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**TERRITORY, ETHNICITY AND  
DIVIDED SOCIETIES: THE CYPRUS QUESTION**

Anna Parrilli



**CYPRUS CENTER FOR  
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Territory, Ethnicity and Divided Societies: The Cyprus Question 12/2019

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## **TERRITORY, ETHNICITY AND DIVIDED SOCIETIES: THE CYPRUS QUESTION**

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## I. INTRODUCTION

The article addresses the Cyprus question by investigating the interrelations between the two ethnic communities and the territory through the lens of comparative constitutional law.

Firstly, the article will examine the interrelations between territory and ethnicity within the broader context of constitutional law studies.

The analysis will then focus on the case of Cyprus, where the discrepancy between the "*law in the books*" and the "*law in action*" followed the 1963-64 constitutional crisis and the military occupation by Turkey (1974).<sup>1</sup> These events caused the creation of new "*boundaries*" and operational rules that significantly disregarded the constitutional regime based on power-sharing and bi-communalism. As it is evident, such a flaw displays profound consequences on this communal dispute.

Finally, the article will deal with territorial demarcation and the recognition of ethnic groups as the constitutive elements of the State. Particular attention will be devoted to territorial instruments of self-government, as well as linguistic and cultural rights directly connected to territorial demarcation.

Indeed, comparative constitutional accommodation of ethnic diversity in multicultural and multinational societies proves to be extremely useful when it comes to developing original solutions for the Cyprus question.

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<sup>1</sup> The notion of "law in the books" was coined in 1910 by Roscoe Pound to describe discrepancies between legal doctrine in the book and the empirical evidences about law. See, R. POUND, *Law in books and law in action*, in *American Law Review*, 44(12), 1910, pp. 12 - 36. On the tensions between the "black letter - law" and "law in action", see also J.-L. HALPERIN, *Law in books and law in action: the problem of legal change*, in *Meine Law Review*, 45, 2011, pp. 46 - 76. For critical views of Roscoe Pound's categories, see K.L. LLEWELLYN, *A Realistic Jurisprudence: The Next Step*, in *Columbia Law Review*, 30, 1930, pp. 431 - 465.

## II. THE INTERRELATIONS BETWEEN TERRITORY AND ETHNICITY: DIFFERENT APPROACHES AND MODELS

A significant body of writing within social sciences has been dedicated to the interrelations between territory, ethnicity and the State. In this respect, territory defines the *scope* of the constitutional order and the legal system.<sup>2</sup> The constitution itself presupposes an understanding of national territory as the realm of the jurisdiction of the State.<sup>3</sup>

National territory is explicitly mentioned in constitutional clauses regarding territorial integrity, inalienability and indivisibility.<sup>4</sup> Furthermore, several constitutional texts contain a delineation of the national territory in various forms: description of borders, references to islands as part of the territory or even maps.<sup>5</sup>

When it comes to ethnicity, States adopt different approaches and instruments. For instance, while the constitutional and legal framework of Macedonia denies the connection between the ethnic groups and the

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<sup>2</sup> For instance, under the Territorial Clause (Art. IV, s. 3, cl. 2) US Constitution uses the notion of "territory" to identify the part of land "over which the United States exercise jurisdiction". See, s. BACON, *Territory and the Constitution*, in *The Yale Law Journal*, Vol. 10, No. 3 (Jan. 1901), pp. 99-117. Similarly, art. 4(1) of the Constitution of the Russian Federation states that "The sovereignty of the Russian Federation shall extend to the entirety of its territory". See, C. ROSS, *Russia's Multinational Federations*, in M. BURGESS and J. PINDER (eds.), *Multinational Federations*, Routledge, London, 2007, p. 113. A peculiar example is provided by the Albanian Constitution that contains a list of the "normative acts that are effective in the entire territory of the Republic of Albania..." (Art. 116.1). See, F. KORENICA, D. DOLI, *The Relationship between International Treaties and Domestic Law: A View from Albania Constitutional Law and Practice*, in *Pace International Law Review*, Vol. 24, Issue 1, Winter 2012, p. 107.

<sup>3</sup> In the Preamble "the People of Malawi . . . Adopt the following as the Constitution of Malawi" it is implicit that the constitutional order is intended to apply to a precise geographical space understood to be Malawi.

<sup>4</sup> Similarly, art. 185 of the Cypriot constitution provides that: "The territory of the Republic is one and indivisible". Similarly, art. 3 of the Turkish constitution affirms: "The State of Turkey, with its territory and nation, is an indivisible entity". Art. 4 of the Slovenian constitution make reference to territorial unity ("Slovenia is a territorially unified and indivisible state"). Similarly, art. 2(2) of the Bulgarian Constitution provides that "The territorial integrity of the Republic of Bulgaria shall be inviolable". Similarly, art. 4(3) of the Constitution of the Russian Federation state: "The Russian Federation shall ensure the integrity and inviolability of its territory". See also art. 5(2), 16, 89(4) of the French constitution (1958); art. 115(a) of the German Basic Law (1949). Furthermore, some Constitutions impose the obligation on the Head of State, the Government and the Parliament to safeguard territorial integrity. For example, art. 134 of the Egyptian constitution provides the President of the Republic to "defends the interests of the people, safeguards the independence, territorial integrity and safety of the nation". Other constitutional text foresees the same duty for citizens. In Bhutan, for instance, citizens are constitutionally required to "preserve, protect and defend the sovereignty, territorial integrity, security and unity of Bhutan" (art. 8). For more on express references to national territory. See, O. DOYLE, *The Silent Constitution of Territory*, in *International Journal of Constitutional Law*, 17, 2018, pp. 887 – 903.

