must also be prepared to give effect to the EU legislation, since this will establish the incorporation of Community law within the Cypriot legal order. The addition to Art. 169 of the Cypriot Constitution, providing for the transfer of sovereign power to the EU and its Institutions, must

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<sup>103</sup> Article 169 of the Constitution is not considered as a Basic one under the provisions of Art. 182 and therefore it could be amended.

<sup>104</sup> For more details about the amending procedure of the Cyprus Constitution, see, Chapter Six.

be well established and interpreted by the Cypriot Courts. In their attempt to give effect to Community legislation in the Cypriot legal order, Cypriot Courts, should also be able to realise and understand the principles and the effect of Community law and to be prepared for major changes in the domestic legal order. The judicial way of giving effect to Community legislation as followed by other Member States, should be a useful and wise guidance for Cypriot Courts on the implementation of the EU legislation in the Cypriot legal order. The EU principles of direct applicability, direct and indirect effect, and the failure to implement European legislation must consequently adopted by Cypriot Courts and through their decisions must successfully implement them in the domestic legal order.

In other words, the non-problematic application of Community law in the Cypriot legal order depends upon the will of the Courts. If the Courts (by the appropriate interpretation and will) achieve that, then and only then will the application of the EU law be smoothly implemented.

**CHAPTER FOUR:****ARTICLE 179 OF THE CYPRIOT CONSTITUTION AND THE PRINCIPLE OF SUPREMACY OF COMMUNITY LAW**

One of the most important constitutional principles of the European Union is without doubt the principle of supremacy of Community law. All Member States, as a consequence of their accession to the EU, had to give priority to the European legislation over national legislation. This has been achieved by various methods, used by the Member States, according to their domestic legislation. For some Member States that was not a difficult task but others faced significant problems in accommodating this principle, mainly due to their own domestic constitutional supremacy. The scope of this chapter is to examine whether the principle of supremacy of the Community law might be in conflict with the Cypriot law. In fact, it deals with Art. 179 of the Cypriot Constitution which provides for the supremacy of the Constitution within the Cypriot legal order and seeks to examine how this provision is compatible with a future accession to the EU. By using the examples of how other Member States managed to accommodate the principle of Community supremacy in their national legal order, this chapter also seeks to examine how this principle could be accommodated to the Cypriot legal order. It is important, therefore, to examine the relationship between Art. 179 of the Cypriot Constitution and the principle of the supremacy of Community law, and whether there is any conflict between them and suggestions as to how Cyprus could accommodate this principle in the Cypriot legal order are made.

#### 4.1 Article 179 of the Cypriot Constitution.

According to Art. 179 the Cypriot Constitution, the Constitution is the supreme law of the Republic. Specifically the Art. 179 provides:

1. *This constitution shall be the supreme law of the Republic.*
2. *No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any provisions of this Constitution.*

This might mean that the Constitution is superior to the EU Treaties and the Acts of the Institutions of the EU. In a former case where there was the dilemma whether the Constitution is superior to an international agreement, or vice versa, the ex-Attorney General of the Republic stated that:

*...a treaty, convention or international agreement concluded and published as provided in Article 169 shall have superior force to any law in force at the time of such publication or enacted subsequently but it cannot have superior force to the supreme law that is to say the Constitution...though the Supreme Court in such case will no doubt, as the Supreme Court in USA, to be very slow to interfere with a matter having serious repercussions on the international plane and will tend to reconcile any inconsistency by a restrictive interpretation...<sup>1</sup>*

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<sup>1</sup> Tornaritis, C., *“The Treaty Making Power Especially Under the Law of the Republic of Cyprus”*, Nicosia, 1973, pp. 17-19.



Therefore, it is quite clear that the constitution must prevail over any international agreement being adopted by the Republic. It should be noted that every international agreement with a foreign state or international organisation relating to commercial matters and *modus vivendi* is concluded under a decision of the Council of Ministers. Any other treaty, convention or international agreement is negotiated and signed under a decision of the Council of Ministers but is operative and binding on the Republic when approved by a law made by the House of Representatives whereupon it is concluded. Treaties, conventions and agreements so concluded have, from the date of their publication in the Official Gazette of the Republic, superior force to any municipal law on condition that they are applied by the other party to the treaty.<sup>2</sup>

The Supreme Court has also highlighted, in several cases, that an adoption of a Law may be made “*if and only if*” such adoption is necessary to bring such Law into conformity with the constitution.<sup>3</sup>

The supremacy of the constitution was reaffirmed in the judgment of the Supreme Court in the case of *Police v Andreas Georgiades*<sup>4</sup>. It was there held that a common law rule of evidence which allowed the admissibility of evidence illegally obtained was unconstitutional as being in contravention of Art. 15, which safeguards the right to privacy, and Art. 17, which safeguards the right to respect for and secrecy of correspondence. It was laid down that the basic rights

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<sup>2</sup> Art. 169 of the Constitution of Cyprus.

<sup>3</sup> *G. Constantinides v The Republic* (1969) 3 CLR 523; and *A. Vrahimis v The Republic*, (1971) 3 CLR 104.

<sup>4</sup> (1983) 2 CLR 33.

safeguarded in Part II of the constitution referring to fundamental rights and liberties are inalienable and inherent in man, that they are at all times to be enjoyed and exercised under constitutional protection and that the Cypriot Courts have no discretion to admit evidence obtained or secured in contravention of such rights.

The concept of the inviolability of a 'supreme' or 'fundamental' or 'higher' law is characteristic of countries where written constitutions are in force, such as, for example the USA. Under such a concept, the legislature has to exercise its powers within the limits laid down by the supreme law and any legislative measures which offend against it are liable to be declared unconstitutional through judicial review. This is a notion unknown in countries where no written constitution exists, such as the United Kingdom, where the legislature represented by the union of the Queen in Parliament is sovereign.

One of the sources of this doctrine of supreme law is the case of *Marbury v Madison*<sup>5</sup> decided by the US Supreme Court in 1803. In his judgment, Chief Justice Marshall said:

*The question whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.*

*That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own*

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<sup>5</sup> 5 US (1 Cranch) 137 (1803).

*happiness is the basis upon which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.*

From the above extract it appears that Marshall CJ based his doctrine of fundamental law on the assumption that a written constitution is the product of the exercise of the ‘original right’ of the people to choose what ‘shall most conduce to their own happiness’. He also accepted that, even after the original adoption of the fundamental law, such a right can still be exercised again, though not frequently. In spite of the view taken by Marshall CJ that it is difficult to exercise such a right often, the fact remains that at least 27 amendments have been made to the Constitution of the United States.<sup>6</sup>

#### **4.2 Challenging the principle of the superiority under Art. 179.**

The constitution of Cyprus contains very rigid provisions for its future amendment, which may take place only in certain non basic respects. It affords no possibility for amendment as far as the Basic Articles (Art.182, Annex III)

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<sup>6</sup> Officially in the USA, the Constitution has been amended 27 times. However, it could be argued that although only 27 amendments have been achieved officially, other amendments have also taken place by other forms rather than the official procedure. See, Levinson, S., ‘How many times has the United States Constitution been amended? (a) <26; (b) 26; (c) 27; (d) >27: Accounting for Constitutional Change’, edited in Levinson, S., “*Responding to Imperfection: The Theory and Practice of Constitutional Amendment*”, Princeton University Press, 1995.

are concerned. According to Art 182 of the constitution, the basic Articles cannot in any way be amended, whether by way of variation, addition or repeal.<sup>7</sup>

The conventional right of the people of Cyprus to amend or reform their constitution is precluded not only by the constitution itself but also by the Treaty of Guarantee which specifically provides in Art.2 that it guarantees, inter alia, the state of affairs established by the basic articles of its constitution. The almost universal custom of preserving the right to alter or amend the constitution is rigidly blocked by the so called unalterable basic articles of the constitution, in contrast to other systems such as the US Bill of Rights which provides for such a right to be exercised by referendum or plebiscite.<sup>8</sup>

In his treatise on "*The Higher Law Background of the American Constitutional Law*", Professor Corwin, one of the foremost constitutional experts of his country, wrote:

*In the first place, in the American written constitution, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a statute emanating from the sovereign people. Once the binding force of higher law transferred to this new basis, the notion of the sovereignty of the ordinary legislative organ disappeared automatically, since there cannot be a sovereign law making body which is subordinate to another law making body.<sup>9</sup>*

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<sup>7</sup> See, Chapter Six.

<sup>8</sup> *Bennett v Jackson*, 186 Ind. 553, 116 N.E. 921 (1917).

<sup>9</sup> Corwin, E.S., "*The Higher Law Background of the American Constitution*", Princeton, 1963, at p. 89.

Thus, it is clear that the concept of the inviolability of a supreme law, by its very nature, is inseparably related to the premise that the constitution embodies the sovereign will of the people which can be exercised at any time, even though seldom, in order to amend it.

Article 179 has formally introduced the concept of supreme law in the constitutional order of the Republic of Cyprus. It is, therefore, useful to examine how far the principle behind the Art.179 corresponds to the realities of the Constitution of Cyprus.

As it has already been mentioned, regarding the basic Articles of the constitution, in respect of matters which were incorporated by the Agreement in Zurich, no amendment is possible, not even by unanimous consensus of all members of the House of Representatives. Thus, it has been deprived of the opportunity of representing the sovereign will of the people of the country at any given time in the future.<sup>10</sup>

It is reasonably concluded from the foregoing that the Constitution of Cyprus, though invested with the sanctity of a supreme law, under Art. 179, is found not to be in reality incompatible with the principles which led Marshall CJ to propound the doctrine of the supreme law in *Marbury v Madison*.<sup>11</sup>

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<sup>10</sup> This issue will be addressed in detail in Chapter Six.

<sup>11</sup> *Supra* note 5.

According to Triantafyllides J. in the famous Cypriot case *The Attorney General v Mustafa Imbrahim and others*,<sup>12</sup> it has to be examined whether the constitution of Cyprus, being treated as a supreme law under Art.179, prevents in all and any circumstances, the enactment of a law which is urgently needed in prevailing circumstances, especially where such circumstances have not been foreseen or provided for by the constitution itself. He is also of the opinion that:

*Art. 179 is to be applied subject to the proposition that where it is not possible for a basic function of the State to be discharged properly, as provided for in the constitution, or where a situation has arisen which cannot be adequately met under the provisions of the constitution then the appropriate organ may take such steps within the nature of its competence as are required to meet the necessity...Even though, the constitution is deemed to be a supreme law limiting the sovereignty of the legislature, nevertheless where the constitution itself cannot measure up to a situation which has arisen...in view of the nature of the constitution it is not possible for the sovereign will of the people to manifest itself...the legislative power remains unhindered by the Art. 179, and not only can, but it must, be exercised for the benefit of the people.*

However, whatever the challenge, Art. 179 is considered to be one of the basic Articles of the Cypriot Constitution. Moreover, according to Art. 1 of the Treaty of Guarantee, *the Republic of Cyprus undertakes to ensure the maintenance of its independence...as well as respect to its Constitution*. Therefore, one must pay particular attention to whether, and how, a future accession to the EU would

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<sup>12</sup> 1964 CLR 195.

influence the principle of the Superiority of the Constitution of Cyprus as arising from Art. 179.

### 4.3 The Supremacy of the European Community Law.

*The Community legal order is intended to bring about a profound transformation in the condition of life - economic, social and even political - in the Member States. It is inevitable that it will come into conflict with the established order, that is to say, the rules in force in the Member States whether they stem from constitutions, laws, regulations or legal usage ... Community law holds within itself an existential necessity for supremacy. If it is not capable in all circumstances of taking precedence over national law, it is ineffective and, to that extent, non-existent. The very notion of a common order would thereby be destroyed.<sup>13</sup>*

The supremacy of Community law over national law, although not expressly formulated in any of the Communities' Treaties, is now considered as a basic unwritten rule of Community law. This principle has been proclaimed with great emphasis by the European Court of Justice. It has been widely applied, irrespective of the nature of the Community provision (constitutive Treaty, act or agreement with a non member state), or that of the national provision (constitution, statute or subordinate legislation). It also applies, irrespective of whether the EU provision came before or after the national provision. In all cases, the national provision must give way to Community law.

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<sup>13</sup> Pescatore, P., *L'ordre des Communautés Européennes*, Presses Universitaires de Liege, 2<sup>nd</sup> Ed. 1973, p. 227.

The basic doctrine of the supremacy of the European Community law was laid down by the Court of Justice in *Costa v ENEL*<sup>14</sup> and confirmed and developed in later cases. It was emphasised, though, in the cases of *International Handelsgesellschaft*,<sup>15</sup> *Simmenthal*,<sup>16</sup> and *Factortame*.<sup>17</sup> In *Costa v ENEL*, quoted above, an Italian law of 6th December 1962 nationalised the Italian electricity industry and created Ente Nazionale Energia Elettrica (ENEL). Mr Costa refused to pay an ENEL electricity bill, on the ground that he objected to the Nationalisation Law. Mr. Costa argued that the Nationalisation Law contravened both the Italian Constitution and a number of provisions of the EEC Treaty. But the Italian Constitutional Court rejected the plea of unconstitutionality. In its observations before the Court of Justice, the Italian Government argued that the proceedings before the Court were “absolutely inadmissible”. The essence of the problem, in the Advocate-General’s opinion, was the coexistence of two (allegedly) opposing legal rules which applied to the domestic system, one deriving from the Treaty and one from the national legislature. A decision was required as to which rule should take precedence. So after reaffirming the independence of Community law, the Court went on:

*The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. Such a measure cannot, therefore, be inconsistent with that legal system. The*

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<sup>14</sup> Case 6/64, [1964] ECR 585.

<sup>15</sup> *International Handelsgesellschaft v EVGF*, 11/70, [1970] ECR 1125.

<sup>16</sup> *Simmenthal v Italian Ministry of Finance*, 106/77, [1978] ECR 629.

<sup>17</sup> Case C-213/89 *R v Secretary of State for Transport ex parte Factortame Ltd* [1990] ECR I-2433.



*executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.*

*...The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.*

In *Simmenthal*,<sup>18</sup> the implications of supremacy are more clearly spelled out. It actually provides a very good example of the importance of the superiority of European law. The facts were simple. *Simmenthal* imported some beef from France into Italy and was made to pay for a public health inspection when the meat crossed the frontier. This was laid down by an Italian law passed in 1970, contrary to the EEC Treaty and two Community regulations passed in 1964 and 1968 respectively. Two points were actually raised by the Italian authorities: firstly the fact that the national law was passed after the relevant Community legislation and secondly, that even if the Italian law conflicted with Italy's treaty obligations, it had to be applied in Italian courts until such time as it had been declared unconstitutional by the Italian Constitutional Court. The latter point was based on the principle of the Italian constitutional law, where questions concerning the constitutionality of Italian laws must be decided by the national Constitutional Court.

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<sup>18</sup> *Supra* note 16.

The European Court held that it was a duty of a national court to give full effect to the Community provisions and not to apply any conflicting provision of national legislation, even if it was passed after the Community legislation. It was also mentioned that there was no need for a domestic provision to be set aside either by a constitutional court or by legislature. Moreover, it was emphasised that supremacy affected both prior and future legislation. The Court, in this case, applied a new basis to the foundations of the supremacy. It based the outcome on the reference procedure in Article 234 EC (ex 177). According to Art. 234 the procedure is only effective, as the Court reasoned, if the answer given to a reference is capable of being applied by the national court. In the case where European law was not supreme, this would not be possible. The Court asserted the obligation of national courts to apply the whole corpus of directly effective European law, and it highlighted the fact that in cases where national provisions are in contrast with the rights conferred on individuals by the Union, they must be overridden in order to give priority to the EU provisions. The Court stated that:

*...in accordance with the principles of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of the Member States - also preclude the valid adoption of new national measures to the extent to which they would be incompatible with Community provisions.*

*Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of the Community Law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.*<sup>19</sup>

According to the above quotation, three major conclusions should be noted: firstly, that the Court's statement is limited to Treaty provisions and "directly applicable measures of the institutions"; secondly, there is no implication that conflicting national provisions are void but they are just "inapplicable"; and thirdly, as it is mentioned in the second paragraph, it is concerned not only with direct conflicting national legislation, but also with national laws which *encroach upon the field within which the Community exercises its legislative power.*

Regarding the first point, it is clear that a Community provision will prevail over any national one in cases where the Community provision is directly effective. However, it does not mean that this is applicable only to EU regulations. There is no specifying limitation that only regulations are directly applicable. Therefore, the principle of superiority can be applied in those cases where directives or even Community decisions are considered to be directly effective.<sup>20</sup>

The ECJ has underlined that point in several cases and, according to the existing

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<sup>19</sup> Paragraphs 17 and 18 of the judgment.

<sup>20</sup> See Chapter Three.

jurisprudence, Community law should prevail over inconsistent national law even in certain cases regarding directives and decisions. The *Ratti*<sup>21</sup> and *Marshall*<sup>22</sup> cases are both very good examples, where Community law, even in the form of directives, prevails over national legislation, provided the right contained in the directive is invoked against the state or an emanation of the state and satisfies certain conditions<sup>23</sup>. It is also obvious that a directly effective provision in a EC Treaty will prevail over inconsistent national legislation<sup>24</sup>.

According to the second point mentioned above, there is a positive obligation on Member States to repeal conflicting national legislation, even though it is inapplicable. This was laid down in the *French Merchant Seamen* case<sup>25</sup> where, according to the French law, a certain proportion of the crew on French merchant ships had to be of French nationality. This was against the provisions of the European law, so a case was brought against France, according to the proceedings of Art. 226 EC (ex. 169). The French Government argued that since the Community law prevailed, the French law was simply inapplicable. Moreover, it was said that since the French law was inapplicable there was no violation of the Treaty. However, the ECJ decided that a failure to repeal the law

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<sup>21</sup> *Publico Ministero v Ratti*, 148/78, [1979] ECR 1629.

<sup>22</sup> *Marshall v Southampton and South West Hampshire Area, Health Authority*, 152/84, (1986), ECR 723, [1986] 1 CMLR 486.

<sup>23</sup> As mentioned in the previous Chapter, there is distinction between the vertical and horizontal effect of directives. As it is mentioned by Advocate General Lenz in his opinion in *Paola Faccini Dorri v Reereb Srl*, 91/92, [1994] ECR I-3325, [1995] 1 CMLR 665, "pursuant to the Court's consistent case law, a directive which has not been transposed cannot have direct effect in relation between individuals (i.e. horizontal effect)". In the *Marshall* case the effectiveness of directives is limited to vertical relationships (i.e. enforceable rights for individuals as plaintiffs or defendants but only against the State). See, also, *Foster v British Gas*, 188/89, [1990] ECR I-3313, *Marleasing SA v La Comercial Internacional De Alimentacion SA*, 106/89, [1990] ECR I-4235, *Von Colson v Land Nordrhein- Westfalen*, 14/83, (1984) ECR 1891 and *Francovich v Italian State*, 6&9/90 [1991] ECR I-5357.

<sup>24</sup> See *Bresciani*, 87/85, [1976] ECR 129.

<sup>25</sup> *Commission v France*, Case 167/73, [1974] ECR 359.

would cause “an ambiguous state of affairs” which would make Community seamen uncertain *as to the possibilities available to them on relying on Community law*.<sup>26</sup> Therefore, according to the judgment, France had to repeal its law.

The question to address at this point, is whether European law prevails over national legislation even when there is no direct conflict between them. The third point mentioned above brings some light to this question. According to that point, the power of the member States can be limited even when the conflict is indirect or potential. In certain cases, for example, Member States lose their power to enter into agreements with third countries, even where there is no direct conflict with the provisions of the EU. Art. 6(2) of the ECSC Treaty states that, *in International relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives*. Therefore, any agreement between a Member State and a third country may potentially be an obstacle to the aims of the Union and consequently against its provisions. Moreover, in cases of agricultural issues, the Union has created a common organisation of the market as a common measure and the Member States are precluded from adopting any measure which might create exceptions or undermine it. This applies even in cases where there is no direct conflict.

In *Factortame*<sup>27</sup> the Court emphasised the obligation to ignore a conflicting national law. The basis for the Court’s decision was, again, the provisions of

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<sup>26</sup> See paragraph 41 of the judgment.

<sup>27</sup> *R v Secretary of State for Transport ex parte Factortame Ltd*, 213/89, [1990] ECR I-2433.

Art. 10 EC (ex 5) and Art. 234 EC (ex 177), referring to the importance of ensuring firstly the effectiveness of Community law in general and secondly the reference procedure in particular. Therefore, member States must amend any rule which prevents the reference procedure from being effective. In *Factortame*, the applicants, Spanish companies, challenged British legislation which limited the possibility of registering a ship as British to persons and companies with a genuine connection with the country. The inability of the applicants to obtain an injunction against the Secretary of State for Transport, due to the then presumed state of the law on injunctions against the Crown and its officers, was found to impede an effective remedy. Interim measures were, according to the ECJ, applicable because otherwise the case would be useless to the applicants because of the losses suffered during the time they could not operate their ships. The Court cited *Simmenthal*<sup>28</sup> and extended the rule to cover interim measures.

*It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.*

*That interpretation is reinforced by the system established by Art. 177 of the EC Treaty.*<sup>29</sup>

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<sup>28</sup> Supra note 16.

<sup>29</sup> Paragraphs 21 and 22 of the decision.

Although in *Factortame* there was the need for a temporary disapplication of a rule of national law pending final determination of the issue in question by the ECJ, in other cases there is a requirement to repeal the national law in favour of the supremacy of Community law when the incompatibility of EC and national law is established.

As has already been mentioned, the principle of the supremacy of the European Community law is also applied in cases where national constitutions' provisions are in conflict with it. This was underlined in the case *Internationale Handelsgesellschaft*<sup>30</sup>. The problem in this case was that there was a possible conflict between a Community system of export licences for agricultural products and human rights provisions of the German Constitution. The applicant argued that Community regulation should be invalid due to its conflict with the constitution. The ECJ rejected any possibility of Community law being judged against national standards, even constitutional ones. In this case, a very good analysis was presented of the relationship between the European law and the national constitution. It stated that:

*For, in this case, it is not enough simply to speak of the 'precedence' of Community law over national constitutional law, in order to justify the conclusion that Community law must always prevail over national constitutional law because, otherwise, the Community would be put in question. Community law is just as little put in question when, exceptionally, Community law is not permitted to prevail over entrenched (zwingende) constitutional law, as international law, is put in question by Art. 25 of the Constitution when it provides that the general rules of international law only take precedence over simple*

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<sup>30</sup> Case 11/70, [1970] ECR 1125.

*federal law, and as another (foreign) systems of law is put in question when it is ousted by the public policy of the Federal Republic of Germany. The binding of the Federal Republic of Germany (and of all Member-States) by the Treaty is not according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they established to carry out its part in order to resolve the conflict here assumed, that is, to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. Invoking such a conflict is therefore not in itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanism which resolves the conflict at the political level.<sup>31</sup>*

It is important, then, to realise the theoretical aspect of the relationship between national constitutional sovereignty and the impact of the European law on it. According to the above quotation, a mere conclusion that European law must prevail over national constitutional law simply because the European provision came later would put the whole existence of the EU into question, since most of the Member States would not have been willing to reject their national sovereign constitutional rights so simply. Supremacy is actually binding in terms of legal obligation. The doctrine of sovereignty and supremacy of EC Law derives from the decisions of the ECJ.<sup>32</sup>

#### **4.4 The relationship between the EU and the national constitutions.**

In this section, a rather jurisprudential approach to the issue is attempted in order to highlight the theoretical background of the special relation between the EU

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<sup>31</sup> Ibid., paragraph 21 of the judgment.

<sup>32</sup> A fact which Lord Bridge observed in *Factortame No. 1*. See, supra note 17.



legislation and the national constitutions. It is important to establish that the supremacy of the first does not necessarily mean the inferiority of the latter. Therefore, the theoretical analysis of this relationship will provide the basis for examining the ground on which national Courts managed to give priority to EU legislation. This analysis, might be useful, also, for the Cypriot Courts in their attempt of compromising the principle of the supremacy of the Cypriot Constitution along with the principle of the supremacy of EU legislation.

In terms of the Treaties establishing the EU, the relationship between the sovereignty of national constitutions and European law, has always been treated very carefully, since an absolute and strict treatment would cause several problems in the nature of the EU and its relations with the Member States. Especially, after the application of the Maastricht Treaty, the interrelation between the national constitutional law and the EU sphere of legislation, has been under even more extensive and particular review.

There has been a belief, especially within the European Parliament, that the Treaty on European Union (TEU), known as the Maastricht Treaty, constitutes a European Constitution.<sup>33</sup> This is in contrast with the usual parallelism of the relationship between the primary European law and the national constitutions. The Maastricht Treaty, like the Single European Act of 1986 and like all the other previous founding treaties, appears to be primarily an international treaty; that is, a treaty which had been agreed by sovereign states and which is the

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<sup>33</sup> See, Llorente, F.R., "*Constitutionalism in the Integrated States of Europe*", The Jean Monnet Working Papers No. 5/98, as cited at

product of intergovernmental conferences. Both the TEU and the Treaty of Amsterdam keep all the usual formalities in the manner of their formation and of their signing. Also as mentioned in Art. 35.1 of the Single European Act (SEA) and as laid down by the Art. 247 of the European Economic Community Treaty (EC), the Treaty must be ratified by the Member States according to the provisions of their constitutions. It could be argued, then, that the European Treaties' "legitimacy" is vested *vis-a-vis* on the national constitutions.

It is, therefore, obvious that within the provisions of the Treaties establishing the EU the problem of the relationship between the European law and the constitutions of the Member States is not clearly resolved. Primary European legislation faces the situation in a very careful, compatible and discreet way. It seeks to avoid any direct conflict regarding the hierarchy of the two levels of legal application, between the primary European law and the national constitutions. This is the jurisprudential approach which, to avoid a direct conflict, rests the application of the two sources of law (i.e. national constitutions and primary European Law) in two different levels. The first level is the national constitutions of the Member States, and the second one is the primary law of the EU. According to this method, the problem of the relationship between the two sources of law is not faced as a hierarchical problem between different sets of laws, since they do not exist on the same level, and therefore there cannot be any direct comparison concerning legal priority or superiority between them.<sup>34</sup> In principle, then, one cannot consider

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[http://www.law.harvard.edu/programs/Jean Monnet/papers/98/98-5-.html](http://www.law.harvard.edu/programs/Jean_Monnet/papers/98/98-5-.html), at p. 29.

<sup>34</sup>Venizelos, E., 'Η Συνθήκη του Μάαστριχτ και ο Ευρωπαϊκός Συνταγματικός Χώρος' [The Maastricht Treaty and the European Constitutional Order] (1995) 13 *CL Rev.* 7119.

the one inferior to the other. By avoiding this direct conflict, one is able to respect both legislations without devaluing either of them. By using the method of the two application levels, one cannot simply compare and say which source of law is superior. In the case of the UK for example, one can support the belief that the application of the supremacy of the European law in Britain is not a product of a comparison between British national law and European law which finds European law superior to British law, but on the contrary, that it is applied in the UK because a national law (Act of Parliament) says so. Therefore, it could rightly be argued that superiority of Community law does not necessarily mean inferiority of national law. It could rather mean that national law gives priority to Community law, by respecting its own legislation and without devaluing its power. This theoretical approach, might be a necessary means, also, for Cypriot Courts on their attempt to implement the principle of supremacy of Community law within the Cypriot legal order. It could be argued that the Cypriot Courts do not devalue the power of the national constitution, but merely, decide, through the constitution, to give priority to European law.<sup>35</sup>

However, according to the relevant jurisprudence of the ECJ, throughout the case law, the problem of the relationship cannot be solved by a 'geometrical' version of the delimitation of the lower levels of application, such that each legal order, national or communal, is considered to cover its own level of application so that the European law would have no problem of contrast or of subjection to the national constitutions. This jurisprudential method, as it was explained above, could, however, be considered as over simplistic.

