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The Supreme Court of Cyprus

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XVIIth Congress of the Conference of European Constitutional Courts

Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles Questionnaire

For the National Reports

I. The role of the constitutional court in defining and applying explicit/implicit constitutional principles.

1. Does the constitutional court or equivalent body exercising the power of constitutional review (hereinafter referred as the constitutional court) invoke certain constitutional principles (e.g. separation of powers; checks and balances; the rule of law; equality and non-discrimination, proportionality, reasonableness, human dignity, etc.) in the process of constitutional adjudication? To what extent does the constitutional court go in this regard? Does the constitution or any other legal act regulate the scope of constitutional decision-making in terms of referring to specific legal sources within the basic law that the constitutional court may apply in its reasoning?

ANSWER

Yes, the constitutional court when exercising the power of constitutional review **does** invoke certain constitutional principles (e.g. separation of powers;; the rule of law; equality and non-discrimination, proportionality, reasonableness, etc.)

The interpretation, identification of constitutional principles and the application of human rights have been the subject of a vast body of case law. Most decisions on the constitutionality of laws, regulations acts and decisions of the Administration concern their compatibility with human rights and the various constitutional principles such as the doctrine of separation of powers.

Contravention to the constitution is a distinct ground for annulling a decision, act or omission of the administration in the context of judicial review of administrative or executive action under Article 146 of the Constitution. The review is intended to examine the legality of acts or omissions and not to evaluate their correctness from the point of view of the Judiciary. So long as the Administration acts within the parameters of the law and according to the norms of good administration, the judiciary cannot intervene.

2. What constitutional principles are considered to be organic in your jurisdiction? Are there any explicit provisions in the constitution setting out fundamental principles? Is there any case-law in respect of basic principles? How often does the constitutional court make reference to those principles?

ANSWER

Some of the constitutional principles that are considered to be organic in our jurisdiction are set out below:

The principle of supremacy of the Constitution as enshrined in Article 179 of the Constitution. Following the fifth amendment of the constitution with law 127/2006 the supremacy is subject to the application of article 1A which provides for the application of mandatory provisions of EU or European community law.

The fundamental rights and liberties of the individual known as human rights entrenched in Part II of the Constitution which contains a Charter of fundamental Rights based on the European Convention on Human Rights. For example article 12 incorporates fundamental norms of justice that there shall be no conviction for conduct that is not criminalised by Law and that punishment cannot be heavier than that provided by law at the time of the commission of the offence. Unimpeded access to the Court for the assertion or vindication of ones rights is acknowledged by Article 30 of the Constitution. The Cyprus Constitution (Article 33.1) provides that human rights cannot be limited except for a purpose specifically prescribed by the constitution.

The principle of institutional separation of the State powers is also organic in our jurisdiction. In accordance with this principle , each of the “three powers of the state , the Legislature, the Executive and the Judiciary is invested with power to act over the entire field of action covered by the corresponding domain of authority except to the extent that provision to the contrary is made to the constitution”. While the principle of separation of power is not mentioned explicitly in the constitution, several constitutional provisions underline that such a principle is embodied in the Constitution.

Article 146 accords with the principle of the separation of powers .The judicial review is confined to ascertaining the legality of the action of the administration.

Article 35 of the Constitution imposes a positive obligation upon each one of the three powers of the State to ensure the effective application of human rights in the sphere of their respective competences.

The classification of powers for the purpose of ascertaining the respective domain of each of the three powers has been also a subject repeatedly addressed by the Supreme Court. The source and nature of the jurisdiction of the Supreme Court was extensively decided in a lot of decisions.

The interpretation of human rights, their range of application and impact on the legal order of the country have also attracted a voluminous body of case law. A number of judgements were given on the approach of the Court in relation to the width of human rights and the consequences of their breach. The case law of the Supreme Court emphasizes that respect for human rights must be primary in the mind of administration.

3. Are there any implicit principles that are considered to be an integral part of the constitution? If yes, what is the rationale behind their existence? How they have been formed over time? Do they originate from certain legal sources (e.g. domestic constitutional law or the constitutional principles emanating from international or European law; newly-adopted principles or ones re-introduced from the former constitutions)? Has academic scholars or other societal groups contributed in developing constitutionally-implied principles?

ANSWER

Several general principles may be derived from the constitution such as the fundamental principle of supremacy of the Constitution which implies that the courts have the power to examine the constitutionality of laws and actions by administration and that no law, regulation or administrative act may be inconsistent with the constitution. This also implies that the rule of law is a cardinal principle of the constitution as this is also evidenced by Part II of the Constitution containing a charter of Fundamental Rights based on the European Human Convention on human rights.