<sup>5</sup> For instance, art. 2 of the Cambodian Constitution safeguard the integrity of the territory within the borders "[..]. As defined in the 1/100,000 scale map made between the years 1933-1953 and internationally recognized between the years 1963-1969".

territory,<sup>6</sup> Bosnia and Herzegovina institutionalised ethnicity as a constitutive element of the State through a complex system for the self-governance of the three entities.<sup>7</sup> To a broader extent, the models applied to minorities and groups range from the liberal (agnostic) solution, which denies the legal relevance of the groups, thus favouring the individual dimension, to the multinational models that strengthen common identity within each community.<sup>8</sup>

Ethnic cleavages often constitute the principal reason for the development of instruments of territorial self-government. However, the legal system can ultimately emphasise the territorial dimension over the ethnic one.<sup>9</sup> Several examples fall in this category. In Scotland, for instance, all residents were entitled to cast a vote in 2014 referendum on independence, regardless of language or ethnicity.<sup>10</sup> It is also the case of Spain, where the 1978 Constitution grants the five historical communities with a “fast track autonomy” procedure (art. 151),<sup>11</sup> which ultimately emphasize the territorial dimension over the ethnic one.

There is, then, an alternative approach which identifies the territory in relation with a language and a culture. To this extent, territorial identity within the multinational State is recognised by the central constitution, which provides for instruments of self-government while promoting the cooperation among the different groups.<sup>12</sup> This idea lies at the very base of

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<sup>6</sup> The current constitutional and legal system in Macedonia is the result of the Ohrid Framework Agreement (OFA) of 2001. Due to the fear of the potential for secession a territorial autonomy might produce, any legal link between ethnicity and territory has been denied with the formula: “*There are no territorial solutions to ethnic issues*” (fundamental principles, Art. 1.2 OFA). However, the Albanian minority is safeguarded.

<sup>7</sup> J. WOELK, *Identity-diversity and the territorial dimension in the western Balkans*, in *Centre international de formation européenne*, 363, 1, 2012, pp.189 - 204.

<sup>8</sup> For instance, while the United States and France tend to value most the individual dimension of rights, German constitutional model valorises the collective dimension of rights by recognising a role for cultural and religious groups in the public sphere. See, F. PALERMO, J. WOELK, *Diritto costituzionale comparato dei gruppi e delle minoranze*, CEDAM, 2nd ed., 2017, pp. 51 – 78.

<sup>9</sup> See, V. VUJACIC, *The Challenges of Ethnic Federalism: Experiences and Lessons of the Former Yugoslavia*, in J. ROSE, J. C. TRAUT (eds.) *Federalism and Decentralization. Perspectives for the Transformation Process in Eastern and Central Europe*, George Marshall European Centre for Security Studies, 2, Hamburg, 2001, pp. 259 et seq; J. WOELK, *Identity-Diversity and the Territorial Dimension in the Western Balkans*, in *L'Europe en Formation*, 363,1, 2012, pp. 189-204.

<sup>10</sup> On the referendum in Scotland, see T. MULLEN, *The Scottish Independence Referendum 2014*, in *Journal of Law and Society*, 2014, pp. 627-64; A. TORRE (ed.), *Il Regno è ancora Unito? Saggi e commenti sul referendum scozzese del 18 settembre 2014*, Maggioli Editore, 2016.

<sup>11</sup> J. M. CASTELLÀ ANDREU *The proposal for Catalan secession and the crisis of the Spanish autonomous State*, in *Diritto pubblico comparato ed europeo*, 2, 2015, pp. 429-448; P. CRUZ – VILLALÒN, *La costituzione territorial del estado*, in *Autonomies. Revista Catalana de Derecho Publico*, 13, 1991, 66; S. Muñoz Machado, *Informe sobre España*, Ed. Crítica. 2012; V. FERRERES COMELLA, *The Constitution of Spain: A Contextual Analysis*, Hart publishing, Oxford, 2013.

<sup>12</sup> See F. PALERMO, *Owned or shared? Territorial autonomy in the minority discourse*, cit., pp. 13 – 32.



the ethno-federalist model, which organise territory according to linguistic, ethnic or religious cleavages.<sup>13</sup> Among others, the case of the Belgian process of federalisation is particularly relevant when discussing the Cyprus question.

