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Article

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The Bifold Cypriot Facet: Echoes of the UN Peacekeeping Mechanisms and the Politico-Legal Policies in the COVID-19 Era

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Abstract

COVID-19 proffered the opportunity to promote intergroup solidarity and enhance coexistence in the dichotomised island of Cyprus. Nevertheless, devices put in place as drastic preventive measures not only incited internal and external reactions, but also resulted in further distancing the two communities. Preventive policies and mecha-nisms implemented during the pandemic were introduced in the form of exceptional orders' which prioritised the protection of public health; thus, they remained in an external relationship to normative constitutional law. In an attempt to cope with the COVID-19 state, emergency measures that generated ambiguities within the exercising powers, since different parts of the Cypriot Consti-tution delimit the role of each government branch, were determined. Ergo, constitutional-compliance questions emerged as per the laws applied and interpreted in the aftermath of the emergency promulgation, examining whether rights under human rights law remained aligned with the rule of law and whether these means were upheld in the context of the pandemic.

Keywords: COVID-19, peace mechanisms, emergency laws, migration, derogation regime, human rights, international law

Introduction

Once the divided island of Cyprus confirmed its first cases of COVID-19, pre-existing complexities and idiosyncrasies, begot out of the particular historical antecedents which had shaped the so-called 'Cyprus Problem', came anew into light. In March 2020, while the confirmed cases were growing exponentially in Europe and whilst other European States precipitated in declaring a state of emergency, the Republic of Cyprus opted for the adoption of executive measures based on the pro-

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visions of a colonial legislation, namely the Quarantine Law (Cap. 260)[2]. The said law had been enacted in 1932 by the British and in the aftermath of Cyprus independence in 1960, it had remained in force, under Article 188 of the Constitution[3], subject to compliance with the constitutional provisions. The emerged paradox was that, even though the Constitution of the Republic of Cyprus provides for the declaration of a state of emergency under Article 183, this was never triggered due to its limited scope and the procedural requirements which mandated the participation of the withdrawn Turkish-Cypriot community. Therefore, and under these legal longstanding perplexities, the Cypriot Parliament reached for the colonial legislation disregarding the fundamental principle of the supremacy of the Constitution.

Cyprus has a long history of ethnic conflict. In the wake of the Turkish invasion in 1974, the islands' division created new borders. The northern area unilaterally declared 'Turkish Republic of Northern Cyprus' (TRNC), solely recognized by Turkey and administered by the Turkish Cypriots and the southern area the Republic of Cyprus administered since 1964 exclusively by Greek Cypriots. The buffer zone, known as 'Green Line' which divides the two parts, typically is under the control of the United Nations. Since 2003, a number of crossing points have opened up allowing movement between the two areas. This was meant to be a start for a long process of negotiations towards the reunification of the island. Nevertheless, on 28 February, the Greek Cypriot Government announced the closure of four of the nine crossing points even though no cases had been diagnosed on any part of the island, considering crossings from the checkpoints as the biggest threat.[4] Consequentially, the Greek Cypriot government response to the crisis stamped out any prospects for reunification as it cemented both physically and politically, the division of the island.[5]

[2] Quarantine Law-Decree, Chapter 260, *Decree under Article 6 (a), (b), (c), (d), (e) and (g)* (2020), available at https://www.pio.gov.cy/coronavirus/diat/10en.pdf. (last accessed 23 May 2020).

[3] Cyprus Constitution, Art 188, available at https://www.constituteproject.org/constitution/Cyprus_2013.pdf?lang=en (last accessed 24 June 2021).

[4] 'End the Unilateral Suspension of the Operation of the Checkpoints and Install the Necessary Control Mechanisms', *Parikiaki* (2 March 2020), available at http://www.parikiaki.com/2020/03/end-the-unilateral-suspension-of-the-operation-of-the-checkpoints-and-install-the-necessary-control-mechanisms/ (last accessed 17 May 2020).

[5] Fiona Mullen & Hubert Faustmann, 'The Impact of the COVID-19 Crisis on Divided Cyprus' (April 2020), available at http://library.fes.de/pdf-files/bueros/zypern/16785.pdf (last accessed 20 June 2021).

Moreover, COVID-19 has also taken a disproportionate toll on refugees, migrants and asylum seekers. The pandemic has been marked by breaches of the Republic of Cyprus' international treaty obligations towards asylum seekers, whose living conditions have caused an additional cause for concern.[6] Back in 2019, the Greek Cypriot Government had announced that would reenforce controls of the Green Line through the amendment of the Code for the implementation of the Regulation of the European Council (866/2004/EC) on the Green Line.[7] However, the initial proposals were not widely welcomed by human rights experts and NGOs as the new measures were considered disproportionate, discriminatory and made without any consultation with stakeholders.[8] Moving forward, in January 2020, the Cyprus Ministry of the Interior announced the alteration of the policy on migration. It proposed setting up a new safe countries list and the construction of EU-funded migrant centres where asylum seekers can be detained until their applications are fully processed and stressed that for the rejected applications the deployment of Frontex will be used as a mechanism for the return of migrants to third countries.[9] Nevertheless, COVID-19 had a deteriorating effect on refugees, migrants and asylum seekers' human rights and living conditions, with delays in asylum and migration procedures and limited access to the legal and judicial systems.

In this article, I analyse through an interdisciplinary approach, the implementation of measures and policies adopted by the Republic of Cyprus to tackle COVID-19 health crisis, the pandemic's impact on the relationship between the two divided communities and on migration. In the first part, the focus is on how the premature response to the pandemic, deterred any prospects for the reunification of the island. The second part examines the existing legislation on migration and asylum policies and its implementation during the pandemic. The focus is subsequently shifted towards an investigation on how preventive measures imposed by the executive power in the form of 'exceptional orders, interfered with constitutionally established rights, political and civil rights and further shrunk civic space,

6 Ibid.

7 'Council of Ministers Amendments on the Green Line Code in Violation of the EC Regulation', *Kisa* (1 December 2019), available at https://kisa.org.cy/ministerial-amendments-on-the-green-line-code-in-violation-of-the-ec-regulation/ (last accessed 25 June 2021).

8 Ibid.

9 'Cyprus to launch a new migration and asylum policy', *Brief* (25 January 2020), available at https://www.brief.com.cy/english/cyprus-launch-new-migration-and-asylum-policy (last accessed 22 June 2021).

challenging the rule of law. With that context, attention is thereafter drawn to an analysis of the concepts of state of emergency, state of exception and the doctrine of necessity. Finally, the article attempts to elucidate the derogation regime developed as an exodus for violation exemptions in times of emergency.

The Cyprus Dichotomy: A Step Towards an Ethnic Reconciliation or Further Distancing

Since the 1974 Cyprus divide, interethnic violence has persisted on the island, endangering peace in the eastern Mediterranean. Regardless of the perennial UN peace-talk attempts and mechanisms to implement specific confidence-building measures to the peace process within a wider reconciliation effort and ensure sustainable peace development, the dispute remains unresolved.