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<sup>35</sup>For further discussion, on how the principle of supremacy of the EU legislation could be

The whole problem shall be faced then, firstly, on the level of the primary European law by reference to the composition, the function and the legal products of the Intergovernmental conferences which were held during the process (i.e. the negotiations and the construction) of the Treaty, and secondly, on the level of the Member States and their constitutions, by referring to it as a matter of constitutional policy. It is, therefore, according to this national constitutional policy that the supremacy of European Law is accepted.<sup>36</sup> And this is proved by the fact that before or during the ratification of the Treaty, the national judicial or political authorities do respect the procedure of ratification (or even the procedure for amending the Constitution for the purposes of the Treaty), which is provided under their Constitutional provisions.

On the EU level, this approach is considered to be more diplomatic and discreet, though on the national level it is considered to be more formalistic. However, the result is the abolition of any potential interpretational doubts in a very radical way. In this point there is nothing new, since a similar approach was adopted in all the critical stages of the communal phenomenon; in the establishment and the enlargement of the Communities, in the Single European Act, in the Treaty on the European Union and the recently adopted Treaty of Amsterdam. In all the above cases, there were special amendments of the national constitutions, or even the preparation of new constitutions (e.g. the Greek Constitution) for the

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implemented within the Cypriot legal order, see below.

<sup>36</sup> Llorente, rightly commented on this issue that: *Obviously, judges will not be able to respect Community law if its validity and its asserted primacy have no basis of support in the constitutions they are bound by oath to uphold.* See, supra note 33, at p.15.

reception of the communal phenomenon, by respecting all the necessary procedures for ratification under the national constitutions<sup>37</sup>. However, these were not enough to stop the argument about the relationship between national constitutions and European law, particularly, during the implementation of the Treaties and especially on the area of the protection of the fundamental constitutional articles.<sup>38</sup> In addition to this, the great ambitions created by the Maastricht Treaty, specifically the creation of the EU and the attempt to codify the primary European law, make things different.

Standing in contrast to the age old theoretical and judicial dispute, firstly and primarily about the issue of supremacy and secondly about the issue of the levels of application, the Treaty of Maastricht faces the classical problem of the relationship methodically. It makes an explicit reference to the main provisions of the European Conference for the Protection of Human Rights and Fundamental Freedoms<sup>39</sup> and the “*common constitutional traditions*” of the

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<sup>37</sup> See Papademetriou, G., “*Το Σύνταγμα και η Διαδικασία της Ευρωπαϊκής Ενοποίησης*” [The Constitution and the Procedure for European Integration], Athens, Volume 1, 1982, at p. 87 and Skandamis, N., “*Ευρωπαϊκό Κοινοτικό Δίκαιο και Ελληνικό Δίκαιο Προσαρμογής*” [European Community Law and the Greek Law of Adaptation], Sakkoulas Publications, Athens, 1992, p. 93.

<sup>38</sup> Most of the national courts have not been prepared to accept the principle of the supremacy of Community law with regard to at least some of the provisions of their national constitutions. In the German *Maastricht* case (*Brunner v European Union Treaty* [1994] 1 CMLR 57), the German Court has made clear that a transfer of powers to the Community and its supremacy cannot affect the basic Articles of the German constitutional order. Similarly, the Danish Supreme Court, in the Danish *Maastricht* case (Danish Supreme Court, decision of 6<sup>th</sup> April 1998, Case I 361/1997), expressly said that the Community cannot be given power to adopt legislation that would be contrary to the Danish Constitution. Also, the Italian Constitutional Court considers that Community law cannot prevail over the fundamental principles of the Italian Constitution (*Fortini, Corte Costituzionale*, decision No. 183 of 27<sup>th</sup> December 1973, [1974] 2 CMLR 372 (para. 21 of the judgment); [1974] RDI 154) and the Greek Council of State in 1997 reserved the right not to apply Community law whenever they consider that the EU institutions have exceeded their competence.

<sup>39</sup> Art. F par. 2 of the TEU.

Member States, as the result of the political and economic interdependence between the Union and its Member States<sup>40</sup>.

Moreover, one could support the view that the TEU created a new ground of mutual concessions between the national constitutions and the EU. The national constitutions reserve their powerful and austere character and the EU is moving towards its goals without considering the national constitutions as a direct obstacle. This is why the EU seeks to respect the national constitutional procedures, in every step it makes. This balance does not seem to be just a coincidence and it was not difficult to achieve, since the constitutional traditions of the Member States share similar features because they reveal common values and similar institutional, historical and cultural European background.<sup>41</sup> This is despite their considerable differences.

In order for the EU to achieve this discreet approach to the national constitutions, it did not restrict itself to the ratification procedures according to the national constitutions, as the founding Treaties did. It also sought a permanent abolition of the existing problematic relationship between the ECJ and the national Constitutional Courts. Paragraph 2 of the Art. F of the TEU reads:

*The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Rights, signed in Rome on 4 November 1950 and as they*

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<sup>40</sup> See McCormick, N., "Sovereign, Democracy and Subsidiarity", International Seminar, Law School of the University of Salonica, Salonica 16-19/5/1993.

<sup>41</sup> Supra note 34, p. 7129.

*result from the constitutional traditions common to the Member States, as general principles of Community law.*

The TEU, then, makes a very significant step, which is the legal reference to the ECHR and the clear reference to the common constitutional traditions as rules, rather than just a simple reference to a common cultural and political background.

By adopting this simple form of legislation by reference, the Treaty promotes the common constitutional tradition from a judicial formula, to a provision of the basic European law. These common constitutional traditions are probably established as a general principle of the European law in a more general and less concise way, but as a part of the European primary law with all the relevant characteristics of superiority and direct applicability. Therefore, the common constitutional traditions are considered to be among *the general principles common to the laws of the Member States*, as they are mentioned in Art. 288 EC (ex. 215).

The question arising here, is whether the provision of the par. 2 of the Art. F of the TEU, carries a new arrangement, additional to what the ECJ case law has already provided. The legal, or the practical, question is whether a common constitutional tradition can be applied at its minimum (i.e. when there is a common ground of a protection of a right in all the Member States) or at its maximum (i.e. when a right provided only by one national constitution could become a part of the EU legal order). This argument helps us to establish and

plan a relevant legal consideration for other constitutional aspects in addition to Human Rights. The argument, therefore, that the existence of a right in only one national constitutional order is enough for it to be considered as a right protected by the European law, can be compared with the reasoning of the decision given in the case *Cassis de Dijon*,<sup>42</sup> where a similar approach seems to have been taken in justifying the national regulation.

However, what is defined by the term “common constitutional traditions”? Are they the common constitutional solutions of the Member States to a common problem? Are they the common codified principles? Are they a common list of fundamental rights, where the provision of a right in one national constitution only is enough to add this right to the list, or is the list made by the common provisions which are included in more than one constitution? Or, are they some common constitutional customs? Definitely, the term “common constitutional traditions” is something more precise than the definition of the term “tradition” itself.

The view that “common constitutional traditions” can mean a common list of fundamental rights, was accepted by the ECJ in the case *Nold II*<sup>43</sup> and supported even more strongly by the Advocate General Warner J.P. in the case *IRCA*.<sup>44</sup> Therefore, one could support the view that the term “common constitutional traditions” refers to the common constitutional background of the Member

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<sup>42</sup> Case 120/78, *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

<sup>43</sup> Case 4/73, *Nold v Commission*, [1974] ECR 491; [1974] 2 CMLR 338.

<sup>44</sup> Case 7/76, *IRCA*, [1976] ECR 1213.



States, and although they might be included in different constitutional passages, they share some common cultural background.<sup>45</sup>

By using this basis for defining the meaning of the common constitutional traditions, one could support the view that a common tradition is more powerful than the common general principles (*principles generaux de droit*) included in the national constitutions. If this assumption is correct, then the first common constitutional tradition is the actual existence of a powerful written constitution in the Member States. Of course, the exceptional case of the UK's legal order (i.e. the non existence of a written constitution) shall not be subtracted but it shall be added to this tradition<sup>46</sup>.

Therefore, the EU shows a great respect for national constitutions. It does not seek either to compete, or to underestimate their power, but just to arrange their coexistence within the EU formula without any struggle for superiority or inferiority.<sup>47</sup> All the efforts to put the two legal orders in a direct opposition are faced successfully and methodically by the EU legislation. It seeks to smooth their relationship by putting them in a parallel coexistence. In spite of potential conflicts, the EU does not attempt to abolish respect for national constitutions.

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<sup>45</sup> Tomuschat, C., 'Europe - a common constitutional space' in De Witte, B. and Forder, C.(eds), *"The Common Law of Europe and the future of legal education"*, Kluwer Law & Taxation Publishers, Maastricht, 1992, at p. 133 Also see, B De Witte 'Community law and national constitutional values', (1991) 2 *LIEI* 1, and Ph. Lauvaux, 'Existe-t-il un modele constitutionnel europeen?', (1991) 14 *Droits*, p. 49.

<sup>46</sup> Supra note 30, p. 7131.

<sup>47</sup> According to Professor Llorente, F.R., *European law will continue to lean on the national constitutions for its validity. At least for the time being there is no alternative to the doctrine of 'two different but co-ordinated' legal systems.* See, supra note 33, at p. 29.

#### **4.5 Accommodating Supremacy to national law.**

Although the principle of supremacy of Community law has been clearly set down by the EU and the ECJ, the accommodation of this principle in the national systems has not been directed by the EU. As mentioned above, this is probably the result of the very careful approach of the EU to its relation to the national constitutions. A direct and absolute decision of the EU on how the principle of superiority should be adopted by the national constitutions would have caused serious damage to the sensitive issue of the relationship between the two legal systems. The relationship between the two systems is based on mutual respect and of course the EU has no wish to create more problems in this matter. The fact that the manner of accommodating the principle of superiority has been left to each Member-State's constitutional procedures, shows that the EU does not seek to undermine the power of the national constitutions. Therefore, each Member-State has followed its own way of accommodating the principle, according to its legal order.

This accommodation has been achieved by several methods used by the national legal and judicial systems. Some states managed to accommodate the principle in a straight forward way and others used more complex methods. Some states tried to make supremacy palatable to the national issue and others tried even to avoid the issue.

However, there are basically two ways of adopting the principle of supremacy in the national system, depending on whether the country follows the monist or the dualist conception of international law. In simple terms, *the basic thesis of the monist approach is that international law and national law are part of one world system; they operate in different spheres but are part of the same legal structure.*<sup>48</sup> The dualist approach is based on the principle that international law and national law are two fundamentally separate things; therefore there is not one world system into which both can be fitted. According to the first theory, then, international treaties can be part of the national law, and they can be applied directly by the courts. However, according to the second theory, international treaties will be part of the national legislation, only if the national legislature passes the appropriate provisions for their adoption.

The countries that follow the monist conception of international law, therefore, already have the appropriate mechanisms for the application of international treaties. So, the EU Treaties can be part of the national law and have direct effect, since those States are prepared to give direct effect to all treaties with suitable provisions. In cases of conflict between the national law and the European law, those countries usually recognise the supremacy of the treaty provisions. One could support the view, then, that there is no need to amend the constitution, since the pre-existing constitutional structure affords the possibility of accommodating the EU law. France and the Netherlands are both examples of states following this conception and both have express provision in their

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<sup>48</sup> Hartley, T.C., *The Foundations of European Community Law*, 2<sup>nd</sup> Ed. 1988, p. 186.

constitutions for the direct effect and supremacy of international treaties.<sup>49</sup>

However, amendments have been made to accommodate the principle of supremacy of Community law.

However, the fact that this approach considers Community law as a part of the international law, could be criticised since it fails to recognise that Community law has its own special characteristics which differentiate it from international law. In addition to this, there is a less satisfactory operation in the case of Community law, since giving effect to the treaty does not necessarily mean applying measures made under the treaty.

On the other hand, countries which follow the dualist concept of international law have to make an express provision for the transfer of power to international organisations. This provision has to be set down through the country's national legislature; and it is not enough for it simply to be mentioned in the treaty. Art. 24(1) of the German Constitution and Art. 20 of the Danish Constitution provide the power for transfer of powers to international organisations. In Art. 66 of the Dutch Constitution, there is a similar provision. The Netherlands, then, can give effect to the EU legislation under Art. 66 and can apply the Treaties on the basis of the monist approach. In Italy and in Greece, the constitutional position appears not to be so clear, but the existence of certain Articles has helped the adoption of the EU legislation.

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<sup>49</sup> Art. 55 of the French Constitution and Art. 66 of the Netherlands Constitution. For more discussion on the reception of the principle of the supremacy of Community law by the national constitutions of France, the Netherlands, Luxembourg, Greece, Spain, Portugal, Belgium, Germany, Italy and Denmark, see, Weiler, J., 'Supremacy and National Constitutions: Reception by the Member States.', in *Trading In and With Europe: The Law of the European Union*, New York University, School of Law, as cited in

In Italy, for example, Art. 11 of the Constitution authorises the limitation of the State's sovereignty in cases concerning the establishment of peace and justice between nations. That was actually the basis for the adoption of Community law in the Italian legal order. Similarly, in Greece, according to the new Constitution of 1974 Art. 28(2) provides that:

*Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organisations, when this serves an important national interest and promotes co-operation with other states...*

In the case of Ireland, the Irish Constitution was specially amended to provide that nothing in it would prevent EU measures from having the force of law.<sup>50</sup> The UK passed a simple Act of Parliament since it was not in a position to adopt a formal constitutional amendment in the absence of a written constitution. This Act of Parliament, the European Communities Act, made a clear provision for the direct effect and supremacy of the Community law. However, in neither of the two above mentioned cases was there an express reference made to a transfer of powers, but something of this nature must have resulted.

In the following paragraphs, the special problems faced by the Member-States in order to accommodate the principle of supremacy in their national legal system, will be discussed.

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<http://www.law.nyu.edu/weilerj/unit4/EU97403.htm>

<sup>50</sup> Third Amendment to the Constitution. Further amendments were required to enable Ireland to ratify the following European Treaties as well.

#### 4.5.1 The case of Belgium.

The Belgian example provides evidence for the clearest instalment of the European legislation in its legal order. The particular case of Belgium, where there was no clear position as to whether the State followed the monist or the dualist concept, also failed to provide any constitutional provision on whether the international treaties should have direct effect and could override national law. The decision, then, on how to face the challenge of the EU law, had to be decided by the Belgian courts.

The case *Minister for Economic Affairs v Fromagerie Franco-Suisse 'Le Ski'*<sup>51</sup> confronted the problem. In this case, the respondent had to pay some import duties for dairy products, as they were imposed by a number of royal decrees.<sup>52</sup> However, the ECJ had declared these duties to be contrary to the EEC Treaty.<sup>53</sup> They were then abolished, but the Belgian Parliament declared that money already paid was not recoverable. The respondent claimed recovery of the duties he had already paid, before the Belgian Court. The Brussels Cour d'Appel decided in his favour, but the Minister appealed to the Cour de Cassation.<sup>54</sup>

The appeal was based on two arguments. The first was that since the Belgian Parliament had already ratified the Treaty by a statute, when Belgium joined the

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<sup>51</sup> Cour de Cassation, Belgium, 21<sup>st</sup> May 1971, [1972] CMLR 330.

<sup>52</sup> Enforcement proceedings used by the Commission under Art. 169 EEC.

<sup>53</sup> *Commission v Luxembourg and Belgium*, Case 90&91/63, [1964] ECR 625.

<sup>54</sup> The highest civil court in Belgium.

EEC, the effect of the Treaty in Belgium was dependent on the statute. Therefore, since the statute prohibiting the recovery of the money was passed subsequent to the Treaty, it prevails over the Treaty, since the later law should prevail over the former. The second argument was that the Cour d'Appel had no right to annul any Act of Parliament since, according to the Belgian Constitution, only Parliament may determine the constitutionality of a statute.

The Cour de Cassation dismissed the appeal on the ground that the treaty does not take effect in Belgian law as part of the statute, but as a treaty in its own right. This can be interpreted to mean that Belgium follows the monist approach. Therefore, the conflict was not between two statutes, but between a treaty and a statute, two fundamentally different things. The Court then stated:

*“The rule that a statute repeals a previous statute in so far as there is no conflict between the two, does not apply in the case of a conflict between a treaty and a statute.*

*In the event of a conflict between a norm of domestic law and a norm of international law which produces direct effects in the legal system, the rule established by the treaty shall prevail. The primacy of the treaty results from the very nature of international treaty law.*

*This is a fortiori the case when a conflict exists, as in the present case, between a norm of internal law and a norm of Community law.*

*The reason is that treaties which have created Community law have instituted a new legal system in whose favour the Member-States have restricted the exercise of their sovereign powers in the areas determined by those treaties.”<sup>55</sup>*

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<sup>55</sup> Supra note 51.

Finally, it was decided that since the provision of Community law was violated by the royal decrees, Art. 25 EC (ex.12) was directly effective and despite the conflict with the statute, the courts had the duty to uphold it.

The second argument of the Cour de Cassation was that the Cour d'Appel had not annulled the law prohibiting recovery, but simply declared its operation suspended to the extent of the conflict. One could argue that there is no distinction between the two statements mentioned above; however, the significance is that since the country follows the monist approach, the courts must have the power to disregard national legislation when it conflicts with a directly effective treaty provision.

This judgment, therefore, was quite helpful in solving the problem of the relationship between the national law and the EU law, when a conflict exists. The acceptance of the monist approach by the Belgian Court was very satisfactory from the point of view of Community law.

#### **4.5.2 The cases of Germany and Italy.**

Germany and Italy are considered to be countries which pay particular attention to the protection of fundamental human rights. Therefore, their constitutions give significantly more protection to human rights than those of any other Member-State. This has caused many problems and conflicts between the domestic law and Community law.



As mentioned before, Germany considered the problem of the relationship between its national law and Community law, in the case of *International Handelsgesellschaft v EVGF*.<sup>56</sup> In this case the plaintiff asked for an annulment of a decision made by the EVGF based on two Community regulations. Firstly, he argued that the regulations were in conflict with the provisions for fundamental human rights made by the German Constitution. In this case the ECJ ruled that the validity of Community provisions should be determined according to the Community law, not national constitutional law, and argued that the provisions in question did not violate the Community's concept of human rights. Later, the case was brought before the Federal Constitutional Court, the *Bundesverfassungsgericht*, which took the view that Community law *is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source*<sup>57</sup> and decided that the two legal systems were independent.

Considering the substantive issue, the Constitutional Court decided that the Community measures in issue were not contrary to the German Constitution. In fact the Constitutional Court has never found any community measure to be contrary to the German Constitution and after adopting a new approach in *Steinike & Weinlig*<sup>58</sup>, in 1979, it finally ruled in 1986 that the Community had sufficiently developed measures concerning the fundamental human rights, so it now meets the requirements of the German Constitution. This was decided in

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<sup>56</sup> Supra note 15.

<sup>57</sup> [1974] 2 CMLR 549, paragraph 19 of the judgment.

<sup>58</sup> 25<sup>th</sup> July 1979, [1980] 2 CMLR 531.

the *Wunnsche Handelsgesellschaft*<sup>59</sup> case, in which it was also stated that the Court would no longer entertain proceedings to test Community measures against the human rights provisions of the German Constitution (*Grundgesetz*). In addition, the judgment of the case explains the accommodation of supremacy to the national system.

*Article 24(1) of the Constitution makes it possible to open up the legal system of the Federal Republic of Germany in such a way that the Federal Republic's exclusive claim to control in its sphere of sovereignty can be withdrawn and room can be given for the direct validity and application of law from another source within that sphere of the sovereignty. It is true that Article 24(1) of the Constitution does not itself provide for the direct validity and application of the law established by the international institution, nor does it directly regulate the relationship between such law and domestic law, for example the question of the priority of their respective application...*

*Article 24(1), however, makes it possible constitutionally for treaties which transfer sovereign rights to international institutions and the law established by such institutions to be accorded priority of validity and application as against the internal law of the Federal Republic by the internal application-of-law instruction. That is what took place in the case of the European Community Treaties and the law established on their basis by the Community organs by the passing of the Acts of Accession to the EEC Treaty under Articles 24(1) and 59(2), first sentence, of the Constitution. From the application-of-law instruction of the Act of Accession to the EEC Treaty, which extends to Article 189(2) EEC, arises the immediate validity of the regulations of the Community for the Federal Republic and the precedence of their application over internal law.<sup>60</sup>*

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<sup>59</sup> 22<sup>nd</sup> October 1986, [1987] 3 CMLR 225. The most important developments, in the eyes of the Constitutional Court, was the significance given to the constitutions of the Member-States and the Joint Declaration of 5 April 1977 of the European Parliament, the Council and the Commission.

<sup>60</sup> Case judgment paragraph 31.

However, *Bundesverfassungsgericht* (BVerfG), in its examination regarding the application of the Maastricht Treaty in Germany, has made an important provision in the famous German *Maastricht Case*,<sup>61</sup> according to which:

*If European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis of the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly, the Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress on them.*

This case, has been considered of paramount importance in regard to the principle of supremacy of European law, since it clearly limits its application, by claiming jurisdiction to review the actions of European institutions for ensuring that they remain within the limits of their powers and that the basic German constitutional rights are not violated. German Courts, in several other later cases, have also challenged the principle of supremacy, either firstly, by granting interim relief on the ground that German Courts must not apply *ultra vires* acts of the Community<sup>62</sup> or secondly, by arguing the primacy of international trade law over Community law.<sup>63</sup>

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<sup>61</sup> *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

<sup>62</sup> German Federal Tax Court, Order of 9 January 1996, 7 EuZW 126 (1996). See, also, *Germany v Commission*, 280/93, [1994] ECR I-4973. For more discussion on the implications of those cases, see, Everling, U., 'Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts', (1996) 33 *CML Rev.* 401 and Reich, N., 'Judge-made "Europe a la carte": Some Remarks on recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation' (1996) 7 *EJIL* 103.

<sup>63</sup> *T. Port GmbH v Hauptzollamt Hamburg-Jonas*, 364&365/95, [1998] ECR I-1023.

Like the BVerfG, the Italian Constitutional Court took the view that Community law is separate from both international law and the internal law of the Member States. In the *Fortini*<sup>64</sup> case, it stated that Community law and internal law are *autonomous and distinct legal systems, albeit co-ordination in accordance with the division of power laid down and guaranteed by the Treaty.*

Nevertheless, it is important to mention that *Costa*<sup>65</sup> and *Simmenthal*<sup>66</sup> were the early cases in which the ECJ established the principle of the supremacy, and were both referred by the Italian courts. Despite these pronouncements of the ECJ, the Italian Constitutional Court, the *Corte Costituzionale*, had not enforced Community law which conflicted with the national law. It was reluctant to override the Constitution, particularly the provisions concerning the fundamental human rights (like Germany), but eventually accepted the rights adopted by the Community as a substitute<sup>67</sup>. Actually, the *Granital* case in 1984 was the first case in which supremacy started to be accepted. In the judgment on this case, it was stated that since where is a conflict between a Community regulation and national legislation, the constitutional court should disapply national law<sup>68</sup>, relying solely on Community law. It has to be noted here, that once a Community regulation existed on a matter, the Italian State was no longer competent to legislate (the concept of pre-emption).

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<sup>64</sup> Corte Costituzionale, 27 December 1973, [1974] 2 CMLR 372.

<sup>65</sup> Supra note 14.

<sup>66</sup> Supra note 16.

<sup>67</sup> See Charlesworth, A. and Cullen H., "*European Community Law*", Pitman Publishing, 1994, Chapter 6.

<sup>68</sup> *Societe Granital v Ministero delle Finanze* [1984] 21 CMLR 756; discussed in Gaja, 'New Developments in a Continuing Story: the Relationship between EEC Law and Italian Law' (1990)

Since, under Article 189 EC, Community regulations were regarded as automatically part of national law, but Treaty provisions and directives were not, the *Granital* case could not clearly identify how far the Constitutional court would apply the supremacy issue.

For this reason, in 1985 in *Spa Beca v Amministrazione delle Finanze*<sup>69</sup>, it was decided that the Italian courts must also disapply national law which was inconsistent with ECJ judgments. The decision was, also, supported in *Provincial di Bolzano v Presidente Consiglio Ministri*<sup>70</sup>. At this stage, the constitutional court faced a conflict between national law and Treaty articles as far as the equality of treatment of self-employed persons is concerned. As a result, the court stated that Article 164 EC required the courts and administrative authorities of Member States to recognise the supremacy of directly effective Community law.

#### **4.5.3 The case of France.**

As mentioned above, the accommodation of the supremacy of the EU legislation in the French legal order has been achieved under the provisions of Article 55 of the French Constitution. Accordingly, Article 55 provides that, treaties or agreements that have been duly ratified shall, as soon as they published, have a

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27 *CML Rev* 83. See, also, R. Petriccione, 'Italy: Supremacy of Community Law Over National Law' (1986) 11 *EL Rev.* 320.

<sup>69</sup> See Gaja, *ibid.* at p. 83-4.

<sup>70</sup> [1989] ECR I-1076.

higher authority than statute, provided that the treaty or agreement in question is applied by the other party. However, a paradoxical phenomenon occurred, since the *Cour de Cassation* (the highest of the ordinary judicial courts) accepted the supremacy of Community law over French law by 1975<sup>71</sup> whereas the *Conseil d'Etat* (the supreme administrative court) rejected it until as late as 1989.

There were two kinds of resistance to acceptance of the principle that Community law should prevail: first, because of the doctrine of the separation of powers and of the supreme power of the legislative, the courts have traditionally no right to verify the constitutionality of legislation, and assessment for compatibility with international conventions is treated in the same way as assessment for compatibility with the Constitution; secondly, there is a body that has this specific function of deciding upon constitutionality, the Constitutional Court.

In particular, in the case of *Syndicat General de Fabricants de Semoules de France*,<sup>72</sup> the *Conseil d'Etat* concluded that it had no jurisdiction to review the validity of French legislation and therefore it could not give supremacy to Community legislation.

The refusal of the application of Community law by the *Conseil d'Etat* continued as late as 1989. In fact, the *Conseil d'Etat* obstinated the establishment of Community law by the development of the so-called “loi-

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<sup>71</sup> *Administration des Douanes v Societe Cafes Jacques Vabre* [1975] 2 CMLR 336.

<sup>72</sup> [1970] CMLR 395.

*ecran*” concept, stating that a statute (*loi*) established subsequent to a Treaty provision acted as a screen (*ecran*) preventing the administrative courts from applying the Treaty provision to administrative acts which were made under the authority of the subsequent statute<sup>73</sup>.

However, in 1989, the *Nicolo* case<sup>74</sup> the *Conseil d'Etat* abandoned its isolation and moved towards an acceptance of the supremacy of Community law. In the *Nicolo* case the *Conseil* assessed the legality of a French electoral statute against the EEC Treaty and by doing so it seems that it have decided to accept the principle of supremacy of Community law. However, the above confusion was finally resolved by the case of *Boisdet*<sup>75</sup> in 1991, where the *Conseil d'Etat* reached a decision applying the Community law on the basis of Community law itself.

Another significant step towards the accommodation of the principle of the supremacy of Community law in the French legal order, was the ruling of the Constitutional Court (*Conseil Constitutionnel*) regarding the ratification of the Maastricht Treaty and the necessity for an amendment to the Constitution. In that ruling it was also accepted that France could in certain circumstances transfer sovereignty to the European Union without a constitutional amendment.<sup>76</sup>

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<sup>73</sup> Judgment of 13<sup>th</sup> May 1983, SA Rene Moline, Rec. Lebon, 191.