The concepts of both territory and territoriality have been subject of debate among scholars in non-Eurocentric legal traditions. Contemporary Muslim jurists discuss on the traditional distinction between *dār al-Islām* (Territory of Islam), *Dar al-Ḥarb* (Territory of war) and the extra-territoriality of Muslim law.<sup>14</sup> The reconceptualization of the notion of territory in Islamic legal tradition plays a crucial role in the development of a Muslim jurisprudence of minorities (*Fiqh al-aqalliyāt*).<sup>15</sup> Similarly, the link between territory and ethnicity has been subject to debate among Jewish jurists, as Talmudic law include both legal and religious rules that make explicit reference to territory.<sup>16</sup>

Besides the peculiarities of the different approaches to the notions of territory and territoriality, it is clear that there is a deep connection between communities, their *own* territory<sup>17</sup> and their conception of the law.

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<sup>13</sup> Asymmetrical regionalism also fits this approach, granting self-government powers to homogeneous communities in a given territory. On asymmetric regionalism, see, among others, L. CARDINAL, *Le fédéralisme asymétrique et les minorités linguistique et nationales*, Ed. Prise de Parole, Ottawa, 2008; R. AGRANOFF, *Accommodating diversity: Asymmetry in Federal States*, Nomos, Baden – Baden. 1999; R. TONIATTI, F. PALERMO, M. DANI (eds.), *An Ever More Complex Union: The Regional Variables as a Missing Link in the EU Constitution?* Nomos, Baden-Baden, 2004.

<sup>14</sup> I. ZAHALKA, *Shari'a in the Modern Era. Muslim Minorities Jurisprudence*, Cambridge University Press, 2017, p. 43 ss.

<sup>15</sup> On Islamic jurisprudence on Muslim minorities (*fiqh al-aqalliyyat*) see, (in English) ABOU EL FADL, KHALED. *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, in *Islamic Law and Society* 1(2), 1994, pp. 141–187; I. ZAHALKA, *Shari'a in the Modern Era: Muslim Minorities Jurisprudence*, cit., 2017.

<sup>16</sup> See, Y. SHILHAV, *Ethnicity and Geography in Jewish Perspectives*, in *GeoJournal*, 30(3), IGU Commission on Population Geography Symposium on Ethnicity and Geography: Ljubljana, Slovenia, September 8-11, 1993 (July 1993), pp. 273-277.

<sup>17</sup> On the territorial discourse in terms of "ownership", see F. W. MAITLAND, *Township and Borough: The Ford Lectures 1897*, Cambridge University Press, Cambridge, 1898, pp. 18 – 20. See, also, F. PALERMO, *Territory and The Law of Ownership*, in M. NICOLINI, E. MILANO, F. PALERMO (Eds.), *Territory, Law and Conflict Resolution*, Brill Nijhoff, Leiden - Boston, 2016, pp. 16 – 38.

### III. CYPRUS CONSTITUTIONAL ARRANGEMENT: BETWEEN TERRITORY AND ETHNICITY

As already noticed, national territory delimits the scope of State law. However, the geographical space where the State claims the application of its own constitutional regime may differ from the space in which that constitutional regime effectively applies.

This flaw may be triggered by several circumstances. For instance, the divergence between the black-letter law and its operational rule may be caused by the departure of court's judgments from constitutional or statutory law. Furthermore, discrepancies often exist between the legal doctrine in the book, the legal teaching in the university and empirical evidence about the function of law. The case of Cyprus reveals that territorial dispute and occupation may accrue the detachment between the black-letter constitution and the "rules in action"<sup>18</sup> that actually governs the territory.

If we conceive of the territory as a "normative concept"<sup>19</sup> we can better grasp the discrepancies between the constitutional regime and the operational rules that regulate a specific geographical space.<sup>20</sup> To this extent, a territory falling under a specific constitutional order can be defined as the place where the laws *effectively apply* more than the place where the laws are *supposed to apply*. This is particularly true in those States whose territory is contended among two or more communities, it has been occupied or annexed by other State.

The divergence between the "law in the book" and "law in action" of the constitution is apparent in the case of Cyprus. The 1960 constitution, which is still in force, is based on a rigid bi-communalism, consociationalism and the mutual recognition of the Greek and Turkish communities as politically equals.<sup>21</sup> This means that each community exists as a political entity within a unitary polity.

However, the constitutional order has been being disregarded since the 1963 constitutional crisis. By invoking the "doctrine of necessity",<sup>22</sup> which has been enshrined in the Supreme Court's *Ibrahim* ruling,<sup>23</sup> a whole range of revisions that contravened the letter of the basic articles of the Constitution were justified by the need to ensure the very survival of the

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<sup>18</sup> J.-L. HALPERIN, *Law in books and law in action*, cit., p. 47.

<sup>19</sup> O. DOYLE, *The Silent Constitution of Territory*, cit., p. 893.

<sup>20</sup> M. NICOLINI, *A new legal geography for Cyprus*, in M. NICOLINI, F. PALERMO, E. MILANO, *Law, territory and conflict resolution*, cit., p. 286.

<sup>21</sup> See C.D. PAPASTATHOPOULOS, *Constitutionalism and communalism: the case of Cyprus*, in *The University of Toronto Law Journal*, 16, 1965, pp. 118 – 144.