Significant role in developing constitutionally implied principles plays the jurisprudence of the Supreme Court. With respect to constitutional and administrative law the supreme court cites judgements of continental law courts such as the Greek Symbouleio tis Epikrateias and the French Conseil d Etat . Greek and French authorities and jurisprudence have guided the evolution of administrative law.

With respect to human rights, the Supreme Court is regularly guided by the case law of the European court of human Rights. In addition with respect to the interpretation of constitutional provisions, the Supreme Court has been at times guided by the case law of the Supreme Court of the United States of America.

European Community Law is considered to be an integral part of the Constitution and no constitutional provision may invalidate any provision of a binding nature of European Community or European Union Law.

Moreover the EU Charter of Fundamental Rights is given legal recognition by the Treaty of Lisbon (having the same legal force as the Treaties). The EU has set out in one place the existing fundamental rights that can benefit every EU citizen. It covers the whole range of civil, political economic and social rights of European citizens in the EU.

The jurisprudence of the European Court of Justice is gradually authoritative. The cooperation and dialogue between the national constitutional courts and national courts with the ECJ, on the basis of the preliminary rulings, certainly contribute to the effective protection of the fundamental rights and freedoms of the EU citizens.

4. What role does the constitutional court has played in defining the constitutional principles? How basic principles have been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or the combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon travaux preparatoires of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognised legal principles gain relevance in this process?

ANSWER

The role of the constitutional court is significant in defining the constitutional principles. The Judiciary is the guardian of the rule of law. The Court reminds that only limitations of human rights for a purpose permissible under the Constitution can legitimately restrict their application. The interpretation of law is the exclusive province of the judiciary. It is, indeed, a fundamental rule of our own law that for the interpretation of the wording of any enactment, and that includes the Constitution, a literal construction should normally be applied and words must be given their literal meaning. Statutes are to be construed according to the plain, literal and grammatical meaning of the words. Therefore words in a statute should be given their ordinary meaning, unless the ordinary meaning of the word is expressly or, by necessary implication, qualified by the Law. This literal rule of interpretation means that if the language is clear and unambiguous the Court has to give effect to it. The mere literal construction of a statute will not prevail though, if it is contrary to the apparent intention of the legislature and if the words are sufficiently flexible to allow some other construction by which that intention can be better served.

Judges may not interpret statutes in the light of their own views as to policy. They may adopt, though, a purposive interpretation if “they can find in the statute, read as a whole, or in material to which they are permitted by law to refer as aids to interpretation, an expression of Parliament’s

purpose or policy." The purposive interpretation is a permissible manner of constructing a statute but it has to be limited to intention, as expressed in the text of the law.

However, there are cases where a purely literal approach, based on the "natural" meaning of individual words, may lead to absurdity. On the other hand a purely purposive approach could lead to judicial arbitrariness. "The modern approach has been appropriately described as integrated. Rather than seek fruitlessly for an answer on a point about which the legislator may never have thought, courts adopt a contextual approach, seeking to understand the overall structure and aim and to understand individual provisions within that context. But how much weight is given to natural meaning, and how much to context and the good sense of a particular result is, ultimately a matter of balance, to be struck by the exercise of sound judicial discretion".

5. What is a legal character of the constitutional principles? Are they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon the fundamental principles by the constitutional court in relation to a particular constitutional right? Are basic principles interpreted separately from the rights enumerated in the constitution or does the constitutional court construe fundamental principles in connection with a specific constitutional right as complementary means of latter's interpretation? Can the basic principles in your jurisprudence constitute a separate ground for unconstitutionality without their connection with a concrete constitutional norm? Is there any requirement in law placed upon the judicial acts of enforcement of constitutional principles?

ANSWER

In view of the strict and detailed character of the Constitution of Cyprus unwritten or general principles cannot be invoked in order to introduce amend or repeal a constitutional provisions. As Professor Aimilianides in his book remarks, "the question of whether the enduring and uniform application of a particular rule is considered as binding could acquire constitutional status or fill a constitutional vacuum, (as a rule and not as mere constitutional practice) has never been examined in the constitutional legal order. Constitutional provisions are the paramount law and supersede and prevail every other legal provision or regulation. The genesis of laws, rules, principles and regulations is dependent on observance of the Constitution and laws made thereunder. There is no room for legitimacy outside that framework or authority. There are several general constitutional principles that derive from the Constitution such as the fundamental principle of the supremacy of the Constitution that has already been explained. For example while the principle of separation of powers is not mentioned explicitly in the Constitution, several constitutional provisions however confirm that the Constitution embodies such principle. The Constitution itself has further introduced certain exceptions to the strict separation of power.

