

**CY - targeted questions- Government
RoL (Virtual) Country Visit, 2023**

Ministries

Justice

Question 1

The 2022 Rule of Law Report contained a recommendation to Cyprus to ‘ensure that the reform on the appointment of the Supreme Constitutional Court and High Court judges takes into account European standards on judicial appointments and the opinion of the Venice Commission’. Taking into consideration the concrete elements referred to in the 2022 Rule of Law Report and the recommendations of the Venice Commission, could you please clarify:

(i) What would be the effect of a graduated recommendation by the Advisory Council in respect to the President’s discretionary powers?

According to the Constitution, the appointment of the President and the Judges of the Supreme Constitutional Court, as well as of the Supreme Court are prerogatives of the President and Vice President (Turkish Cypriot) of the Republic. Cyprus Constitution is admittedly a rather rigid constitution connected to the Treaty Establishing the Republic of Cyprus, with a list of fundamental articles that cannot be amended. The two Articles providing for the appointment of the Supreme Constitutional Court and the Supreme Court Judges by the President of the Republic, are, under our Constitution, fundamental, meaning that they cannot be amended in any way.

In particular, from the revision of the Constitution are excluded the fundamental articles, which determine the form of the system of government as a Presidential Democracy, as well as all provisions that ensure the bi-communal character of the state and the principle of the separation of powers.

A graduated recommendation by the Advisory Judicial Council indirectly limits and interferes to the absolute discretion of the President of the Republic, regarding the appointment of the Supreme Constitutional Court and Supreme Court Judges. It is considered to constitute a limitation to this absolute constitutional right and discretionary executive powers of the President of the Republic. This means that any provision adopted, regulating the graduated recommendation, it will be judged as unconstitutional, either before the enactment of the said provision into law or after the enactment of the said provision into law.

In particular, according to the Constitution, a preventive review of the constitutionality of the said provision can be occurred before the enactment of the said provision into law, by reference of the President of the Republic to the Supreme Constitutional Court, by virtue of the article 140 of the Constitution. The Supreme

Constitutional Court will judge in this case the said provision as unconstitutional and, therefore, the provision will not acquire any legislative force.

Furthermore, the unconstitutionality of the said provision can also emerge during the repressive review of constitutionality of the said provision, by the challenging of this provision by anyone before the Court who consider that their legal interests are affected.

On this point, I would like to reiterate once again that, while appreciating the usefulness of the Recommendations of the Venice Commission, the reason that some of them have not been adopted, is due to constitutional restraints.

It should be noted that, the Venice Commission seems to acknowledge the constitutional implications, stating in paragraphs 55 and 61 of the Opinion of the Venice Commission, that “It is not in the remit of this opinion to assess the constitutionality of the proposed reform”.

Lastly, it is also noted that the Ministry of Justice and Public Order contacted the Venice Commission and informed them for the recommendations that could not be adopted and the reasons for that. The Venice Commission didn’t come back.

(ii) Regarding the right of an unsuccessful candidate to challenge the decision, have you considered the possibility of a non-judicial remedy (i.e. a request for review)?

As you already know, this absolute power of the President of the Republic to appoint the Supreme Constitutional Court and the Supreme Court Judges is considered by the Judiciary as “acts of government”, which are not susceptible to judicial review. The term “acts of government” is oriented to limit judicial review of the executive power. Acts of government are defined as administrative acts that are surrounded by judicial immunity, because they are related to the management of political power.

The decision of the President cannot be either under any kind of review. No one can force the President to revise his decision. Besides, the list which the Advisory Judicial Council will draw up, will include only suitable candidates to be appointed as judges, either to the Supreme Constitutional Court, or to the Supreme Court. So, the request for a non-judicial review will not have any practical impact or any added value, since the reasons on which the President relied and made his decision, will be the same. Therefore, there will be no reason for the President to reconsider and change his decision.

Question 2

The 2022 Rule of Law Report contained a recommendation to Cyprus to “ensure that the reform on the composition of the Supreme Council of the Judiciary takes into account European standards regarding Councils for the Judiciary and the opinion of the Venice Commission.”

Could you please explain why the initial plan to include in the composition of the Supreme Council of the Judicature judges from all court levels was subsequently modified?

Could you also explain how it became possible to include in its composition non-judicial members (President of the Bar association and distinguished legal professionals), despite the constitutional constraint of Article 157?

Indeed, the first drafts of bills provided for in the composition of the Supreme Council of the Judicature judges from all court levels, plus the participation of the Attorney General of the Republic and the President of the Cyprus Bar Association.

According to Article 157 of the Constitution, the Supreme Council of Judicature is only composed by the judges of the Supreme Court, an exclusively judicial body. Article 157 is a fundamental Article of the Constitution that cannot be amended.