<sup>74</sup> Application of Raoul Georges Nicolo [1990] 1 CMLR 17.

<sup>75</sup> [1991] 1 CMLR 3.

<sup>76</sup> See, Oliver, 'The French Constitution and the Treaty of Maastricht' (1994) 43 *ICLQ* 1, at pp. 11-16.

#### 4.5.4 The case of the United Kingdom.

The United Kingdom Courts have accepted the full implications of supremacy albeit perhaps by a gradual process.<sup>77</sup> The fundamental principle of Parliamentary sovereignty, on the one hand, and the dualistic approach to international law, on the other, forced Britain to use a different to the other Member States approach in order to accommodate the principle of the supremacy of Community law in its own legal order.

The sovereignty of Parliament states that the legislative power of Parliament has no legal limits except that Parliament cannot limit its own powers for the future.<sup>78</sup> Also, the dualistic approach of British law towards international law implies that international treaties signed and ratified by the UK are not part of the domestic law. Thus, for any international treaty to be binding and enforceable in the UK, further national legislation has to be passed.

Therefore, due to those distinctive characteristics of the British legal system, British courts decided to apply Community law directly from an Act of Parliament<sup>79</sup> rather than from Community law itself, since the Act could be

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<sup>77</sup> For more information about the UK case, see Birkinshaw, P., 'European Integration and United Kingdom Constitutional Law' (1997) 3 *EPL* 57. See, also, Craig, P., 'Parliamentary Sovereignty in the United Kingdom after Factortame' (1991) 11 *YEL* 22; Chalmers, D., 'The Application of Community Law in the United Kingdom, 1994-1998' (2000) 37 *CML Rev.* 83.

<sup>78</sup> Moreover, according to Professor Dicey, *Parliament has the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.* Dicey, A.V., *An Introduction to the Study of the Law of the Constitution.* MacMillan Press, London, 1960, p. xviii.

<sup>79</sup> European Communities Act 1972.



treated as a permission by Parliament to do so. Therefore, Community law will always prevail unless Parliament clearly and expressly in a future statute overrides Community law. Also, according to Section 2(1) of the European Communities Act (1972), the enforcement of directly effective Community law in the UK was clearly provided.

Nevertheless, British courts had to decide whether the application of the supremacy of Community law derived from the Community law itself, or it was because the Act of Parliament provided so. If the latter occurred, under the usual rules of statutory interpretation, legislation subsequent to domestic legislation (the European Communities Act) would prevail over it.

According to Lord Denning in *Macarthy's Ltd v. Smith*<sup>80</sup>, the application of the supremacy of Community law in the British legal order shall be justified by the specific provisions made by the European Communities Act. He emphasised, though, that if the overriding of Act of Parliament is to be seen as a fulfilment of a true Parliamentary intention and if it is clear that the legislative contravention of Community law was intentional, then domestic law should prevail. In particular, he stated that:

*If the time should come when Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. I do not however envisage any such situation ...Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.*

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<sup>80</sup> [1980] ICR 672 (CA).

However, in the later case of *Factortame*,<sup>81</sup> where the issue of conflict of Community and British law was addressed, the ECJ supported the view that the English statutory legislation had to be disapplied. The British government considered this as a new remedy and subsequently it could not be created by the Court. However, the ECJ, replying to the British government, insisted that this remedy already existed in the British law and it explained that the purpose was to remove a barrier and not to create a remedy.<sup>82</sup>

When the case returned to the House of Lords, Lord Bridge concluded that the supremacy of Community law was derived from the Community itself.

*If the supremacy within the European Community of Community law over the national law of Member States was not always inherent in the EC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community... Under the terms of the 1972 Act it has always been clear that it was the duty of the United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.*<sup>83</sup>

However, although for the ECJ Community law must be made effective with a superior force, for the British courts it was still not clear whether to apply Community law as supreme, if Parliament explicitly derogated from Community rules.<sup>84</sup> Moreover, in *Duke v GEC Reliance Ltd.*<sup>85</sup> a question raised whether the

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<sup>81</sup> Supra note 17.

<sup>82</sup> Supra note 67 at p. 55.

<sup>83</sup> *Factortame v Secretary of State for Transport (No2)* [1991] All ER 106 at 108 (HL).

<sup>84</sup> Supra note 67 at p. 56.

principle of the supremacy of Community legislation could also have effect on the non-directly effective Community law. As mentioned above, section 2(1) of the European Communities Act provides for the enforcement of the directly effective Community law. For this reason, the House of Lords in this case refused to interpret a provision of the Sex Discrimination Act 1975 in the light of the Community's Equal Treatment Directive, since the British legislation predated the directive and, therefore, the Act could be seen as implementing legislation.<sup>86</sup> Therefore, the House of Lords did not accept to construe national legislation consistent with non directly effective Community law. However, more recently, in *Webb v EMO Cargo Ltd.*<sup>87</sup> the House of Lords accepted that in principle their Lordships and British Courts will try to construe domestic legislation consistent with a non directly effective directive whether the domestic legislation came after or preceded the directive. In fact, the House of Lords eventually construed the domestic legislation in dispute, consistently with the European Court's ruling.<sup>88</sup>

The accommodation, therefore, of the principle of the supremacy of Community law in the British legal order, has been primarily achieved by the introduction of the European Communities Act in 1972, but the application of this principle has been achieved by the continuous rulings of the British courts. The role of the national British courts has been of paramount importance in accommodating the

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<sup>85</sup> [1988] AC 618.

<sup>86</sup> Whereas, according to previous rulings, when legislation post-dates Community directives, British courts have been willing to interpret it in accordance with Community law. See, *Pickstone v Freemans plc* [1989] AC 66; *Litster v Forth Dry Dock and Engineering Co. Ltd* [1989] 1 All ER 1134.

<sup>87</sup> [1992] 4 All ER 929.

<sup>88</sup> *Webb v EMO Cargo Ltd.* [1996] 2 CMLR 990; [1994] ECR I-3567.

principle of supremacy in the British legal order and this could be used as an example of how important and constructive the role of the courts might be in accommodating the principle of supremacy in the domestic legal order.

#### 4.5.5 The case of Greece.

As mentioned above, the new Constitution of Greece of 1974 provided a special provision for assisting the adoption of the Community law and its provisions within the Greek legal order. The provision of Art.28(2) of the Greek Constitution constitutes the basis for accommodating the supremacy of the EU law into the Greek legal system. Specifically in the case *Karellia v Minister of Industry*<sup>89</sup>, it was stated that:

*In accordance with the provisions of the Act of Accession, and with immediate effect from 1 January 1981, the provisions of the treaties establishing the European Communities constituted part of the Greek legal order and took precedence over any other conflicting legislative provision, pursuant to Article 28 of the Constitution. This primacy necessarily also covered the provisions of acts of the institutions of the Community enacted pursuant to Article 189 of the Treaty which, together with the Treaty itself, constituted the Community legal order.*

Therefore, for Greece, the necessity of a new constitution after the fall of the dictatorship in 1974, and the abolition of the Monarchy in Greece, assisted

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<sup>89</sup> Case No 3312/1989.

Greece to face this problem, preventing the need for a future amendment or regulation.

#### **4.6 Accommodating the principle of supremacy of Community law in the Cypriot legal order.**

The accommodation of the principle of supremacy into the legal systems of the Member States, has been achieved by several methods used by the national legal and judicial systems. Each member state adopted its own approach for accommodating the principle, since, as it was mentioned above, the accommodation of the principle is not directed by the EU. The question, arising then, is whether and how Cyprus will accommodate the principle of supremacy in its own legal system.

As it has been noted above, following the examples of other Member States, the accommodation of the principle to the national system mainly depends on whether the country follows the monist or the dualist conception of international law. Before suggesting any possible ways according to which Cyprus would be able to accommodate the principle of the supremacy of European Law into its own legal system, it is important to analyse the relationship between the Cypriot Law and International Law. It is important, then, to point out whether Cyprus follows the monist or the dualist approach towards the international law.

The Constitution of the Republic of Cyprus does not make an expressed provision for incorporating international law into the legal system of the Republic as it is done by other countries' constitutions.

In Germany, Article 25 of the Basic Law of the German Federal Republic provides that *the general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.* Moreover, Art. 10 of the Constitution of Italy provides that *Italy's legal system conforms with the generally recognised principles of international law. The legal status of foreigners is regulated by law in conformity with international law and treaties. A foreigner to whom the practical exercise in his own country of democratic freedoms, guaranteed by the Italian Constitution, is precluded, is entitled to the right of asylum within the territory of the Republic, under conditions laid down by law. The extradition of a foreigner for political offences is not admitted.* Finally, Art. 28 of the Constitution of Greece (1975) reads, *The generally accepted rules of international law and its international conventions from their ratification by law and in accordance with the terms of each one as regards their coming into force constitute an integral part of the Greek internal law and have superior force to any internal law.*

According to the provisions of Art. 32 of the Constitution of Cyprus one could assume that the legislator's intention, although it is not precisely expressed, was to incorporate general international law (private international law, customary international law and conventional international law) into the legal

system of the Republic. Art. 32 reads as follows: *Nothing in this Part contained shall preclude the Republic from regulating by law any matter relating to aliens in accordance with international law.* Referring on this provision, one could assume that international law is part of the Republic of Cyprus.<sup>90</sup>

However, on the other hand, in Art. 169, the Constitution makes express provision with regard to conventional international law.<sup>91</sup> Tornaritis, commenting on Art. 169, stated that *the Constitution of Cyprus follows the monist theory and considers treaties, conventions and international agreements concluded in accordance with the provisions of Article 169...*<sup>92</sup>

Nevertheless, the question is whether the Constitution is included within that “*municipal law*”, as it is mentioned in Art. 169(3). The answer to this question is very important, since if the Constitution is part of this municipal law, then automatically, as it is provided by Art. 169(3), any treaty, convention and agreement concluded would be superior to it as well. If that is the case, then one could support the view that European Law, as part of a possible treaty of accession of Cyprus to the EU, has superior force to the Constitution and therefore Article 179 does not conflict with the principle of superiority.

The answer, though, seems to be negative. The argument is that if, indeed, an international treaty has superior force to the Constitution, that would amount to

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<sup>90</sup> See Tornaritis, C., “*The Introduction of International Law into the Legal System of Cyprus*”, Nicosia 1987.

<sup>91</sup> The full Article is quoted in Chapter Three.

<sup>92</sup> *Supra* note 90, p. 17.

an amendment of the Constitution without the procedure laid down in Art. 182 being followed. It could also be argued that since the Constitution of Cyprus is considered as one of the most rigid in the world, especially considering amending provisions, the legislator's intention was not to include the Constitution within the term "municipal law" and by the provision of Art. 179 intended to give emphasis to the superiority of the Constitution, even over international treaties, conventions and agreements. Otherwise, if international treaties were supposed to be superior to the Constitution, Art. 182 and generally the Constitution itself would have lost their strict character which was actually the legislators' intention. One could suppose, then, that the legal structure in Cyprus hierarchically is listed as: Constitution superior to international treaties, conventions and agreements, and international treaties, conventions and agreements superior to municipal law (where municipal law consists of any law passed by the organs of the Republic but it does not include the Constitution).

Although, as Tornaritis suggests, Cyprus follows the monist approach and has the appropriate mechanisms for the application of international treaties in its legal system, the Cypriot legal system does not recognise the supremacy of treaty provisions over its Constitution. Therefore it can be argued, the accommodation of the principle of supremacy of the Community Law cannot be achieved by following the example of other Member States which adopt the monist approach to international law.

Following the examples of Greece and Italy, or even Ireland's case (see previous headings) one could support the argument that the accommodation of the



principle of supremacy could be achieved by adding a special provision to the Constitution of Cyprus. As mentioned in Chapter Three, an extra provision to Art. 169 of the Constitution authorising the limitation of the State's sovereignty to cases *concerning the establishment of peace and justice between nations* or providing clearly that *nothing in it would prevent EU measures from having the force of law*, would be the best way of accommodating the principle of EU law supremacy along with the whole European legislation within the Cypriot legal order.<sup>93</sup> An actual amendment of Art. 179 of the Constitution directly providing for the supremacy of Community Law would undoubtedly be restricted by the strict rules concerning constitutional amendments, since Art. 179 is considered as a basic Article.<sup>94</sup> Therefore, any future interpretation of Art. 179 (i.e. after the accession of Cyprus to the EU) should be made parallel to the provisions of Art. 169. As mentioned above, supremacy of Community law does not necessarily mean inferiority of the national Constitution. On the contrary, the two principles of supremacy could co-exist theoretically on a parallel level without competing each other, and in practice their compatibility is achieved by the national principle of supremacy in giving priority, by its own provisions (i.e. constitutional provisions for transfer of powers) to the Community.

Therefore the role of future judicial decisions of the Supreme Court of Cyprus, could play the most significant role for the accommodation of the EU supremacy to the Cypriot legal order. One could support the view that future judicial decisions through the appropriate interpretation of the supremacy of the

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<sup>93</sup> See Chapter Three.

<sup>94</sup> See Chapter Six.

Constitution under the light of the provisions of Art. 169 of the Constitution, could be the best tool for achieving the accommodation of the principle of the Community's supremacy to the Cypriot legal order. In most cases, a potential conflict between EU provisions and Cyprus Constitutional provisions could be avoided by a suitable compromising interpretation of the constitutional provisions. When such a compromise is impossible, Art. 179 could also be interpreted in such a way that it will not have force over matters concerning EU legislation. Thus, it could be achieved by an interpretation stating that the Constitution is superior to all municipal laws and international treaties but is not superior to EU law, which is considered as a *sui generis* regime in international law.<sup>95</sup> Such an interpretation could also result from a reference to Art. 169, which as mentioned in the previous chapter, would provide for the transfer of powers to the EU and its institutions.

As a conclusion, then, taking into consideration the rigid character of the Cypriot Constitution, the issue of the accommodation of the European principle of supremacy into the Cypriot legal order should be tackled very carefully. Thus, the best way of facing the problems would be the addition of an extra provision to the Constitution, following the example of Greece and Ireland and the parallel to this, interpretation of the Art. 179.

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<sup>95</sup> For more discussion about the *sui generis* character of the Community's legal order, see Chapter Five.

**CHAPTER FIVE:****ARTICLES 170 AND 185(2) OF THE CONSTITUTION OF CYPRUS AND  
ARTICLE I OF THE TREATY OF GUARANTEE: THEIR FUNCTION  
AND APPLICATION IN REGARD TO THE ACCESSION OF CYPRUS  
TO THE EU**

In the last two chapters, there was an examination of the relationship between Cypriot Constitutional law and Community law, and how the basic principles of the Community legislation could be accommodated in the Cypriot legal order. This chapter examines whether the existence of particular provisions of the Cypriot Constitution might prohibit the accession of Cyprus to the EU. In particular, Articles 170 and 185 of the Constitution and Article I of the Treaty of Guarantee are examined. The provisions of those Articles could be considered as possible obstacles towards the accession of Cyprus to the European Union because of their prohibitions for the political and economic union of Cyprus with another state, and the limitation of the most favoured treatment on behalf of Cyprus to Greece, Turkey and the UK. It has been officially argued (mainly by the Turkish side) that those constitutional provisions could establish the actual accession of Cyprus to the EU as unconstitutional. However, this thesis seems to support the view that those Articles should not be considered capable of preventing the Republic of Cyprus from gaining access to the EU, for certain reasons that will be explained below.

## 5.1 Articles 170 and 185 (2) of the Constitution and Article I of the Treaty of Guarantee.

Article 170 reads as follows:

1. *The Republic shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland for all agreements whatever their nature may be.*
2. *The provisions of paragraph 1 of this Article shall not apply to the treaty concerning the Establishment of the Republic of Cyprus between the Republic, the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland concerning the bases and military facilities accorded to the United Kingdom.*

The three States mentioned above were actually the three Guarantor powers so it was important for them to have most-favoured-nation (m-f-n) treatment. It was also a guarantee that the new state would maintain the best economic relations with its guarantor powers. That would serve the Cypriot economy in its early stages too. It should also be noted that this Article derives from paragraph 23 of the Zurich and London Agreement of 19 February 1959, which provides that *“The Republic of Cyprus shall accord most-favoured-nation treatment to Great Britain, Greece and Turkey for all agreements whatever their nature”*.

However, the implication of m-f-n does not prohibit Cyprus from entering into economic agreements with other States as well. The Article did not seem to intend the economic isolation of Cyprus. It could be argued that the Article was

vital, since restricting the most favoured treatment to only one of the Guarantor powers would definitely lead to internal problems between the two communities and the economic dependence of Cyprus on one of the Guarantor powers. In such a case, the independence of the Republic of Cyprus would be seriously jeopardised and the future of the 1959 settlement would be under threat.

The pressing argument, however, is whether Cyprus is eligible for accession to the EU since Turkey is not a Member State; whereas Greece and Britain are, and whether by this implication Turkey loses the privilege of being accorded most-favoured-nation status.

Article 185 could also be considered as an obstacle towards the accession of Cyprus to the EU. It reads as follows:

- 1. The territory of the Republic is one and indivisible.*
- 2. The integral or partial union of Cyprus with any other State or the separatist independence is excluded.*

According to Article 185 (2) then, one could arguably suggest that the accession of Cyprus to the European Union is prohibited by its provisions regarding the integral or partial union of Cyprus with any other State. This is an argument that could also be stated concerning the provisions of Article I of the Treaty of Guarantee. As mentioned in chapter one, the Treaty of Guarantee has constitutional force under Article 181 of the Constitution.

According, then, to Article I of the Treaty of Guarantee,

*The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution. It undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited any activity likely to promote, directly or indirectly, either union with any other state or partition of the Island.*

Therefore, it is important to examine and analyse those Articles in order to decide whether they constitute an obstacle to the accession of Cyprus to the EU. It is also desirable, for reasons which will become apparent, to set out the situation at the time of the drafting of those Articles.

The immediate precursor of Article I paragraph 2 was Point 22 of the “Basic Structure of the Republic of Cyprus”. As mentioned in chapter one, the “Basic Structure of the Republic of Cyprus” was initialled by the Greek and Turkish Prime Ministers at Zurich on 11 February 1959. According to Point 22, *it shall be recognised that the total or partial union of Cyprus with any other State, or a separatist independence for Cyprus (i.e. the partition of Cyprus into two independent States), shall be excluded.*

However, what was the need for such a provision in Point 22, which would later come to be an Article of the Constitution? The answer to such a question lies in the historical and political facts which resulted in the creation of the Republic of Cyprus. It is, indeed, a fact that the creation of the Republic of Cyprus was a political settlement given by the three States involved in the Cyprus case in 1959. The three states were Greece, which represented the Greek Cypriots’

rights and demands, Turkey, which represented the Turkish Cypriots' rights and demands and the United Kingdom as the colonial ruler. It is also a fact that the Greek Cypriots were struggling for *enosis*, union of Cyprus with Greece, where the Turkish Cypriots were objected and supported *taksim*, a partition of the island. It is obvious, then, that a settlement providing for the birth of a new sovereign and independent State would exclude both ambitions.<sup>1</sup> The compromise underlying the Zurich and London Accords of 1959 involved the abandonment of both. That is why Point 22 was considered to be quite crucial and necessary to be included in the Constitution of the new State (i.e. the Republic of Cyprus) having the form of a constitutional article.

The minutes of the meeting held at the British Foreign Office on 12 February 1959 shed light on the need of such an Article in Cyprus' Constitution. In this meeting, the Greek and Turkish Foreign Ministers, Messrs Averoff and Zorlu, reported their Zurich Agreements to the United Kingdom Secretary of State for Foreign Affairs. The Foreign Secretary then asked a number of questions concerning the Zurich documents. Referring to Article I of the Treaty of Guarantee the following exchange took place.

*The Secretary of State... turned to the Zurich documents beginning with the Treaty of Guarantee. Was the second paragraph of Article I intended to preclude Cypriot membership of all international associations, as for*

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<sup>1</sup> Ahmed Sheich in his book "*International Law and National Behaviour*", John Wiley & Sons, 1974, at p. 265 explains: "Both groups of inhabitants over a long history had managed to perpetuate a strong and rich different cultural heritage that continued to make assimilation extremely difficult. This became quite apparent at the time of independence from British rule in 1960 when the Greek Cypriots demanded a union with Greece and the Turkish Cypriots demanded a partition of the island. Consequently, the recent cause of tension can be attributed to the 1960 national Constitution of this island that was written under the explicit premise that neither of the above two demands will be met."

*example the Free Trade Area if that ever came into existence.*

*M. Zorlu explained the paragraph was intended to prohibit partition and Enosis (whether with Greece or with any other country). M. Averoff agreed; he explained that the wording was specifically designed to exclude possible Greek devices in the direction of Enosis, such as a personal union of Cyprus and Greece under the Greek Crown. M. Zorlu and M. Averoff both made it clear that there would be no objection to Cypriot membership of international associations of which both Greece and Turkey were members; e.g., the Postal Union and any Free Trade Union. Nor did they exclude either Commonwealth membership for Cyprus or membership of the Sterling Area. They would, indeed, welcome Commonwealth membership...Article I of the Treaty of Guarantee could be amended if necessary to make clear that neither Commonwealth nor Sterling Area membership were excluded. But the final decision on such membership would, of course, rest with the Cypriots themselves.<sup>2</sup>*

The Foreign Secretary accepted this explanation, and no amendment to Article I was found necessary, though in another case an additional article (Art. 3) was added to the Treaty of Guarantee to ensure the existence of the British bases in Cyprus by both Greece and Turkey.<sup>3</sup>

However, the matter was raised again in the London Joint Committee on Cyprus on 19 October 1959. The Committee was responsible for the finalisation of the various texts in accordance with the provisions agreed on by the three states at Zurich and London. The Committee consisted of representatives of the Greek Cypriot Community, the Turkish Cypriot Community, the United Kingdom, Greece and Turkey. According to the minutes of the 26<sup>th</sup> meeting of

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<sup>2</sup> "Record of a Meeting held at the Foreign Office at 4 p.m. on Thursday, February 12, 1959" FO 371/144640, p. 2.

<sup>3</sup> Meeting on the 12 February 1959, FO 371/144640, p. 3.



the Committee, the discussion between the British chairman and the senior Greek Cypriot representative went as follows:

*Sir Knox Helm then asked if, apart from the proposed Article V Mr. Rossides accepted the draft text.*

*Mr. Rossides replied affirmatively. He then asked the meaning of Article I paragraph 2. He presumed it referred to union with Greece or Turkey, but it seemed rather sweeping, as he supposed that Cyprus could for instance join an economic organisation or the Commonwealth.*

*Sir Knox Helm observed that that was coming near to re-examining the wording of the Treaty, and that it was perhaps better not to start to try to interpret the various Articles.*

*M. Roumos said he thought they could all assure Mr. Rossides and put on record that it was certainly not intended that Cyprus should be precluded from membership of the Free Trade Area or multilateral organisations. What was meant was that Cyprus should not be politically united with Greece or Turkey, or even economically in the narrow sense of customs union; but that could not really be said in a Treaty.*

*M. Bayulken confirmed that the wording did not refer to any international organisations, such as F.A.O., G.A.T.T, etc.*

*Mr. Rossides thanked M. Roumos and M. Bayulken for their explanation, and then said that he must reply to Sir Knox Helm's remark that he was trying to open discussion of the Treaty. When starting, he had said that he did not dispute it, and had asked for elucidation... His Delegation had received a constructive reply from the Greeks and Turks and had thought it proper to raise the issue.<sup>4</sup>*

Thus, one could rightly argue that the aim of the Article I of the Treaty of Guarantee was to prevent both *enosis* and *taksim*. However, are these the only two occasions where the Article applies? For an accurate answer, more analysis is needed and the use of several interpretative methods must be considered.

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<sup>4</sup> London Committee on Cyprus, Corrected Minutes of the 26<sup>th</sup> Meeting of the Committee of Deputies, LC (MD), 19<sup>th</sup> October 1959, p. 6.

Additionally, it is important to mention that up to the present, the Republic of Cyprus participated in several international organisations and movements and concluded numerous economic agreements between other states without confronting the above Articles as obstacles. Notably, the Association Agreement with the EU and the Customs Union have been signed without facing any constitutional problems. Could these be considered, then, as a misconduct and a constitutional infringement on behalf of the Republic of Cyprus? If that is the case, then, it would seem that the international legal personality and independence of Cyprus would be seriously limited. Therefore, it is submitted that the generalisation of the Articles mentioned above, is inappropriate, since that would cause, as it has already mentioned above, the international isolation of Cyprus.

## **5.2 Interpreting Article 185 of the Constitution and Article I of the Treaty of Guarantee, under the provisions of international law.**

### **5.2.1 Interpretation methods and tools under international law.**

*Whatever the system of public order, whether that of the world community in its entirety or of a regional, national, or sub-national component of the whole, the task of interpretation would appear to be fundamentally the same for all types of prescriptions - international agreements, constitutions, statutes, precedents, and*

*customary prescriptions - and even for private agreements.*<sup>5</sup>

As rightly stated above, the task of interpretation is a fundamental one for all sorts of prescriptions. Generally speaking, interpretation is called the form of activity which aims at explaining and expanding the meaning and a scope of a prescription, as well as the outcome of this activity. In *stricto sensu* interpretation denotes the process by which judges ascertain the meaning of the words or phrases and elucidate obscurities originally inherent in law, whereas in *lato sensu* it indicates the creative activity of judges in extending or limiting the scope of the language, strengthening or weakening its operation, correcting its shortcomings, responding to new problems and filling gaps.<sup>6</sup>

To achieve the task of interpretation concerning treaties, several methods have been developed by international law, namely, the textual method, the subjective method and the functional method. The textual method is based on the presumption that the intention of the parties is reliably expressed in the text so that the main task is to read and consecrate its sanctity. According to the Latin maxim "*in claris non fit interpretatio*" (viz. If the text is clear and unambiguous it does not require to be interpreted) the textual method concentrates on the clarity or ambiguity of the text.

The lexical element is the first aid to the textual method. The lexical element refers to the vocabulary and language used. It has to be detected whether or not

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<sup>5</sup> McDougal, L.M., "*The Interpretation of Agreements and World Public Order*", Yale Press, 1967, p. xi.

<sup>6</sup> Bredimas, A., "*Methods of Interpretation and Community Law*", North-Holland, 1978, p. 2.

the natural ordinary meaning leaves room for another meaning. Moreover, the lexical element is assisted by the grammar. Great emphasis is given to the meaning of the words in the context of the sentence and how the words are used in that context, rather than their isolated meaning. Thus, under the systematic technique of interpretation, emphasis has been given to the meaning of words, not in isolation but in the context of the paragraphs, articles and the treaty as a whole. Several arguments have been advanced in favour of the textual method. As Asquith L. J. mentioned, *chaos may be obviously resulted if instead of asking what the words used to mean, the inquiry extends to what each of the parties meant to mean and how and why each phrase came to be inserted.*<sup>7</sup> On the other hand, as Stamp, J. mentioned, *sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned them as separate words...*<sup>8</sup>

The second method of interpretation is known as the subjective method. It considers as a starting point the real intention or the presumed intention of the original drafters of the treaty. It also considers the expression of those intentions to exist in the documentary history of the negotiations (*travaux préparatoires*). This term refers to the extrinsic materials which had a formative effect on the final draft of a treaty, such as the record of negotiations preceding the conclusion of a treaty, the minutes of plenary meetings and committees of a conference which adopted a convention and the successive drafts of a treaty. Although many

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<sup>7</sup> *Abu Dhabi Oil Arbitration (Petroleum Development) Trucial Coast v. Sheikh of Abu Dhabi*, ILR, 1951, No. 37, p. 144.