Core issues of territorial adjustments, and the power-sharing balance of federal governance —including the symbolism of a rotating presidency— coupled with questions of security and guarantees have divided the Turkish and Greek communities for almost five decades. The failure of the President of the Republic of Cyprus (RoC), Nicos Anastasiades, and the leader of the 'Turkish Republic of Northern Cyprus' ('TRNC'), Mustafa Akıncı, to obtain the convergence of positions on the aforementioned internal dimensions before moving on to security and the implementation stage resulted in further negative implications. Although this was designed to increase the RoC President's bargaining position for implementing a rotating presidency with a reduced security role for Turkey, in effect, it blocked, negotiations and sustained a negative atmosphere in the relations with the 'TRNC' leader M. Akıncı and the Cypriot public. The security issue was, perhaps, the key factor leading to the collapse of the negotiations.[10]

The pandemic outbreak was thought to be a step towards a reunification process, bringing the two communities closer, and enabling them confront the state of emergency that had occurred. Back in 2008, a bicommunal Technical Committee on Health was established, involving experts from both sides with the intention to share information on their health systems and provide assistance to both communities, respectively. Additionally, a sub-committee with expertise on issues

[10] Michális S. Michael, 'Dialogue Remains Critical as Hopes Rise for Cyprus' *IPI Global Observatory* (19 August 2015), available at https://theglobalobservatory.org/2015/08/cyprus-akinci-anastasiades-united-nations/ (last accessed 16 May 2020).

related to infectious and genetic diseases was set up.[11] During the Technical Committee meeting that took place on 3 February,[12] both the President of the RoC, Nicos Anastasiades, and the leader of the 'TRNC', Mustafa Akıncı, mutually agreed that the pandemic crisis necessitated the joining of their forces, an increase in their cooperation and coordination levels and actions in concert. Yet, on the 28th of the same month, Nikos Anastasiades unilaterally prompted a temporary closure of four checkpoints, citing COVID-19 spread-out concerns, even though no reported infections in the occupied territories had officially been made until that point. On this note, the Parliamentary Spokesperson and Political Bureau member of AKEL[13], Yiorgos Loucaides, challenged the government's answer on the matter of control mechanisms which were not installed at all checkpoints, and which would have prevented the closure of any crossing points. [14]

Evidently, as this decision carried sensitive political implications, the unilateral suspension caused –as expected– the reaction of the 'TRNC' leader, who proceeded to state that this action does not unite but, on the contrary, divides the two communities even more.[15] Therefore, in counter-response, as COVID-19 began to spread on the Greek Cypriot side, Turkish Cypriots proceeded to close all nine checkpoints, resulting in another disjunction of the only previously joined forces, completely isolating the two communities.

In fact, COVID-19 presented an opportunity to promote intergroup solidarity and enhance coexistence in the two divided societies. However, the tactical lines followed, such as the drastic preventive measures, not only incited internal and

[11] Secretary-General's Good Offices Mission in Cyprus, 'Joint Statement by the bicommunal Technical Committee on Health' *UN Cyprus Talks* (3 February 2020), available at http://www.uncyprustalks.org/joint-statement-by-the-bicommunal-technical-committee-on-health/ (last accessed 16 May 2020).

[12] 'They Join Forces Against the Coronavirus: Anastasiadis-AkıncıHave Agreed on Measures' ('Ενώνουν Δυνάμεις για τον Κορωνοϊό: Αναστασιάδης-Ακιντζί Συμφώνησαν Μέτρα') *AlphaNewsLive* (3 February 2020), available at https://www.alphanews.live/politics/enonoyn-dynameis-ton-koronoio-anastasiadis-akintzi-symfonisan-metra (last accessed 16 May 2020) (in Greek).

[13] AKEL (Progressive Party of the Working People) is a contemporary communist party guided by the ideology of Marxism-Leninism. Founded in 1941, it has been the oldest political party in the Republic of Cyprus.

[14] Parikiaki (no 4).

[15] 'It Is Not a Coronavirus Struggle, But an Action to Divide the Two Communities' (Coronavirüs mücadelesi değil, iki toplumu birbirinden uzaklaştıracak bir eylem) *Genctv* (29 February 2020), available at https://www.kibrisgenctv.com/kibris/coronavirus-mucadelesi-degil-iki-toplumu-birbirinden-uzaklastiracak-h64679.html (last accessed 17 May 2020) (in Turkish).

external reactions but also resulted to further distancing the steps taken towards reconciliation.

Following a brief account of the recent interaction of the two communities during the pandemic crisis, the questions raised for examination are focused on the legitimacy of the implemented policies and their consequences on the already turbulent relationship of the divided island of Cyprus. Secondly, since different parts of the Cypriot Constitution delimit the role of each branch of government, emergency measures and regulations which caused ambiguities within the exercising powers were determined in an attempt to cope with the rapid spread of COVID-19. Ergo, questions of constitutional compliance emerged as per the laws applied in the aftermath of the promulgation of emergency, examining citizens' rights in conjunction with the rule of law and whether these means were upheld in the context of the pandemic.

The Echoes of Peace Efforts in the COVID-19 Era

In the aftermath of the closure of the checkpoints, the sudden disruption posed questions on the impact of implemented policies on the 'Green Line' and the missed opportunity for a 'COVID-19 synergy' which could bridge a significant part of the gap between the two communities. Efforts to rejoin forces during crucial times in an attempt to sustain peace between the divided communities withered away with the suspension of the crossings, rendering Cyprus more akin to the pre-2003 era when the two communities were entirely isolated from each other. Besides the limited information and exchange of medical supplies, the two leaders of the island proceeded to their own individual responses to contend with the COVID-19 outbreak. The continuous waning of trust among them, and the nature of the pandemic dictating isolation and distancing exacerbated the lack of cooperation and the probability of acting in concert. By turning their backs to each other during crucial times, the two leaders could unavoidably bequeath a lasting legacy on the dichotomy of Cyprus and any reunification prospects.

In response to the global pandemic, the United Nations Peacekeeping Force in Cyprus (UNFICYP), has been working in unison with the authorities to ensure all relevant mitigating and preventive protocols are strictly adhered to, monitoring the divided island's ceasefire line.[16] In the meantime, on 4 April the UN Secretary-Gen-

[16] Fm, 'COVID19: UN Peacekeeping Reports First Cyprus Case' *Financial Mirror* (10 April 2020), available at https://www.financialmirror.com/2020/04/10/covid19-un-peacekeeping-reports-first-cyprus-case/ (last accessed 18 May 2020).

eral suspended the rotation and deployments of all uniformed personnel across all UN peace operations until 30 June, prioritising the personnel's and wider community's safety while enhancing measures to ensure the continuity of operations and the prevention of the spread of the virus.[17]

On the other hand, part of past peace efforts included a Bi-communal, Technical-Committee structure as an effective way to ensure communications and cooperation would go forward. Sharing medical supplies, expertise and even personnel could lead to a successful coordination of health care which could result in further appreciation of interdependencies and a step forward in regulating the relations between Greek Cypriots and Turkish Cypriots. On this note, the UN Secretary-General, Antonio Guterres, encouraged the two leaders to strengthen the other Bi-communal Technical Committees in the fight against COVID-19 and urged them to find additional ways to build trust between the two communities, stressing that a joint agreement on the opening of crossing points as soon as the health situation on the island stabilises is expected.[18] The closure of crossing points caused a number of issues, chiefly to those who live on one side of the island and work on the other, as well as to Turkish Cypriot students who study at schools and universities in the south of the island. In the meantime, the Cyprus News Agency (CNA) reported that the Bi-communal Technical Committee on Economic and Commercial Matters, which works on maintaining the civil-society and economic-organisations dialogue between the two sides, was able to restart its economic activities with the Turkish Cypriot community as part of the implementation of the Green Line Regulation, facilitating contactless transactions.[19]

Evidently, once more the two leaders found themselves facing the challenge of finding a way to regain the lost momentum and steer their divided communities back to the reunification process by demonstrating good will, thereby redefining security and migration key priorities to address emergencies under the scope of mutual understanding and cooperation.

[17] Ibid.

[18] Evie Andreou, 'Coronavirus: Guterres Expects Joint Agreement on Reopening Crossing Points'*Cyprus-mail* (14 May 2020), available at https://cyprus-mail.com/2020/05/14/coronavirus-guterres-expects-joint-agreement-on-reopening-crossing-points/ (last accessed 18 May 2020).

[19] Ibid.