<sup>22</sup> See, among others, C. PAPASTYLIANOS, *The Cypriot Doctrine of Necessity within the Context of Emergency Discourse: How a Unique Emergency Shaped a Peculiar Type of Emergency Law*, in *The Cyprus review*, 30(1), 2018.

<sup>23</sup> Supreme Court of Cyprus, *The Attorney General of the Republic v. Mustafa Ibrahim and others*, 6 CLR (1964), p. 195 et seq.

State in exceptional circumstances.<sup>24</sup> Instead of a system of individual liberties provided by the constitution, a system of *de facto* territorial autonomies for both Greek and Turkish communities have been created.<sup>25</sup>

Further discrepancies between the constitutional text and the operational rule followed the Turkish invasion in 1974. The occupation affected territorial integrity and resulted in the creation of a new “border”. The *Green Line* physically separates Turkish and Greek Cypriots and creates distinct social and economic orders. Although “illegal”, the *de facto* partition of the island acquires legal relevance when discussing the future constitutional framework of Cyprus.<sup>26</sup>

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<sup>24</sup> Legal scholars are deeply divided over the question of whether necessity has to be considered a source of law, a meta – rule to interpret the constitution or an extra-legal factor operating outside the constitutional order. See, among others, C. KOMBOS, *The Doctrine of Necessity in Constitutional Law* (Athens, Thessaloniki: Sakkoulas, 2015); K. L SCHEPPELE, *Legal and Extralegal Emergencies*, K. E. WHITTINGTON, R. D. KELEMEN,, G.A. CALDEIRA 8EDS, *The Oxford Handbook of Law and Politics*, Oxford University Press, 2008, pp. 165-18; O. GROSS, F. N. AOLÁIN, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge University Press, 2006, p. 47.

<sup>25</sup> A. PIZZORUSSO, *Le minoranze nel diritto pubblico interno*, Giuffrè, Milano, 1967, p. 389.

<sup>26</sup> M. NICOLINI, *A new Legal Geography for Cyprus*, cit., p. 302.

#### **IV. ETHNIC CLEAVAGES AND TERRITORIAL DEMARCATION: THE CYPRUS QUESTION IN COMPARATIVE PERSPECTIVE**

Territory and ethnicity are salient dimensions in the Cyprus question. Part of the conflict's intractability derives from the fact that territory bears both a symbolic and a material meaning, as the communities claim ownership over the same geographical space. In this respect, the different conceptions of "belonging" to the territory of each community have profound consequences in terms of regional demarcation, territorial alteration and the constitutional approach towards ethnicity.

In order to deal with closely interrelated and extremely complex issues in a logical way, the first part of this section deals with regional demarcation and territorial adjustments. Then, territorial instruments of self – government will be analysed. Particular attention will be dedicated to linguistic and cultural rights, which affects the construction of a (common) constitutional identity.

##### **4.1. Regional demarcation and territorial alteration**

Regional demarcation governs the division of a country into one or more territorial constituent units. When drawing the sub-national boundaries in deeply divided societies, economic, cultural and religious factors constitute crucial variables in determining the success of the demarcation and preventing future conflicts between the communities.<sup>27</sup>

In Cyprus, the strong sense of sameness and belonging to different ethnic groups, tied up to the respective "motherlands" (Turkey and Greece), was emphasized by the 1960 Constitution; this was the result of the Zurich Treaty (1959) between Greece, Turkey, Great Britain, and the leaders of the Turkish and Greek communities.<sup>28</sup> However, the system of power-sharing and veto rights revealed far too rigid and complex to work.

While designed to manage ethnic cleavages through law, bi-communalism contributed to further strengthening the distinctive identity of Turkish and Greek Cypriots.<sup>29</sup> In principle, this would not necessarily prevent the system to work. The major problem was rather that Constitution "forced" the

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<sup>27</sup> M. F. RAMUTSINDELA D. SIMON D., *The Politics of territory and Place in Post-Apartheid South Africa: The Disputed Area of Bushbuckridge*, in *Journal of Southern Africa Studies*, 25, pp. 479-481

<sup>28</sup> On the 1960 Constitutions, the drafting process and the complexities that have hindered the full implementation of the constitutional text. Notably, the Constitution does not contain any reference to the concept of "people". According to art. 2, the Turkish and Greek Communities are identified on the basis of different criteria: origin, language, religion and culture. Citizens who do not meet these criteria are asked to opt to either the Greek or the Turkish community. Furthermore, constitutional recognition is granted to three religious minorities: Latines, Armenians, and Maronites, referred to as "smaller religious groups" (art. 29). See, among others, T. W. ADAMS, *The First Republic of Cyprus: A Review of an unworkable constitution*, in *The Western Political Quarterly*, 19(3), 1996, pp. 475 – 490.

