

UCLAN Cyprus 18th November 2020.

Symposium to mark the 60th anniversary of the establishment of the Republic of Cyprus.

Speech by the ex Attorney General of Cyprus Mr. Costas Clerides under the title:

“The constitutional status of the Attorney General as enshrined in 1960.”

First of all, I would like to congratulate UCLAN Cyprus and especially the organizers of this Symposium, for their initiative to contribute towards the celebrations for the 60th anniversary of the establishment of the Republic of Cyprus, through this highly interesting event. UCLAN Cyprus and especially the School of Law have always been very active in promoting scientific research and knowledge on numerous legal, political and social issues of general importance and interest, which at the same time present a special interest to the hosting country, Cyprus.

I have been kindly invited by the organizers of the Symposium, to give a short speech under the title *“The constitutional status of the Attorney General as enshrined in 1960”* and having left this honorable post only five months ago, I readily accepted the invitation. In this short contribution to the Symposium, I can only give a general description of the main features, duties, powers and privileges granted by provisions of the Constitution to the Attorney General and at the same time I will express some personal thoughts and ideas arising out of my own experience as the holder of this important post for a period of almost seven years.

Following the agreements for the termination of the colonial status of Cyprus and the granting of independence, the need for a written constitution, explicit in its terms and strict in its application, immediately arose. Thus, the Constitution of the Republic of Cyprus was drafted in such a way, as it was justifiably characterized by jurists as one of the most detailed and rigid constitutions in the world. Amongst other special characteristics, this constitution contained divisive provisions as to the granting and the sharing of powers between the two main

communities on the island, the Greek Cypriots and the Turkish Cypriots, the good relations amongst which had suffered severe blows during the last few years of the colonial rule.

It must also be mentioned that the Constitution of 1960 which contained, inter alia, strict safeguards as to the enjoyment of fundamental rights and liberties of all citizens and of course as to their limitations, was never put before them for approval or rejection, through a referendum or other democratic method, neither was it brought up for ratification at any stage. It was only signed by the leaders of the communities acting on their behalf.

It must have not escaped the minds of the drafters of the constitution that in view of its provisions, many of which were unique, in the sense that no similar provisions were found in the constitutions of any other country, difficulties as to its application were bound to arise, sooner or later. It must have been obvious, if not taken for granted, that unavoidably, novel and difficult legal, constitutional and problems of international law, were to arise at some stage, regarding the proper application, the misapplication or the non application of many of its main provisions. In this respect, it is not perhaps surprising that quite extensive powers were given to the institution of the Attorney General of the newborn Republic, as the highest ranking lawyer in the country and the organ responsible for advising as to the proper interpretation and application of the provisions of the Constitution, as well as for enforcing the law and order through criminal prosecutions. These powers were inserted in Part 6 of Chapter 1 Articles 112 – 114 of the Constitution which provide for the institution of the Attorney General and the Deputy Attorney General of the Republic, both established as the highest independent officers in the state.

The main functions and powers entrusted in the hands of the Attorney General are twofold: He is the legal adviser of the Republic and of the President of the Republic, of the Council of Ministers and of the Ministers. At the same time the Attorney General is given extensive, if not absolute power, exercisable at his discretion and in the public interest, in order to institute, conduct, take over and

continue or discontinue any proceedings for an offence against any person in the Republic (Article 113 of the Constitution).

Leaving aside for the moment the absolute powers of the Attorney General in all criminal cases, the general powers assigned to him as the legal adviser of the Republic, coupled with the fact that he is granted security in office thus serving not for the limited duration of the term of office of the President of the Republic who appoints him but until the completion of the retirement age which is the same as that of the Supreme Court judges, makes the Attorney General one of the most powerful organs in the republic.

In order to give you an example of the important and numerous issues with which the Attorney General is entrusted by the Constitution to deal with, I refer you to the topics chosen by the organizers as included in this Symposium's programme.

Having had the advantage of listening to the very able speeches of Dr. Kyriakides and Dr. Nasia Hadjigeorgiou earlier on, I could refer you to the role played by the Attorney General in each one of the important issues involved in them.