6. What are the basic principles that are applied most by the constitutional court? Please describe a single (or more) constitutional principle that has been largely influenced by constitutional adjudication in your jurisdiction. What contribution does the constitutional court has made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.

ANSWER

The Supreme Court has formulated certain general principles which govern the constitutional review of legislation.

The Court shall not decide on abstract questions of a constitutional nature unless this is absolutely necessary for the decision in the case. It is also a cardinal rule, that no law and no legislative provision shall be declared unconstitutional unless they are unconstitutional beyond reasonable doubt. Accordingly there is a presumption that the law is constitutional, unless the Court is satisfied beyond any reasonable doubt and that is such is inconsistent or repugnant with any provision of the Constitution.

Another important maxim is that the Courts are concerned only with the constitutionality of legislation and not with its motives, policy or wisdom or with its compatibility with natural justice or spirit of the constitution.

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

1. Do the constitutional principles enjoy certain degree of superiority in relation to other provisions in the basic law? How are constitutional principles and other constitutional provisions related to international law and/or to the European Union law? Are there any provisions in international or the European Union law that are deemed superior than the national constitutional principles? If yes, how such higher international provisions are applied with regard to the national constitutional principles? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional principles over other provisions of basic law?

ANSWER

Constitutional provisions are the paramount law and supersede and prevail every other legal provision or regulation inconsistent with them .The genesis of laws, rules and regulations is dependent on observance of the Constitution and laws made thereunder. International treaties

properly become part of the domestic law and have superior force to any other domestic law enacted by Parliament. This, in effect, means that no other domestic law enacted by Parliament can be contrary to the provisions of international treaties and no act of any organ of the administration may infringe their provisions. Legislative measures which contravene any provisions of the Constitution safeguarding human rights may be declared unconstitutional by the Courts. It has been held that the fundamental rights and liberties safeguarded by the Constitution have to be narrowly construed and in case of doubt, they should always be interpreted in favour of the individual protected rather than in favour of the state.

Our Constitution has been amended by law 127(I)/2006 giving supremacy to European Union Law even over the Constitution. It provides, in essence, that no provision of the Constitution is considered to invalidate any laws, acts or measures which are deemed necessary due to the obligations of the Republic of Cyprus as a Member state of EU or impede the legal effect and application, in the Republic, of Regulations, Directives, or other EU, or European Communities' legal instruments of a binding nature. Moreover the EU Charter of Fundamental Rights is given legal recognition by the Treaty of Lisbon (having the same legal force as the Treaties). The EU has set out in one place the existing fundamental rights that can benefit every EU citizen. It covers the whole range of civil, political economic and social rights of European citizens in the EU.

Article 52(3) of the Charter requires "the ECJ to interpret fundamental rights cases in conformity with ECHR (subject to the caveat that Union Law can provide more extensive protection, although the ECJ has tended to follow the Strasbourg court's interpretation of the ECHR in its own case law)".

2. How are the constitutional principles related to each other? Is there any hierarchy within those principles? What approach has the constitutional court taken in terms of determining a hierarchy within the constitution? Is it possible to conclude from the jurisprudence of the constitutional court that it has given principal status to some constitutional principles over the rest of the basic law?

ANSWER

Constitutional provisions are the paramount law and supersede and prevail every other legal provision or regulation inconsistent with them. The genesis of laws, rules and regulations is dependent on observance of the Constitution and laws made thereunder. There is no room for legitimacy outside that framework or authority.

However, no provision of the Constitution is considered to invalidate any laws, acts or measures which are deemed necessary due to the obligations of the Republic of Cyprus as a Member state of EU or impede the legal effect and application, in the Republic, of Regulations, Directives, or other EU, or European Communities' legal instruments of a binding nature. As a result, EU and European Community Law now has an intra constitutional effect, in the sense that it is considered

to be an integral part of the Constitution and no constitutional provision may invalidate any provision of a binding nature of European Community or European Union Law. The jurisprudence of the European Court of Justice is gradually authoritative. The cooperation and dialogue between the national constitutional courts and national courts with the ECJ, on the basis of the preliminary rulings, certainly contribute to the effective protection of the fundamental rights and freedoms of the EU citizens.