<sup>29</sup> See, A. THEOPHANOUS, *The Cyprus Question and the EU: the challenges and the promises*, Intercollege Press, 2004, pp. 51- 52.

cooperation between the communities without providing any mechanism to accommodate potential disagreements.<sup>30</sup>

The failure of the 1960 constitutional regime can provide us with the major counter-argument to any solution which commence with the existing institutions and legal order.<sup>31</sup> Indeed, the constitutional text (internationally) agreed in 1960 proved dysfunctional way before the Turkish occupation. Thus, a new, pragmatic approach to the Cyprus problem is needed and the challenging question of constitution making arises.

Studies in comparative law reveal that countries characterised by consolidated ethnic, linguistic and religious cleavages often rely on an incrementalist approach to constitution making,<sup>32</sup> which is in turn implemented *via* different constitutional strategies. As it has been rightly pointed out,

“[...] constitutional impasse may be resolved by reconceptualising the moment of constitution making. Instead of perceiving it as a moment of revolutionary transformation, elements of gradualism may be introduced in the constitution making process. Instead of perceiving it as the moment of enacting a constitution as one that has a profound effect on the identity of the nation, it may be seen as one stage in a long-term evolutionary process of collective redefinition”.<sup>33</sup>

In other words, the constitution enshrines a more “flexible” approach by leaving a number of controversial issues open for future regulation.<sup>34</sup> It also provides us with mechanisms for conflict accommodation (at the legislative level or at the level of other bodies) with the aim to solve future conflicts. The incrementalist approach offers two advantages: it avoids stalemate in a phase of constitution-making and allows future modifications (whether through constitutional amendment or other form of regulation) within the framework of the constitutional order. A progressive, non-majoritarian and

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<sup>30</sup> Two Communal Chambers should have had legislative power on purely communal matters (artt. 86 – 111). The bi-communal constitutional arrangement, which was not subject to amendment (art. 182.1), is apparent in all State powers (executive, legislative and the judiciary), as well as in the public sectors. For a comprehensive study on the implementation of bi-communalism as designed by the 1960 Constitution, see C.D. PAPASTATHOPOULOS, *Constitutionalism and Communalism*, cit., pp. 118 – 144.

<sup>31</sup> A. AUER, M. BOSSUYT, P. BURN, A. DE ZAYAS, S. MARCUS-HELMONS, G. KASIMATIS, GD OBERDOERGER, M. SHAW, *A principled Basis for a Just and Lasting Cyprus Settlement in the Light of International and European Law* (Paper of the International Expert Panel, presented by the Committee for a European solution in Cyprus to Members of the European Parliament), 12 October 2005, para. 23.

<sup>32</sup> See H. LERNER, *Constitution-writing in deeply divided societies: the incrementalist approach*, in *Nations and Nationalism*, 16 (1), 2010, 68–88.

<sup>33</sup> H. LERNER, *Making Constitutions in Deeply Divided Societies*, Cambridge University Press, 2011, p. 39.

<sup>34</sup> D. OLIVER, C. FUSARO, *How Constitution Change: A Comparative Study*, Bloomsbury, 2011, p. 381 et seq.

consensual approach is particularly interesting when discussing regional demarcation and geographical accommodation.<sup>35</sup>

Moreover, once recognised (as well as institutionalised) the connection between territory and ethno-linguistic identity, the same approach can be applied to the regulation of ethno-cultural matters, such as language and education.

In this respect, the Belgian case is particularly interesting. Belgium is a multinational State that underwent a gradual process of federalisation by disaggregation.<sup>36</sup> This process reflects the sensitivities of ethno-linguistic groups. From a unitary State, it became an asymmetric federation composed by two types of constituent entities<sup>37</sup>: three linguistic Communities (Flemish, French and German) and three Regions (Flemish, Walloon and Brussels-Capital), whose territory and competence partially overlap.

Whilst founded on the principle of equality among the federated units,<sup>38</sup> the constitutional arrangements are shaped by linguistic territoriality and preferential monolingualism in the Regions (with the exception of Brussels metropolitan area). However, although the ethno-linguistic factor has initially functioned as the structural elements of the federation, jurisdiction is defined by territory and not by shared language or culture.<sup>39</sup>

The system based on linguistic territoriality does not prevent the entities to collaborate on sensitive matters, such as religion, culture and language. Moreover, it must be recalled that Belgian Regions and Communities enjoy what can be labelled "constitutive autonomy", which is the power to modify rules that regulate their political organization. Conversely, they do not enjoy

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<sup>35</sup> T. GINSBURG, *Constitutional Design and Territorial Cleavages*, in A. ANDERSON, S. CHOUDHRY (eds.), *Territory and Power in Constitutional Transitions*, Oxford University Press, 2019, pp. 352 et seq.; M. NICOLINI, *Accommodating Divided Societies Through Constituent Units? A comparative Survey of Regional Demarcation and Territorial Alteration*, in A. THEOPHANOUS (ed.), *Issues of Politics and Governance in Bi-Ethnic, Multi-ethnic and Divided States*, Nicosia, 2014, pp. 87-117.

<sup>36</sup> G. A. TARR, R.F. WILLIAMS, J. MARKO (eds.), *Federalism, subnational constitutions, and minority rights*, London, 2004.