The first speech related to the inherently divisive colonial foundations upon which the constitution of Cyprus was constructed and the second related to the retention by the United Kingdom of two so called Sovereign Base Areas and the impact of this. Regarding the first issue, it is well known and it has been very explicitly analyzed by Dr. Kyriakides that the divisive provisions included in the Constitution and the complex checks and balances imposed with regard to the two main communities were bound to create problems of workability and good cooperation. And indeed, they did create such problems as early as only three years following the implementation of the Constitution, when all of its fundamental provisions and structural arrangements regarding the sharing of powers and the checks and balances between the two communities, became unenforceable as a result of the withdrawal of the Turkish Cypriots from all sections of government. Everyone can imagine the duty cast upon the shoulders of the legal adviser of the Republic, the Attorney General, to explore, propose and implement legally and constitutionally recognized methods to prop up the state which was in effect falling apart. Resorting to the principles of the doctrine of

Necessity was the available solution, in order to avoid the complete collapse of the state institutions. The application of the doctrine was judicially accepted by the Court of Appeal in its judgment in the well known case of **The Attorney General of the Republic v. Mustafa Ibrahim and others** in 1964. The President of the Appeal Court in his judgment made specific reference to the valuable assistance offered especially on the legal background of the case, from the learned Attorney General who appeared as the appellant. Special reference was made to his able and most helpful address in the course of which he had referred the court to reports of superior judicial authorities and to writings of eminent jurists showing how the doctrine of Necessity had long been accepted and applied in other European jurisdictions. It is a well known fact that the doctrine of Necessity was resorted to and employed by other Attorney Generals in Cyprus until our days in order to support and save important pieces of legislation which had been enacted in contravention or not in conformity of express provisions of the Constitution and were otherwise bound to be declared as null and void. The role played by the Attorney Generals through the years which followed in succeeding to preserve the Republic of Cyprus as a worldwide recognized and legally constituted state was also of vital importance.

The second issue on the agenda of the present Symposium relates to the retention by the United Kingdom of two Sovereign Base Areas and its impact upon the principle of self – determination. This theme has been presented in the most able manner by Dr. Nasia Hadjigeorgiou. The role which the Attorney General has to play in the issues of the existence, the legal status and the practical operation of the SBAs is both extremely important as well as continuous. During the first few years of the Republic's life, the Attorney General had to deal with legal issues arising therefrom, both from an academic and theoretical point of view as well as from a practical need to find solutions to problems arising out of the relevant treaty and its novel provisions. The most important legal issue which still remains uncertain, relates to the question what is the exact legal status of these Bases. Opinions of the Attorney General on these matters were repeatedly been sought and given and the matter was also carefully presented before the courts in cases in which they were raised in one way or another. One

important and always difficult to deal with aspect of this issue, is the matter of the conflicting jurisdiction and other related matters arising in criminal cases, such as arrests of citizens of the Republic within the areas of the Bases, issues of overlapping and optional jurisdiction, transfer of persons arrested etc. Many of these issues keep the Attorney General and the officers of the Law Office quite busy. Another important issue on the matter of the SBAs is the agreement for the Non Military Development (NMD) within certain areas of the Bases, an agreement signed by the President of the Republic and the British Prime Minister a few years ago. The talks relating to the implementation of the provisions of that agreement present various problems which can justifiably be characterized as a lawyer's nightmare. The support of the office of the Attorney General on many complex legal issues arising is sought and provided through a standing team of law officers which is in constant contact with the Ministry of Foreign Affairs, under the supervision of the Attorney General.

The specific issue of the impact of the continuous existence of the Bases upon the principle of self – determination analyzed by Nasia is closely related to the continuing dispute between Mauritius and the United Kingdom over the Chagos Archipelagos, which was dealt with by the United Nations International Court of Justice in the Hague in September 2018. The Republic of Cyprus took part in the hearing proceedings for an advisory opinion by the Court, represented by a whole team of experts headed by the Attorney General and the Opinion which was finally delivered by the Court and referred to the General Assembly of the United Nations, is an extremely useful tool in approaching legal matters arising out of the continuous existence of the Bases in Cyprus.