The Impact of the Pandemic on Security, Migration, and Vulnerable Groups

In recent years, the Cypriot government has introduced a more restrictive migration policy through particularly repressive measures. More precisely, in November 2019, the government announced the implementation of stricter controls by amending the Code[20] related to the Regulation of the European Council on the Green Line which specified in paragraph 7 that:

> While taking into account the legitimate concerns of the Government of the Republic of Cyprus, it is necessary to enable EU citizens to exercise their rights of free movement within the EU and set the minimum rules for carrying out checks on persons at the line and to ensure the effective surveillance of it, in order to combat the illegal immigration of third country nationals as well as any threat to public security and public policy. It is also necessary to define the conditions under which third country nationals are allowed to cross the line.[21]

Although the government had initially suggested controls to be introduced for all people crossing the border, Greek-Cypriot citizens of the Republic were eventually exempted. In fact, the suggested amendment extends the ban to third-country nationals (TCNs) with a temporary residence permit also depriving them of the right to cross the checkpoints to the occupied northern territories.[22] Since 2014, asylum seekers have not been authorised to cross the border, which constitutes an act of discrimination and, at the same time, a violation of the Community *acquis* on free movement[23] . The decision to prohibit the crossing creates a direct violation of the Regulation of the European Council (866/2004/EC) according to its paragraph 6 and 7[24] as the imposed measures bring about disproportionate restrictions and

[20] Kisa (no 7).

[21] Council of the European Union, 'Council Regulation (EC) No 866/2004' (9 June 2004) L 206/51, (9 June 2004) *Official Journal of the European Union (OJEU),* (available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0866R(01)&from=EN) (last accessed 18 May 2020).

[22] See (no 7).

[23] Cyprus Government Gazzette, 'Ο Περί Μετονομασίας του Υπουργείου Εργασίας και Κοινωνικών Ασφαλίσεων Νόμος του 2014' (15 April 2014) Part I(I), No 4441, 287-330, available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/100595/120736/F-1727220848/CYP100595%20Grk.pdf (in Greek) (last accessed 20 May 2020).

[24] In this context para 7 of the Regulation states that the Republic of Cyprus shall enable EU citizens to exercise their rights of free movement within the EU and set the minimum rules for carrying out checks on persons at the line and to ensure the effective surveillance of it, in order to combat the illegal immigration of third country nationals as well as any threat to public security and public policy. It is also nec-

obstacles to the free movement of people through the line.[25] Additionally, provisions contained within the proposals could potentially restrict Article 18 on the right to asylum, which is a fundamental right of the EU Charter and thus, obstruct the access to the asylum procedure for those who cross the Green Line.[26]

In the statement on new migration and asylum policy by the Minister of Interior on March 2020, it was stressed that measures aiming to accelerate the examination of asylum applications and expedite the return procedures in order to ensure safety and cope with the migrant flows within the Republic of Cyprus were planned. The aim was mainly to return only economic migrants to their countries or to the 'safe countries'[27] where a better future possibly awaits them, since, admittedly, the RoC has already exceeded its limit and, thus, cannot afford to offer such prospects. In essence, the strategy proposal contained procedures focusing on strengthening the infrastructure of the Republic in the emergency reception centres at Pournara and Kofinou, which were converted into the migrants' first-arrival registration centres ad hoc, with the purpose of accommodating a larger number of people. At the same time, the Minister of Interior underlined that the European Union (EU) should implement a pan-European asylum policy which would facilitate negotiations with third countries to which immigrants must return.[28]

In the wider context of migration in the Mediterranean and Europe, concerns have been raised in view of the COVID-19 outbreak, where countries are struggling to cope with the huge migrant flows during the pandemic crisis. In Cyprus, the percentage of the migratory flow has recently reached 3.8%, indicating that 12,000 people have already been offered international protection, while there are 17,000

essary to define the conditions under which third country nationals are allowed to cross the line. Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:206:0051:0056:EN:PDF (last accessed 20 June 2021).

[25] Kisa (no 7).

[26] Nicos Trimikliniotis, 'Cyprus As A New Refugee "Hotspot" in Europe? Challenges for a Divided Country', (Nicosia: Friedrich-Ebert-Stiftung, 2019), available at http://library.fes.de/pdf-files/bueros/zypern/16001.pdf (last accessed 21 May 2020).

[27] In the refugee context, the term 'safe country' is applied to countries which are determined either as being non-refugeed-producing countries or as being countries in which refugees can enjoy asylum without danger. UNHCR, 'Background Note on the Safe Country Concept and Refugee Status EC/SCP/68' (26 July 1991), available at https://www.unhcr.org/uk/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html (last accessed 19 June 2021).

[28] Press and Information Office, 'Statement by the Minister of Interior on the Migration Problem' (3 March 2020), available at https://www.pio.gov.cy/en/press-releases-article.html?id=12444#flat (last accessed 22 May 2020).

pending asylum applications and 4,000 pending appeals.[29] Yet, on 20 March, a boat carrying 175 Syrian asylum seekers –many of who claimed they were trying to join family already settled in the RoC– was warded off by the Greek Cypriot coast guard ending up near the shore of Northern Cyprus where Turkish Cypriot authorities assisted it in reaching land. The asylum seekers were, at first, put in a 14-day quarantine period which led to an effective house arrest, as they were kept in confinement and under constant surveillance. As the reasons for their extended confinement were not clarified, major concerns were raised as per the 'TRNC' law stipulating that detention on migration grounds is authorised only for 8 days and is solely extendable by a court decision.

According to international law regulations, the Republic of Cyprus covers the entire island, which is, nevertheless, under the effective control of two states due to its dichotomy. Therefore, within the State-responsibility framework, Turkey should assume responsibility for any human rights violations, since, as the occupying power, it is the only country recognising the self-declared 'Turkish Republic of Northern Cyprus'. To this effect, the European Court of Human Rights (ECtHR), in its judgment of 10 May 2001 on the Fourth Interstate Application of *Cyprus v. Turkey* held that 'Turkey having effective overall control over Northern Cyprus, its responsibility extends to securing all human rights under Article 1 of the European Convention of Human rights and for violations of such rights by her own soldiers or officials, or by the local administration, which are imputable to Turkey'.[30]

Interestingly, even though the 'TRNC' issued deportation orders to send the asylum seekers to Turkey, the latter refused to accept the 175 asylum seekers invoking COVID-19 concerns. The Greek Cypriot authorities had already refused permission allowing the boat to land and had pushed them back, hence, since Turkey's ratification of the 1967 Protocol comes with a geographical restriction recognising only European refugees[31], based on these grounds Turkey proceeded in sending them back to Syria. It is not the first time Turkey has violated the non-refoulement principle[32] by forcibly returning refugees or asylum seekers to their country, where their

[29] Ibid.

[30] *Cyprus v. Turkey,* (10 May 2001) Application no 25781/94, para 77.

[31] UNHCR, The Republic of Cyprus, available at https://www.refworld.org/pdfid/5541e6694.pdf (last accessed 22 June 2021).

[32] 'EU: Don't Send Syrians Back to Turkey' *Human Rights Watch* (HRW (20 June 2016), available at https://www.hrw.org/news/2016/06/20/eu-dont-send-syrians-back-turkey (last accessed 22 May 2020).

life could be endangered or where they could face violations of their rights. In particular, Syrian asylum seekers in the RoC stated that during their previous attempts to reach Cyprus they were deterred by the Turkish coast guard and were forced to sign voluntary repatriation forms before being returned to Syria.[33] In fact, as the 'TRNC' has no available asylum system, nongovernmental groups are sometimes granted access to migrants who reach the territory in order to determine whether international protection is needed; if it is, refugee law provisions are activated, allowing asylum seekers to stay and to have access to basic rights.

Protections afforded to asylum seekers by the RoC –operating as an EU member and under its strict migration policy– are not accessible to those who reach the Northern Cyprus territory. Although it is under the jurisdiction of the RoC to control its borders and crossings into the country, the Republic is also bound to respect the right to seek asylum, as stated within the EU Charter of Fundamental Rights. Failure to do so could constitute violation of the non-refoulement principle, while refusing to aid a boat in distress could also be a breach, under Article 98,[34] of the Law of the Sea and of their EU obligations on search-and-rescue.[35]

It would be expected that under international law and the ECtHR case law on *Cyprus v. Turkey*[36] and *Loizidou v. Turkey*[37] respectively, joint responsibility would apply, since Turkey has been considered to exercise effective control over the north. Nevertheless, Turkey maintains the geographical limitation to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which, in turn, reduces the protection, offered to refugees from non-European States[38] and thus restricts the legal frame in both Turkey and the North to specific policy decisions.