<sup>37</sup> Under art. 1 of the Constitution "Belgium is a federal State composed of Communities and Regions".

<sup>38</sup> See, P. POPELIER, K. LEMMENS, *The Constitution of Belgium: a contextual analysis*, Hart Publishing, Oxford and Portland (Oregon), 2015, p. 119; R. L. WATTS, *Multinational Federations in comparative perspective*, in M. BURGESS, J. PINDER, *Multinational Federations*, Routledge, London - New York, 2007, pp. 225 et seq.

<sup>39</sup> Constitutional Court n. 9, 30 January 1986; Case relating to "certain aspects of the law on the use of languages in education in Belgium" v. Belgium (1968); Series A n. 6; *Mathieu – Mohin and Clerfayt v. Belgium* (1987) Series A n. 113. See also, P. POPELIER, K. LEMMENS, *The Constitution of Belgium: A Contextual Analysis*, Hart Publishing, 2015. The opposite example is provided by Quebec, which is "the guardian of the French language in Canada". See P. C. OLIVER, *Quebec and The Amending Formula: Protection, Promotion and Federalism*, in S. TIERNEY (ed.) *Accommodating Cultural Diversity*, Ashgate Publishing, Aldershot, 2007, p. 172.

"constitutional" autonomy, namely the power to adopt their own constitution.<sup>40</sup>

Not only the interrelation between identity and territory acquires legal significance in the demarcation process, but it also affects the procedures for future territorial adjustments.

In Belgium, art. 4 of the constitution requires a majority of the vote of each community within the federal Parliament to alter the geographical boundaries between the linguistic Regions. Although the legislatives of the Communities play no role, the voting procedure is designed to effectively require the consent of the two linguistic groups.<sup>41</sup> Likewise, in Cyprus any partial reconfiguration of the constituent units' boundaries would likely be provided by principles and procedures enshrined in the constitution and they shall require the consent of the sub-national entities.<sup>42</sup>

It can be argued that establishing the constituent units on the basis of language and ethnicity may further exasperate the separation of the communities. However, as already noted, this would not necessarily prevent the system to function, as soon as mechanisms to accommodate potential disagreement are provided.

Moreover, the current political and social landscape seems to make a non-ethnically oriented solution unfeasible. Firstly, ethnic and linguistic cleavages display profound effects on the success of regional demarcation and territorial alteration. Secondly, ethnic divisions influence the establishment and internal functioning of the institutions based on power-sharing. Thirdly, territorial concentration facilitates the design of instruments of self-government - to which the last section is dedicated - and it influences the allocation of competences at different level of the federal/regional State. The final object is to properly balance the rights of the majoritarian community in each entity with those of the ethnic minorities.

#### **4.2. The performativity of the *Green Line* and the City of Nicosia**

In multinational countries, the linguistic and cultural dimensions often overlap with legal geography. This is apparent in Cyprus. Turkish occupation and the stabilization of the division along the *Green Line* created a new "border", different from that enshrined in artt. 181 and 185 of the constitution. Consequently, a new relationship developed between the ethnic groups and the territory over which they claim power and in which

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<sup>40</sup> See G. ROLLA, *Federalismo e regionalismo in tempi di transizione*, in *Federalismi.it*, 2, 2018, pp. 1 – 22; Y. LEJEUNE, *DROIT constitutionnel belge fondements et institutions*, Larcier, 2014.

<sup>41</sup> G. ANDERSON, S. CHOUDHRY, *Territory and Power in Constitutional Transitions*, in *International IDEA policy Paper*, 2017, p. 12.

<sup>42</sup> M. NICOLINI, *Regional demarcation, territorial alteration and accommodation of divided societies*, cit, p. 53.

they project their national identity.

Designed as an *interim* solution, the *Green Line* underwent a consistent process of stabilization and bureaucratization, which displays similarities with the Gaza Strip and the Israeli – Palestinian case. In Gaza, the administration of the border has shifted from being transient to a fixed infrastructural construction.<sup>43</sup> Both “borders” are the visible manifestation of the “ossification” of the conflict and the creation of a new “legal geography of illegal spaces”.<sup>44</sup>

In this respect, for instance, in Cyprus toponymy is an expression of the ethnic-territorial divide. In the northern part of the island, places were re-named in Turkish, while the south underwent a process of (further) hellenization.<sup>45</sup> It is not by chance that, following the admission of Cyprus to the EU in 2004, the issue of place naming in the north has been often raised by Cypriot representatives in the European Parliament. Toponymy continues to be a contentious matter in the negotiation rounds – together with the issue of land and property restitution.<sup>46</sup>

The disputes over toponymy goes far beyond the protection of linguistic rights: they are the visible manifestation of the power a certain community exercise over *its* territory. In a pivotal judgment, the Constitutional Court of Bosnia and Herzegovina has been asked to rule on the decision by Republika Srpska to change the name of some towns and municipalities in a way that was ethnically coloured.<sup>47</sup> According to the Court, the decision violated the constitutional equality right of the peoples of Bosnia and Herzegovina, as well as the right of non-discrimination.