The examples given above serve to show that the Attorney General in this country has an important role to play in almost all serious issues arising in the Republic. Amongst these we should include all novel legal matters arising out of the 2013 economic crisis, advising on legal and constitutional matters arising out of the Covid 19 pandemic, advising on matters of Cyprus's Exclusive Economic Zone especially in the context of International Law and the Law of the Sea, advising and representing the Republic in matters of Intellectual Property e.g. in relation to the

pending application for the registration of halloumi as POP and so many other important matters.

Another important aspect of the duties of the Attorney General as the legal adviser of the Republic lies of course on the obligation to represent the Republic in all court cases, both in Cyprus and abroad. This includes thousands of civil law cases, administrative law cases, disciplinary proceedings against civil servants, local and international arbitrations and many other proceedings.

In dealing with the aspects of the role of the Attorney General as the legal adviser of the Republic, special mention must be made to the duty cast upon him to ensure the strict and proper enforcement of the provisions of the European Convention for the Protection of Human Rights, most of which were adopted verbatim in the text of our Constitution. This role of the Attorney General spreads along the following obligations and duties:

1. The duty to act as the Government Agent, as a consequence of which all recourses by private individuals complaining of violation of human rights, are forwarded by the European Court of Human Rights in Strasbourg to the office of the Attorney General who collects the relevant facts from the relevant organs involved and decides as to the further handling of each case, in the light of the Convention's provisions and the Court's case law.
2. The duty to take action or to advise for taking action in order to comply with judgments of the European Court of Human Rights or of the ECJ which impose obligations upon the Republic.
3. The duty to give advice as to the compatibility of proposed legislative or other governmental measures with the provisions of the Convention and of course with the provisions of the Charter of Fundamental Rights of the European Union and the relevant case law.
4. The duty to give advice as to the reviewing or amending legislation or administrative acts or practices, so as to be in conformity with binding court judgments.

Another feature of the role of the Attorney General as the top ranking lawyer is the duty cast upon him to act as the honorary President of the Bar Council, as the President of the Legal Council and as the President of the Disciplinary Board of the Bar Council.

Reverting now back to the criminal cases, the powers vested in the Attorney General are indeed strong and extensive and in effect they are beyond the control of the courts. The only criterion and restriction imposed by Article 113 upon the Attorney General in exercising his powers in criminal cases, is the taking into consideration of the “public interest”. A decision of the Attorney General, for example to enter a so called nolle prosequi which puts an end to any criminal case whether in public or in private prosecutions, has been held to be a decision beyond the control of the courts, as being an unfettered constitutional privilege. This very fact of enjoying an unfettered power, casts upon the Attorney General, in my opinion, an increased responsibility to exercise it with even greater caution, and to be ready and able to give a proper and convincing reasoning which lies behind his decision in order to avoid or refute any impressions of arbitrariness or other form of abuse.

Needless to mention here, that the extensive powers of the Attorney General in all criminal proceedings, casts upon him a special duty to actively assist in fighting the phenomenon of corruption in public life. In recent years there has been an immense effort by law officers entrusted with presenting corruption cases and cases of the so called white collar before the criminal courts. Despite the fact that many cases against persons holding high public office were successfully presented to the courts during the last few years, it is true that deficiencies and difficulties in this effort became apparent from the beginning, due to the fact of the lack of knowledge and experience in the issues involved such as in banking practices, accounting and economics. Deficiencies and difficulties also arose due to the small number of available officers who were called upon to fight complex cases in the courts alone, without assistance as against a team of able and experienced lawyers for the defence. The lack of specialized knowledge and experience in financial and banking realities was also apparent at the critical stage of the police investigations which are of vital importance in the proper preparation of a case

for the court. In my view, the setting up of a specialized department which will deal with economic crime, both within the police as well as within the prosecution office, along the lines of the British Serious Fraud Office (SFO) is a necessity in order to fight this kind of crimes effectively.