[33] Gerry Simpson, '"Repatriation" of Syrians in Turkey Needs EU Action' *HRW* (7 November 2019), available at https://www.hrw.org/news/2019/11/07/repatriation-syrians-turkey-needs-eu-action (last accessed 22 May 2020).

[34] Article 98 para b of the United Nations Convention of the Law of the Sea stipulates that 'to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him'.

[35] 'Turkish Cypriot Authorities: Release Detained Syrian Asylum Seekers' (*HRW*, 16 April 2020), available at https://www.hrw.org/news/2020/04/16/turkish-cypriot-authorities-release-detained-syrian-asylum-seekers (last accessed 23 May 2020).

[36] *Cyprus v. Turkey* (no 30).

[37] *Loizidou v. Turkey,* [1995] ECtHR, Application no. 15318/89.

[38] UNHCR (no 31).

COVID-19 Preventive Measures and Devices

On 11 March 2020, in the aftermath of the World Health Organisation's (WHO) declaration of the coronavirus pandemic, governments, international agencies and institutions announced temporary measures considering the circumstances of public emergency. Inevitably, emergency measures imposed at a national, European, international and global level are entangled in principles, freedoms, and rights which, according to Article 4 of the International Covenant on Civil and Political Rights (ICCPR), shall be in conformity with the legality, temporality, official proclamation, and inviolability of absolute rights.[39]

Preventive policies and mechanisms implemented during the pandemic were introduced in the form of 'exceptional orders' which prioritised the protection of public health, and thus, remain in an external relationship to normative constitutional law. For instance, under the UK Coronavirus Bill,[40] substantial and exceptional measures were assumed by the government to be used only for ad hoc purposes and in a manner which would be proportionate to the situation. These measures included powers for the police to arrest and forcibly take for testing any people suspected of being infected with the virus.

The wide-ranging restrictions on individual freedoms enacted in several countries under emergency COVID-19 measures also raised major concerns as per the free flow of news and information. Government officials in Brazil, China, Mexico, Belarus, Myanmar, and the United States revealed a muddled denialism as per the pandemic, depriving their publics of accurate information. In Bangladesh, Cambodia, Egypt, Ethiopia, Turkey, and Venezuela, journalists and others were arrested and detained for reporting on or expressing opinions about COVID-19 on social media. In Bolivia, authorities used COVID-19 as a ground to menace political opponents with up to 10 years of imprisonment for spreading 'misinformation'.[41] The International Press Institute (IPI) reported that over 193 media-freedom violations had been committed worldwide in the first three months from the outbreak of the pandemic, resulting in arrests and charges of journalists, restrictions on access to information, censorship, excessive fake-news regulations, and verbal or physical attacks.

[39] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 4.

[40] Coronavirus Act 2020 (HC Bill c. 7).

[41] 'COVID-19: A Human Rights Checklist' *HRW* (14 April 2020), available at https://www.hrw.org/news/2020/04/14/covid-19-human-rights-checklist (last accessed 22 May 2020).

The response of many countries to the COVID-19 crisis, where vulnerable and marginalised populations were particularly affected, precipitated governments to tighten or close border regimes and apply precautionary isolation and border measures. The same tactic was adopted by the Republic of Cyprus, first by imposing lockdown, applying control restrictions on non-essential journeys and international travel in a coordinated attempt among Schengen Member States and the contiguous States, and second, by proceeding to suspend the crossing-points operations afterwards.

By temporarily limiting personal freedoms guaranteed by the Constitution, the Cypriot government 'froze' the constitutional legal order for an indefinite period. Article 183, paragraph 1 of the Constitution specifies that 'in case of war or other public danger threatening the life of the Republic or any part thereof, the Council of Ministers shall have power, by a decision taken in this respect, to issue a Proclamation of Emergency'.[42] It then continues to stipulate in paragraph 2 'any such Proclamation shall specify the Articles of the Constitution which shall be suspended for the duration of such Emergency'.[43]

Although no state of emergency had been declared by 24 March[44] and no official transcript on the Proclamation of Emergency appeared to be available, the President of the Republic of Cyprus, in his announcement on 24 March 2020, referred to the pandemic by naming and describing the challenging condition as a 'war'.[45] Within the context of a state of emergency, restrictive measures taken by governments restrict or limit fundamental human rights prescribed by the Universal Declaration of Human Rights (UDHR), such as freedom of movement (Article 13) and the right to freedom of peaceful assembly (Article 20), 'for the sake of protecting and promoting the health of individuals and communities'.[46]

[42] Cyprus Constitution, Art. 183, para 1, available at https://www.constituteproject.org/constitution/Cyprus_2013.pdf?lang=en (last accessed 19 June 2021).

[43] Ibid, para 2.

[44] European Union Agency for Fundamental Rights (FRA), *Coronavirus COVID-19 outbreak in the EU-Fundamental Rights Implications* (University of Nicosia and Symfiliosi, 24 March 2020), available at https://fra.europa.eu/sites/default/files/fra_uploads/cyprus-report-covid-19-april-2020_en.pdf. (last accessed 22 May 2020).

[45] Bouli Hadjioannou, 'Coronavirus: Full Text of Address of President Anastasiades Announcing the Lockdown' *In-Cyprus* (24 March 2020), available at https://in-cyprus.philenews.com/coronavirus-full-address-of-president-anastasiades-announcing-the-lockdown/ (last accessed 22 May 2020).

[46] Universal Declaration of Human Rights, (adopted 10 December 1948) UNGA Res 217A (III) (UDHR).

Limitations on rights and freedoms are, obviously, justified and considered imperative for the protection of public health during emergencies. Nevertheless, paragraph 28 of the General Comment 14 of the Committee on Economic, Social and Cultural Rights (CESCR) stipulates that limitations are 'intended to protect the rights of individuals rather than to permit the imposition of limitation by states' and that on the other hand, States have the 'burden of justifying such serious measures' as it has been the case with the notifications by States addressed to the Council of Europe (Treaty office).[47] Yet, paragraph 29 of the General Comment 14 explicitly specifies that any limitations 'must be proportional whilst the least restrictive alternative must be adopted', and stipulates that 'restrictions should be of limited duration and subject to review'.[48] Ergo, distinct conditions and features of the grounds for limitation or derogation along with interpretations which legitimise limitations in the case of public emergencies find themselves in the intersection of a triad of principles, posing the question of how derogations in human rights law can be permissible and in alignment with the rule of law whilst mandating 'the least intrusive means and not risking to be characterised arbitrary, unreasonable or discriminatory'.[49]

The Quarantine Law: A Colonial Alternative Within the Scope of a State of Emergency

The Constitution of the Republic of Cyprus contains a constitutional peculiarity which dates to the deep-rooted influence of the Republic since the British era. The Quarantine Law Cap. 260, a remnant of the pre-existing colonial legislation still underpinned by Article 188 of the Constitution, was triggered during COVID-19, bestowing a broad leeway of discretionary powers to the Council of Ministers to determine measures to prevent the spread of the Covid-19 Coronavirus 2020, Decree No 9.[50]

All decrees, regulations and notices promulgated under the rule of law are supposed to remain in force until further notice, which suggests measures might remain in place beyond reasonable time. Yet, it is questionable whether extending the restricted measures for an indefinite period provides a precautionary and effective

[47] UNCESCR 'General Comment 14' (11 August 2000) E/C.12/2000/4, Art 12.

[48] Ibid.

[49] Lawrence O. Gostin, 'When Terrorism Threatens Health: How Far Are Limitations on Human Rights Justified' (2003) 31 *Journal of Law, Medicine and Ethics* 524.