3. How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law? Has the constitutional principles ever been subjected to change in your jurisdiction? If yes, what were the reasons behind it?

ANSWER

In accordance with the provisions **of Article 182**, those Articles which have been in-corporated from the Zurich Agreements and which are listed in Annex III of the Constitution are considered to be fundamental and therefore they are not subject to modification. The remaining non fundamental constitutional provisions may be amended by law passed by a majority vote comprising at least two thirds of the total number of representatives belonging to the Greek Community and at least two thirds belonging to the Turkish community. Intercommunal troubles and the decision in 1964 of the Turkish Cypriot leadership to withdraw from participation in all functions assigned to their community by the Constitution, created an impasse. It was then imperative to have recourse to the law of necessity in order to secure the survival of the state.

The ***Ibrahim case*** forms the foundation of the subsequent case law of the Supreme Court with regard to doctrine of necessity. The aim of the doctrine is to solve problems which were not foreseen by the drafters of the constitutional order and which threaten the existence of the republic. The House of Representatives may modify non fundamental articles of the Constitution by a majority of two thirds of its Greek Cypriot members, on the grounds of the doctrine of necessity so long as such amendments are not contrary to the international obligations of the Republic of Cyprus and more importantly the European Convention of Human Rights and Community law.

The competence of the House of Representatives to amend the non-fundamental provisions of the Constitution, with a majority of its Greek Cypriot members only on the grounds of the doctrine of necessity was examined in the leading case of ***Nicolaou v Nicolaou (1992) I CLR 1338***

4. Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard among academic scholars and other societal groups in your jurisdiction?

ANSWER

Constitutional amendment procedure should be subjected to judicial scrutiny and not be left entirely up to political actors.

Invocation of the doctrine of necessity is only permissible when dire necessity compels its application and only to the extent it is strictly necessary to enable constitutional organs to carry out their constitutional functions.

5. Does the constitution in your jurisdiction provide for constitutional overview of the constitutional amendment? If yes, what legal subjects may apply to the constitutional court and challenge the constitutionality of the amendment to the basic law? What is the legally-prescribed procedure of adjudication in this regard?

ANSWER

Yes. Article 140 of the Constitution provides for a form of *preventive constitutional review of the constitutional amendment*. In particular, it provides that the Supreme Court has exclusive jurisdiction to hear a reference by the President of the Republic for the opinion of the Court as to whether a constitutional amendment, a law or a decision of the House of Representatives or any specified provision thereof, is repugnant or inconsistent with any provision of the Constitution.

The Supreme Court shall consider every question referred to it and having heard arguments on behalf of the President of the Republic and on behalf of the House of Representatives, shall give its opinion on such question and notify the President of the Republic and the House of Representatives accordingly.

6. Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? In the absence of explicit constitutional power, has the constitutional court ever assessed or interpreted constitutional amendment? What has been the rationale behind the constitutional court's reasoning? Has there been a precedent when the constitutional court had elaborated on

its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? What is legal effect of a decision of the constitutional court finding the constitutional amendment in conflict with the constitution? Please, provide examples from the jurisprudence of the constitutional court.

ANSWER

See our answer above.

In addition it should be mentioned that since 1964 any court in the Republic has jurisdiction to hear questions on the constitutionality of laws .It should be noted that a declaration of unconstitutionality shall not annul (repeal) the unconstitutional law or automatically delete it from statute book. The effect of such declaration is binding only on the parties of the proceedings and accordingly the law shall be inapplicable in the case in hand only. The Supreme Court has formulated certain general principles which govern the constitutional review of legislation.

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of constitutional court's power to check amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How the judicial review is observed in this regard? Would the expansion or recognition of constitutional court's authority encourage the realisation of constitutional ends or threaten its viability? Please, elaborate on this.

ANSWER

The Court shall not decide on abstract questions of a constitutional nature unless this is absolutely necessary for the decision in the case. It is also a cardinal rule, that no law and no legislative provision shall be declared unconstitutional beyond reasonable doubt. Accordingly there is a presumption that the law is constitutional, unless the Court is satisfied beyond any reasonable doubt and that is such is inconsistent or repugnant with any provision of the Constitution. Another important maxim is that the Courts are concerned only with the constitutionality of legislation and not with its motives, policy or wisdom or with its compatibility with natural justice or spirit of the constitution. *(See President of the Republic v House of Representatives (1989)3CLR1931*