However, the Constitutional Court goes beyond the scope of the judgment by obliging the Entities to modify the names of those towns which present ethnic prefixes (with the exception of historical denominations).<sup>48</sup> In so doing, the Court implicitly affirms that the process of State re-building must necessarily involve the federated entities (the constituent communities),

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<sup>43</sup> See I. BRAVERMAN, *Check-point Watch: Bureaucracy and Resistance at the Israeli – Palestinian Border*, in *Social and Legal Studies*, 21(3), pp. 297 – 320.

<sup>44</sup> M. NICOLINI, *A new Legal Geography for Cyprus*, cit., p. 297.

<sup>45</sup> See, B. EIKI, R. TOOMLA, *Mission impossible in Cyprus? Legitimate return to the partnership state revisited*, in *Nationalities Papers* 41(2), 2013, pp. 276 – 92.

<sup>46</sup> The property issue has been subject to numerous cases before the European Court of Human Rights and the European Commission. Art. 2.2 of Attachment 2 on the Cyprus Property Board and Compensation Arrangements of Annex VII of the Foundation Agreement provides for the resolution of the claim “in accordance with international law, the respect of the individual rights of dispossessed owners and current users and the principle of bi-zonality”. See, N. SKOUTARIS, *The Cyprus Issue: The Four Freedoms in a Member State under Siege*, Hart Publishing, Oxford - Portland (Oregon), 2011, p. 109. The difficulties in meeting these criteria in relation to the current situation in Cyprus are self-evident.

<sup>47</sup> Constitutional Court of Bosnia and Herzegovina, Case No. U 44/01, *Names of towns*, (27. 2. 2004).

<sup>48</sup> On the judgment, see D. FELDMAN, *Renaming cities in Bosnia and Herzegovina*, in *International Journal of Constitutional Law*, 3(4), October 2005, Pages 649–662.



not just the central State.<sup>49</sup> The aim is to find the right balance between the recognition of the distinctive ethnic groups and the building of shared constitutional identity within the multinational State.

The erasing of the *Green Line* will require several territorial alterations. Among others, the question of the future of the Capital city of Nicosia arises. In this respect, lessons can be learned from the federalist model “à la belge”. Following the sixth state reform (2012 – 2014) Brussels-Capital Region underwent a remarkable transfer of powers. Although the reform caused deep discussion, the attention shifted from communal disputes to the interests of the inhabitants.<sup>50</sup>

Similarly, to what happened to the *Communauté métropolitaine de Bruxelles*, a bilingual Region of Nicosia can be established, characterised by bi-communal institutions. This solution would require a process of gradual territorial adjustments, which will ultimately bring to the dismantling of the buffer zone.

#### **4.3. Combining territorial and non-territorial instruments of self-government**

The geographical concentration of the ethnic groups and the new relationships between communities and territory allow us to propose territorial responses to the Cyprus question.<sup>51</sup> It can be argued that the future path towards the reunification of the Island would be asymmetric federalism<sup>52</sup> and it might adapt various constitutional and legal models to the domestic political, social and cultural characteristics of the country.

In Cyprus the Constitution recognises two communities (artt. 1 and 2) and two official languages (Greek and Turkish) (art. 3). Moreover, the constitution regulates use of languages in legislative, executive and administrative acts, as well as in the judicial proceedings and judgments is regulated. However, the *de facto* partition of the Island separated the two ethnic groups and the provisions concerning bi-communalism and bilingualism were not fully complied with.

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<sup>49</sup> F. PALERMO, J. WOELK, *Diritto costituzionale dei gruppi e delle minoranze*, cit., p. 323.

<sup>50</sup> See J. GOOSSENS, P. CANOOT, *Belgian Federalism after the Sixth State Reform*, in *Perspective on Federalism*, vol. 7, issue 2, 2015, p. 47.

<sup>51</sup> In depth analysis has been conducted on this topic, see, among others, R. AGRANOFF (ed.), *Accommodating diversity: Asymmetry in Federal States*, Nomos, 1999; C. TARLETON, *Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation*, in *Journal of Politics* 27, 1965, pp. 861–74.

<sup>52</sup> B. O’LEARY, *Debating Consociational Politics: Normative and Explanatory Arguments*, in S. NOEL (ed.), *From Power Sharing to Democracy: Post-conflict Institutions in Ethnically Divided Society*, London, McGill-Queen’s University Press, 2005, pp. 3-43; J. MCGARRY, B. O’LEARY, *Federation as a Method of Ethnic Conflict Regulation*, in S. NOEL (ed.), *From Power Sharing to Democracy*, cit., pp. 263-288.