[50] Quarantine Law-Decree (no 2).

approach against the pandemic. The applicability of the Quarantine Law Cap. 260 raised multiple concerns including the issuance of 24 Decrees out of which only seven were officially translated in the English language even though the official languages of the RoC are Greek and Turkish. The absence of a social contract in the Republic of Cyprus, partly due to its colonial background, often explains the absence of an ample and inclusive public consultation which –regardless of the government's tactic of seeking scientific advice on the control of the infectious disease– cannot substitute mechanisms of direct democracy.[51]

On the contrary, the anachronistic context of the Quarantine Law per se can cause ambiguities and further controversies in conjunction with the rule of law during the pandemic, mainly because it confers a broad spectrum of powers to the executive. Thus, it would be more advantageous to pursue a more holistic conceptualisation, incorporating a synthesis of appropriate emergency laws, which would be proportionate to the circumstances and abide by the principle of proportionality, which is common practice to limiting derogation and other powers, justifying a means-end relationship reflected by the obligation to avert any derogations where strictly required by the situation of emergency.

The rule of law is designed to respond to facts of life in a reasonable and justified manner and must do justice to the situation at hand. Hence, it is determined which governmental measures are legally suitable and consequently admissible for the alleged legitimate purpose under the so-called sub-principle of 'fitness' or 'suitability'.[52] On the other hand, the principle of necessity gives rise to the question of whether less intrusive means to achieve the *desideratum* of the measures can be found and requires that no measure less restrictive –yet equally effective– be available.

The foresaid principle, generally defined as proportionality *stricto sensu,* assesses whether a measure is considered excessive, evaluating all relative factors, and preventing unjustifiable results.[53] Yet, the applicability of these three intercon-

[51] Stéphanie Laulhé Shaelou, Andrea Manoli, 'The Islands of Cyprus and Great Britain in Times of COVID-19 Pandemic: Variations on the Rule of Law 'In and Out' of the EU' *UCLan School of Law* (1 June 2020), available at https://lawblog.uclancyprus.ac.cy/the-islands-of-cyprus-and-great-britain-in-times-of-covid-19-pandemic-variations-on-the-rule-of-law-in-and-out-of-the-eu/?cn-reloaded=1 (last accessed 8 June 2020).

[52] Thomas Cottier & Ors, 'The Principle of Proportionality in International Law: Foundations and Variations' (2017) 18(4) *The Journal of World Investment and Trade* 628.

[53] Schlink Bernhard, 'Proportionality' in Michel Rosenfeld & András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012).

nected components does not comply with a systemic way but rather lies within a framework of balancing aspects at stake according to the facts of an ad hoc basis, as defined by the exigencies of the situation[54] and the protection of public health.

The Doctrine of Necessity Within a State of Necessity

It is not the first time the Cypriot constitutional order has come to a halt by the law of necessity in the aftermath of the constitutional crisis in 1963 and the Turkish invasion and occupation of the Republic's territories in 1974. Following the constitutional breakdown in 1963, whereupon Turkish Cypriots withdrew from the government, Greek Cypriots undertook full control in 1965.[55] During the transitional phase of the merging of the two supreme courts of Cyprus under the 33/1964 Law, the Supreme Court relied on and applied the doctrine of necessity under the *Mustafa Ibrahim* case[56] for the first time in 1964 in its attempt to go beyond the Constitution whilst preserving constitutional order. The ad hoc reference to reliance is not directly linked to the inaptitude of the existing State bodies to respond to a state of emergency by exercising their powers under the Constitution. In the absence of willingness of the two communities to cooperate under the bi-communal constitutional provisions —which was an indirect prerequisite but not a legally binding rule— for the effective operation of the provisions defined under Article 179 within the constitutional framework, the Cypriot State's identity as a constituted State,[57] as this was determined in the Constitution, was legally hampered.[58] Hence, the doctrine of necessity is reflected within the context of the State's per se necessity to introduce measures which would otherwise be unconstitutional, but only for the purpose of surmounting the absence of the Turkish-Cypriot community, since State bodies were impeded from fulfilling their duties. Therefore, the Court's decision to rely on and apply the doctrine, was primarily founded on the power conferred by Article 179, paragraph 1 which specifies that: 'This Constitution shall be the su-

[54] Cottier (no 52).

[55] Criton G. Tornaritis, 'Peculiarities of the Cyprus Constitution and Impacts on the Smooth Operation of the State' ('Ιδιορρυθμίες του Κυπριακού Συντάγματος και Επιπτώσεις στην Ομαλή Λειτουργία του Κράτους') (1979) 5 *Cyprus Legal Podium* (*Κυπριακό Νομικό Βήμα*) (in Greek).

[56] *Attorney-General of the Republic v. Mustafa Ibrahim and others* [1964] CLR 195.

[57] Constantinos Kombos, *The Doctrine of Necessity in Constitution Law* (Athens-Thessaloniki: Sakkoulas Publications, 2015) 175.

[58] Cf. Polyvios G. Polyviou, *The Case of Ibrahim, the Doctrine of Necessity and the Republic of Cyprus* (Nicosia, 2015) 35-45.

preme law of the Republic'[59] *ipso facto*, interactively and by responding to a state of emergency. Article 183 would therefore seem to be appropriately invoked in this respect, under judicial control and on the basis of establishing a necessity per se.

The Constitution of the Republic of Cyprus provides, under Article 183, a leeway to issue a Proclamation of Emergency which, so far, has never been triggered due to its limited scope and the fact that during the two previous crises the constitutional proceduralisation required the cooperation of both communities. Following the withdrawal of the Turkish community members from all public offices of the State after the inter-communal conflict of 1963, that was no longer the case. Hence, the State's necessity to surmount the crisis whilst ensuring the continuity of the functioning of the organs of State helped invent the law of necessity –applicable since 1964– instead of amending Article 183 that nurtures a constitutional paradox.[60]

In Cyprus, the doctrine of necessity has received a bifold recognition as an external and internal restriction. However, as an internal restriction solely, its applicability is effective within the frame of emergency law under the context of the suspension of rights.[61] In the *Ibrahim judgement*, specific prerequisites must be met before the principle of necessity becomes applicable. Ergo, measures taken to confront the necessity should be proportionate to the gravity of the situation which has affected the necessity and limited to the duration of the exceptional circumstances.[62]

The COVID-19 outbreak brought back bygone constitutional peculiarities by way of evidencing a further dimension of the paradox based on the recently emerged necessity. This law of necessity, as an aftereffect of the collapse of the bi-communal Cypriot State, cannot be directly invoked in this instance of absence of a link between the public-health emergency and the *raison d'être* of the doctrine's content. On the same note, Article 183 cannot be directly invoked either, due to its rigid content based on grounds involving 'war or other public danger threatening the life of the Republic or any part thereof'.[63] Thus, a link could not be established despite

[59] Christos Papastylianos, 'The Cypriot Doctrine of Necessity within the Context of Emergency Discourse: How a Unique Emergency Shaped a Peculiar Type of Emergency Law' (2018) 30(1) *The Cyprus Review* 115.

[60] Constantinos Kombos, *Covid-19 and the Cypriot Example: A Constitutional Paradox*, 7 May 2020, available at https://ukconstitutionallaw.org/2020/05/07/constantinos-kombos-covid-19-and-the-cypriot-example-a-constitutional-paradox/ (last accessed 10 June 2020).

[61] Papastylianos (no 59) 134.

[62] Papastylianos (no 59) 140.

[63] Cyprus Constitution, Art 183, para 1.

the fact that the President of the Republic of Cyprus, when addressing the public, referred to the situation as being tantamount to a 'war'.[64]

Laws of Exception v. Citizens of the Republic of Cyprus

Upon closer examination of the legal possibilities during the pandemic outbreak in Cyprus, it becomes evident that the proclamation of a state of emergency was not constitutionally feasible due to constitutional impediments on the use of emergency powers and the clear absence of reference to public health. The Council of Ministers, as the empowered body for triggering Article 183, would have to specify which articles would be suspended for the duration of the emergency (Article 183, paragraph 2) and which should cease to operate at the end of two months from the date of confirmation by the House of Representatives, unless decided otherwise. However, the President and the Vice-President of the Republic have the right of veto against such decision as per the stipulation of Article 183, paragraph 6.