<sup>8</sup> *Bourne v. Norwich Crematorium, Ltd.* [1967] 2 All ER 576, at p. 578.

critics have argued that the a priori use of this method may lead to unacceptable results, Lauterpacht argued that *to say that the intention is irrelevant and what matters is plain words is to divest the task of interpretation of its scientific character. Words are an expression of will. That will is not the will of the judge. He cannot substitute the intentions.* Additionally, Lauterpacht strongly supported the recourse to “*travaux preparatoires*” on the assumption that it provides information as to the state of mind of the parties which in turn enables their intention to be discovered.<sup>9</sup>

Finally, the third method is known as the functional method or the teleological one. The emphasis here lies on the function, utility, aim and purpose which the treaty has to fulfil, the circumstances in which it was made and its place in international life. It differs from the other methods because, although all the methods have recourse to the purpose, the functional method is the only one that recognises that the purpose may be independent of both the text and the intention. A criticism has been advanced against the functional construction in that it may spill over into judicial legislation and may amount to amendment. On the other hand, it has been fervently supported with regard to filling in the gaps in a treaty (in the absence of text or intention) or with regard to interpretation of constitutive treaties of international organisations and humanitarian treaties. Treaties of this type are viewed as “*living law*”, to be interpreted according to contemporary standards, thereby facilitating their rapid adaptation to changing circumstances.

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<sup>9</sup> Lauterpacht, ‘Restrictive Interpretation and Principle of Effectiveness in Interpretation of Treaties’, (1949) *BYIL* 48.

Besides the three methods of interpretation mentioned above, the Vienna Convention on the Law of Treaties (1969) also deals with the issue of interpretation. Basically, it promotes the pursuit of textuality, subject to modifications.<sup>10</sup> Such a significant modification in favour of the teleological approach has been the inclusion of subsequent practice among the principal means of interpretation in Art. 31.3. It favours the view that the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. Lip service has been paid to the subjective method in Art. 31.4 providing that, *A special meaning shall be given to a term if it is established that the parties so intended.* In case of discrepancy between the various texts, a teleological solution is to be followed if they remain irreconcilable after the application of Arts. 31 and 32.<sup>11</sup> The main interest of Art. 33, lies in the fact that it envisages and provides for the case of failure of the textual approach.

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<sup>10</sup> Articles 31-33 of the Vienna Convention on the Law of Treaties, 1969

<sup>11</sup> Article 31 provides for the general rule of interpretation. It reads:

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose...*
3. *There shall be taken into account, together with the context ... any subsequent practice in application of the treaty which establishes the agreement of the parties regarding its interpretation...*

Article 32 provides the supplementary means of interpretation. It reads:

*“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation to Article 31: leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.”*

### 5.2.2 Interpretation of Art. 185(2) of the Constitution and Art. I of the Treaty of Guarantee.

Bearing in mind the above methods of interpretation and especially with reference to Arts. 31-33 of the Vienna Convention, a successful interpretation of the relevant Articles can be achieved. The first step is to consider the actual language of the treaty provision in its context and in the light of its object and purpose. This is actually the process suggested in Arts. 31-33 of the Vienna Convention.

The second paragraph of Art. I consists of two sentences. The first contains a commitment by Cyprus itself *not to participate, in whole or in part, in any political or economic union with any other State whatsoever*. The second declares that any activity likely to *promote, directly or indirectly, either union with any other State or partition of the island* is prohibited.

According to the text, it should be noted that the lexical element of the word "State" is in the singular. Is the term "State" wide enough to include a plural version as well, or was the reference to the term as "State" and not "States" deliberate? By following the textual method, one could support the strict interpretation of the words as they are written in the article, and therefore one could insist that the word "State" differs from the word "States" and consequently this provision applies only in relation to union with another "State" and not with other "States". Moreover, taking into consideration the whole

context of the Constitution (indeed, it is legitimate to take as the context of paragraph 2 the Constitution itself, to which paragraph 1 refers), one could notice that in other articles the plural form has been used instead of the singular. Article 50 of the Constitution refers to *international organisations and pacts of alliance*. Also, Article 169 of the Constitution refers to *international agreements with a foreign State or any International Organisation relating to commercial matters, economic co-operation... and modus vivendi*. Thus, on the one hand, Article I paragraph 2 of the Treaty of Guarantee refers to “*political or economic union with any State*”, whereas on the other hand, the relevant Articles mentioned above refer to “*international organisations and pacts of alliance*” and economic co-operation “*agreements*”. That shows that there is a certain distinction between cases where the singular was used and cases where the plural was preferred. Accordingly, then, one could support the view that what is prohibited by Art. I paragraph 2 is union with another state, not co-operation with a group of states in establishing a supranational organisation of a political and/or economic character.

Furthermore, under Article 31(3)(b) of the Vienna Convention, the subsequent practice of the parties to a treaty is to be taken into account if it establishes their agreement as to the interpretation of the treaty. Subsequent practice in the application of the Treaty of Guarantee suggests that it has not been regarded by the parties as preventing Cyprus from entering into treaties for closer economic and political relations with groups of states. The Association Agreement between the EEC and Cyprus probably constitutes the best example. As it is mentioned in Chapter 2 of this thesis, the Agreement envisages a customs union between Cyprus and the EEC (Article 2(3)), and adopts a principle of non-discrimination



as between nationals or companies of member states, and also as between nationals or companies of Cyprus (Article 5). The Turkish Cypriot side objected to the conclusion of the Agreement and Turkey, for its part, expressed concern over the possibility of discrimination against the Turkish Cypriot community in Cyprus, a concern addressed by Article 5 of the Agreement. The EEC disregarded the objections made by the Turkish Cypriot side on the ground that they were internal matters for Cyprus. However, and most importantly, neither the United Kingdom nor Turkey argued that the conclusion of the Association Agreement was a breach of Article 1 paragraph 2 of the Treaty of Guarantee or a breach of Article 185(2) of the Constitution. In fact, no-one suggested that the Agreement indirectly created or envisaged an economic union with any existing member of the EEC.

Finally, by virtue of Article 32 of the Vienna Convention, regard can always be had to the *travaux preparatoires* of a treaty in order to confirm its interpretation. As it is mentioned above<sup>12</sup>, during the drafting of the Treaty the main use of the Art. I of the Treaty of Guarantee was to prevent from any attempt for union with Greece, *enosis*, or partition of the island, *taksim*. According to the travaux, then the Greek and Turkish negotiators of the Treaty assured first the British Government and subsequently the Cypriot representatives that Art. I paragraph 2 of the Treaty of Guarantee would not prevent Cyprus from joining to international organisations, including free trade areas, common currency areas etc. Therefore, it is clear that the intention of the Article was the prevention of the achievement of any possible uncompleted desire of the two communities, by

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<sup>12</sup> See section 5.1 of this Chapter.

preventing them from achieving union with Greece or partition, together with any indirect form of arrangement which might achieve the same end, such as “narrow... customs union”. It seems clear, then, the intention was not to prevent Cyprus from forming a political or an economic union with a supranational organisation or Union of States. The *travaux* of Article I paragraph 2 confirm that it means exactly what it says, that the use of the singular term “State” is deliberate.

### **5.3 Articles 170 and 185(2) of the Constitution and Article I of the Treaty of Guarantee as obstacles towards the accession of Cyprus to the EU.**

As indicated above, there are several arguments supporting the view that Article 170 and 185(2) of the Constitution and Article I of the Treaty of Guarantee, provide certain obstacles towards the accession of Cyprus to the EU. In fact, the Turkish Cypriot Authorities and Turkey strongly support this view.

In brief, the main arguments supporting the view that Art. 170 and Art. 185(2) of the Constitution and Art. I of the Treaty of Guarantee are obstacles towards the accession of Cyprus to the EU, can be listed as follow:

- a) The EU is considered as a state, therefore, according to the lexical element of Art.185(2) and Art. I, the accession of Cyprus to the EU (union with another state) is prohibited.

- b) A possible accession of Cyprus to the EU would be an indirect way of achieving *enosis* with Greece which, according to the teleological approach of interpretation of the Art. 185(2) and Art. I is also prohibited.
- c) Art. 170 provides for a most-favoured-nation treatment to Greece, Turkey and the UK. Therefore, the accession of Cyprus to the EU, where Turkey is not a member, is against the provisions of this Article.

According to Necati Monir Ertecon<sup>13</sup>, the implications of the advantages to the Greek Cypriots of EU membership can be summarised as follows:

First of all the membership of Cyprus in the EU would automatically mean removal of barriers between member states (including Greece, which is an EU member) and Cyprus. So that would logically be interpreted as the achievement of *enosis* between Greece and Cyprus through the “back door”.

Secondly, the membership of Cyprus in the EU would constitute a violation of the 1960 Treaty of Guarantee, and therefore would be invalid.

Thirdly, with the accession of Cyprus to the EU, any special arrangements concerning bi-communality, bi-zonality and security would in effect be meaningless within an EU context.

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<sup>13</sup> Ertecon, N.M., “*The Greek Cypriot Eagerness and Agitation for EU Membership - Why?*”, see <http://www.cypnet.com/.ncyprus/cyproblem/articles/bolum2.html>

Finally, and more important for the Turkish Cypriots, membership would actually bring union with Greece, since Greece is an EU member, while Turkey would remain outside. Turkish Cypriots have been resisting union with Greece for years, and since Turkey is not a member state of the EU, they point out that there is a restriction formally ruled out in the 1960 agreements.

They also argue that a further legal aspect of this restriction is imposed by the international Treaties, which had established the bi-communal 1960 Republic of Cyprus, on the membership of the Republic of any international organisations and pacts of alliance in which Greece and Turkey are not both members.<sup>14</sup>

In fact this “restriction”, imposed by the 1960 Treaties, is particularly highlighted by the ex-Foreign Minister of Turkey, Murat Karayalhin, in one of his statements.<sup>15</sup> He emphasises that the application by Cyprus for membership in the EU is in conflict with the Zurich and London agreements of 1959 and the 1960 Treaties on Cyprus. The Treaties contain provisions excluding membership of Cyprus in international political and economic unions to which Turkey and Greece do not both belong. They also contain specific provisions which do not allow Cyprus to participate, in whole or in part, in any political or economic union with any state whatsoever.

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<sup>14</sup> Turkish Ministry of Foreign Affairs, Politics & Policy, “*The Question of the Membership of Cyprus In the European Union, Legal Implications*” (<http://turkey.org/turkey/p-cypr08.htm>).

<sup>15</sup> Statement by Murat Karayalhin, ex-Foreign Minister of Turkey on Greek Cypriot application for EU membership on 6<sup>th</sup> March 1995 during the EU - Turkey Association Council in Brussels. <http://www.cypnet.com/ncyprus/cyproblem/articles/bolum31.html>

These specific provisions are included in the second paragraph of Article 1 of the Treaty of Guarantee 1960, which states that “the Republic of Cyprus undertakes not to participate in whole or in part, in any political or economic union with any state whatsoever”, and it cannot be disputed and proves the intention to maintain an equitable balance between the parties concerned.

They actually argue that as the EU is fast becoming a closely integrated union it must be regarded as a compound “State” for the purposes of the said Article. Membership of the EU would constitute participation in whole or in part in an economic union and at least in part in a political union. So their argument is that this would be contrary to the Treaty. This is also mentioned in the Opinion of Professor M.H. Mendelson Q.C.<sup>16</sup> where he also makes another important point: that to try and escape that fact that it is contrary to the Treaty by arguing that the Treaty prohibits only union with a State, not States in plural,<sup>17</sup> would not only violate the ordinary meaning of the words, but would also oppose the intentions of the Governments who drafted this provision. Professor Mendelson also states that the drafters were only prepared to relax this ban if the organisation was one in which both Greece and Turkey participated, but such is not the case with the EU.

By Article 1 of the 1960 Treaty of Guarantee, Cyprus bound itself “not to participate in any political or economic union with any state whatsoever”.

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<sup>16</sup> “*Opinion on the Application of the Republic of Cyprus to Join the European Union*” as drafted by Professor M.H.Mendelson Q.C (6 June 1997).

<sup>17</sup> Professor Mendelson argues that: the UK’s Interpretation Act of 1978 (c.30), s.6 provides, for instance : “*in any Act, unless the contrary appears... words in the singular include the plural and words in the plural include the singular.*” Similarly section 1 of the Code of the Laws of the United States of America: 1 USC, Sect. 1, (1982).

Another supporter of that view is Hakki Muftuzade, who is the London Representative of the so-called “*Turkish Republic of Northern Cyprus*”.<sup>18</sup> He strongly supports the view that since Cyprus has bound itself with the Treaty of 1960 with the sole exception that it is not restricted to union with organisations or “union of States” where both Greece and Turkey belong. He also suggests that though the Greek Cypriots have applied for EU membership, Britain and Turkey have the right to have a veto on Cyprus joining the EU. Britain has a veto, as a member of the EU on any new member under ordinary European Union Law, and Britain as a party to the 1960 Cyprus Treaty is legally bound by Article 2 “to prohibit ... any activity aimed at promoting ... union of the Republic of Cyprus with any other state”. Turkey as a party to the 1960 Treaty also has a veto in the sense that she is not willing to release Britain from her treaty obligation under Article 2 until Greek Cypriots and Turkish Cypriots have settled their differences. He also urged the point that under the 1960 International Treaties establishing the “Republic of Cyprus”, the Greek Cypriot side by itself has no capacity or authority, under the rule of law, to make a valid application for the union of Cyprus with the EU.

According to Mr. Ergon Olgun,<sup>19</sup> both Guarantor Motherlands (Greece and Turkey) agreed to respect each other’s rights and interests *vis-a-vis* the bi-communal Republic. The representatives of Turkey, Greece and the UK mutually agreed on 12<sup>th</sup> February 1959 that: “the intention was to exclude more favourable

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<sup>18</sup> “*Cyprus - Two States Or One - Prospects For Membership Of The European Union*”, a speech at Chatham House, London 9<sup>th</sup> December 1998, by Hakki Muftuzade, London, Representative of the “*Turkish Republic of Northern Cyprus*”.

<sup>19</sup> Olgun, M.E., “*European Union for “Cyprus”?* ”, as cited in <http://www.cypnet.com/.ncyprus/cyproblem/articles/bolum3.html>

bilateral agreements between Cyprus and countries other than the Three Powers, and also to avoid the possibility of either Greece or Turkey securing a more favourable economic position in Cyprus than the other - of Greece for example, establishing a kind of economic enosis". The British document of 12<sup>th</sup> February 1959 states that the two representatives, Zorlu and Averoff, both made it clear that there would be no objection to Cypriot membership of international associations of which both Greece and Turkey were members.

Another point of paramount importance is the one made by Professor M.H. Mendelson Q.C. in his Opinion mentioned above. He argues that Article I, paragraph 2 of the Treaty of Guarantee by which "the Republic of Cyprus undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever" declares prohibited all activities likely to promote either union with any other State or partition of the Island. In his view, membership would amount to participation in whole, let alone in part, in an economic union. At that point he is making an interesting parallel with the *Austro-German Customs Union* case (1931), in which the Permanent Court of International Justice held that Austria's entry into a customs union with Germany would constitute an alienation of its economic independence, contrary to Geneva Protocol 1 of 4<sup>th</sup> October 1922.

The supporters of this view argue that in June 1967 the Greek Cypriot legislature went so far as unanimously to pass a resolution in favour of *enosis*, union with Greece, so clearly prohibited by Article 185 of the Constitution. By this

implication they consider the accession of Cyprus to the EU as an indirect *enosis* between Greece and Cyprus.

Mr. Rauf R. Denktas, self-styled president of the “Turkish Republic of Northern Cyprus” emphasised that the application of Cyprus for membership in the EU is open to objection arising from Article 1 of the Treaty of Guarantee and echoed in Article 185(2) of the Constitution.<sup>20</sup>

Article 170 is also argued by the Turkish and Turkish Cypriot authorities to be an obstacle towards the accession of Cyprus to the EU. The intention of the Article was to exclude more favourable bilateral agreements between Cyprus and countries other than the Three Powers, and also to avoid the possibility of either Greece or Turkey securing a more favourable position in Cyprus than the other, and they cite as an example the possibility of Greece establishing a kind of economic *enosis*. The proposed entry of the Republic of Cyprus into the EU, they say, would doubly violate this provision. Firstly, it would tend to encourage the kind of economic *enosis* with Greece, which according to the Agreement is prohibited, and secondly, if Cyprus joined the EU, this would result in Greece and the UK receiving considerably more favourable treatment than Turkey, which is not a member.

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<sup>20</sup> Turkish Cypriot Memorandum Addressed to the Council of Ministers of the EU in Respect of an Application for membership by the Republic of Cyprus, 12 July 1990, by Rauf R. Denktas. <http://www.mfa.gov.tr/yayinlar/stat-cyp/Chap3.htm>



#### 5.4 Articles 170 and 185(2) of the Constitution and Article I of the Treaty of Guarantee as non-obstacles towards the accession of Cyprus to the EU.

Objecting to the above, several other arguments can be developed, supporting the view that Art. 170 and 185(2) of the Cypriot Constitution and Art. I of the Treaty of Guarantee do not prevent the Republic of Cyprus from acceding to the EU.

According to Clerides, C. the accession of Cyprus to the EU is not against the provisions of Art. I of the Treaty of Guarantee or Art. 185 (2), since it cannot be considered as a union with another State,<sup>21</sup> since the EU is not a state<sup>22</sup>. He mentions that according to Professor P. D. Dactoglou the EU is not a state but a new entity, neither national nor international.<sup>23</sup> Therefore, neither Art.185 (2) nor Art. I applies on this occasion since their reference to “state” is not broad enough to cover the EU.

The argument about the legal status of the EU has also, on several other occasions, been considered irrelevant to the Cypriot application. The general

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<sup>21</sup> Clerides, C., “Το Κυπριακό Δικαίο και η Κοινοτική Εννομη Τάξη” [Cyprus Law and the European Legal Order], *EKEM*, Working Papers No. 24, May 1993.

<sup>22</sup> See, Antonopoulos, N., “Η Κύπρος και η Ευρωπαϊκή Οικονομική Κοινότητα” [Cyprus and the European Economic Community], Nicosia, 1977, pp. 30-31; See also concerning the legal status of the EC, Tornaritis, C., “Αι Συμφωνίαι Συνδέσεως και η Σύνδεσις της Κύπρου με την ΕΟΚ” [The Association Agreement and the Association of Cyprus with the EEC], Nicosia, 1977, pp. 9-31; *COSTA v. ENEL* (1964) 3 CMLR 425; C. Tornaritis, “Η Κοινή Αγορά και η Κύπρος” [The Common Market and Cyprus], Nicosia, 1976.

<sup>23</sup> Dactoglou, P.D., “Ευρωπαϊκό Κοινοτικό Δίκαιο” [European Community Law], Sakkoulas Publications, 1979, p. 25, “Είναι ορθότερο να δεχθούμε οτι οι Ευρωπαϊκές Κοινοότητες αποτελούν ενα τρίτο, καινοφανές και αυτοτελές επίπεδο συνασπισμού κρατών, μια υπερεθνική (δηλαδή ούτε εθνική ούτε διεθνή) ενότητα που καλείτε ‘Κοινότητα’.” [It is more accurate if we accept that the European Communities constitute a third, new and self-contained, level of States’ coalition, a supranational (i.e. neither national nor international) union which is called “Community”].

belief is that the EU has its own *sui generis*<sup>24</sup> status and it cannot be considered as a state. Although there is a plethora of academic arguments about the legal status of the EU, there is no clear argument supporting the view that the EU is a state. Indeed, the EU has been established and it cannot be held back, however, its future final format remains unpredictable.<sup>25</sup> As Professor Dactoglou explained, *no complete and final answer has yet been given and probably no such answer can be given because the Community is in a permanent state of evolution.*<sup>26</sup>

Obviously, at the very beginning, those who envisaged and founded the European Union had in mind the model of a federal state. According to Jean Monnet, *Have I said clearly enough that the Community we have created is not at end in itself? It is a process of change... I have never doubted that one day this process will lead us to the United States of Europe.*<sup>27</sup> However, this appears to be more

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<sup>24</sup> Ibid., at p. 37. See also Wyatt & Dashwood, "European Community Law" Sweet & Maxwell 1993, 3<sup>rd</sup> Ed., at p. 55, *It is the latter conception of the Community legal system, quasi-federal yet undeniably sui generis, which seems likely to influence the future of the Community.* Also Wyatt, D., 'New Legal Order, or Old' (1982) 7 *EL Rev.* 147, wrote that *the European Economic Community is established by an international tribunal, yet the prevailing orthodoxy has it that it constitutes a legal order sui generis, to be contrasted from the point of view of legal analysis, with traditional public international law.* See also Wistrich, Ernest., "The United States of Europe" Routledge 1994, at p. 104, *It is in this sense that Edward Heath was right to claim Europe's political organisation will be sui generis, but there is a little doubt that its development will be on federal lines.* See also Fortini [1974] 2 *CMLR* 386, *SPA Comaricola* [1982] 19 *CMLR* 455, and Wunsche Handelsgesellschaft [1987] 3 *CMLR* 255.

<sup>25</sup> Lord Denning famously remarked that the (then) European Economic Community Treaty "is like an incoming tide. It flows into estuaries and up the rivers. It cannot be held back" (*HP Bulmer Ltd v Bollinger SS* [1974] 2 *WLR* 202, [1974] 2 *CMLR* 91).

<sup>26</sup> Dactoglou, P.D., "The legal nature of the European Community" in "Thirty Years of Community Law" EC Publication 1983, p. 33. See also George, S., "Politics and Policy in the European Union" Oxford Press, 1996, 3<sup>rd</sup> Ed. at p. 275, *Most analysts of the process of European integration long ago abandoned the aspiration to predict what would happen next.* And at p.283. "Does this mean that no predictions can be made about the future of the EC? If by predictions is meant the sort of positive prediction that neo-functionalists made of inevitable progress from an initial integrative step to some sort of end-state that would involve something vaguely described as the European Union, then probably such hard prediction cannot be made.

<sup>27</sup> Monnet, J., 1978 "Memoirs" (trans. R. Mayne), Doubleday and Company, New York at pp. 523-524. Also Dactoglou, P.D., *supra* note 26, at pp. 33-34, mentions that *there can be no doubt that the political figures who conceived, founded and fashioned the Communities (Jean Monnet,*

rhetoric than reality. There is a long way to go before a United States of Europe will be achieved, if ever.<sup>28</sup> And in a further analysis, even the existence of federal elements<sup>29</sup> in the Community constitution are not equivalent to seeing the Community as a state or super-state.<sup>30</sup> Furthermore, according to P. Dactoglou, *in reality, the way in which the Community is developing has robbed the federalist theory not only of such of its foundations as refer to the current period but also of the legal objective directed towards the future.*<sup>31</sup>

Moreover, additional arguments supporting the view that the EU is not a state have been made by J. Caporaso, who insists that the EU may not conform to the stereotype of the traditional international agreement, but nor is it a super state in the traditional sense of the term.<sup>32</sup> Also, Dactoglou commenting on whether the EC could be considered as a state argued, *according to this theory, the Community is not a state because it does not possess the Kompetenz-Kompetenz,*

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*Robert Schuman, Paul-Henri Spaak, Konrad Adenauer, Alcide de Gasperi, Walter Hallstein) had the federal state in mind as a model. Legal writers too (especially German legal writers) attributed to the Community a federal nature, or, at all events, federal elements (federalist theory) during the early years which followed the conclusion of the Treaties establishing the Communities (C.F. Ophuls, E.J. Wohlfarth, G.Jacnicke, H.J. Schlochauer, G. Schwarzenberger, G. Heraud, L. Cartou). A good analysis of the development of the federal idea within the EU and the distinction between the neofunctionalists and federalists is provided by Pinder, P., "The Building of the European Union", Oxford University Press, 1998, 3<sup>rd</sup> Edition.*

<sup>28</sup> Andersen, S. S. and Eliassen, K.A. argue that the model of a federal Europe, a kind of United States of Europe, would seem to be too utopian to be realised in the near future. "Making Policy in Europe. The Europeification of National Policy-making", Sage, 1993, at p.7.

<sup>29</sup> For particular reference to the federal features of the EU see Weiler, J. "Trading in and with the EU" at Chapters "Subsidiarity in the EC/ The Evolution of Community Federalism" as it is cited in <http://www.law.nyu.edu/weilerj/unit5/UnitV11.htm>. See, also, Wistrich, E., "The United States of Europe", supra note 24. See also Fischer, T.C and Neff, S.C., 'Some American Thoughts on European Federalism' [1995] 44 *ICLQ* 904.

<sup>30</sup> Charlesworth, A. and Cullen, H., "European Community Law", Pitman, 1994, at p. 42.

<sup>31</sup> Supra note 26, at p. 34. However, according to Weiler, J. in "The Community System: The Dual Character of Supranationalism", (1982) *YEL* 267, a different view is supported that there is still life in the concept of legal federalism.

<sup>32</sup> Caporaso, J., 'The European Union and Forms of State: Westphalian, Regulatory and Post-Modern' (1996) 34 *JCMS* 29. He also comments that *the EU was treated as supranational state, a confederation, an emerging federal union, a concordance system, and a multi-level polity, among other things... Today, the study of European integration is moving into a post-ontological*

*that is to say because it does not have universal competence in all spheres...It would preferable, however, to avoid the term state, which can give rise to false interpretations...*<sup>33</sup> The view that the EU is characterised by some degree of “statelessness” when compared to member states, is also supported by Andersen and Eliassen.<sup>34</sup> Also, according to B. Laffan, the EU could be described as a distinctive model of internationalism,<sup>35</sup> compared to other organisations such as NAFTA (North Atlantic Free Trade Association), APEC (Asia Pacific Economic Co-operation) and ASEAN (Association of South East Asian Nations) which are further examples of nations collaborating to fortify internal economic relationships by enhancing inter state trade and external competitiveness. Among contemporary international systems, the EU is the most advanced, going beyond the trade process to institution building, law making and political integration. Therefore, it is suggested that to understand the EU, it is essential to abandon the idea of evolution towards state or nationhood and recognise that integration is fuelled by inter-regional relationships based on common economic and legal values rather than the omni-competance of central government.

The distinctive status of the EU has also been highlighted by the German Federal Constitutional Court which describes the EU as *a supranational organisation, which is separate from the State authority of the Member States, a supranational*

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*stage and scholars are less concerned with how to categorise than how to explain the process and outcome, paying less attention to the ‘nature of the beast’, at p. 30.*

<sup>33</sup> Supra note 26 at pp. 41-42.

<sup>34</sup> Supra note 28 at p. 256.

<sup>35</sup> Laffan, B., “*The European Union: a Distinctive Model of Internationalism?*”, European Integration, Vol. 1, No. 18 (10 October 1997), as cited at European Integration On-Line Papers (EIOP), <http://eiop.or.at/eiop/texte/1997-018.htm>

*system of competences.*<sup>36</sup> Moreover, commenting on the Maastricht Treaty, the Court stated that it *establishes a European Union of States which is to be borne by the Member States and respects their national identity. It relates Germany's membership of supranational organisations, not membership of a European State ... The exercise of sovereign authority by a union of States which remain sovereign and which, at international level, always act by their governments and thereby control the process of integration.*<sup>37</sup>

Article 88 of the French Constitution focuses on the same point and describes the EC and the EU as *established by States having freely chosen, pursuant to the constitutive treaties of those entities, to exercise certain of their powers in common.* The French Constitutional Council has gone even further in describing the EU as *an independent legal order which, although integrated into the legal systems of the different Member States of the Communities, does not form part of the institutional order of the French Republic.*<sup>38</sup>

Therefore, since the present legal status of the EU, which is described as possessing a *sui generis* existence, prevents us from characterising the EU as a state, either unitary or federal, Art. 185(2) of the Constitution of Cyprus and Art. I of the Treaty of Guarantee cannot provide any obstacles towards the accession

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<sup>36</sup> *Maastricht Treaty Constitutionality Case* (1993) 98 ILR 196, pp. 216-217. In this case, the German Supreme Court has invented a new German word, "*Staatenverbund*", to describe the Community. However, according to this definition, the term "*Staatenverbund*", could be translated neither as state nor as international organisation.