In this respect, the comparison with the Belgian model can provide us with useful suggestions. In particular, the allocation of competences adopted after the implementation of the VI State Reform (2012-2014)<sup>53</sup> aims to combine federalism based on the personal principle of the linguistic Communities, with the principle of territoriality of the Regions. Accordingly, a difference can be drawn between matters connected to the territory, such as the urban development and the environment (*territorialisables*), and matters related to the individuals (*personnalisables*), notably cultural rights, language and education. The constitutional reform also provides the possibility to horizontally re-allocate competences among the State entities. The final aim is to ensure the preservation of the ethnic identities and self-government at the local level, the functioning of power-sharing mechanisms and the allocation of competences at the federal/central level. Indeed, the Federal systems combines *self-rule and shared rule* and “basic policies are made and implemented through negotiation in some form so that all can share in the system's decision making and executing processes”.<sup>54</sup>

Albeit extremely complex and subject to strong criticism, federal asymmetric and “flexible” solutions combining territorial and non-territorial instruments of self-government may prove successful. Finally, examples of mechanisms for the resolution of conflicts and conciliation bodies between the entities in other divided societies deserve careful consideration in elaborating possible solutions for Cyprus.

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<sup>53</sup> For a comprehensive study on the VI State Reform in Belgium, see M. UYTENDAELE, M. VERDUSSEN, *Dictionnaire de la Sixième Réforme de l'Etat*, Larcier, 2015.

<sup>54</sup> C.D. ELAZAR, *Exploring Federalism*, The University of Alabama Press, Tuscaloosa and London 1987, p. 5.

## V. CONCLUDING REMARKS

In this essay, an attempt has been made to address the Cyprus question by investigating the interrelations between ethnic communities and the territory through the lens of comparative constitutional law. As the study reveals, Cyprus is characterized by the high relevance of ethnicity and its strong interrelation with territory, seen as having both a symbolic and a material value.

In order to design the best constitutional and legal solution for Cyprus, the new spatial relationship developed between the two ethnic communities and *their* territory has to be considered.

Similarities have been underlined between Cyprus and other divided societies, with particular attention to the case of Belgium. The goal is to acquire cross-national knowledge as a tool to develop original solutions for the Cyprus question.

Furthermore, extra-legal factors deserve careful consideration. For instance, Turkish Cypriots and Greek Cypriots adhere to a contrasting historical narrative “through which issues of identity and “otherness” [...] are negotiated in order to define the imagined community of the nation, its enemies and its pertinent history”.<sup>55</sup> Moreover, the influence of Turkey and Greece over the Cyprus community and political elite, as well as the deep socio-economic cleavages between the two communities have profound consequences on the acceptance of the proposed solutions by the two communities. Consequently, when shaping constitutional design for Cyprus, foreign experiences shall be “tuned”<sup>56</sup> and adapted to the peculiarities of the country.

In dealing with the Cyprus question, a pragmatic approach ought to be adopted.<sup>57</sup> The bi-zonal and bi-communal model has been proposed in the Annan Plan and rejected by the Greek Community in the 2004 referendum. The same solution constituted the basis for the failed 2017 agreement. Although both Greek and Turkish Cypriots bare considerable concerns over a number of controversial issues – among others, the functioning of power-sharing mechanisms and territorial adjustments - consociationalism within

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<sup>55</sup> Y. PAPADAKIS, *Nation, narrative and commemoration: political ritual in divided Cyprus*, *History and Anthropology*, 14(3), 2003), p. 253.

<sup>56</sup> On legal transplants and the notions of “transposition” and “tuning”, see E. ÖRÜCÜ, *Comparatists and Extraordinary Places*, in P. LEGRAND, R. MUNDAY (eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, 2003, pp. 467 – 489.

<sup>57</sup> In a recent work, A. Theophanous proposes an alternative solution for Cyprus based on an “evolutionary approach” which addresses local, regional and international dimension of the problem from a multidisciplinary perspective. The proposed “roadmap” deals with both legal and extralegal factors which have contributed to the failure to find a solution. On the evolutionary approach and the proposed solutions, see, A. THEOPHANOUS, *Revisiting the Cyprus Question and the Way Forward*, in *Winter’s Issue 2017*, vol. 15, 4, *Turkish Policy Quarterly*, <http://turkishpolicy.com/article/841/revisiting-the-cyprus-question-and-the-way-forward>.

the framework of asymmetric federalism is likely to remain the core of any future proposal that aims to avoid the “two - State” solution.

As Cyprus is a member of the European Union, some cultural and socio-economic differentials have been positively affected by Europeanization. Indeed, the Cyprus Question can and must also be analysed through the lens of international and EU law. In this respect, for instance, the implementation of EU law and the protection of individual rights, with particular reference to freedom of movement and settlement, as well as property rights, contribute to re-shape human geography of the Island and to reduce the salience of the ethnic dimension.<sup>58</sup>

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<sup>58</sup> For example, in South Africa ethnic and linguistic cleavages persist, citizens, however, tend to become more compact in a socioeconomic perspective. See, C. MURRAY, R. SIMEON, *Reforming Multi-level government in South Africa*, in *Canadian Journal of African Studies*, 43, 2009, pp. 536-571. Similar paths have been experienced by Malaysia. See A. HARDING, *The Constitution of Malaysia. A Contextual Analysis*, Hart Publishing, Oxford and Portland, 2012.



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