Notwithstanding, within the suspended articles, Article 14 which stipulates that 'no citizen shall be banished or excluded from the Republic under any circumstances', was ambiguously interpreted and does not fall under Article's 183 sub-provisions. Therefore, within the framework of the implemented policies, the right of Cypriot citizens to enter the RoC was banned unless a medical certificate (Coronavirus/COVID-19) or other relevant evidence was presented during their entry, if the individuals fell under the exceptions determined for this purpose.[65] This measure incited controversies related to the ban on entry to the citizens of the Republic[66] and the protection afforded by Article 14 for which, as considered by the Supreme Court of Cyprus in the *Attorney General v. Afamis* case, [67] the Court maintained the position that:

> It is true that the literal meaning of the relevant Greek and Turkish expressions might be more akin to the English term "exiled" but for the purposes of the object of Article 14 of the Constitution it is clear that whether the precise phrase

[64] Hadjioannou (no 45).

[65] High Commission of Cyprus in the UK, 'Urgent Information for Persons Seeking to Return to Cyprus' (2020), available at https://cyprusinuk.com/news/urgent-information-for-persons-seeking-to-return-to-cyprus/ (last accessed 10 June 2020).

[66] 'Attorney General on Article 14: 'Some People Occupy Themselves with Convenient Theories Without Thorough Investigation' 'Κάποιοι Ασχολούνται με εξ Ανέσεως Θεωρίες Χωρίς Εμπεριστατωμένη Μελέτη»') *Justice* (17 March 2020), available at https://dikaiosyni.com/enimerwsi/genikos-eisaggeleas-diloseis/ (last accessed 10 June 2020) (in Greek).

[67] Supreme Court of Cyprus, *The Attorney General of the Republic and Andreas Costas Afamis*, Case 50/61 (1961).

> used is "exile" or "banishment", they connote one and the same idea, namely, a compulsory expulsion from the Republic of a citizen with a prohibition of his return to the Republic for a limited or unlimited period of time. The Court is of the opinion, after having considered the relevant authorities on the subject, that proceedings under the Act would not amount to a "banishment" or "exile" or "exclusion" from the Republic. This being so, the Court is of the opinion that the Act is not contrary to, or inconsistent with, the provisions of Article 14 of the Constitution.

Nevertheless, it is worth mentioning that the Court in *Afamis* case was called to examine the (un-)constitutionality of a legislative act, which was related to the arrest or detention of a citizen of the Republic for the purposes of taking proceedings against him. In this respect, Article 11 paragraph 2 (f) of the Constitution, prohibits depriving a Cypriot national of his liberty save in cases where the person is effecting an unauthorised entry into the territory of the Republic or of an alien against whom action is being taken with a view to deportation or extradition[68]. However, ever since Cyprus was constituted, this provision has been interpreted as confining the deportation procedures to aliens only[69]. Consequently, the differentiation between the terms 'person' and 'alien' led the Supreme Court to declare of the said legislative act unconstitutional, since Afamis –being a citizen of the Republic – could not fall under the provisions of the ad hoc legislative act.

On the other hand, as per the restriction of entry measures for Cypriot citizens seeking to return to Cyprus during the COVID-19 outbreak, Article 13 was invoked, as it is related to the right to move freely throughout the territory of the Republic, while being subject to any restrictions imposed by law and which are necessary for the purposes of defence or public health. Yet, the ad hoc Article falls under the specifications of free movement within the Republic and, subsequently, within the scope of internal movement; it does not reflect the case of Cypriot citizens whose entry to the Republic's territory was temporarily suspended.

Under the Quarantine Law, Cap. 260 –a 'frozen' colonial legislation amended only once before the pandemic crisis– the executive body was authorised to impose restrictive measures to the areas declared as infected by issuing ministerial decrees

[68] European Union Agency For Fundamental Rights, 'The Constitution of the Republic of Cyprus', Article 1(f), available at https://fra.europa.eu/en/law-reference/constitution-republic-cyprus-3 (last accessed 19 June 2021).

[69] *Afamis*, (no 67).

which limited the legislative role to that of a mere observer left with no power of intervention to amend the Quarantine law. Out of this, a constitutional-compliance issue occurred between the ministerial decrees and their conformity with the Republic's Constitution that should be assessed in conjunction with the principle of proportionality, mainly in the cases brought before the court by individuals and legal persons affected during the COVID-19 pandemic.

The Case 301/2020, 16 April 2020,[70] refers to a Cypriot student residing in the United Kingdom (UK), whose access to the RoC was indirectly denied since the student could not provide the medical certificate required due to the fact that such medical documents were not being issued in the UK at the time. Upon examining the case within the context of interim proceedings, the administrative court was solicited to proceed by judicial order to the suspension of the ministerial decree which was imposing restrictions on entry to the RoC, as the measure imposed was deemed unconstitutional under Article 14. The Court, in its decision, dismissed the claim on procedural grounds, referring to its inability to challenge measures of a regulatory nature implemented for reasons of public safety and determined that the case was involving other factors, such as airline companies. Thus, by taking into account the condition of public emergency, the contested act could not be deemed illegal in interim proceedings based on standing grounds, but rather a matter *in abstracto*.[71]

In this instance, the case failed to become substantiated because the measures imposed were promulgated under a ministerial decree and were, thus, precluded from judicial scrutiny. The Court, in its approach, invoking the severity of the exceptional situation of the pandemic and its ad hoc absence of expertise, decided that such matters fall within the remit of scholars and policymakers.[72]

In many respects, it remains questionable why the Constitution's provisions pre-empted the promulgation of emergency during the pandemic outbreak rather put forward laws of emergency and necessity in which the State has priors to, proceeding to relevant amendments. Obviously, the doctrine of separation of powers played a considerable role in the adoption of emergency measures, as the Constitution confers powers to each branch of government in an asymmetrical way. For instance, the executive branch is considered a powerful body. Hence, while a

[70] *Regarding Articles 1 (A), 7, 9, 14, 28 and 146 of the Constitution,* Case 301/2020 (16 April 2020), available at http://www.cylaw.org/cgi-bin/open.pl?file=/administrative/2020/202004-301-20ait300320.html (in Greek).

[71] Ibid.

[72] Ibid.

Proclamation is in operation, and if immediate action is required, the Council of Ministers may make any ordinance strictly connected with the state of emergency having the force of law (Article 183 paragraph 7 [1]) subject to the right of veto of the President and the Vice President of the Republic under Article 57.

On the other hand, the legislative branch —as exercised by the House of Representatives— has limited power, since it is considered 'inter-dependent' to the executive body. The *President of the Republic v. House of Representatives*[73] case law demonstrates the legislature's exclusive authority to legislate except where the content of an act falls under the immediate remit of the executive; in that case, the power is exclusively conferred to the foresaid branch. Therefore, during the pandemic, and although Article 183 would seem more appropriately triggered in a state of public emergency in the absence of immediate provisions related to public health and its safeguard along with the vagueness regarding a potential prolongment of the duration of the state of emergency, the ad hoc constitutional article ended up not being applied. Instead, the colonial quarantine law was deemed more relevant in providing the solution despite its legal hindrances which stand against constitutional scrutiny.[74]

In addition, the fact that the Court seems to allow ample space to governmental acts during the current situation of public emergency raises questions of constitutional compliance, since measures imposed are precluded from judicial scrutiny and therefore remain outside a legal safety net which might compromise the rights of the citizens of the Republic.

COVID-19 State of Exception

Considering the COVID-19 emergency, notions of the state of exception and biopolitics involved reflect ways in which sovereignty is understood and individual rights are recognised by and within sovereign power. The question lies on how a state of exception can be conceptualised within the context of sovereignty as it responds to the threat of a 'COVID-19 state'. In this context, an examination of the biopolitical governance of the vicissitudes of biological life itself cannot be pursued without considering the legality and illegality of state measures enacted to keep the pandemic outbreak from spiralling out of control.