<sup>37</sup> *Ibid.*, pp. 221, 223 and 225.

<sup>38</sup> Conseil Constitutionnel, Decision No. 92-308 DC, April 1992, *Traite sur l'Union Europeenne, Recueil des decisions* 1992, 55, 62 (para. 34) reprinted in (1992) 93 ILR 338, p. 347.

of Cyprus to the EU. Cyprus' membership of the EU would not constitute participation *in any political or economic union with any State whatsoever.*

In opposition to the argument that by the accession of Cyprus to the EU an indirect *enosis* with Greece is achieved, several arguments can be developed proving the invalidity of the argument. Firstly, it is important to be mentioned that since 1960, when Cyprus gained its independence, the Republic of Cyprus has existed and been recognised by the international community as a sovereign and independent state, and therefore any argument implying that Cyprus is applying for accession to the EU in order to achieve a "back door" *enosis* with Greece would seriously undermine the reliability, the independence, the sovereignty and the very existence of the internationally recognised Republic of Cyprus.

As it has already been mentioned above, according to the *travaux préparatoires*, the scope of these Articles was to prevent *enosis* with Greece or *taksim*.<sup>39</sup> However, by examining the scope of *enosis* as it had been developed before the 1960 arrangements, one would be able to realise that *enosis* had the meaning of union with Greece in the sense that Cyprus would have become a part of Greece. Bearing in mind this presumption, it is unreasonable to imply that by the accession of Cyprus to the EU Cyprus will become a part of Greece. It sounds as unreasonable as if we were to say that by the accession of the Britain to the EU, Britain became part of France or Germany. The EU is neither Greece nor France

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<sup>39</sup> See Ch. 5.1 and 5.2.2.

nor Germany, it is simply the union of these states.<sup>40</sup> Parallel to this, considering the Turkish arguments that by the accession of Cyprus to the EU, *enosis* with Greece is achieved, we could also argue that Turkey itself is also a candidate state for accession to the EU, but it has never been argued that a possible accession of Turkey to the EU would be equal to *enosis* with Greece.

The question whether Cyprus' membership of the EU would equal to *enosis* with Greece, can be also tackled by reference to the analogous case concerning Austria's accession to the EU. According to Art. 4(1) of the Austrian State Treaty of 1955, Austria undertook not to *enter into political or economic union with Germany in any form whatever*. Art. 4(2) amplified that guarantee against another *Anschluss*, in the following terms:

*In order to prevent such union Austria shall not conclude any agreement with Germany, nor do any measures likely, directly or indirectly, to promote political or economic union with Germany, or to impair its territorial integrity or political or economic independence. Austria further undertakes to prevent within its territory any act likely, directly or indirectly, to promote such union and shall prevent the existence, resurgence and activities of any organisations having as their political or economic union with Germany, and pan-German propaganda in favour of union with Germany.*

The view taken concerning Austria's application in 1989 for EC membership was that membership was not prevented by the provisions of Art. 4 of the State

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<sup>40</sup> In the Opinion drafted by Crawford, J., Hafner, G. and Pellet A., "Republic of Cyprus: Eligibility for EU membership", 24<sup>th</sup> September 1997, stated that *the EU is not a state, and it is inaccurate to describe any individual member state as economically or politically in union with other individual member states. In the language of the French Constitutional Council, no member state "forms part of the institutional order" of any other member state. Rather, they are all linked in and through the Community of the EU.* At pp. 6-7.

Treaty.<sup>41</sup> The position of the Austrian Government was that Art. 4 was irrelevant to the issue of an indirect union with Germany.<sup>42</sup> Neither the EC Commission considered Art. 4 of the State Treaty as relevant to Austria's membership.<sup>43</sup> Lernhardt also supported the view that Art. 4, *clearly refers to the bilateral relationship between Austria and Germany. Membership in an association of states could at best be affected by the article if this association were dominated by Germany. In the EC, Germany is only one of twelve member-states, without coming even closely to having a majority of votes. With complete justification each of the present EC members would strictly reject any interpretation of its accession as 'Anschluss' with Germany.*<sup>44</sup>

Moreover, F. Ermacora supported the view that Austria's accession to the EEC would not contradict Art. 4 of the State Treaty, since the prohibition of "Anschluss" related to union with a state, not to a supranational community. Seidi-Hohenveldern also reached to the same conclusion.<sup>45</sup> Also, as it is pointed out in the Opinion, *on the question whether EU membership would amount indirectly to union with Germany, the question was whether German influence or control over the EEC amounted to domination, so as to produce indirectly*

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<sup>41</sup> Although the matter was discussed following Austria's application.

<sup>42</sup> See the Government's Report to Parliament (III-113 Beilagen zu den Stenographischen Protokollen des Nationalrats XVII GP, para. 3.2, reprinted in Economy Extra, 19<sup>th</sup> May 1989. Cited in the Opinion, supra note 40, p.12.

<sup>43</sup> Sec/91/1590 Final, 1<sup>st</sup> August 1991, summarised in Bull EC 7/8-1991, p. 81.

<sup>44</sup> Lernhardt, A., "Austria and the European Community. A Guide to Orientation" trans. Mansfield, I., Vienna, 1985 as it is cited in the Opinion, supra note 40 p.13. See also, Weiss, F., 'Austria's permanent neutrality in European Integration' (1977) 1 *LIEI* 101, where the author supports the view that the sovereignty of a state is neither affected nor transferred to any other Member State by its accession to the EU. By this assumption, one could reach the conclusion that accession to the EU does not mean transfer of sovereignty from one Member State to another and therefore the argument that accession to the EU implies direct union with another member state (*i. e.* transfer of sovereign rights to another state) is invalid.

<sup>45</sup> Supra note 40, p. 13.



*what Art. 4 directly prohibited. Again, the unanimous answer was that it would not; on the contrary, the exclusion of Austria from the Common Market, it was concluded, would weaken the economic survival capacity of Austria and, consequently, undermine the objective of Art. 4(2) of the State Treaty. In the event, Austria was admitted to the EU in 1994, without Russian objection and with no amendment to Art. 4 of the State Treaty.*<sup>46</sup>

Furthermore, although according to Professor Mendelson's Opinion *there are some interesting parallels with the Austro-German Customs Union case (1931), PCIJ Ser. A/B, no. 41, p.37, in which the Permanent Court of International Justice held that Austria's entry into a customs union with Germany would constitute an alienation of its economic independence, contrary to Geneva Protocol I of 4 October 1922,*<sup>47</sup> it is important to note that in that case the Soviet Union was concerned with Austrian neutrality,<sup>48</sup> and not with Art. 4. In regard to the Cypriot Constitution both Art. 185(2) and Art. I of the Treaty of Guarantee neither provide for nor imply a Cypriot neutrality, so the case of Cyprus seems to be entirely different from the Austro-German Customs Union Case. Hence, any similarities between the Cypriot application and the Austrian one are based not on the notion of neutrality, but on Art. 4 of the Austrian Constitution. Moreover, despite the numerous arguments raised in connection to the Austrian neutrality, Austria became a full member of the EU in 1994 without any objection from Russia and with no amendment to the Art. 4 of the State Treaty. The case of

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<sup>46</sup> Ibid.

<sup>47</sup> Supra note 17, p. 36.

<sup>48</sup> For more information about Austria's permanent neutrality and its connection to the Austrian Accession to the EU see; Luif, P., "On the road to Brussels", Braumuller 1995, pp 198-199, 238-244. See also, Kennedy, D. and Speht, L., 'Austria and the European Communities', (1989) 26

Austria, then, can be considered as a strong precedent<sup>49</sup> for and not against the case of Cyprus, proving that references to *Anschluss* and *Enosis* are irrelevant to their accession to the EU.

Finally, it is important to mention the view of the British Foreign & Commonwealth Office, as Mr. T. Standbrook expressed it, that *in 1998 there was a legal challenge to Cyprus' EU application which argued that the Treaty of Guarantee disallowed the political or economic union of Cyprus with another state. This challenge was defeated in the UK courts. We see no legal bar to Cyprus' membership of the EU.*<sup>50</sup>

Concerning Art. 170 of the constitution, several other arguments support the view that it also does not prevent Cyprus from acceding to the EU (i.e. Turkey's non-membership to the EU does not affect its most favoured nation treatment under Art. 170 provisions). As a starting point, it is important to mention that Art. 170 does not prohibit Cyprus from entering into economic agreements which could bring benefits to third countries. The use of the term of "most favoured nation" treatment in relation to the three Guarantor powers merely requires that a most favoured nation treatment should be extended to each of the guarantors.

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*CML Rev.* 615; Weiss, F. at supra note 44 and Seidl-Hohenveldern, H.C.I., 'Austria and the EEA' (1992) 1 *LIEI* 29.

<sup>49</sup> This view is also supported by Chrysostomides, K. in his Article "Νομικά προβλήματα του Κυπριακού" [Legal Issues Concerning the Cyprus Problem], as published in the Cyprus' daily newspaper "*Η Σημερινή*", Wednesday 21<sup>st</sup> July 1999.

<sup>50</sup> Answer received to the Questionnaire by the British Foreign & Commonwealth Office, 22<sup>nd</sup> April 1999. (See, Annex IV)

However, it is also important to mention that according to the lexical element of the Article 170, most favoured nation treatment has only to be extended *by agreement on appropriate terms*. Therefore, the unilateral undertaking in Art. 170 is conditional and as it has rightly been stated in the Opinion,<sup>51</sup> most favoured nation treatment was only to be extended under a subsequent agreement with Cyprus; it was to be a matter for the parties to reach agreement, in particular, “on appropriate terms” for granting such treatment. It is, then, up to the parties to reach such an agreement and, notably, Turkey has never made any claim based on Art. 170.

Additionally, past bilateral trade agreements between Cyprus and both Turkey and Greece, not only considered Art. 170 not to be an obstacle towards the economic relations between Cyprus and the EU, but clearly envisaged the prospect of a future economic relation. According to Art. 1 of the Trade Agreement between Cyprus and Turkey of 9 November 1963:

*The above most favoured nation treatment shall not apply:*

*... c) to privileges, exemptions from taxes (fees), preferences or concessions which each of the Contracting countries has granted or will grant in the future to other countries on account of a present or future participation, entry or association by them to a customs union, a free trade area or an economic community.*<sup>52</sup>

Obviously, the contracting parties of this agreement had in mind the possibility of future bilateral agreements with an economic community (presumably the

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<sup>51</sup> Supra note 40, p. 16.

<sup>52</sup> Art. 1 of this Trade Agreement refers to most favoured nation treatment to be extended to duties or charges of any kind of importation of the goods of either country to the other.

EEC) and they cared to make an express provision that the most favoured nation treatment obligation is not affected by more favourable treatment extended by either state to its partners in a free trade area or economic community.

Moreover, accession to the EU does not necessarily mean termination of the most favoured nation obligations of the entrant to third states. This is actually consistent with Article XXIV (5) of the GATT.<sup>53</sup> The fact, then, that Turkey itself is a member of the WTO and an applicant for EU membership shows that Turkey must not only accept these positions but also not consider its most favoured nation treatment status in relation to Cyprus to be jeopardised by a future accession of Cyprus to the EU. The present relationship between Turkey and the EU (Association Agreement, Customs Union, application for EU membership and its recent acceptance by the EU as a Candidate Member State) makes it clear that Art. 170 of the Cypriot Constitution would not require any more favourable treatment to be extended to Turkey in the event of Cyprus' accession to the EU.<sup>54</sup>

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<sup>53</sup> See *The GATT, Uruguay Round; A negotiating History (1986-1992) Vol III: Documents* edited by Terence P. Stewart, Kluwer, 1993, at p. 820. See also, 'Understanding on the Interpretation of Articles XXIV of the GATT 1994', in WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts*, Geneva, 1994, p. 31. Also according to Art. 24 of the GATT an important exception to the non-discrimination provision permits regional tariff preference areas such as the EU and NAFTA. This would also enable Cyprus to become a member of a regional organisation without being prevented by its m-f-n obligation to Turkey. The United States of America for example, reserve their m-f-n obligation to China along with their membership to NAFTA (of course, NAFTA is not as a strong organisation as the EU). According to Moon B.E., "A member of such a regional organisation may apply a tariff schedule more favorable than the most-favored-nation rate to other member countries, but these discriminatory arrangements must meet three conditions to be considered GATT legal. First, they must lower barriers inside the region rather than raise the others. Second, they must be completed over a reasonable amount of time. Third, they must cover substantially all products. Although no regional arrangement has ever fully met these standards, all have been tacitly permitted". Moon, B.E., *Dilemmas of International Trade*, Westview Press 1996, at p. 81.

<sup>54</sup> *Supra* note 40, p. 17.

## 5.5 Conclusion.

As it has been analysed above, Articles 170 and 185(2) of the Constitution of Cyprus and Art. I of the Treaty of Guarantee, may indeed provide sources for several arguments concerning the Cypriot accession to the EU, but they do not seem to provide any certain obstacles. It is obvious that the particular relevant Articles are also influenced by the austere and peculiar character of the Constitution of Cyprus, which is actually the main reason for the need of an extensive legal analysis and the main source of the development of several arguments concerning their interpretation and their application. The fact that these Articles are considered as basic Articles<sup>55</sup> of the Constitution and they cannot, in any way, be amended<sup>56</sup> necessitates a more theoretical approach concerning their implications for the accession of Cyprus to the EU. The lack of any power for their amendment prevents us from a practical and more drastic approach (amendment) and leads us to the need for an explicit theoretical analysis of their interpretation and application. Under these conditions, then, the above analysis was important for realising whether these Articles could be considered as obstacles towards the accession of Cyprus to the EU.

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<sup>55</sup> According to Annex III of the Constitution Of Cyprus Arts. 170 and Art. 185(2) are included in the List of Basic Articles of the Constitution. Note that Article 181 which provides for the constitutional power of the Treaty of Guarantee is also included in the list of the basic articles.

<sup>56</sup> Article 182 (1) of the Constitution of Cyprus provides that "*The Articles or parts of Articles of this Constitution set out in Annex III hereto, which have been incorporated from the Zurich Agreement dated 11<sup>th</sup> February, 1959, are the basic Articles of this Constitution and cannot, in any way, be amended, whether by way of variation, addition or repeal.*" For more discussion see Chapter Six.

According to this analysis, then, the arguments supporting the view that Art. 170 and Art. 185(2) of the Constitution of Cyprus and Art. I of the Treaty of Guarantee can block the accession of Cyprus to the EU, appeared to be insufficient. In brief, the reasons for the insufficiency of those arguments can be listed as follows:

- a) The accession of Cyprus to the EU is not directly prohibited by the provisions of the Articles.
- b) According to the lexical element of Art. 185 (2) of the Constitution and Art. I of the Treaty of Guarantee, the EU cannot be considered as a “state” (*in strict sensus*); therefore the accession of Cyprus to the EU cannot be interpreted as a union with another state.
- c) According to the *travaux preparatoires* the scope of Art. 185 (2) of the Constitution and Art, I of the Treaty of Guarantee was to prevent *enosis* and *taksim* and not to prevent Cyprus from entering into a regional organisation.
- d) The accession of Cyprus to the EU cannot be considered as *enosis* with Greece.
- e) The accession of Cyprus to the EU does not affect Turkey’s most-favoured-nation treatment as provided for by Art. 170 of the Constitution

It is therefore submitted that the accession of Cyprus to the EU cannot be considered as prevented by the provisions of these Articles.

**CHAPTER SIX:****THE POSSIBILITY AND THE NECESSITY OF AMENDING THE CONSTITUTION OF CYPRUS IN REGARD TO THE ACCESSION OF THE REPUBLIC OF CYPRUS TO THE EU**

Although some legal and political sources in Cyprus support the view that there is no actual need for an amendment to the Constitution for Cyprus' accession to the EU,<sup>1</sup> there are others who argue that Constitutional amendment not only would prevent legal uncertainties but would also be necessary for the accession of Cyprus to the EU.<sup>2</sup> Indeed, the way for full EU membership includes also the problem of adapting the Constitution to the requirements of the EC Treaties before their ratification. Thus, any potential constitutional amendments implied by the accession of Cyprus to the EU will be a *sine qua non* to the ratification (approval) of the founding Treaties and the Treaty of Accession.

This chapter, then, analyses the procedure for amending the Constitution of Cyprus and suggests several amendments necessary for the smooth accession of Cyprus to the EU and for the relevant harmonisation of Cypriot legislation to that of the EU. The importance of this Chapter lies on two factors: firstly, the

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<sup>1</sup> See, Clerides, C., 'Το Κυπριακό Δίκαιο και η Κοινοτική Έννομη Τάξη' [Cyprus Law and European Legal Order], Hellenic Centre of European Studies (EKEM), May 1993, at p. 9.

<sup>2</sup> According to Professor Antonopoulos, in a potential accession of Cyprus to the EU a constitutional revision would be necessary. This is justified by the special effect of the European legislation on the Cypriot legal order. The fact that the legislative power would be exercised not only by the legislative bodies, as provided by the Cypriot constitution, but also by the EU institutions and the fact that the judicial power would also be affected, justifies the necessity for revision and amendment of the 1960 Constitution of Cyprus. See, Antonopoulos, N., "Η Κύπρος και η Ευρωπαϊκή Οικονομική Κοινότητα" [Cyprus and the European Economic Community], Research Paper, 1977, at p. 33.

complex and, under the present circumstances (i.e. the absence of the Turkish Cypriots), difficult procedures for amending the Constitution; and secondly the necessity to amend particular Articles of this Constitution which are either in conflict with the provisions of the EU legislation or could possibly be problematic in the future (i.e. after accession).

### **6.1 Procedure for amending the Constitution under Article 182.**

Article 182 of the Constitution provides for both the possibility of amending the Constitution and the appropriate procedure. It reads:

- 1. The Articles or parts of Articles of this Constitution set out in Annex III hereto which have been incorporated from the Zurich Agreement dated 11<sup>th</sup> February, 1959, are the basic Articles of this Constitution and cannot, in any way, be amended, whether by way of variation, addition or repeal.*
- 2. Subject to paragraph 1 of this Article, any provision of this Constitution may be amended, whether by way of variation, addition or repeal, as provided in paragraph 3 of this Article.*
- 3. Such amendment shall be made by a law passed by a majority vote comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of the Representatives belonging to the Turkish Community.*

The first point, then, is the clear distinction which is made between the basic Articles (non amendable) and the non-basic Articles (amendable). Therefore, before amending an Article, it is important to examine whether such an amendment is possible. This might be an additional problem in the attempt to



harmonise the legal provisions of the Cypriot constitution to be compatible with those of the EU. The problem is, first, the limitation of the scope for a general amendment of the Constitution and second, the possibility that these basic Articles could actually jeopardise the accession of Cyprus to the EU. Therefore, an analysis of the effect of these basic Articles, regarding the Cyprus' membership to the EU, will be attempted below.

The second important point which has to be considered is the actual procedure for amending the Constitution, bearing in mind the absence of the Turkish Cypriot Representatives. Basically, there exist three different views.<sup>3</sup> The first is that no amendment to the Constitution is possible at all, because of the absence of the Turkish Cypriots. The second is that constitutional amendment is possible, but only so as far as it concerns the non-basic Articles, and is based on the law of necessity. Finally, the third view suggests that any possible amendment depends on the actual necessity for amendment and whether such an amendment is justified under the principles of the law of necessity. The third view seems to be the most acceptable, since it seems that is also supported by the jurisdiction of the Supreme Court of Cyprus.

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<sup>3</sup> See, Clerides, C., 'Η Δυνατότητα Τροποποίησης του Συντάγματος της Κυπριακής Δημοκρατίας', [The Possibility of Amending the Cypriot Constitution], Article in the Cypriot daily newspaper "Αλήθεια", 13/1/1990.

### 6.1.1 Amending the non-basic Articles of the Constitution

In Plea No. 3/89 of the Autocephalus Church of Cyprus,<sup>4</sup> the Supreme Court reaffirmed that, according to Art. 182.3 of the Constitution any potential amendment of non-basic Articles depends on separate majorities of Greek Cypriot and Turkish Cypriot Representatives. Therefore, the existence of the Turkish Cypriot vote appears to be necessary. It has also been highlighted that this provision applies, regardless whether the suggested amendment concerns only one or both of the two Communities.

The Court has also reconfirmed that there is no precedent for a constitutional amendment without the participation of both of the Communities, in cases where the amendment would affect only one of them.

More specifically, in this Plea, the Court referred to Ref. 1/86<sup>5</sup> and noted that in that Reference the Court did not reach a decision suggesting that in cases where an amendment affected only one of the two Communities, the participation of the other Community would not be necessary for achieving it. For example, if an amendment concerns only the Greek Cypriot Community, no decision has been reached by the Supreme Court to support the view that such an amendment may be achieved by the vote of the Greek Cypriot Representatives alone.

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<sup>4</sup> 29/12/1989.

<sup>5</sup> *President of the Republic v House of Representatives* (1986) 3 CLR 1439.

However, Reference 1/86, does not exclude the possibility that such a decision could be reached in the future. In fact, such a decision would not be groundless if we consider the current conditions in Cyprus. Of course, such a decision should be based on and regulated by the principle of the law of necessity.

More particularly, Ref. 1/86 concerned the possibility of amending Articles 63 and 66 of the Constitution without the vote of the Turkish Cypriot Representatives. The Court in its conclusion noted that to justify any amendment of non-basic Articles of the Constitution, regardless of their effect on the Communities, the existence of a major reason alone is not enough; those reasons must also be justified according to the principle of the law of necessity.<sup>6</sup>

As Pikis J. and Kouris J. mentioned in the above decision, any reference to the principle of the law of necessity is justified only when the constitutional order and basic functions of the State are in danger. In addition, they emphasised that the House of Representatives should not have unlimited power to amend the Constitution.<sup>7</sup>

In other litigation<sup>8</sup>, the Supreme Court has referred to the constitutionality of Law 95/89 and Law 23/90. Those two Laws provided for the establishment of civil marriage and the issuing of divorces by the Family Courts according to the first amendment of Art. 111 of the Constitution which originally provided that

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<sup>6</sup> Ibid., 1444.

<sup>7</sup> Ibid., 1446-1450.

<sup>8</sup> *Nikolaou v. Kyriakides* (1992) 1 CLR 356. In this case the Supreme Court (16/12/92) concerned the Legal Question No. 282, as it has been referred by the Nicosia Family Court (according to the provisions of Art. 144 of the Constitution) related to the References 17/90 and 24/90.

these issues were under the exclusive competence of relevant religious authorities for each community. The question, then, was whether those Laws which had been passed without the presence of the Turkish Cypriots could be considered as unconstitutional, since according to the provisions of Article 182, any amendment of non-basic Articles demands separate majorities of the Greek Cypriot and Turkish Cypriot Representatives. The Members of the Court, in their decision for this case, expressed two different opinions.

According to the opinion of D. Stylianides J., A. Kouris J., I. Papadopoulos J., I. Pogiatzis J. and G. Chrysostomis J., those Laws could not be considered as unconstitutional. They supported the view that the absence of the Turkish Cypriots could not deprive the House of Representatives from its power of making amendments to the non-basic Articles of the Constitution. The potential lack of power of the House of Representatives to make amendments would have transformed the non-basic Articles to basic ones. If this is to be considered as a fact, then, consequently, a basic function of the State, namely the power of constitutional revision, is in danger. The power of the House of Representatives of constitutional revision is not only an important one but a necessary one, and therefore the law of necessity could provide for its continued functioning. The power to amend the Constitution serves the smooth adaptation of the Constitution to evolving socio-economical changes without interrupting the continuation of the Law.

Moreover, according to their opinion, the law of necessity justifies the power of the House of Representatives to make amendments to the Constitution, even in

the absence of the Turkish Cypriots, since their absence is self-imposed. Also, they emphasised that the Court is obliged to support the continued functioning of the Constitutional Institutions of the Republic, especially under the difficult situation which exists in Cyprus today.

On the other hand, the President of the Supreme Court A. Loizou J. and Pikis J., Artemis J., Constantinides J. and Nikitas J. expressed the opposite opinion, holding that both Laws were unconstitutional, for the following reasons.

Primarily, they emphasised that the law of necessity seeks to support the proper application of the constitutional legal order under extremely special conditions, and by no means, seeks to replace and change the existing constitutional principles. If the power to amend the Constitution without the vote of the Turkish Cypriots was justified by the law of necessity, then the whole legal system, as it exists in Cyprus today, would be jeopardised, since the whole Constitution could be amended in such a way as to exclude Turkish Cypriot participation. In such a case, the law of necessity would have resulted in a complete change of the constitutional legal order of Cyprus, and its application would definitely have been misused.

Thus, it is important, before deciding whether an amendment of the Constitution is justified by the law of necessity (because of the absence of the Turkish Cypriots), to examine its effect. Is the amendment necessary for the continuation of the functioning of the State? If this amendment is not successful, is there a danger of the collapse of the State? These questions focus on the necessity of the

amendment and not on the necessity of amending without the vote of the Turkish Cypriots.

Also, the above mentioned Judges, in their opinion, argued whether the whole application of the law of necessity as it exists today in Cyprus, demands reconsideration because of its lengthy existence.<sup>9</sup> The application of the law of necessity is temporary, whereas the constitution is a permanent element of the legal order with a perpetual perspective. Consequently, any amendment of the Constitution without the strict application of the provisions of Art. 182, could potentially have lead to the total reformation of the constitutional order. In this case, it is obvious that the unwise use of the law of necessity for amending the constitution could seriously change the very character of the Cypriot Constitution.

According to the above judgments, then, it seems that the House of Representatives (as it is constituted today) must be very careful in its decisions to amend any part of the Constitution. Any potential amendment must be achieved only by reference to Art. 182 of the Constitution and only if the law of necessity justifies such an amendment. Accordingly, only the non-basic Articles of the Constitution could be amended and only in cases where such an amendment is absolutely necessary for the smooth continuation of the functioning of the Republic. Basically, on the one hand, the intentional withdrawal of the Turkish Cypriots must not be allowed to paralyse the

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<sup>9</sup> The Law of Necessity was first introduced in the Cypriot legal order in 1964 by the *Ibrahim Case*. (*The Attorney General of the Republic v Mustafa Ibrahim (1964) CLR 195*. See Chapter One.

functioning of the House of Representatives, but on the other hand, the House of Representatives should not take advantage of this situation to transform the Constitution against its prior exceptional character.

Additionally, it could also be argued that since the House of Representatives still functions and still enacts Laws according to the principle of the law of necessity, without the participation of the Turkish Cypriots, the same principle could justify its power to make amendments as well. In fact, even the Supreme Court itself, as it functions today, is a product of a constitutional amendment which was achieved without the participation of the Turkish Cypriots. This amendment, rightly, is not considered unconstitutional, since it was important for the continuation of the functioning of the State and therefore could be justified by the law of necessity.