Regarding the sentences passed upon persons convicted for criminal offences and without prejudice to the cardinal principles of the independence of the Judiciary, special reference must be made to the fact that according to Article 53 of the Constitution, the prerogative granted to the President of the Republic to remit, suspend, or commute any sentence passed by a court in the Republic in all cases, can only be exercised on the unanimous recommendation of the Attorney General and the Deputy Attorney General of the Republic. Again in this respect, no limitations or criteria are imposed by the relevant constitutional provision. It goes without saying however, that this prerogative must be exercised in the public interest and that valid and convincing reasons must exist and must readily be given where required.

It should be noted at this point that this duality of powers vested in the Attorney General comprising of his position as the legal adviser of the Republic on the one hand and as the Public Prosecutor on the other hand, is not a common feature with other European states. Most of the member states of the European Union have a separate institution or office which is in charge of all criminal cases. The same also applies to England, whose common law legal system we otherwise follow in general terms.

As it regards the necessary full independence with which the Attorney General must be vested, an objective observer must be able to diagnose certain apparent deficiencies which inevitably arise as a result of the duality of functions of the Attorney General. The functions of the Public Prosecutor do not present any problems since in exercising his rights and privileges the Attorney General only represents the state, the Republic and he acts in the public interest in any way he thinks fit. His independence in this respect is beyond any doubt. The exercise of the functions of legal adviser, however, may create and in practice it does so

create, problems of objective impartiality or apparent independence. According to the aforesaid Article 113 of the Constitution, the Attorney General is the legal adviser of the President of the Republic and of the ministers. As a lawyer, he appears in person or through the officers of the Law Office in all court cases defending or representing the state either as against claims of individual physical or legal persons, or in favour of the interests of the state. In proceedings defending the acts, omissions and decisions of the administration as against claims by individual citizens or corporations, the Attorney General unavoidably takes sides. However impartially he may appear to be acting, unavoidably he takes the side of the executive in defending or fighting a case and in effect the relationship between counsel and client is created in these cases. A similar situation is created in all cases where the legal guidance of the Attorney General is sought by state officials who seek his opinion as to methods of promoting governmental policies or taking administrative measures. In all these cases it can hardly be said that the Attorney General acts as an independent and impartial officer. This distinction between the functions of the Attorney General is unfortunately playing its role in weakening the claim of the Attorney General for more independence and autonomy. It should be noted at this point that the relevant observations and recommendations of European institutions such as the Venice Commission and GRECO, are mostly referring to public prosecutors when in their reports they insist on the enjoyment of the highest possible independence.

Having seen these deficiencies in practice during my term of office as Attorney General, I can put forward the idea of seriously examine the possibility of dividing the constitutional functions of the Attorney General into two separate institutions, to be headed by two different officers of the Republic. On the one hand, the Law Office or Service of the Republic headed by the Attorney General and on the other hand the Office of the Public Prosecutor, or Prosecutor General, or Director of Public Prosecutions, or whatever he might be called. Such an officer, who will only be responsible for handling all criminal cases, will enjoy full autonomy without any objections from anyone. When I say autonomy, I include in this term the power to prepare a budget and to select, appoint and promote all

the law officers of his service through a selection committee in which judicial officers may participate as well. The law officers should no longer be regarded as civil servants but they must be equated with judicial officers enjoying the same degree of independence and security of tenure. All matters relating to their service, such as promotions, secondments, discipline, etc, should be assigned to the aforementioned committee. This development will disengage them from the Public Service Commission and will undoubtedly contribute towards having a more reliable, efficient and independent office of prosecutors.

In concluding, I feel obliged to mention that I feel proud to have been in charge of the Law Office of the Republic for almost 7 years. How important the role of the Attorney General is in a country like Cyprus, is something which we all see in practice every day, in so many events and aspects of our political, social and economic life.

We have a duty to protect, support and strengthen this institution, for the sake of the smooth running of the law and order in our small country.

C. Clerides

18th November 2020