[73] , *Regarding Article 139 of the Constitution*, Case 1695/2015 (28 March 2016), available at http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_3/2016/3-201603-1695-15.htm (in Greek).

[74] Kombos (no 59).

In this respect, international human rights law interfaces with and impacts on the domestic regulation of crisis by regulating the experience of emergencies at the domestic level through binding documents and treaties such as the UDHR, the European Convention on Human Rights (hereinafter European Convention), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[75]

The pandemic could be seen as a means to justify an unprecedented attempt to legitimise measures of control and regulation by State authorities in Western democratic societies. In this context, the term 'COVID-19 state' has been described by Agamben as a state of exception 'provoked by an unmotivated emergency',[76] which has provoked the media and authorities to produce a 'disproportionate response' to something that was just 'a normal flu'.[77]

While there have been debates on how a digitalised system of social control — such as the one implemented in China— could prove to be the right solution for democratic societies as a response to the pandemic threat, fundamental questions have been raised about the necessity of a check-and-balance model struck between government control providing security and the protections of individual rights and human rights in general. Ergo, notions of legal protection and rights recognition need to be reconsidered in the light of sovereign practices that have emerged during the COVID-19 crisis.

The 'COVID-19 state' has not involved the supersession or suspension of constitutional law but has rather instituted a biopolitical regime carrying political-legal orders that destabilise existing notions of individual, social and political bodies over the course of remodelling chief functions of the State and strengthening the

[75] Universal Declaration of Human Rights (adopted 10 December 1948UNGA Res 217 A(III) (UDHR) at 71 (1948); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)(1950) ; International Covenant on Civil and Political Rights (adopted 16 December1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR);International Covenant on Economic, Social and Cultural Rights, GA res 2200A (XXI), 21 UN GAOR Supp (no 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976.

[76] Nicolas Truong, 'Giorgio Agamben: "The Epidemic Clearly Shows That the State of Emergency Has Become the Normal Condition" ('Giorgio Agamben: "L'épidémie montre clairement que l'état d'exception est devenu la condition normale"') *Le Monde* (24 March 2020), available at https://www.lemonde.fr/idees/article/2020/03/24/giorgio-agamben-l-epidemie-montre-clairement-que-l-etat-d-exception-est-devenu-la-condition-normale_6034245_3232.html (last accessed 27 March 2020) (in French).

[77] Ibid.

convergence between biomedical knowledge and political power. Yet, the confluence between *bios* and politics is played out in specific ways on displaced bodies.

Measures implemented by governments have led to a situation where two kinds of state of exception are in operation. Firstly, while an entire society found itself under a temporary state of exception in order to protect life, populations who had already been living under a state of exception prior to the pandemic –including refugees, as well as some other migrant and homeless populations– often faced contradictory (at times supportive and at other times repressive) policy responses. Therefore, the quarantine itself has produced, in a way, new borders, which could be inscribed as social institutions,[78] thus consolidating the already existing ones, paradoxically, even after the lockdown has been eased.

Under these circumstances, notions of legal protection and rights recognition need to be reconsidered in the light of sovereign practices that have emerged during the COVID-19 crisis through an attempt to redefine the term 'emergency' in order to minimize the gap between the interpretation of the law and its enactment, where ambiguities and contradictions have been made visible between coercive and relational practices of public security.

In Search of a Redefinition of the COVID-19 State of Emergency

The European Commission of Human Rights, for the purposes of Article 15 of the European Convention, defined as public emergency in *Lawless v. Ireland* [79] 'a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question'.[80] Although some dissenters suggested a more diligent definition of public emergency, an alternative was indicated, associating war and public emergency in Article 15 – 'in time of war or other public emergency'– which must be construed as tantamount to war[81] or as analogous to circumstances of war.[82] A further dissenting opinion which simultaneously reflects the case of Cyprus and its constitutional crisis in 1963, propounded that a public emergency should be considered in instances where the constitutional order of the

[78] Sandro Mezzadra, Brett Neilson, *Border as Method, or The Multiplication of Labor* (Duke University Press, 2013).

[79] *Lawless v. Ireland,* 1 Eur. Ct HR (ser. B) at 56 (1960-1961) (Commission report) (hereinafter *Lawless* [Commission]); *Lawless* (Court), 3 Eur. Ct HR (ser. A) (1960-1961).

[80] Ibid. para 90, at 82.

[81] Cf. Hadjioannou (no 45).

[82] *Lawless* (no 79), para 93, at 95 (Commission member Süsterhenn, dissenting).

State has collapsed and the different branches of government can no longer be in function.[83] Yet, after considering the dissenting opinions and the submitted suggestions, the European Court of Human Rights (ECtHR), , in its response merely affirmed the Commission's decision and abstained from providing a per se definition of its own.

Following the *coup d'état* in Greece which took place on 21 April 1967, the country announced the suspension of certain articles of the Constitution which guaranteed human rights.[84] In fact, Greece had ratified the Convention in 1953 and had been the first State to file two applications against the UK charging violations of the Convention by British authorities in Cyprus. In this regard, in their attempt to define a public emergency in the *Greek* case,[85] the Commission members identified four main characteristics under Article 15. Firstly, the emergency must be actual or imminent; secondly, its effects must involve the whole nation; thirdly the organised life of the community must be threatened; and finally, the ad hoc crisis or danger must be exceptional so that the ordinary measures or restrictions afforded by the convention for the maintenance of public health, safety, and order are manifestly inadequate.[86]

On the same note, the UN Human Rights Committee, in its General Comment 5/13 in Article 4 of the ICCPR stipulated that an alleged emergency will allow grounds for derogation under Article 4, solely if the relevant circumstances are of an exceptional and temporary nature.[87] For any cases presented before the Committee, the State has full responsibility for providing evidence that the requirements, set forth in the Optional Protocol, have been duly fulfilled.[88] It should be mentioned that the principles encapsulated in General Comment 5/13 were revised and ex-

[83] Ibid. Para 96, at 101 (Commission member Ermacora, dissenting).

[84] A Royal Decree n 280, which the King Constantine II did not approve and which, besides suspending basic constitutional rights, also established martial law. Alexandre C. Kiss ; Végléris, Phédon, 'L'affaire grecque devant le Conseil de l'Europe et la Commission européenne des Droits de l'homme' [The Greek case before the Council of Europe and the European Commission of Human Rights] (1971) 17 *Annuaire Français de Droit International* (in French) 889

[85] ECtHR, *The Greek Case: Report of the Commission* (1969).

[86] *Lawless* (no 79), para 153, at 81.

[87] Report of the Human Rights Committee, UN GAOR Human Rights Comm., 36th Sess., Annex VII, General Comment 5/13, at 110, UN Doc. A/36/40 (1981).

[88] Jaime Oraá, 'Human Rights in States of Emergency in International Law' (1992) 63 (1) British Yearbook of International Law, 485 *in* Oren Gross and Fionnuala Ní Aoláin, *International human rights and emergencies* (Cambridge University Press, 2006) 250.

tended in the new General Comment 29,[89] and were used during the COVID-19 pandemic by several countries.

More precisely, in its General Comment no 29 of states of emergency[90], the UN Human Rights Committee clarifies that for a State to invoke Article 4 two fundamental conditions must be met a priori: first, the situation must amount to a public emergency which threatens the life of the nation, and second, the State party must have officially proclaimed a state of emergency with the latter being a *sine qua non* condition for the maintenance of the principles of legality and the rule of law.

> When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, states must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order for the Committee to perform its task, states parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers. [91]

Proclaiming a state of emergency offers a certain amount of leeway to probable grounds for derogation from any provision of the Covenant. Therefore, States are expected to act within their constitutional (and other) provisions of law that govern such proclamations and enable the use of emergency powers. For the Committee to monitor the laws in question and evaluate their compliance with Article 4, the Covenant State parties are expected to submit a detailed report under Article 40 in respect to their law and practice in the field of emergency powers.