Thus, for the amendment of non-fundamental Articles of the Constitution, the procedure under Art. 182(3) is still valid and should be respected. Any deviation from the provisions of Art. 182(3) should be valid only if it is justified by the law of necessity. Therefore, one could argue that the absence of the Turkish Cypriot Representatives from the amending procedure does not automatically give the right to the Greek Cypriot Representatives to amend the Constitution by themselves. The power of doing so, according to the present conditions, relies on the principles of the law of necessity and only in cases where the law of necessity justifies the amendment as absolutely necessary, do the Greek Cypriot Representatives have the power to vote for an amendment.

Under these circumstances, any necessary amendment of non-basic Articles of the Constitution, for the smoother accession of the Republic of Cyprus to the EU, should be justified by the law of necessity. This provides us with further difficulties, since the strict and limited implementation of the law of necessity may not justify all the potential amendments demanded for the implementation of the EU legislation into the Cypriot legal order. However, one could rightly argue that in cases where a non-fundamental Article of the Constitution is in conflict with international conventional obligations of the Republic, the law of necessity could justify its amendment. In such a case, not only would there not be a major reason for the amendment of the relevant Articles, but also the necessity for their amendment would supersede the statutory necessity for their non-amendment.

Therefore, as it appears from the above, any amendment of non-basic Articles of the Constitution relevant to the accession of Cyprus to the EU should preferably happen after the final negotiations and the signing of the Treaty of Accession. In this case, all the necessary amendments could be justified better by the law of necessity.

In addition to this, one could also support the view that a referendum for the final signing of the Treaty of Accession and also for the suggested amendments of the Constitution could be very helpful for the better application of the law of necessity. However, this argument might not be so strong, since the performance of a referendum does not necessarily provide the base for the implementation of



the law of necessity. The referendum proposal could possibly pose a danger of a future unlimited and unwise use of the law of necessity.

As a conclusion, then, one could strongly emphasise that the possibility of constitutional amendment of non-basic Articles is not excluded from the juridical point of view. Any other conclusion, supporting the view that no amendment is possible, would definitely cause serious legal problems for the accession of Cyprus to the EU and could also assume the prior solution of the political problem as a pre-requirement for Cyprus' EU membership. However, as mentioned in previous chapters of this thesis, according to the Conclusions of the European Council at the Helsinki Summit, the prior solution of the political problem of Cyprus is not a pre-requirement for the accession of Cyprus to the EU.<sup>10</sup>

### **6.1.2 Amending the basic Articles of the Constitution.**

The law of necessity, as it has been explained above, could, in some cases, provide the power for the constitutional amendment of non-basic Articles. However, could the same view be held for the basic Articles of the Constitution as well? This is a crucial question to be answered, since it is likely that some basic Articles of the Constitution might appear to be problematic in regard to the smooth accession of Cyprus to the EU.<sup>11</sup>

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<sup>10</sup> Helsinki EU Council, Presidential Remarks, 10-11 December 1999, para. 9 (b).

<sup>11</sup> In Chapter 6.2 there is a selection of some Articles (basic and non-basic) which might be problematic with regard to Cyprus accession to the EU.

In order to answer this question, firstly it is important to examine the constitutional background for the existence of basic (non-amendable) Articles in the Constitution of Cyprus.

As a starting point, it may be noted that Cyprus is not the only State in the world with basic (non amendable) Articles in its Constitution. Normally, all written constitutions lay down a specific process for the change of the constitution, and the more specific the rules, the greater the incidence of constitutional inertia. Those special provisions laid down for the change of the Constitution emphasise the difference between ordinary law and superior law. The most common constitutional approaches to constitutional inertia involve the following mechanisms, singly or in combination: a) qualified majorities; b) referendum; c) delay; d) confirmation by a second decision and e) confirmation by sub-national government.<sup>12</sup>

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<sup>12</sup> For example, the Italian Constitution requires two positive decisions within both Chambers of the National Assembly within three months. The Greek and the Swedish Constitutions stipulate that constitutional change needs two positive decisions by two Parliaments, where there have been ordinary elections to Parliament in between. The Norwegian Constitution only requires delay (i.e. the proposal concerning a change of the Constitution can only be decided after a new Parliament has been elected through ordinary elections every fourth year but there must also be a qualified majority of two-thirds). In France, for the constitutional change, there is a requirement of a majority of 60% in both Chambers of the National Assembly, or a simple majority decision in each chamber combined with a referendum. In Portugal, a two-thirds majority is required and similarly in Finland. However, the Finnish Constitution requires both delay and confirmation (the first positive single majority decision has to be confirmed by Parliament by a second positive two-thirds majority decision, with elections having taken place in between, or, if there is no time for such a long process, then one five-sixths majority decision in Parliament is enough). The Danish Constitution outlines quite a complicated process of constitutional revision. First there must be a positive decision in Parliament, then a new positive decision by Parliament and finally confirmation by a referendum where there has to be at least 40% of votes for the decision among all those eligible to vote, besides of course that *yes* must defeat *no*. In the Austrian and Irish Constitutions, any constitutional change requires an obligatory referendum in which simple majority is enough. A rather complicated process can be found in the Netherlands and Belgium. The Dutch Constitution involves delay, confirmation and a qualified majority vote and according to the Belgian Constitution there must be a decision that a constitutional revision is needed and then Parliament will be dissolved, after which new constitutional provisions may be enacted with

However, certain articles may also be laid down in a Constitution that are considered unalterable. For example, the 1949 German Constitution (Article 79.3) rules that:

*An amendment to this Basic Law affecting the organisation of the Federation into Lander, the basic participation of the Lander in legislation, or the basic principles laid down in Articles 1 and 20, is inadmissible.*

The German Constitution, then, similarly to the Cypriot, explicitly rules out certain changes in the Constitution. More specifically, it gives permanent constitutional protection to certain rules about basic rights, a democratic regime and the federal nature of the State.

Similarly, certain limits to constitutional change are also included in the Portuguese Constitution. Article 288 of the Portuguese Constitution provides for certain limitations on matters of revision and specifies that *laws revising the Constitution shall respect* a list of sixteen matters, while Article 289 provides restrictions on the time of revision.

Also, Article 139 of the Italian Constitution reads: *The republican form of the State cannot be the subject of constitutional amendment.* Norway's Constitution imposes limitations that are perhaps more sweeping. After laying out procedures for amendment, Article 122 adds: *Such amendment must, however, never*

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a two thirds majority. However, the most complicated process is probably found in the American Constitution, where there are not only qualified majority requirements, but also confirmation and

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*contradict the principles embodied in this Constitution, but merely relate to modifications of particular provisions which do not alter the spirit of this Constitution.*

From a theoretical perspective, the existence of unalterable basic Articles in a Constitution, could justifiably raise several arguments.<sup>13</sup> In particular, for how long could “basic” Articles remain “basic”, if the will of the people is strongly in favour of a change? This is the most important argument against the existence of restrictions for amending the Constitution. It is the conflict between the principle of democracy, in the sense of the sovereignty of people, versus the restraints of a constitution as *lex superior*. Why should a sovereign legislature or a sovereign people choose to restrict its power to make and change the constitution in accordance with the will of the majority?

The answer to this lies, most of the time, in the constitutional background<sup>14</sup> of the State. Reasons like the existence of minorities and the necessity for the

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outside involvement.

<sup>13</sup> Kahn, R. strongly supported the necessity for constitutional changes since *problematics about institutions and the faith that we hold in them also changes, as do the individual rights we believe are needed to protect fundamental constitutional values.* (“*The Supreme Court & Constitutional Theory, 1953-1993*”, University Press of Kansas, 1994 at p.266) See also, Levinson, S. (Ed.) “*Responding to Imperfection; The Theory and Practice of Constitutional Amendment*”, Princeton University Press, 1995; with particular reference to Article Eight (Murphy, W.F., ‘Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity’) and Article Nine (Vile, J.R., ‘The Case against Implicit Limits on the Constitutional Amending Process’). Also, ‘Symposium; Constitutional Change and Politics in History’ edited in *The Yale Law Journal* [Vol. 108, 1999; pp 1917- 2163] includes several Articles providing arguments about changing the American Constitution. Although those Articles refer to the American Constitution, there are several interesting arguments with a general effect.

<sup>14</sup> Each constitution is normally a reflection of its historical background. *Constitutions have, of course, been granted or adopted for many different reasons. New constitutions have marked stages in progression towards self-government (as in most British colonies before independence); they have established a system of government in a newly independent state (as in the United States of America in 1787), or in a reconstituted state (such as Malaysia in 1963 or*

protection of their rights could rightly justify certain restrictions on constitutional change.<sup>15</sup> Also, as in the case of Cyprus where the constitution was a product of an international agreement for a political solution to a dispute, such provisions are guarantors for the respect of the very character of the solution.

Also, as Oliver Cromwell told his several parliaments *in every government there must be somewhat fundamental, somewhat like a Magna Carta, that should be standing and be unalterable...*<sup>16</sup> It could be argued that the supreme and sometimes the unalterable existence of a constitution is what makes a “constitution” a “constitution” and an element which provides stability to the state. Although it is not within the scope of this thesis to analyse the various constitutional theories and constitutional forms, it is important to mention the plethora of constitutional theories which provide a variety of arguments about the existence of rigid constitutions and their effect. What is important to be mentioned is that, whatever the constitutional background and form, there must be a certain constitutional flexibility. Constitutions should be able to be adjusted according to the demands of the time, preferably, though, under a strict process

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*Tanzania in 1964 or Germany in reunification in 1990); they have marked a major change in the system of government (as in Spain in 1978); they have adopted in order to rebuild the machinery of government following defeat in war (as in the Federal Republic of Germany in 1949); and they have declared a new beginning after a revolution, or after the collapse of a regime (as in France in 1791 and in 1958). Brazier, R., “Constitutional Reform, Reshaping the British Political System”, Oxford University Press, 2<sup>nd</sup> Ed., 1998, at p. 1.*

<sup>15</sup> It has been rightly observed that the principle of democracy could be in conflict with the prohibition of a constitutional change. Nevertheless, ... *a people could not legitimately use the democratic process to destroy the essence of democracy - the right of others, either of a current majority or minority or of a minority or majority of future generations, to meaningful participation in self governments.* See, Murphy, W.F., *supra* note 13, at p. 179.

<sup>16</sup> Friedrich, C.J., “*Constitutional Reason of State*”, Brown University Press, 1957, at p. 119.

which will guarantee the perpetual power of a constitution.<sup>17</sup> Normally, such “no change” rules bind the State too closely to already existing constitutional rules.

Nevertheless, such “no change” rules are clearly set out in the Constitution of Cyprus, and whatever the criticisms against them, should be respected. As mentioned above, those unalterable Articles exist mainly for the protection of the political solution granted to Cyprus and for the protection of the Turkish Cypriot community (minority) in relation to the Greek Cypriot community (majority). It was a mechanism used by the founders of the Constitution, for the mutual respect of both communities, under the political settlement which resulted in the birth of the new state: the Republic of Cyprus.<sup>18</sup>

Therefore, it seems that any attempt to amend those non-amendable basic Articles would be against the provisions of the Constitution. Any argument providing for the application of the law of necessity regarding the amendment of the basic Articles would seem equally unsuccessful. As it has already been emphasised, the law of necessity is a means for the continuation of the functioning of the State, but it by no means seeks the change of the constitutional order. It is a temporary device and cannot be used as a tool for the change of the nature of the constitution. Article 182.1 of the Constitution

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<sup>17</sup> However, according to the Chief Justice of India, *a Constitution is only permanent and not eternal*. (*Golak Nath's case*, [1967] AIR 1643, 1670). This quotation expresses, in a very distinctive and successful way, the importance of the ability of a Constitution to be adjusted according to the demands of time, while preserving its perpetual character.

<sup>18</sup> Although, that political condition has been *de facto* destroyed by the 1974 division of the island (presumably, the change of the political nature of the state was one of the main tasks of the 1974 invasion), *de jure*, the Constitution is still valid, and the official recognised organs of the Republic of Cyprus must respect it. Any disrespect to the existing Constitutional provisions, would automatically mean the change of the whole character of the 1960 settlement and therefore the current *de facto* situation would equally be and *de jure*.

explicitly provides that the revisional power of the House of Representatives is not extended to the basic Articles which are listed in Annex III of the Constitution.<sup>19</sup>

The non-amendable character of the basic Articles of the Constitution should be preserved and respected. It is an important task, therefore, to examine whether the existence of basic Articles could pose problems in relation to the accession of Cyprus to the EU and the application of the EU legislation in the Cypriot legal order. However, it is important to mention, that their unalterable character does not mean their *ab initio* incompatibility with the legal obligations placed upon the Republic of Cyprus by its potential accession to the EU.

The problem of the non-amendable basic Articles of the Constitution, then, should be faced in a very distinctive but not a facile way. There must be a balance between their unalterable character and the State's harmonisation with the European legislation. Whenever there is a conflict between those two elements, there must be a general formula for facing the problem. There might be several proposals as to how to achieve this balance. A proposal suggesting a detailed analysis of all the basic Articles and an examination of their compatibility with the EU legislation, however, would definitely provide us with a particularly useful analysis of any potential incompatibility, though such a method would merely result in a temporary solution of the problem. Thus, a more general formula providing guidance on how to tackle the problem would definitely give a more helpful and permanent solution.

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<sup>19</sup> Annex III has been incorporated from the Zurich Agreement dated 11<sup>th</sup> February, 1959.

It seems that nothing, concerning their compatibility with the EU legislation, could be done before the accession of Cyprus to the EU. After the accession, provided that those basic Articles do not prevent Cyprus from acceding to the EU,<sup>20</sup> the embodied provisions for the transfer of powers from the Republic of Cyprus to the EU might provide a solution to the problem. The amendment of the non-basic Article 169 of the Constitution by an addition providing for the transfer of powers to the EU would result in the application of the EU law in the Cypriot legal order. Also, as it has been explained in Chapter Four, the application of the treaty of accession and the EU legislation should have superior force.

As a matter of fact, then, a potential constitutional conflict must be faced with regard to the priority to be given to the conflicting Articles.<sup>21</sup> An article might be given superior force, not necessarily by the annulment or the inferiority of another one, but simply by the latter's non-application.<sup>22</sup> This is a technical solution which might be useful with regard to the basic articles' unalterable

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<sup>20</sup> As it has been mentioned in Chapter Three there is no Article directly providing against the accession of Cyprus to the EU. Basic Article 185(2) seems the only one which might pose a constrain on Cypriot membership of the EU, but as it has been analysed in Chapter Five, this is not the case.

<sup>21</sup> In Germany, the *Bundesverfassungsgericht* firstly, proposed reconciliation through structural interpretation and secondly, stated that *a constitutional provision itself may be null and void is not conceptually impossible just because it is a part of the constitution. There are constitutional principles that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void, because they contravene those principles.* (The *Southwest Case*, 1 BVerfGE 14 (1951)). Also, the American President Madison (see Murphy, W.F., *supra* note 13, p. 178) referred to *two rules of construction, dictated by plain reason, as well as founded on legal axioms.* Accordingly he pointed out that, firstly, *every part of the expression ought if possible, to be allowed some meaning, and be made to conspire to some common end* and secondly, *where the several parts cannot be made to coincide, ... the less important should give way to the more important part; the means should be sacrificed to the end, rather than the ends to the means.*

<sup>22</sup> See, *Toula Malachtou v Armefti*, (1987) 1 CLR 217.



character and their potential conflict with EU legislation. It is possible, then, that after the accession, some articles may become, *de facto*, displaced but not necessarily repealed.<sup>23</sup> It is, therefore, up to the judicial will to give priority to the amended Article 169 guaranteeing the constitutional validity of transfer of powers to the EU.

Also, as a matter of law, it is up to the Court to decide whether there is any conflict between a basic Article and EU provisions. The Court for deciding whether there is a conflict or not, would have to be based on the interpretation of the Article. Therefore, a presumable conflict might not always be an actual one, if according to the Court's interpretation the scope of the Article is not in conflict with the relevant, and seemingly conflicting, provisions. This is the case of Article 185(2) of the Constitution where the exclusion of an integral or partial union of Cyprus with any other State, could not be interpreted as an exclusion for the accession of Cyprus to the EU.<sup>24</sup>

Therefore, as a conclusive remark, it could be argued that the difficult task of harmonising the basic Articles of the Constitution with the EU legislation depends upon successful implementation by the judiciary, after, of course, of the signing of the Treaty of Accession.

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<sup>23</sup> It is also possible that a provision might be self-destructed by implication. In the American Constitution, the prohibition against amending the clause forbidding regulation of the importation of slaves self-destructed in 1808. See Murphy, W.F., *supra* note 13, at p. 175.

<sup>24</sup> See Chapter Five.

Referring to Germany, which faced similar problems in adopting the EU legislation, because of the existence of inalienable fundamental rights in the Constitution (Basic Law), the judiciary provided many arguments in several cases on how to face the problem. Although it seems that the German Courts appear rather reluctant in renouncing the supreme power of the unalterable fundamental constitutional provisions, they managed to find a compromising way in the favour, though, of the constitutional provisions. In the *Internationale Handelsgesellschaft* case,<sup>25</sup> the German Constitutional Court maintained its right to uphold German fundamental rights even in the face of a conflict with Community law. In a later case,<sup>26</sup> though, the German Court decided that it would no longer examine compatibility between Community legislation and German fundamental rights while the Community continues to protect those rights adequately. It was an expression of trust on behalf of the German judiciary that the European Court would secure the EC legislation to be within the provisions of fundamental rights. However, in the famous *Maastricht* case in 1993 the German Constitutional Court decided that the European Court has the primary responsibility of securing fundamental rights but hinted that if that Court failed to carry out the task adequately the German Constitutional Court would do so.<sup>27</sup> By that way, then, the German Courts on the one hand, reserved the right of giving priority to German fundamental rights but on the other hand they reconfirmed their compatibility with EU legislation.

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<sup>25</sup> *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, decision of 29<sup>th</sup> May 1974, BVerfGE 37, S. 271; [1974] CMLR 540.

<sup>26</sup> *In re the Application of Wunsche Handelsgesellschaft*, also known as the *Solange II* case, decision of 22 October 1986, *Europaische Grundrechte-Zeitschrift*, 1987, p. 1; [1987] 3 CMLR 225.

<sup>27</sup> *Brunner v European Union Treaty* [1994] I CMLR 57.

Nevertheless, it has to be emphasised that, in Germany, the provisions of those fundamental rights have not been in a direct clash with the EU legislative provisions. Thus, this cannot be the case in Cyprus since the actual provisions of some basic Articles of the Constitution may be incompatible with the EU legislation. Therefore, it seems that Cypriot Courts have, *pro tanto*, a more difficult task to achieve.

## **6.2 Articles of the Constitution lacking compatibility with EU legislation.**

Although, as it mentioned above, the most of the changes of the Constitution should take place after the signing of the Treaty of Accession of Cyprus to the EU,<sup>28</sup> it is important to confine certain constitutional provisions which appear to be problematic in regard to the existing European legislation and might pose several problems to its application and effect in the Cypriot legal order after the accession. It is not the task to propose their current amendment in order to be compatible with the EU legislation, but merely to specify as indications for future, after the accession, some necessary amendments (for non-basic Articles) and judicial arrangements (for basic Articles).

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<sup>28</sup> Any amendments to the non basic Articles of the Constitution, as explained above, should be justified by the proper application of the law of necessity. In order for the law of necessity to be properly applied there must be a legal basis to justify the necessity. Therefore, any constitutional amendments necessary for the harmonisation of the constitutional provisions to Community legislation should be made after the signing of the Treaty of Accession, since otherwise, it could be argued that by the absence of the signing of the Treaty of Accession, there is not a legal basis justifying the necessity. Of course, for preventing any conflict with Community provisions, such amendments could be better made after the signing of the Treaty of Accession but before the procedure for the approval and the conclusion of the Treaty of Accession. According to Art. 169 the Treaty ...*shall be negotiated and signed under a decision of the Council of Ministers and*

For this reason, it seems necessary to divide the following “problematic” Articles into two categories; the non -basic and the basic.

### **6.2.1 “Problematic” non-basic Articles.**

Non-basic articles of the Cypriot Constitution which potentially clash with certain principles and provisions of EU legislation, and could therefore give rise to problems in the event of Cyprus’ accession to the EU, include provisions related to citizenship, the exercise of executive power, the legislative power and elections arrangements, currency and judicial power. The potential difficulties, and the measures that would be needed to bring the Cypriot Constitution into line with EU legislation, are analysed hereunder, for each of the “problematic” articles in turn.

The first difficulty arises in relation to a provision of the Constitution with regard to citizenship and discrimination between sexes. Article 2.7 (a) and (b) provide that a married woman and unmarried children under the age of 21 shall belong to the husband’s/father’s Community. This constitutional provision might be considered to be in contradiction with the fundamental personal rights protected by the EU legislation providing for non sex discrimination. More specifically, it might be considered as inconsistent with the principle providing for equal treatment of women and men. This principle could be considered as an evolving one, since before the ToA the principle was mainly limited to the

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*shall be operative and binding to the Republic when approved by a law made by the House of*

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provision of equal pay between the sexes.<sup>29</sup> The ToA, though, definitely provides for the general respect of the principle and for the expansion of its effect. Additionally, the ECJ has stated that the general principle of equal treatment between men and women is a fundamental one in the Community legal order. Specifically, the Court, in the case of *Defrenne*<sup>30</sup> originally and more recently in the case of *P v S*,<sup>31</sup> ruled that the elimination of sex discrimination was one of the fundamental personal human rights which had to be protected by the Community.

Therefore, in regard to Article 2(7) (a) and (b) of the Cypriot Constitution, an amendment would need to be made in order to provide and safeguard the right of married women to retain their membership of their Community of origin and also to allow to children to belong to their mother's Community, if this is desired. Such an amendment would be necessary to give effect to the principle of equality between the sexes.

Several articles in the Constitution dealing with the exercise of executive power raise potential problems with regard both to who may exercise such power (Art. 46) and the manner and scope of its exercise (Arts. 48-50, Art. 54).

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*Representatives where upon it shall be concluded.*

<sup>29</sup> Actually, it was Article 141EC (ex 119) which established the principle of equal pay between sexes. However, the fact that the Treaty of Amsterdam managed to incorporate the Social Policy Agreement as part of the Treaty (Articles 136-148) provided a new dimension for the respect of the principle of equality between the sexes into a more general effect. The progress of the EU legislation has been significant and the principle of equal treatment on grounds of sex has been also gradually achieved by the ECJ. Significantly, the amended Article 3 EC provides that in all of the Community's activities "the Community shall aim to eliminate inequalities, and to promote equality, between men and women". Also, Article 13 inserted by the Treaty of Amsterdam gives the Council, amongst others, to adopt legislation to prohibit discrimination between sexes.

<sup>30</sup> Case 149/77, *Defrenne v Sabena* [1978] ECR 1365, [1978] 3 CMLR 312. See paras. 26-27.

<sup>31</sup> Case C-13/94, *P v S. and Cornwall County Council* [1996] ECR I-2143. See para. 19.

According to Article 46, the executive power is to be exercised by the Cypriot Council of Ministers. However, after accession, the EU Council must also be vested with power to exercise executive power. The necessary provision could be made in one of two ways; either by an additional clause explicitly making such a provision, or by reference to the amended Article 169 providing for the transfer of powers to the EU. It should, however, be noted that Art. 46 is a basic one except for its fourth paragraph. Thus, the earlier paragraphs are non-amendable and any addition must be included in paragraph four.

As to the scope of the executive power, according to Article 48 (d) and (f) and Article 49 (d) and (f) the executive power exercised by the President and the Vice President of the Republic provides them with a right of final veto on laws or decisions of the Council of Ministers and the House of Representatives, on matters concerning foreign affairs, defence or security. It is necessary, however, that those constitutional provisions should take into consideration any potential engagements and obligations towards the EU. Such engagements and obligations may derive under the provisions of the European Common Foreign and Security Policy<sup>32</sup> or with the general principles regulating the external

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<sup>32</sup> The Common Foreign and Security Policy (CFSP) was included in the TEU under Title V. It is an evolution of the European Political Cooperation (EPC) system as it was set out by Article 30 SEA. The provisions of Title V are by far, though, more obligatory in nature (See, Eaton, in O'Keefe and Twouey (eds.), *Legal Issues of the Maastricht Treaty*, Chichester, 1994). A number of changes were made to the second pillar (Title V) by the Amsterdam Treaty, although on the whole as far as the structure and the institutional involvement is concerned, it is not radically different. According to Article J. 1 (3), there are two means by which the objectives of the CFSP are to be achieved. Firstly, by establishing systematic cooperation between member States in the conduct of principle, in accordance to Article J.2 TEU, and secondly by gradually implementing, in accordance to Article J.3 TEU, joint action in the areas where the Member States have important interests in common. Moreover, the systematic cooperation may result in the Council defining common position if it deems necessary (Art. J.2 (2)), which is agreed unanimously (Art. J.8(2)) and binds the Member States (Art. J.2 (2)). Additionally, according to

relations of the EU and its power in negotiating and signing various international treaties<sup>33</sup>.

In other words, it must be ensured that the power of the veto will not be used to renege on or withdraw from such regional commitments. Similarly, certain consideration to the EU engagements must also be given in regard to the provisions of Art. 50(1) (a) (ii) and (iii) concerning the Presidential and Vice Presidential right of veto regarding such foreign affairs matters as the recognition of states, the establishment of diplomatic and consular relations

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Article J.2 (3) Member States must coordinate their action. Although, unanimity is the general rule, the Council may by unanimous vote, when adopting joint action or at any stage during its development, decide that certain matters will be decided by qualified majority (Art. J.3 (2)). Also Declaration 27 annexed to the TEU notes the agreement that Member States will, to the extent possible, avoid preventing a unanimous decision where a qualified majority exists in favour of this decision. Also *an amendment made by the ToA (Article 23) refers to the possibility that a Member of the Council may abstain from a vote and make a formal declaration ensuring that that Member State is not obliged to apply the decision even while accepting that it commits the Union, and that State must not obstruct Union action based on that decision.* (See, Craig, P. and De Burca, G., *EU Law; Text, Cases and Materials*, Oxford University Press, 2<sup>nd</sup> Ed., 1998, at p. 41).

<sup>33</sup> The EU is conferred with certain treaty-making powers as a result of the extension of its legal personality (Art. 281 EC (ex. 210) provides for the legal personality of the Community) from the internal legal sphere to the international legal sphere (See, Charlesworth, A. and Cullen, H., *European Community Law*, Pitman Publishing, 1994, at p. 63). The European Court, in Case 6/64, *Costa v ENEL* [1964] ECR 1441, at 1159, referred to the Community's *capacity of representation on the international plane*. Additionally, Articles 133 and 310 EC (ex. 113 and 238) provide for the treaty-making powers granted to the Community. The Community, therefore, is granted with the right to negotiate any tariff agreements with non-EU members and treaties relating to its common commercial policy (Art. 133 EC). Finally, Article 310 EC provides for the conclusion of association agreements with non Member States of the EU, or international organisations, by *establishing an association involving reciprocal rights and obligations, common action and special procedures*. Also, Articles 302-304 EC (ex. 229-231) provide for the establishment and maintenance of relations with international organisations, like the United Nations, GATT, the Council of Europe and the Organisation for Economic Cooperation and Development. A further development concerning the external relations of the EU was made by the ECJ in *ERTA* case (Case 22/70, *Commission v Council* [1971] ECR 263) by developing the doctrine of parallelism, which states that the Community's international relations power should co-extensive with its internal legislative powers. The Court has also decided that the Community's external relations power arises not only from an express conferment by the Treaty, but may equally arise from other provisions of the Treaty, from the Act of Accession and from measures adopted within the framework of those provisions. (*Kramer Case*, 3, 4 & 6/76 [1976] ECR 1279; [1976] 2 CMLR 440). Additionally, in Opinion 1/76, *Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741, the Court clarified that the Community may enter into international commitments not only by an express attribution by the Treaty, but, also, implicitly from its provisions. ( See, Charlesworth, A., and Cullen, H., *op. cit.*, at p. 64-68).

with other countries and the interruption of these relations and, also, the conclusion of international treaties, conventions and agreements with third countries (non members of the EU).