Many discussions followed concerning the constitutionality of the provision as to the participation of anyone else in the Council, apart from the Supreme Court judges. At the end, it was accepted that the composition of the Supreme Council of Judicature cannot be modified, since it is provided in a fundamental Article of the Constitution. But at the same time, it was accepted that the participation of non-judicial members is not opposed to the constitutionality, if these non-judicial members participate without the right to vote.

So, the composition of the Supreme Council of the Judicature has been further expanded compared to the bills. According to the new laws, the members of the Supreme Court remain as members of the Council. This is by Constitution and cannot be altered. But at the same time, the composition of the Council is now enriched with the participation of the Attorney General of the Republic, the President of the Cyprus Bar Association and also with two further advocates of highest professional level, holding the qualifications for appointment as judges of the Supreme Court. The advocates are appointed on the recommendations of the Cyprus Bar Association and upon approval of the Supreme Court.

It is noted, nonetheless, that the new four members do not have a right to vote, for constitutional reasons, as already referred. By this way, the provisions of the laws came even closer to the Venice Commission recommendations, avoiding at the same time the issues of constitutionality. Thus, the transparency of the procedure and at the same time, the independence of the judiciary, are both ensured and enhanced.

In parallel, another recommendation of the Venice Commission is adopted, that is to replace the Attorney General in the composition of the Council, unless he participates without the right to vote. This is now done, since the Attorney General of the Republic participates to the Supreme Council of the Judicature, without the right to vote.

It must be noted that even for these recommendations that could not be adopted for constitutional reasons, amendments were made to the legislation, in order to come as closer as possible to those recommendations. Throughout the consultation of the bills

with the stakeholders, the Minister's effort focused on being as closer as possible to the recommendations of the Venice Commission and therefore to the recommendations of the Rule of Law Report of 2022, while at the same time ensuring the necessary consensus between the involved bodies, mainly the Supreme Court, the Cyprus Bar Association and the political parties and preserving the constitutionality of the provisions of the new laws, avoiding possible constitutional challenges, in order to achieve the adoption of a radical and well-needed justice reform that promotes check and balances, quality of decisions and timely administration of justice.

It must also be noted that the aim was to enlarge the composition of the Supreme Council of Judicature with non-judicial members, to reflect a wider range of legal professions, for the purposes of transparency, but also for broadening the perspective and perception of its members regarding the selection of the most appropriate candidates and to strengthen, therefore, the democratic legitimacy of the Council itself and its decisions. All these of course without affecting the autonomy and independence of the Council. The new laws achieve this goal.

Question 5

Could you provide more information on the Independent Court Service and a detailed timeline for its operationalisation? Could you provide the study you refer to in your written submissions, as well as any other related document?

The study of this project was conducted by the Institute of Public Administration (IPA) of Ireland, it was concluded recently and delivered to all the relevant stakeholders in February 2023. The project was funded by DG Reform.

The objective is the establishment of an efficient Court Service, which will undertake all aspects of management, administration and support of the courts in Cyprus.

The study covers, inter alia:

- (a) The weaknesses and challenges in the management and administration of all the courts in Cyprus. (gap analysis of administrative procedures).
- (b) A comparative international perspective on courts management and administration in three countries (Ireland, Scotland and Norway. These countries have in recent decades transitioned to new forms of management and administration within their courts).
- (c) The three possible governance options for addressing the weaknesses and challenges in the courts system.

They are as follows:

-Option 1: Create a Professional Management Structure within the existing Court System. This option would involve establishing a new professional management

structure, with the appointment of professional managers, led by a Chief Executive Officer, within the existing courts system and reporting to the Supreme Court. The Supreme Court would effectively maintain its management oversight role and responsibilities, albeit with more professional management support.

-Option 2: Establish the Courts Service of Cyprus as a Statutory Agency with a Judicial Board. This option would involve establishing the new courts service as a statutory agency with a judicial oversight Board. The Board would consist of a majority representation of the Supreme Court and include representation from the judiciary of the courts of first instance and specialized courts.

-Option 3: Establish the Courts Service of Cyprus as a Statutory Agency with a Broadly Representative Board. This option, like option 2, would establish the new courts service as a statutory body with an oversight Board. There would also be a judicial majority on the Board, which would be chaired by the President of the Supreme Court. However, there would be broader representation on the Board to include other key stakeholders.

(d) The essential elements required to establish and govern the new Court Service as a statutory agency based on option 3.

(e) The proposed organization and management structure of the new courts service; the key roles and responsibilities; and the staffing requirements, including the estimated requirement for new or additional staff.

(f) ISO certifications of procedures,

(g) Re-engineering of court registries, and

(h) Transitional arrangements for the establishment of the new Court Service.

It is significant to stress out that the IPA team had recommended a specific option (Option 3), as the optimal approach for Cyprus. This was also the recommendation in the Functional Review of the Courts (conducted in 2018). This recommendation was based on an assessment of the advantages and disadvantages of the management and administration of all the courts in Cyprus, the understanding of the courts system in Cyprus, the experience of IPA team of establishing a courts service in Ireland to address similar problems, and the review of international trends.