Yet, following the announcement of 11 March 2020 by the WHO proclaiming COVID-19 as a pandemic posing a significant danger to the public, the notifications board of the Council of Europe, as of 2 April 2020, included only Latvia, Armenia, the Republic of Moldova, Estonia, Georgia, Albania,[92] North Macedonia and Roma-

[89] UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: https://www.refworld.org/docid/453883fd1f.html (last accessed 20 June 2021).

[90] Ibid.

[91] Ibid.

[92] On 24 March 2020, the Council of Ministers of the Republic of Albania decided to declare a state of natural disaster to ensure the containment of the spread of COVID-19 throughout its territory. The aim of the decision was to ensure epidemiological safety, restrict the spread of COVID-19 and ensure public

nia in the list of countries which had notified the Secretary-General regarding their emergency measures.[93] The *notes verbales'* content involved measures reasoning the necessity to derogate from obligations under Articles 8 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHR), Article 2 of Protocol to CPHR, and Article 2 of Protocol no 4 to the CPHR. In addition, pursuant to Article 15, paragraph 3 of the CPHR, the States were engaged to inform the Secretary-General of the Council of Europe about any future developments with respect to the emergency situation.[94] It was noted that Italy, France, Germany, Spain, Greece, Cyprus, and other States did not notify the Council of Europe, although notifications are legally required and are expected to be immediate. Failure to comply with the notification obligation could constitute a breach of international law, as well as of human rights law and refugees and migration law, which could cause confusion to the judgement and decision-making of international bodies, raising questions as to whether State measures are in conformity with principles, norms, and standards of international law and the international legal order.

A. Derogation: an Exodus for Violation Exemptions in Times of Emergency

Even though the UDHR has no derogation clause, international human-rights treaties contain derogation clauses which serve governments in prompting action when threats to the nation impinge upon human safety and security. Exceptional measures allow for the extension of the legal regime through derogations and encapsulate such exceptional cases. The intention is to ensure that actions taken under a state of emergency remain governed by independent norms which can be supervised by independent tribunals.[95] Decisions to extend the legal regime to facilitate emergency action have received strong objections based on the allegations that fundamental rights and the rule of law shall remain to the constitutional system's power to act and allow for extra-legal emergency action. These objections are based

health at a national level. The decision of the Council of Ministers restricted certain fundamental human rights and freedoms enshrined in Articles 37, 38, 41, paragraphs 4, 49, 51 of the Constitution of Albania. The state of natural disaster began on 24 March 2020.

[93] Council of Europe, 'Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) Notifications under Article 15 of the Convention in the Context of the COVID-19 Pandemic'(Status as of 30 April 2021) available at https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/99943603 (last accessed 20 June 2021).

[94] Ibid.

[95] Tom R. Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism', (2005) 68(4) *Modern Law Review* 657.

on the arguments that exceptional measures taken within a normative framework stymie the jurisdiction of the executive power and impair the fundamental principles of the ad hoc regime by interweaving the exceptional with the ordinary.[96] Yet, a constitutional regime should allow for exceptional measures to be taken in times of public emergency and for policies to be implemented, which would be subject to political accountability under the derogation and the limitations imposed on rights channels. These mechanisms were pervasively used during the COVID-19 pandemic and were misinterpreted, as States were relieved from their obligations against protected rights by placing them in abeyance without being subject to judicial supervision. However, Article 15 of the ECHR expressly determines that a derogating State should satisfy the two following conditions: first, that exceptional circumstances do in fact prevail, and second, that measures taken are in conformity with such an emergency and are strictly required by the exigencies of the situation. Certainly, the 'strictly required' phrase invites governments to demonstrate that all possible alternatives have been considered and that no less intrusive means exist.

Nevertheless, derogation mechanisms afford governments with an 'exceptional exodus' from treaty obligations resulting in a provisional crystallisation of rights. Hence, derogation from fundamental rights is excluded since it is not related to qualifications or limitations on rights defined in Article 8, paragraph 2 and Article 10, paragraph 2 of the Convention.[97] If States validly derogate from a human rights treaty, the very derogation itself exempts them from the obligation to abstain from violating rights and discharges them from the obligation to legally justify any probable interference with such rights. In fact, a state of emergency does not justify grounds for interferences with rights, but it poses the question of whether a justification is required at all, as when the application of measures that is validly in derogation is subject to legal supervision, it is not, at the same time, subject to supervision on human rights grounds.[98]

Therefore, the recourse to a derogation generates a *lacuna* between the rule of law and fundamental human rights which is further amplified by allowing governments to diverge from the human-rights regime, while their action remains within

[96] The ad hoc argument is founded on the Jackson, J., dissenting *Korematsu* v. *U.S* 232 US 214 (1994), 244, 46 (Justice Jackson asserted his view that civilian courts should refrain completely from making substantive assessments of military judgments based on concerns about expertise, practicality, and the distorting effect on constitutional law).

[97] UNHRC (no 89).

[98] Hickman (no 95) 659.

the law and subject to judicial supervision. Under these circumstances, derogation generates a twofold constitutional system in a way that, although both systems are under the umbrella of the legality regime, only one is under the human-rights regime that entails a gap between legality and human rights.

In conclusion, COVID-19 exacerbated the complex 'Cyprus problem' on a number of levels. First, it revealed multidimensional concerns, gaps and inadequacies nested within the political and legal system of Cyprus, where the government was called upon to respond, as a matter of urgency, to a new type of crisis. In this context, substantial deviations from the core regulatory model incorporated into the derogation regime directly or indirectly affected Constitutional provisions, while ministerial decrees and policy-making decisions were mandated to cope with the pandemic crisis.

Second, migration and conflict, two of the most prominent elements of Cypriot history, were also faced with challenges. In the migration field, COVID-19 has been the triggering event for breaches on the international treaty obligation towards asylum-seekers. The fact that Cypriot migration policy is bound to EU policies and the Turkish-Cypriot to the Turkish policies, it creates uneven dynamics due to the lack of communication and coordination between the two areas and the fact that the policing of migration is directly related to the status of the Green Line and the deep-rooted territorial dispute. The third component discussed was the unexploited opportunity that arose from the pandemic crisis and could potentially lead to strengthening cooperation and coordination between the north and the south; this is in large part due to the lack of strong public backing of cooperative mechanisms and an overall unwillingness to engage.[99]

Consequently, on the legal and political response, a more holistic approach to the multifaceted emergency regime is required, demarcating where the emergency's boundaries begin and where they end. The identification of such ring-fenced boundaries detailing the razor's edge between states of emergency and public strife is imperative in understanding the amplitude of the emergency and how it evolves, ensuring, at the same time, greater accountability and transparency when emergency powers are set in motion. Moreover, under such emergency circumstances, checks should not fail to adequately address the potentiality of abuses of the derogation privileges, government management during crisis, and citizen rights viola-

[99] Erol Kaymak & Neophytos Loizides, 'COVID-19 in Cyprus', *Panorama* (2 June 2020), available at https://www.uikpanorama.com/blog/2020/06/02/covid-19-in-cyprus/ (last accessed 18 June 2021).

tions, while States should not be 'relieved' from their obligations against protected rights by placing them in abeyance without being subject to judicial supervision.

Furthermore, the new migration and asylum policy introduced in January 2020 does not seem to provide for a better handling of the issue. Cypriot authorities, for the first time in 2020, carried out pushbacks of boats carrying mainly Syrians, Lebanese and Palestinians. Following the Country's report, 9 pushbacks were carried out in total fact that indicates the necessity for an effective asylum and immigrant system reform in conjunction with a broader reform of the Dublin system; an asylum and immigration system approach which not only protects but also safeguards fundamental rights, principles, and freedoms.

Ultimately, the mismanagement of the pandemic crisis and the unilateral closure of crossing points further withered hopes for reunification of the divided island. However, the 'behest' to open the border crossings could influence decision-makers and even proffer new confidence-building measures, while the bicommunal technical committee structures could act as a foothold in reenergising communications and coordination as a novel step towards interweaving a future of unity.

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