The other “problematic” Article with regard to the exercise of executive power is Article 54, whereby the Council of Ministers shall exercise executive power in matters including foreign affairs (Art. 54(b)), consideration of Bills to be introduced to the House of Representatives by a Minister (Art. 54(f)) and making of any order or regulation for the carrying into effect of any law as provided by such law (Art. 54 (g)). Firstly, then, in concern to Art. 54(b) there must be a general reservation which will take into consideration any obligations towards the EU. Then, in regard to Art 54(f), EU regulations must be excluded since they will be directly applicable in domestic law. Special reference might, however, be made in relation to EU directives which could be implemented in domestic law via decrees of the Council of Ministers. Finally, concerning Art. 54(g) it should specified that for EU matters, any order or regulation could come directly from the Ministers.

Another area in which the existing constitutional provisions will be inconsistent with European provisions or inadequate to cope with the European dimension of political activity in Cyprus is that of electoral activity. Article 63(1) provides for the right of Cypriot citizens to be registered as electors in either the Greek or the Turkish electoral list. However, according to Article 19 EC (ex 8b) European citizenship gives the right of electing and being elected in municipal and communal elections to all citizens of the EU. Also, according to Article 19 EC



citizens of the EU have the right of electing and being elected in elections for the European Parliament. Therefore, an amendment, most probably by addition, would need to be made to Article 63.1, in order to safeguard for both Cypriot and other EU Member States' citizens the electoral rights deriving from European citizenship

Similarly, Article 64 of the Constitution, providing for the elections of the House of Representatives, must also be amended in order to include European Parliament elections as well.<sup>34</sup> Additionally, the title of Part IV of the Constitution should be changed to "The House of Representatives and the European Parliament" in order to reflect the expanded scope of political rights to which it refers.

A problem may also arise in relation to Article 119 which makes provisions concerning the issuing and administration of currency laws of the Republic. There is a need, however, to ensure that the currency policy of the Republic is in line with that of the EU. This can be provided explicitly by means of an addition to Article 119.

The greatest number of non-basic Articles which may be "problematic" in relation to Cyprus accession to the EU, are to be found amongst the provisions relating to judicial power. In general terms, the issues raised in this regard concern the need for EU law to be explicitly included amongst the areas in which the relevant courts have jurisdiction, and the potential, in addition to the

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<sup>34</sup> As provided by Article 20 of the Treaty of Amsterdam.

existing arrangements, for matters to be brought before the ECJ. Also, the Cypriot Courts should adopt, when possible, the duty of interpreting national law in the light of the EU legislation.<sup>35</sup>

Article 136 provides that, *the Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on all matters as provided in the ensuing Articles*. However, one of the effects of Cyprus' membership to the EU would be the necessary transfer of judicial power to the ECJ. A possible amendment might be enforced in order to provide that any decision of the Supreme Court on issues concerning the EU legislation and policy, could be referred to the ECJ.<sup>36</sup>

Article 140, provides for the right of the President and the Vice President of the Republic to refer to the Supreme Court for its opinion the question as to whether any law or decision or any specified provision thereof of the House of

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<sup>35</sup> See, for example, Case 32/74, Haaga [1974] ECR 1201, para. 6, Case 11/75, *Impresa Construzione Comm Quirino Mazzalai v Ferrovia del Renon* [1976] ECR 657 and Case 270/81, *Felicitas Rickmers-Linie v Finanzamt Hamburg* [1982] ECR 277. Also, for the duty of interpretation in regard to the EU directives, see above, Chapter Three.

<sup>36</sup> Certain national judicial power must be transferred to the ECJ. The ECJ must also have a superior force to national courts. Moreover, according to Article 234 EC (ex 177) a preliminary ruling procedure allows the ECJ to rule on questions of interpretation and validity of Community law which have been arising in proceedings before national courts and tribunals. Article 234 provides a mechanism whereby any questions of interpretation or validity of Community law from Member States can be ruled upon before they return their judgement thus ensuring they are applying the correct law. The power to make a reference to the Court of Justice under Art. 234 belongs to any court or tribunal of a Member State, however, it is not necessary for an institution to be specifically classified in these terms (for the general criteria regulating the *locus standi*, see, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*, 54/96, [1997] ECR I-4961, [1998] 2 CMLR 237). Normally, such a reference to the ECJ is discretionary as far as the decision of the relevant national court is not final (without an appeal being available). In regard to the supreme courts of the Member States, such a reference is considered as compulsory, since *the cases which get to the House of Lords are substantial cases of the first importance...[in comparison to] lower courts...[that] may not be worth troubling the European Court about*. (Lord Denning in *Bulmer v J Bollinger SA* [1974] 3 WLR 202). For more discussion about Art 234, see, Weatherill, S. and Beaumont, P., "EU Law", Penguin Books, 3<sup>rd</sup> Ed., 1999, pp. 314-

Representatives is repugnant to or inconsistent with any provision of the Constitution. This right should be extended, also, for EU legislation which is not going to be passed through the House of Representatives.

In a similar view, Article 141(1) reads: *The President or the Vice President of the Republic may, at any time prior to promulgation of any law imposing any formalities, conditions or restrictions on the right guaranteed by Article 25, refer to the Supreme Constitutional Court for its opinion the question as to whether such formality, condition or restriction is not in the public interest or is contrary to the interests of his Community.* Within this provision, too, it must be ensured that for issues regarding interpretation of European legislation, the Supreme Constitutional Court, as the supreme court of Cyprus, should make compulsory reference to the ECJ, according to the provisions of Article 234 EC (ex. 177).<sup>37</sup>

Additionally, in Article 145 which confers the exclusive jurisdiction upon the Supreme Court to adjudicate finally on any election petition with regard to elections of the President and the Vice President, or of members of the House of Representatives or of any Communal Chamber, an addition must be incorporated in order to make reference to elections for members of the EP as well.

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356; Craig, P. and De Burca, G., *EU Law; Text, Cases and Materials*, Oxford University Press, 2<sup>nd</sup> Ed., 1998, pp. 406-452.

<sup>37</sup> Ibid.

Moreover, Article 152(1) provides that: *The judicial power, other than that exercised under Part IX by the Supreme Constitutional Court and under paragraph 2 of this Article by the Courts provided by a communal law, shall be exercised by a High Court of Justice and such inferior courts as may, subject to the provisions of this Constitution, be provided by a law made thereunder.* As it has already been mentioned, there must be a certain transfer of judicial power on behalf of the Republic of Cyprus to the ECJ. Therefore, the exercise of the judicial power would not only be vested on the Cypriot Courts provided by Art. 152(1), but by the ECJ as well. An amendment to this Article, then, should be done, by making special reference, in order for the EU legislation and the ECJ to be included within this provision. Although, it might be additionally argued that this is implied by the amendment made to Art. 169, which would provide for the transfer of powers and sovereignty to the EU and its institutions.

A similar problem arises, finally, with regard to the scope of Article 155(1) which provides that: *the High Court shall be the appellate court in the Republic and shall have jurisdiction to hear and determine, subject to the provisions of this Constitution and of any Rules of Court made thereunder, all appeals from any court other than the Supreme Constitutional Court.* Special reference must also be made in order the High Court to have jurisdiction to hear and determine, not only subject to the constitutional provisions and the rules made thereunder but also subject to European legislation.

The Constitution also contains certain arrangements with regard to the municipalities which are incompatible with EU principles and law, as they

maintain separation between the Greek and the Turkish Communities, thereby limiting individuals' rights of participation in elections and their ability to apply on equal terms for granting of licences and permits.

According to Article 173(2), then, the Council of the Greek municipality in any town shall be elected by the Greek electors of the town and the Council of the Turkish municipality by the Turkish electors. However, as mentioned above, according to the EU legislation providing for European citizenship, European citizens have the right to elect and be elected in all municipal elections. Thus, this Article should be amended in order to provide the right to all European citizens to elect and to be elected in those municipal elections.

Finally, Article 175 provides that no licence or permit shall be issued to any person by a municipality in any such town not belonging to the Community of such municipality. This might be considered as a discriminatory provision which denies citizens the opportunity to live and work on equal terms in the place of their choice and is clearly opposed to the basic principle of the EU providing for non-discrimination among European citizens, on the ground of nationality.<sup>38</sup> In a similar way, Article 176 (a) and (b), also, makes discriminations among the five municipalities in the island. Therefore, this Article, too, must be amended to accord equal rights and status to all, in compliance with the EU principles of non-discrimination.

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<sup>38</sup> According to the provisions of Article 12 EC (ex. 6), any discrimination on grounds of nationality within the scope of the Treaty is prohibited.

### 6.2.2 “Problematic” basic Articles.

Although, as mentioned above, the basic Articles of the Constitution cannot be amended, it is important to examine some of the potential problems which derive from those unalterable constitutional provisions in regard to the application of the EU legislation in the Cypriot legal order. The fact that, especially at this stage before the accession, there is a little space for action, limits any attempt at the stage of a mere confinement of those “problematic” basic Articles. As also mentioned above, their harmonisation with the legal effect of Cyprus’ EU membership is an extremely difficult task which could be achieved only after the signing of the Treaty of Accession. Such a harmonisation will depend, mainly, on successful judicial interpretation and the recognition and implementation of the precedence of EU legislation over national law, in the Cypriot legal order.

The confinement and the examination of those Articles, might not constitute a radical solution to the problem, but at least will serve as a basis for solving it.

The first basic Article which might be in contrast with the EU provisions is Article 4 of the Constitution, concerning the flag of Cyprus and its use. According to Art. 4.2, 3 and 4, along with the Cypriot flag, the flags of Greece and Turkey might be also used in certain occasions. However, after the accession of Cyprus to the EU, the use of the flag of the EU would also be permitted. Although one could argue that this is not such a crucial problem, the

Court should approve it, probably by interpreting the use of the EU flag in Cypriot territory not inconsistent with the scope of this constitutional provision. Indeed, such an interpretation seems to reflect the reality, since that provision was actually introduced to balance the demands of the two Communities to use their original flags; Greek and Turkish. It does not seem that the purpose of this provision was to exclude the use of the flag of the EU.

Another Article, though, which could also be “problematic” is Art. 61. According to Article 61, *the legislative power of the Republic shall be exercised by the House of Representatives in all matters except those expressly reserved to the Communal Chambers under its Constitution.* This is, of course, a more important provision, than Article 4, and it could pose much more crucial problems to the application of EU law in Cyprus. As mentioned above,<sup>39</sup> one of the basic effects of the application of the EU legislation derives from the principle of direct applicability. Accordingly, then, directly applicable EU legislation (especially the EU Regulations) shall be introduced in the Cypriot legal order without the necessary prior action on the part of the House of Representatives. The question is one of transfer of legislative power to the EU organs. This Article should, however, be interpreted in conjunction with Article 169 which will provide the constitutional basis for the transfer of powers to the EU. It is up to the Court, then, to decide whether the provisions of Article 61 could be operated along with the provision of Article 169 providing for the transfer of Cyprus. It could also be argued, that this Article provides for the exercise of the legislative power of the Republic within the Republic; a fact that

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<sup>39</sup> See Chapter Three.

will continue in effect even after the accession; but it does not prohibit the transfer of part of this power (as an amended Article 169 would provide) to a supranational organisation. This could also be achieved by an Act of the House of Parliament based on Article 169, recognising the transfer of legislative power and giving effect to European legislation, similar to the UK example of the 1972 Act of Parliament providing for the application of EU legislation in Britain.

Article 123(1) of the Constitution might also be considered as being against the EU legislation. This Article provides for the 70:30 ratio between the Greek Cypriots and the Turkish Cypriots in the public service. It could, therefore, be considered as a provision that discriminates among EU citizens.<sup>40</sup> Thus, the fact that after the accession of Cyprus to the EU, not only Cypriot citizens but other European citizens, as well, might be able to be employed in certain posts of the public service, would definitely pose problems in the application of this provision. The introduction of this provision was, of course, aimed at the protection of the Turkish Cypriot Community and it was a part of the political solution given to the Cyprus question by the Zurich Agreement. So, the

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<sup>40</sup>Article 39.2 EC (ex 48.2), specifies the *abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment*. This is an amplification of the basic Treaty rule forbidding any discrimination on grounds of nationality within the scope of the Treaty, which is contained in Art. 12 EC (ex. 6). However, according to Art. 39.4 (ex. 48.4) Art. 39 shall not apply to employment on public service. The provision, though, of Art. 39.4 is not a precise one, since the term 'public service' is not the same in all Member States. The level of expansion (or limitation) of the term public service has been differently understood by Member States and the level of its application constitutes a threat towards the principles of the European citizenship. Thus, the Commission in 1988 published a document in the Official Journal ([1998] OJ C72/2) on the scope of the provision of the Art. 39.4 providing some guidance on the sorts of state functions which it considered would or would not fall within that provision. Those which probably would included the armed forces, police, judiciary, tax authorities and certain public bodies engaged in preparing or monitoring legal acts, and those which would not included nursing, teaching, and non-military research in public establishments. See Craig P. and De Burca G., *EU Law; Text, Cases and Materials*, Oxford University Press, 2<sup>nd</sup> ed., 1998, pp. 684-691.



fundamental character of this provision seems rather difficult to harmonise with the EU provisions. However, it is again up to the Court to resolve the matter by giving priority to EU legislation, which would probably result in the non-application of Article 123(1), rather than its repeal. As explained above, some Articles might become *de facto* displaced but not repealed. Additionally, the wording of Article 123(2) providing for quantitative distribution in all grades of the hierarchy of the public service *so far as this will be possible*, might also provide an interpretative tool for the Court in giving effect to the European non-discriminatory provision.

Equally, the provision of Article 178 could also be considered as having discriminatory effect. Art. 178 provides that *with regard to other localities, a special provision shall be made for the constitution of the organs of the municipalities in accordance, as far as possible, with the rule of proportional representation of the two Communities*. Similarly, then, this provision must be faced in the light of the European principle of non discriminatory provisions, based on nationality, among the European citizens.

Finally, Article 181 provides for the constitutional force of the Treaty of Guarantee concluded between the Republic, the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Britain. The question arising, then, is whether a non member state of the EU (i.e. Turkey) could guarantee the independence and territorial integrity of a state member of the EU. This seems to be against the provisions of the EU for Common Foreign and Security Policy<sup>41</sup>

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<sup>41</sup> Supra note 32.

since Turkey is not a member of the EU. However, it could be argued that the current status of Turkey, as a candidate EU member state, could result in the *de facto* respect on the part of Turkey of the European Union's territory. Also, this provision might also be considered as *de facto* non-applicable, since Turkey by the 1974 invasion and current occupation of the north of Cyprus is not in a position to be claimed as a guarantor of the Republic of Cyprus.

### **6.3 Conclusion.**

As a conclusive remark, it could be noted that the unalterable character of the basic Articles of the Constitution of Cyprus would definitely pose serious problems to the application of Community law in Cyprus; however, those problems must not be considered as insuperable obstacles excluding the accession of Cyprus to the EU. These obstacles, as noted above, could be overridden by a wise compromise and interpretation on the part of the Cypriot Courts.

## CONCLUSION

As mentioned in the introduction to the thesis, the purpose of this thesis was to provide an examination and analysis of constitutional issues raised by the potential accession of Cyprus to the EU. It sought firstly to prove that the Constitution of Cyprus itself, and its current application, cannot be considered as obstacles towards the accession of Cyprus to the EU and secondly to examine how Community legislation might be introduced and applied parallel to the Cypriot constitutional provisions.

The fact that the EU does not consider the prior solution of the political problem of Cyprus as a precondition for the Cypriot accession implies that there is a possibility for Cyprus to accede the EU with the present constitution in force. Therefore, accession itself and the application of the implications from such an accession must be based on the present constitution.

As it has been examined in Chapter One of the thesis, the current functioning of the constitution of Cyprus is mainly based on the application of the law of necessity. According to the Cypriot Courts, the law of necessity justifies the continuation of the functioning of the Republic of Cyprus, even in the absence of the Turkish Cypriots, and the constitution cannot be paralysed because of the deliberate absence of the Turkish Cypriots. However, this thesis emphasised the need for the wise use of the law of necessity, since its application is only to be considered temporary and not unlimited, for its misuse could pose a serious threat to the very character of the constitution. Changing the character of the

constitution is by no means the purpose of the application of the law of necessity. As indicated, the law of necessity is to be used only in exceptional circumstances.

In examining the development of relations between the Republic of Cyprus and the EU, it has been shown that the significant effort on behalf of the Republic of Cyprus and its achievement in harmonising most of its legislation and its standards with those of the EU, enables the inclusion of the Republic of Cyprus within the next enlargement of the EU. However, the beginning of the accession negotiations should not be influenced by the absence of the Turkish Cypriots. As it has been stated, the Turkish Cypriots, even though they were invited to participate in the negotiations, refused. The issue of their non participation should not to be considered as an obstacle to the completion of the negotiations, since the Government of the Republic of Cyprus is the only recognised government on the island and it is the only body responsible for the conclusion of an accession agreement. Regarding this issue, attention has also been drawn to the fact that the EU must be very careful in her dealings with the Turkish Cypriot participation, in order that the illegal *de facto* division of the island should not acquire a *de jure* status.

Regarding the possible impact of the political problem of Cyprus on its accession to the EU, the EU position to the issue (i.e. that the prior solution of the political problem is not to be considered as a precondition for accession) is considered to be the right one. Of course, the prior solution of the political problem would facilitate the accession of Cyprus to the EU, but on the other hand, the prior accession to the EU might act as a catalyst for the solution of the problem. It is

also argued that the non accession of Cyprus to the EU because of the non solution of the political problem, would effectively make the Republic of Cyprus a hostage to the will of Turkish foreign policy. In regard to the application of the Community legislation, in the event of the accession of Cyprus with the political problem unsolved, it has been suggested that a derogation could be issued providing for the temporary non application of Community legislation in the occupied area of Cyprus. It is emphasised, though, that such a derogation must be accompanied by a strong declaration on the part of the EU of the recognition of the impartial territorial sovereignty of the Republic of Cyprus. Without such an additional declaration, a derogation could result to the division of the island becoming permanent and no further attempt and pressure for a solution to be carried. On the other hand, it is also argued that the possible accession of a divided Cyprus on the EU could be a unique challenge for the practical establishment of the CFSP of the EU. The recent failure of the actual application of the CFSP might be changed to success if Member States manage to use their influence for a political settlement on Cyprus.

Referring to the signing of the Treaty of Accession to the EU, it has been argued that the Cypriot constitution provides a power for such a step. Specifically, the constitution does not contain any special provision excluding accession of Cyprus to the EU; on the contrary, Article 169 of the Constitution provides for the power of the Republic of Cyprus to enter into international agreements. Under the provisions of this Article, the Treaty of Accession might be concluded. The issue of the absence of a Turkish Cypriot Vice President from the Government and Turkish Cypriot Ministers from the Cypriot Council of

Ministers (normally, under the provisions of the Constitution, the Vice President could exercise the right of veto on such a decision and the Council of Ministers should include three Turkish Cypriot Ministers) should not pose an obstacle to the conclusion of the accession agreement since, as it has been made clear by the law of necessity, their deliberate absence must not jeopardise the continuation of the functioning of the Republic.

Another issue that has been examined in detail within this thesis, was whether the constitutional provisions provide the necessary mechanisms for the application of the Community law on the Cypriot legal order. This is a problem faced by all Member States and examples of the various ways that other Member States have managed to give effect to Community legislation, have been used as a helpful guidance for the Cypriot case. For achieving this task, an important transfer of sovereignty must be made from the Member States to the EU institutions. Similarly to other Member States, in the case of Cyprus, this might be achieved by an addition to Article 169 providing for the transfer of power to the EU. As it has been noted, Article 169 is not a basic Article of the Constitution and therefore is capable of being amended.

An additional issue addressed in the thesis was the accommodation of the principle of supremacy of Community legislation within the Cypriot legal order. This is very important to be achieved since the principle of the supremacy of the Community law is to be considered as the backbone of the Community's legislation. The very existence of the EU is actually based on this principle, since this is a major factor for harmonisation and integration to be achieved. The

relationship between the provision of the supremacy of the Cypriot Constitution (Art. 179) and the Community supremacy was examined and means of compromise to avoid the direct conflict between the two principles have been suggested. Firstly, it was emphasised that, theoretically, those two principles might not be considered to be in a direct conflict, seeking for the supremacy of the one over the inferiority of the other. However, practically, the Cypriot domestic law must find ways to give priority to the Community legislation. It is suggested that the Cypriot Courts could play a major role in the achievement of this task. It is upon their wise judicial interpretation that compromising solutions could be achieved. Their interpretation might be based on the provisions of the amended Art. 169 of the constitution, providing for the transfer of power from the Republic of Cyprus to the EU institutions.

The next issue that was dealt within the thesis, is the constitutionality of Cyprus' accession to the EU, having regard to the provisions of Articles 170 and 185(2) of the Constitution and Art. I of the Treaty of Guarantee. Articles 185(2) of the Constitution and Article I of the Treaty of Guarantee excluding the political or economic union between the Republic of Cyprus and another state. Consequently, it has been argued by some, that these provisions could act as obstacles towards the accession of Cyprus to the EU. However, on the basis of interpretative analysis, it has been concluded that the provisions of these Articles cannot restrict Cyprus from gaining accession to the EU. According to the *travaux préparatoires*, the scope of this provision was merely to prohibit the achievement of *enosis* (union with Greece) or *taksim* (partition of the island). It does not seem that the aim of the Article was to prevent the Cypriot membership

of the EU. Also, by based on a strict legal interpretation of the Articles' provisions, it appears that the EU could not be included within their provisions, since the wording of the Articles refers to union with another state. Firstly, it is argued that according to the wording of the provision, the word state is singular (i.e. state) and not plural (i.e. states). Moreover, although some have argued that the EU could be considered to have the status of a state, the EU as it stands today, cannot in the author's view be considered as a state, since it has its own *sui generis* status, significantly different from the normal meaning of an international organisation or of a state.

In regard to the provision of Article 170 of the Constitution, it is equally argued in the thesis, that the accession of Cyprus to the EU is not prohibited. Turkey's most favoured nation treatment as provided by Art. 170 would not be affected by the Cypriot accession to the EU. As it has been explained in Chapter Five, the existing status of the relationship between Turkey and the EU would not jeopardise the application of the m-f-n on behalf of Cyprus to Turkey. Moreover, the current situation on the island as a result of the Turkish foreign policy, has for a long time frozen the application of this provision.

Finally, in Chapter Six, the necessity for amending the Constitution as a result of the Cypriot accession to the EU, and the possibility of such amendment, were examined. Accordingly, it has been argued that several amendments to the Constitution would be necessary for the smoother application of the Community law in the Cypriot legal order. However, amendments can be made only to the non basic Articles of the Constitution, as Article 182 provides. Such amendments



of the non basic Articles of the Constitution should be justified by the wise application of the law of necessity. On the other hand, though, no amendments should be made to the basic, non-amendable, constitutional provisions. The law of necessity can in no way justify any amendment of basic Articles, since this would be a violation of the very character of the Constitution. In regard to a potential conflict between a basic Article of the Constitution and an EU norm, it is up to the judiciary to find a compromise. As a matter of fact, some non-amendable provisions might be *de facto* non applicable. As it has been explained, in such a case, the basic provision is not replaced but merely remains inapplicable. According to the conclusion of the thesis, constitutionally talking, this is the most difficult problem that Cyprus will face in the event of its accession to the EU, but nevertheless, such a problem should not be considered as capable of preventing Cyprus' membership of the EU.

Therefore, as it shown throughout this thesis and the Constitution of Cyprus cannot be considered as an obstacle towards accession and any possible difficulties provided by the constitution itself cannot be considered as incapable of solution.

In conclusion, then, although there are certain procedural and legal difficulties to be faced in connection with Cyprus' accession to the EU, neither the provisions of the constitution nor the current political situation in Cyprus prevent such accession. Selective constitutional amendments and wise interpretation by the courts of the non amendable constitutional provisions would enable Cyprus to

accommodate EU legislation within its own legal order, and meet fully the obligations arising from its membership.

# ANNEX I

## Map of Cyprus



Source: <http://www.emulateme.com/cyprus.htm>



Source: <http://csmonitor.com/durable/1998/07/31/p6s3.htm>

**ANNEX II****CHRONOLOGICAL TABLE OF EVENTS IN CYPRUS (1878 -1999)**

5 <sup>th</sup> November 1878	Cyprus annexed to Great Britain.
1 <sup>st</sup> May 1925	Cyprus became a British Crown Colony.
1 <sup>st</sup> April 1955	Armed revolt began by EOKA.
5 <sup>th</sup> February 1959	Zurich Negotiations commenced.
11 <sup>th</sup> February 1959	Basic structure of the Republic of Cyprus was laid down at Zurich.
19 <sup>th</sup> February 1959	London Agreement.
21 <sup>st</sup> September 1960	Signing of the Constitution of Cyprus.
16 <sup>th</sup> August 1960	Establishment of the Republic of Cyprus / The Constitution came into force.
21 <sup>st</sup> September 1960	Membership of the UN.
24 <sup>th</sup> May 1961	Membership of the Council of Europe.
15 <sup>th</sup> February 1961	Membership of the Commonwealth.
30 <sup>th</sup> November 1963	President Makarios proposed for the amendment of the Constitution
21 <sup>st</sup> December 1963	Intercommunal conflicts began / Turkish Cypriot officials refused to exercise their constitutional duties.
13 <sup>th</sup> March 1964	Establishment of the UNFICYP.
10 <sup>th</sup> November 1964	Mustafa Imbrahim Case / Introduction of the Law of Necessity.
19 <sup>th</sup> December 1972	Signing of the Association Agreement with the EEC
1 <sup>st</sup> June 1973	Association Agreement came into force.
15 <sup>th</sup> July 1974	Military coup against President Makarios.
20 <sup>th</sup> July 1974	Turkish military "intervention" (1 <sup>st</sup> Phase)
14 <sup>th</sup> August 1974	Turkish military "intervention" (2 <sup>nd</sup> Phase)
17 <sup>th</sup> November 1974	UN GA Res. 3212/1974
13 <sup>th</sup> December 1974	UN SC Res. 365/1974
13 <sup>th</sup> February 1975	Establishment of the "Turkish Federal State of Cyprus" (TFSC).

30 <sup>th</sup> June 1977	End of the first stage of the Association Agreement.
15 <sup>th</sup> November 1983	Establishment of the “Turkish Republic of Northern Cyprus” (TRNC).
19 <sup>th</sup> October 1987	Second stage of the Association Agreement
4 <sup>th</sup> July 1990	Cyprus Application for EU full membership
17 <sup>th</sup> September 1990	The Council of Ministers (EU) asked the Commission to draw an Opinion on Cyprus’ application for membership
30 <sup>th</sup> June 1993	The Commission issued its Opinion on Cyprus’ application
1 <sup>st</sup> November 1993	Substantive talks between the Government of Cyprus and the Commission began.
6 <sup>th</sup> March 1995	Re-examination of the Cypriot Application / Beginning of the procedures for Cyprus’ accession to the EU.
17 <sup>th</sup> July 1995	Definition of the level, frequency and other modalities of the structured dialogue between Cyprus and the EU.
15 <sup>th</sup> December 1995	The President of Cyprus was invited to participate in the Cannes European Council.
31 <sup>st</sup> May 1998	The accession negotiations between Cyprus and the EU formally started.
10 <sup>th</sup> November 1998	Commencement of the Substantive negotiations.
10 <sup>th</sup> December 1999	Helsinki European Council. (The Cyprus problem not to be considered as a prerequisite for accession)

## **ANNEX III**

### **MEETINGS AND INTERVIEWS**

For the completion of this thesis, meetings and interviews with several officials of the Republic of Cyprus have been held between the summer of 1996 and 1998.