Thus, the study focuses on the implementation of option 3 and describes all the stages in the establishment of the new Court Service, the detailed actions at each stage, the timescale for completion, and the person/ group with the primary responsibility for the task, as well as the key risks and obstacles that may arise during the preparation for, and subsequent establishments of, the Court Service of Cyprus.

The recommendations of the study are now examined by the relevant government Ministries (Ministry of Justice and Public Order and Ministry of Finance), the Supreme Court and the Cyprus Bar Association, and a decision will be taken as to the best organizational structure to be adopted.

According to the study, the Courts Service must be operational, according to all the stages that must be followed, in about 2.5 to 3 years' timeframe.
The relevant study is attached.

Question 12

According to the 2022 EU Justice Scoreboard (Figure 25), there is no system of legal aid in Cyprus. Do you consider this to be an obstacle for access to justice? Is there any plan for reform?

Legal aid is granted in Cyprus in all court proceedings, with the exception of civil ones. Legal aid is granted particularly in:

- (a) Criminal proceedings
- (b) Proceedings concerning a European Arrest Warrant (EAW).
- (c) Civil and criminal proceedings for specific violations of human rights.
- (d) Proceedings before the Family Court in relation to matters of family relations, parental responsibility, alimony, recognition of child, adoption, property relations of spouses and any other dispute in the marriage or in the family;
- (e) cross-border disputes,
- (f) Applicants of international protection and illegally third country nationals when lodging a recourse before the Court according to Article 146 of the Constitution.
- (g) Victims of trafficking, sexual abuse, sexual exploitation, child pornography, or victims who are solicited for sexual purposes, for the purpose of claiming compensation.
- (h) To a mortgage debtor or any interested person, in proceedings concerning a sale of a mortgage property.
- (i) European Union citizens and the members of their family.

From the above, it is obvious that the categories covered by the legal aid scheme concern cases of human rights, family rights, obligations arising for the Republic in relation to EU Directives and generally matters dealing with humanitarian issues. Legal aid is oriented to protect vulnerable persons.

The cases that can be of help to the vulnerable persons are included in the legal aid scheme.

It is noted that if a certificate for free legal aid is granted by the Court, then all the costs are covered.

The lawyer is chosen by the person entitled to legal aid from a list of lawyers who are willing to offer their services. There are different lists of lawyers, according to each category of legal aid. In the case where the person entitled to legal aid does not indicate a lawyer of his own choice, the Court that issues the certificate of legal aid appoints a lawyer from the list of lawyers, interested to offer their services, prepared by the Cyprus Bar Association.

Legal aid cannot be expanded, unless there is a decision by the state, but this can be provided only within the financial capabilities of the Republic.

The Ministry of Justice and Public Order, in order to deal with the problems that arise during the process of granting legal aid and with the aim of making the system more efficient, prepared and sent for submission, in September 2022, to the House of Representatives, a bill entitled "The Legal Aid (Amendment) Law of 2022". The bill provides for:

- (a) the rotating appointment of lawyers in all types of legal aid, based on a list that will be drawn up in alphabetical order.
- (b) the obligation to justify the court decision, in the case that the grant of free legal aid is not approved.
- (c) the abolition of the obligation of the preparation of the socio-economic report for international protection applicants.
- (d) not granting legal aid when there is a late filing of review before the Administrative Court of International Protection.
- (e) the establishment of a criminal offense where a lawyer providing legal aid services, is paid by the State, but collects an additional fee from the applicant, and
- (f) increasing the penalty in the event that a person makes a false statement or conceals information in order to secure free legal aid.

The bill was discussed at a session of the Parliamentary Committee on Legal Affairs, Justice and Public Order, on 15 March 2023. The main topic of the debate was the proposed rotation system of legal aid, which was contested as to whether it is constitutionally permissible.

The above matter will be discussed between the Ministry of Justice and Public Order with the Law Office of the Republic.

Checks and balances

Question 31

Is there a specific mechanism in place to monitor and/or ensure the follow-up by public authorities to final court decisions by national courts (and if yes, could you elaborate on its functioning)?

As you are aware, a bill is pending before the competent Parliamentary Committee of Legal Affairs providing for sanctions in case an authority violates the obligation to comply with court decisions.

The bill was discussed several times before the Parliamentary Committee, without been forwarded to the Plenary.

Recently, the Legal Service of the Republic sent to the Ministry of Justice and Public Order its legal opinion on the provisions of the bill, according to which the bill faces

many legal and practical problems. The relevant Parliamentary Committee was informed about this development. As a Ministry, we are now study alternate solutions in order to overcome the problems raised by the Legal Service of the Republic.