#### Meetings and interviews during summer 1996

Mr Alecos Michaelides, Minister of Foreign Affairs of the Republic of Cyprus.

Mrs Leda Koursoumba, Advocate of the Republic of Cyprus.

Dr Constantinos Lykourgos, Ministry of Foreign Affairs of Cyprus.

Dr Nicolas Emiliou, Ministry of Foreign Affairs of Cyprus.

Dr Kypros Chrysostomides, distinguished lawyer and author.

#### Meetings and interviews during summer 1997

Mr Alecos Markides, Attorney-General of the Republic of Cyprus.

Mr Thanos Michael, General Director of the Ministry of Foreign Affairs of Cyprus

Dr Constantinos Lykourgos, Ministry of Foreign Affairs of Cyprus.

Mr Christos Iosephides, Legal Service of the Republic of Cyprus.

#### Meetings and interviews during summer 1998

Mr Demetris Stylianides, ex President of the Supreme Constitutional Court of Cyprus.

Mrs Leda Koursoumba, Advocate of the Republic of Cyprus.

Dr Kypros Chrysostomides, distinguished lawyer and author.

**ANNEX IV****QUESTIONNAIRE**

The following questionnaire was drafted and sent in order to obtain the formal opinion of the recipients on issues arising from the accession of Cyprus to the EU.

The questionnaire was sent to:

- Ministry of Foreign Affairs of the Republic of Cyprus,
- Office of the Chief Negotiator and Co-ordinator of the Harmonisation Process (Cyprus),
- Major political parties in Cyprus,
- British Foreign Office,
- Greek Ministry of Foreign Affairs,
- Turkish Ministry of Foreign Affairs (Turkish Embassy in London),
- The “TRNC” Representative in London,
- The EU Commissioner for Enlargement (Enlargement Directorate).

Attached are the responses received.

**SAMPLE****Part I**

1. Do you support a possible accession of the Republic of Cyprus to the EU?
2. Do you think that Cyprus is going to benefit from such an accession? Why?
3. Do you think that Cyprus is eligible for accession to the EU? If so, why?
4. Does the Government of the Republic of Cyprus have the right to negotiate its accession to the EU without the opinion of the Turkish Cypriot Community?
5. Do you consider the political problem of Cyprus as an obstacle towards its accession to the EU?

**Part II (Optional)**

6. Is the Constitution of Cyprus (1960) an obstacle towards the accession to the EU? If yes, why?
7. Which amendments (if any) do you suggest must be made to the 1960 Constitution of the Republic of Cyprus if Cyprus is to be able to access to the EU?
8. Do you support the view that a new constitution is necessary for enabling Cyprus to gain access to the EU? Why?
9. According to the Art. 1 of the Treaty of Guarantee "*the Republic of Cyprus undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever*". Do you think that the accession to the EU is against the provisions of this Article?
10. How, if at all, can the Turkish Cypriot Community be represented in the accession negotiations?



## RESPONCES

### 1. Office of the Chief Negotiator and Co-ordinator of the Harmonisation Process (Republic of Cyprus)



#### Office of the Chief Negotiator and Co-ordinator of the Harmonisation Process

4/3/1999

#### Reply to Questionnaire of Christos Patsalides

Part 1:

**1. Do you support a possible accession of the Republic of Cyprus to the EU?**

There is a consensus in Cyprus on this issue, i.e. all parties and the public at large support Cyprus' accession to the EU.

**2. Do you think that Cyprus is going to be benefit from such an accession?**

Definitely, Cyprus will benefit from joining the EU, both politically and economically. Historically, culturally, Cyprus belongs to the European family. Furthermore, the international developments (globalisation of the economy, dismantling of barriers to trade, etc) render Cyprus' accession to the EU imperative.

**3. Do you think that Cyprus is eligible for accession to the EU? If so, why?**

Cyprus applied to become a member of the EU because it believed that it was eligible. But the decision to confirm its eligibility was taken by the EU itself by the Commission's Avis of May 1993. Cyprus is eligible because it is a European country, meets all the Copenhagen criteria and has a high level of economic development.

**4. Does the Government of the Republic of Cyprus have the right to negotiate its accession to the EU without the opinion of the Turkish Cypriot Community?**

The government of the Republic of Cyprus has the right to negotiate the island's accession to the EU, taking into consideration the rights of all communities on the island. For this purpose the government has extended an invitation to the Turkish Cypriot community to nominate their representatives to participate in the Cyprus negotiating team.

.../2

## 2. British Foreign Office

2

**5. Do you consider the political problem of Cyprus as an obstacle towards its accession to the EU?**

Cyprus will continue working towards a just and viable solution to the Cyprus problem, hoping that this will be achieved before the island's accession to the EU. The negotiation process will continue and every effort will be made to harmonise with the acquis. We do believe that Cyprus will not be victimised due to any obstacles or objections raised by a third party. If despite all the efforts made a solution to the Cyprus problem is not obtained at the time of accession, Cyprus' accession would not entail any insurmountable problems. Accession of the government controlled part of Cyprus is anticipated to be much smoother than that of other states.



*Costas Paschalis*  
Advisor-Coordinator

## 2. British Foreign Office



Foreign &  
Commonwealth  
Office

Southern European Department  
London SW1A 2AL  
Telephone: 0171-270-

22 April 1999

Christos Patsalides  
University of Hull law School  
Hull  
HU6 7RX

*Dear Mr Patsalides,*

Thank you for your letter of 9 February enclosing some questions on Cyprus, answers to which you hope to use in your thesis on Cyprus' accession to the EU. I apologise for the long delay in replying; it has been an extremely busy time. I hope the following answers cover not only your questions 1 to 5, but also your optional questions.

**1. Do you support accession of the Republic of Cyprus to the EU?**

Yes. The EU announced its intention at the Luxembourg European Council in December 1997 to open accession negotiations with Cyprus. Those negotiations opened on 31 March 1998. The UK welcomed this, and we hope that Cyprus' accession process will continue to make steady progress.

**2. Do you think Cyprus will benefit from accession? Why?**

Yes. Apart from all the obvious economic and social benefits of EU membership, the EU made clear at Luxembourg that Cyprus' accession should benefit all communities in Cyprus and help bring about civil peace and reconciliation. In short, we hope that the accession process can act as a catalyst towards a political solution in Cyprus.

**3. Do you think that Cyprus is eligible for accession? Why?**

Yes. It is for the EU to decide who is eligible for membership. The UK, as a member of the EU, supported the decision to open accession negotiations with Cyprus.

In 1998 there was a legal challenge to Cyprus' EU application which argued that the Treaty of Guarantee disallowed the political or economic union of Cyprus with another state. This challenge was defeated in the UK courts. We see no legal bar to Cyprus' membership of the EU.

**4. Does the Government of the Republic of Cyprus have the right to negotiate its accession to the EU without the opinion of the Turkish Cypriot community?**

As you will be aware, in March 1998 President Clerides made an offer to the Turkish Cypriot community to participate in Cyprus' accession negotiations process. That offer remains; we, and the EU as a whole, have urged the Turkish Cypriots to take it up. The modalities of a joint negotiating team is of course a matter for resolution by the two sides.

**5. Do you consider the political problem of Cyprus an obstacle to accession?**

The UK has consistently made clear that whilst a political settlement in Cyprus is not a pre-condition for EU membership, the accession process will be easier if a settlement has been reached. The UK hopes the accession of a united Cyprus will be possible and will continue to work hard in support of efforts to achieve a political settlement.

*Yours Sincerely,*

*Tim Standbrook*

T Standbrook  
Southern European Department

### 3. Turkish Embassy in London

**TURKISH EMBASSY**

43, Belgrave Square  
LONDON SW1X 8PA  
Tel.: 0171-393 0202  
Fax.: 0171-393 0088

15 March 1999

*Dear Mr. Patsalides,*

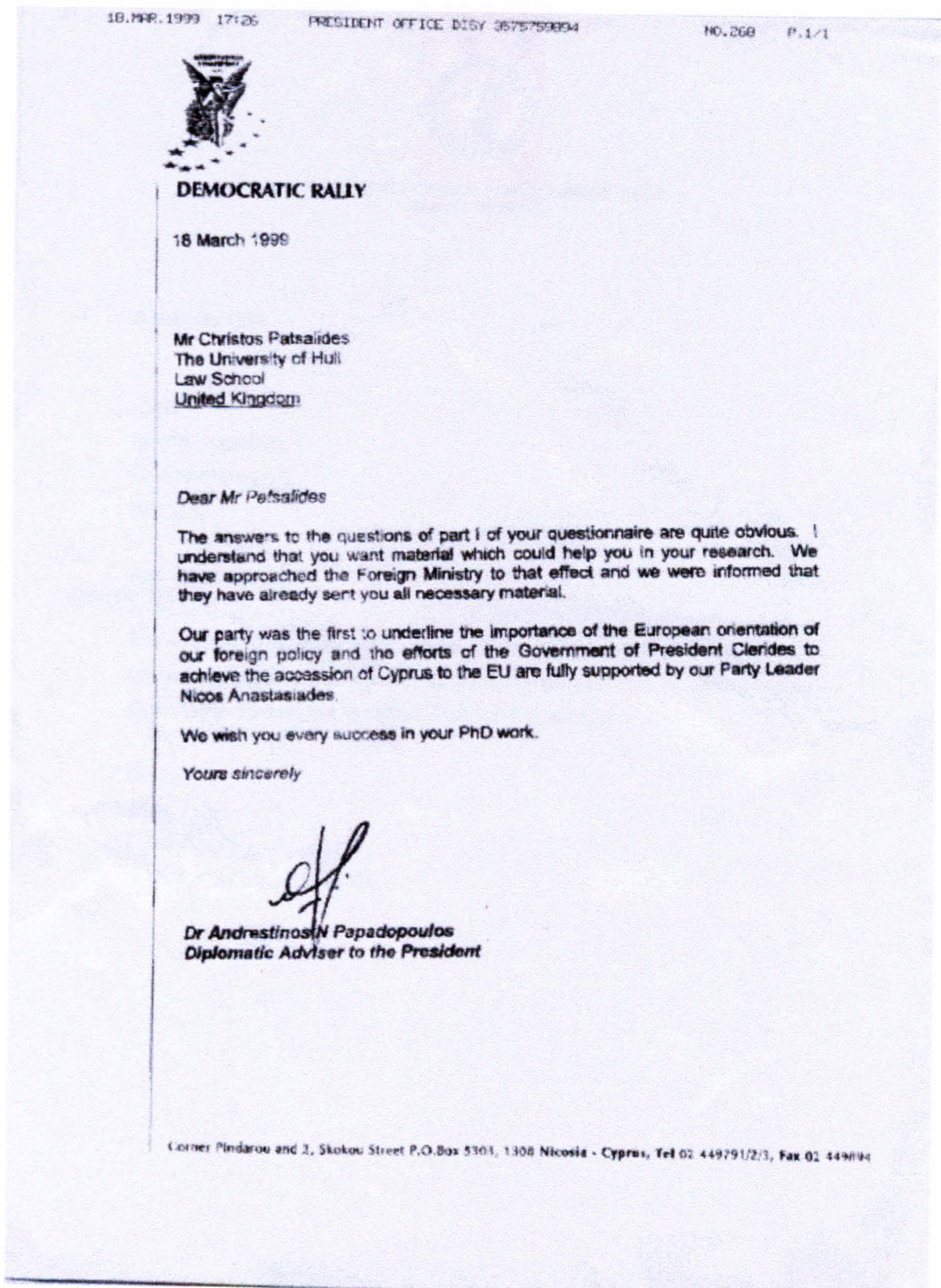
I am sorry for a somewhat belated reply to your letter of 12 February.

Turkey's position on the Greek Cypriot unilateral application for EU membership is quite clear and there is abundant material on this topic. One of the sources to reach research material is the web site of the Turkish Ministry of Foreign Affairs (<http://www.mfa.gov.tr>) and its cross references.

It has come to my knowledge that the London Representative of the Turkish Republic of Northern Cyprus (TRNC) Mr. Hakkı Müftüzade has sent you an information package on your research topic. Turkey supports the TRNC position and plays a constructive role in seeking a just and viable solution to the Cyprus question.

*Best regards*  
*Kerim Uras*  
Kerim Uras  
Counsellor

Encl.

**4. DISI (Right Wing Political Party in Cyprus)**

**5. AKEL(Left Wing Political Party in Cyprus)**

ΑΝΟΡΘΩΤΙΚΟ ΚΟΜΜΑ ΕΡΓΑΖΟΜΕΝΟΥ ΛΑΟΥ  
Κεντρική Επιτροπή

5 Μαρτίου 1999

Κύριο,  
Χρίστο Πατσαλίδη,  
Πανεπιστήμιο Hull,  
Βρετανία

Αγαπητέ κ. Πατσαλίδη,

Επισυνάπτουμε τις απαντήσεις στο ερωτηματολόγιο που μας έχετε στείλει. Τις απαντήσεις ετοίμασε το Γραφείο Μελετών του Κυπριακού της Κ. Ε. ΑΚΕΛ. Είμαστε στη διάθεση σας για όποια άλλη βοήθεια χρειάζεστε.

Φιλικά

Γ. Κολοκασίδης

μέλος του Π.Γ. της Κ.Ε. ΑΚΕΛ

Ακόμαντος 4, Τ.Θ. 1827, 1513 Λευκωσία, Τηλ. 02 761121, Φαξ, 02 761574  
E-mail: k.e.akel@cytanet.com.cy, <http://www.akel.org.cy>

Απάντηση 1

Σύμφωνα με απόφαση του 18ου Συνεδρίου του ΑΚΕΛ, που διεξήχθη στις 16-19 Νοεμβρίου 1995 στη Λευκωσία, "με την προϋπόθεση ότι η Ευρωπαϊκή Ένωση βοηθά στην ορθή επίλυση του Κυπριακού, εντάσσεται ολόκληρη η Κύπρος στην Ευρωπαϊκή Ένωση και διασφαλίζονται σημαντικές κοινωνικο-οικονομικές κατακτήσεις του λαού μας, το ΑΚΕΛ είναι έτοιμο να συνηγορήσει υπέρ της ένταξης της Κύπρου στην Ευρωπαϊκή Ένωση".

Απάντηση 2

Αν δεν πιστεύαμε ότι η Κύπρος μπορεί να επωφεληθεί από την ένταξη τότε δεν θα συνηγορούσαμε, υπό τις πιο πάνω προϋποθέσεις, υπέρ της ένταξης. Το κυριότερο όφελος από την ένταξη θα μπορούσε να είναι η κατά το δυνατό κατοχύρωση της ασφάλειας της Κύπρου έναντι της απειλής της Τουρκίας και η αμοιβαία αποδεκτή λύση του Κυπριακού στη βάση των συμφωνιών υψηλού επιπέδου και των ψηφισμάτων του Συμβουλίου Ασφαλείας. Η ενταξιακή πορεία θα μπορούσε να λειτουργήσει ως καταλύτης για τη λύση του Κυπριακού. Αυτό θα μπορούσε να συμβεί υπό την προϋπόθεση ότι η Ευρωπαϊκή Ένωση θα στείλει ένα ξεκάθαρο μήνυμα προς την Τουρκία και τον κ. Ντενκτάς: Ότι με την επιτυχή κατάληξη των ενταξιακών διαπραγματεύσεων, ανεξάρτητα από το αν μέχρι τότε θα είναι λυμένο το Κυπριακό, η Κυπριακή Δημοκρατία, ως φορέας της κυριαρχίας σε ολόκληρη την επικράτειά της, περιλαμβανομένων των κατεχομένων εδαφών, θα ενταχθεί στην Ευρωπαϊκή Ένωση. Σε μια τέτοια περίπτωση τα κατεχόμενα εδάφη μας θα θεωρούνται μέρος της Ευρωπαϊκής Ένωσης. Αυτό, με τη σειρά του, θα εκμηδενίσει τις πιθανότητες ευρύτερης διεθνούς αναγνώρισης του ψευδοκράτους που είναι ο άμεσος στόχος της Τουρκικής πλευράς. Έτσι, η Τουρκία θα βρεθεί μπροστά στο δίλημμα: Είτε να προχωρήσει η ένταξη χωρίς τους Τουρκοκύπριους και με εξουδετέρωση των επεκτατικών της στόχων είτε να αποδεχθεί λύση του Κυπριακού στο πλαίσιο των συμφωνιών υψηλού επιπέδου και των ψηφισμάτων του Συμβουλίου Ασφαλείας.

Αυτή τη στιγμή δεν συντρέχουν οι πιο πάνω προϋποθέσεις. Για μια σειρά λόγους, η ένταξη της Κύπρου δεν έχει αποσυνδεθεί από τη λύση του Κυπριακού και κάτω από τέτοιες προϋποθέσεις η ενταξιακή πορεία δεν λειτουργεί υποβοηθητικά για τη λύση του Κυπριακού. Αντίθετα, η ελληνοκυπριακή πλευρά δέχεται πιέσεις για υποχωρήσεις, διαφορετικά επικρέμεται η έμμεση απειλή ότι δεν θα μας εντάξουν.

Απάντηση 3

Τόσο στη Γνωμοδότηση της Ευρωπαϊκής Επιτροπής του 1993 όσο και σε άλλα επίσημα έγγραφα της Ευρωπαϊκής Ένωσης αναγνωρίζεται πλήρως η επιλεξιμότητα της Κύπρου για



ένταξη: Η Κύπρος γεωγραφικά, πολιτικά, πολιτιστικά, θεσμικά και άλλως πως συνιστά μέρος της Ευρώπης και πληροί όλα τα κριτήρια για ένταξη, περιλαμβανομένων των οικονομικών κριτηρίων (τελευταία, όμως, αντιμετωπίζουμε πρόβλημα απόκλισης από τους δείκτες του Μάαστριχτ).

#### Απάντηση 4

Ασφαλώς η Κυπριακή Δημοκρατία έχει το δικαίωμα να διεξάγει τις ενταξιακές διαπραγματεύσεις χωρίς τη σύμφωνη γνώμη της τουρκοκυπριακής κοινότητας. Από τη στιγμή που διεθνώς αναγνωρίζεται μόνο η Κυπριακή Δημοκρατία και η νόμιμη κυβέρνησή της, αυτή είναι και η μόνη αρμόδια να αποφασίζει τη σύνθεση της διαπραγματευτικής της ομάδας. Έχοντας όμως υπόψη τις πολιτικές προεκτάσεις του ζητήματος, η κυβέρνηση της Κυπριακής Δημοκρατίας έχει αποστείλει πρόσκληση στην Τουρκοκυπριακή κοινότητα για συμμετοχή στις ενταξιακές, πρόταση που η ίδια η Ευρωπαϊκή Ένωση έχει χαρακτηρίσει ως "γενναϊόδωρη". Όμως, η ηγεσία της τουρκοκυπριακής κοινότητας έχει απορρίψει την πρόσκληση, διότι εκείνο που στην πραγματικότητα επιδιώκει δεν είναι τίποτε λιγότερο από την εκ μέρους μας αναγνώριση του ψευδοκράτους. Κάτω από τέτοιες συνθήκες είναι διεθνονομικά ορθό και πολιτικά επιβαλλόμενο να προχωρήσει η ενταξιακή πορεία, ενώ η πρόσκληση παραμένει ανοιχτή.

#### Απάντηση 5

Εν πολλοίς η ερώτηση έχει απαντηθεί. Έχουμε πλήρη επίγνωση του γεγονότος ότι η λύση του Κυπριακού θα άνοιγε διάπλατα την πόρτα της ένταξης. Γι' αυτό και η προσπάθειά μας πρέπει να είναι η λύση του Κυπριακού. Όμως, από τη στιγμή που τη λύση την παρεμποδίζει η Τουρκική πλευρά, είναι άδικο η Ευρωπαϊκή Ένωση να απαιτεί λύση πριν την ένταξη. Μια τέτοια στάση θα απομάκρυνε ακόμα περισσότερο τις πιθανότητες για λύση του Κυπριακού, αφού θα παρείχε ένα επιπρόσθετο κίνητρο στην Άγκυρα να παρεμποδίζει τη λύση: Έτσι θα αποτρέπει και την ένταξη.

#### Απάντηση 6

Όχι, το Σύνταγμα του 1960 δεν συνιστά εμπόδιο για ένταξη.

#### Απάντηση 7

Αν η λύση προηγηθεί της ένταξης, τότε ασφαλώς το νέο Σύνταγμα θα πρέπει να είναι διατυπωμένο με τρόπο που να επιτρέπει την ένταξη χωρίς περαιτέρω τροποποιήσεις. Αν η ένταξη προηγηθεί της λύσης κατά την γνώμη μας ο πιο κατάλληλος τρόπος αντιμετώπισης του ζητήματος θα είναι βασικά η προσθήκη πρόνοιας για μεταβίβαση αρμοδιοτήτων σε διεθνείς οργανισμούς διακρατικού χαρακτήρα. Όπως θα

γνωρίζετε, σε χώρες που υπήρχε τέτοια πρόνοια (π.χ. Γαλλία, Γερμανία, Ιταλία, Δανία) δεν χρειάστηκε τίποτε περισσότερο, ενώ σε χώρες που δεν υπήρχε έγινε προσθήκη στο Σύνταγμα (π.χ. Βέλγιο, Λουξεμβούργο, Ολλανδία) και όλες προχώρησαν χωρίς πρόβλημα σε θέσπιση σχετικού νόμου. Έδη υφίσταται μια νομική βάση για κάλυψη της ένταξης όταν θα έλθει η ώρα της συζήτησης του Συντάγματος (άρθρο 169 του Συντάγματος, άρθρα 26, 27, 46 της Συνθήκης της Βιέννης για το Δίκαιο των Διεθνών Συνθηκών, κ.ά.). Εν πάσει περιπτώσει, βασικά θα αρκούσε μια διατύπωση όπως: "Η άσκηση ορισμένων εξουσιών μπορεί να μεταβιβασθεί με σύμβαση ή νόμο σε διακρατικούς οργανισμούς", κάτι δηλαδή μεταξύ Βελγικού και Γερμανικού Ομοσπονδιακού Συντάγματος. Στην πορεία, και όποτε χρειάζεται, θα πρέπει να μπορούν να γίνονται και άλλες τροποποιήσεις.

#### Απάντηση 8

Έδη η ερώτηση απαντήθηκε. Όχι, δεν είναι απαραίτητο ένα νέο σύνταγμα για διευκόλυνση της ένταξης.

#### Απάντηση 9

Το άρθρο στο οποίο αναφέραστε χρησιμοποιήθηκε από την Τουρκία - που με πληρωμένη γνωμοδότηση γνωστού νομικού-διεθνολόγου - προσπάθησε να πείσει ότι αυτό απαγορεύει την ένταξη. Η Κυπριακή Δημοκρατία έχει στα χέρια της γνωματεύσεις διεθνολόγων κύρους που υποστηρίζουν το αντίθετο. Και πράγματι, ο σκοπός του πιο πάνω άρθρου, όπως απορρέει και από αναγνωρισμένες από τη Σύμβαση της Βιέννης ερμηνευτικές μεθόδους (λογική ερμηνεία, συστηματική ερμηνεία, ιστορική ερμηνεία, κλπ.) ήταν απλώς και μόνο ο αποκλεισμός τόσο της ένωσης με την Ελλάδα όσο και της διχοτόμησης. Άλλωστε, η Ευρωπαϊκή Ένωση δεν είναι κράτος, αλλά sui generis διακρατικός οργανισμός.

#### Απάντηση 10

Σημασία έχει ότι προσκλήθηκαν να συμμετάσχουν. Αν δεχθούν την πρόσκληση, τότε θα πρέπει να συζητηθούν τα modalities. Θα ήταν ζημιολόγο να συζητάμε λεπτομέρειες ενόσω δεν αποδέχονται την πρόσκληση. Ένα πρέπει να είναι σίγουρο: Διαπραγματευτής είναι η Κυπριακή Δημοκρατία και καμία άλλη οντότητα.

5/3/1999

## 5. Dr Kypros Chrysostomides

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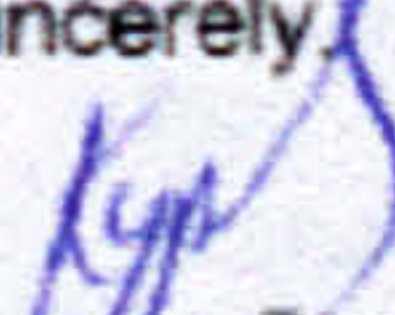
Dear Christos,

I do apologise for the delay in replying to your letter of 9 February, 1999 and the Questionnaire attached. Hopefully this has not caused any problems to the progress of your thesis.

I enclose my replies to your questions as well as a number of documents that may be of assistance to you.

With my best personal regards and wishing you every success,

Sincerely,

  
Kypros Chrysostomides

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**Part I**

1. *Do you support a possible accession of the Republic of Cyprus to the EU?*

Yes, without any hesitation.

2. *Do you think that Cyprus is going to be benefit from such an accession?*

I enclose as Annex I, the official views on the benefits. I agree with all of them and additionally believe that Cyprus within an enlarged Community will be looking for a new individual role to play, that of a small but compact unit, having its problem solved in accordance with the principles accepted by all Member States. Its new role can be both political as well as economic and social within the organs of the EU.

3. *Do you think that Cyprus is eligible for accession to the EU? If so, why?*

No doubt yes. See the "Avis" of the Commission and subsequent documents, e.g. the Agenda 2000 etc. We belong to an area which historically contributed to the creation of what is today the European civilisation, culture and values.

4. *Does the Government of the Republic of Cyprus have the right to negotiate its accession to the EU without the opinion of the Turkish Cypriot Community?*

Yes. Its legitimate Government is entitled to represent the entire State (cf. Agenda 2000). A discussion on this point is found in the attached opinion (Annex II).

5. *Do you consider the political problem of Cyprus as an obstacle towards its accession to the EU?*

This it is a matter that will come up periodically in political discussions. From the legal point of view the problem as such is no obstacle to accession. Some countries, however, may raise it and refuse to agree to Cyprus' accession. If we follow a wise strategy we can overcome this hurdle.

**Part II (Optional)**

6. *Is the Constitution of Cyprus (1960) an obstacle towards the accession to the EU? If yes, why?*

Not in my view. But see also detailed discussion in Annex II.

7. *Which amendments (in any) do you suggest must be made to the 1960 Constitution of the Republic of Cyprus if Cyprus is to be able to access to the EU?*

No substantial amendments are required. One provision probably must be inserted, that EU Law has precedence over domestic law. We may introduce legislation on the basis of the "doctrine of necessity", pending constitutional arrangement after a solution, without the need for formal amendment of the Constitution.

8. *Do you support the view that a new constitution is necessary for enabling Cyprus to gain access to the EU? Why?*

No. But a new constitution will be required upon settlement of the problem, which will have to conform with EU standards.

9. *According to the Art. 1 of the Treaty of Guarantee "the Republic of Cyprus undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever". Do you think that the accession to the EU is against the provisions of this Article?*

On this see the Opinion, Annex II.

10. *How, if at all, can the Turkish Cypriot Community be represented in the accession negotiations?*

The proposal by President Clerides outlines the expected participation of Turkish Cypriots in the accession negotiations. Annex III.

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