

The Legal World of Polyvios Polyviou.

A Review of 11 Books Published between 2016-2021

Introduction

Polyvios (Polys) G. Polyviou is widely considered as one of the leading advocates in Cyprus. Son of advocate Georgios Polyviou, one of the Greek Cypriot members of the Joint Constitutional Committee that drafted the Constitution of Cyprus in 1960, grandson of Georgios Chryssafinis, former Chair of the Nicosia Bar Association, and great-grandson of Nicolaos Chryssafinis, also former Chair (and ‘Dean’) of the Nicosia Bar, and founder of the law firm Chryssafinis Polyviou in the early 1900s, Polyviou has been a leading figure in Cypriot law for more than four decades. After teaching law in the University of Oxford as lecturer in the 1970s, he excelled in public and private law cases before the Cypriot courts, having also participated in several proceedings before international courts. In 2011 he was appointed as Commissioner of Inquiry to investigate one of the most tragic incidents in the recent history of the island, an explosion which occurred in a Cypriot military base killing 13 people and destroying the island’s power station. His Report assigned personal blame to the then President of the Republic.

During the past decade Polyviou has been extremely prolific in authoring new books. Following several new publications focusing on the Cyprus Problem and Cyprus’ constitutional struggle for survival between 2009-2015,¹ Polyviou has published in recent years a number of new monographs in purely legal issues in the field of contract law, tort law, labour law, human rights law, and criminal law. This collective book review will elaborate on eleven books by Polyviou, consisting of 14 volumes and published between 2016-2021. I will also refer to three additional

¹ Π. Πολυβίου, Μακάριος. *Τα Τρία Λάθη*, Καστανιώτη: Αθήνα, 2009, Π. Πολυβίου, *Το Κυπριακό Πρόβλημα. Παραλογισμοί και Προβληματισμοί*, Παπαζήση: Αθήνα, 2010, Π. Πολυβίου, *Κυπριανού και Κυπριακό*, Καστανιώτη: Αθήνα, 2010, Π. Πολυβίου, *Η Διπλωματία της Εισβολής*, Καστανιώτη: Αθήνα, 2010, P. Polyviou and L. Arakelian, *Fall of the Guardians. The European Court of Human Rights and the Case of Demopoulos*, University of Nicosia Press: Nicosia, 2011, P. Polyviou, *Cyprus on the Edge*, Chryssafinis and Polyviou: Nicosia, 2013, P. Polyviou, *Cyprus. A Study in the Theory, Structure and Method of the Legal System of the Republic of Cyprus*, Chryssafinis and Polyviou: Nicosia, 2015, P. Polyviou, *The Case of Ibrahim: The Doctrine of Necessity and the Republic of Cyprus*, Chryssafinis & Polyviou: Nicosia, 2015; the latter was reviewed in (2018) 30 (1) *The Cyprus Review* 411 by S. Mitas. Polyviou has also recently published Π. Πολυβίου, *Το Κυπριακό Πρόβλημα. Παρελθόν, Παρόν και Μέλλον*, Επίκεντρο, 2020, which is not reviewed herewith as it is not a legal publication.

books published between 2013-2016 which are earlier versions/editions of books reviewed herewith.

I. Law of contract

Polyviou first published a two-volume work on Cypriot law of contracts in 2014.² This very detailed book was, at the time of its publication, the first comprehensive work on Cypriot contract law. Polyviou subsequently published a more concise revised volume on the same issue in 2017,³ and more recently a new revised edition, again in two volumes, in 2021.⁴ Whereas, the main purpose of his publications in the field of contract law is to analyse Cypriot substantive contract law, he assesses topic within a wider common law framework and methodology.

Whereas, Cyprus is a mixed legal system, the importance of common law for the legal system should definitely not be underestimated. By virtue of Article 188 of the Constitution, the laws which were in force during the British rule of Cyprus remained in force to the extent that they are not subsequently repealed or modified and to the extent that they are not contrary to or inconsistent with the Constitution. The Cypriot legislator, however, went even further than the constitutional text dictated. Section 29(c) of the Courts of Justice Law 14/1960 provides that common law and the principles of equity are to be considered as a source of law, in so far as they are not inconsistent with or contrary to the Constitution, provisions of International Treaty or Convention promulgated in accordance with Article 169 § 3 of the Constitution, or legislation enacted in accordance with the Constitution, or legislation which remains in force in accordance with Article 188 of the Constitution. This essentially meant that Cyprus would continue to apply the common law after independence and that English cases would continue to be considered as precedent for Cypriot courts. In addition to retaining post-independence common law as a source of law, some of the most important pieces of legislation remain in force since the British rule with minor amendments and effectively refer to common law rules (or sometimes English law as it was in force in 1959), often as influenced by the Indian codifications. These include Contract Law (Cap. 149), and the Law of Torts (Cap. 148). The aforementioned legislation remains in force, despite the fact that

² Π. Πολυβίου, *Το Δίκαιο των Συμβάσεων*, Χρυσ αφίνης και Πολυβίου: Λευκωσία, τ. I-II, 2014.

³ Π. Πολυβίου, *Η Σύμβαση στο Κυπριακό Δίκαιο. Θεωρία και Πράξη*, Χρυσ αφίνης και Πολυβίου: Λευκωσία, 2017.

⁴ Π. Πολυβίου, *Το Δίκαιο των Συμβάσεων στο Κοινοδίκαιο και το Κυπριακό Δίκαιο*, Νομική Βιβλιοθήκη: Αθήνα, τ. I-II, 2021.

in England the respective legislation might in the meantime have been repealed or amended.

Polyviou is correct in his approach that Cypriot contract law can only be understood through an evaluation of the case-law of common law. Whereas, contract law is governed by statutory legislation in Cyprus, the common law methodology, comparative approach, and system of precedent is the backbone of any understanding of the system. Polyviou expresses the view that even without the existence of the statutory basis of Cap. 149, the Cypriot contract law would be roughly the same, because of its common law structure. This raises a number of questions in Cyprus, as well as in other countries where common law is applied: to what extent should judges apply their own understanding of how the law ought to be in their assessment of what the law currently is? The process of continuous judicial reshaping of the law is based on the premise of organic development, rather than the imposition of the arbitrary personal tastes of judges; however, this is always easier said than applied. Polyviou argues that whereas the strict distinction between continental law and common law does not reflect reality, since statutory initiative and judicial action co-exist in both systems, in common law systems the judge, rather than the legislator, is the central figure of the system. Whereas, Cypriot law entails a degree of mixity between the two approaches, in practice the common law has superseded the application of the Cypriot statutory contract law. Polyviou further argues correctly that contract law is applied within a pragmatic framework, and with a practical approach, on a case-by-case basis, rather than by applying preconceived notions prescribed in the statute.

As already indicated, Polyviou's work is exhaustive in scope, including questions such as capacity, formalities, offer and acceptance, consideration, intention to create legal relations, privity of contract, consent, unconscionable bargains, mistake, non est factum, rectification, good faith, content, unlawfulness, invalidity, public policy, frustration, remedies, assignment, and unjust enrichment. The methodological analysis of the case-law echoes the approach followed by classic works, such as the Sweet & Maxwell's Common Law Library. Polyviou assesses the development of Cypriot law in its totality, thus including the development of common law, and concludes that there is no general theory of good faith in common law; rather the approach should remain empirical, without generalization. Despite this sweeping statement, he acknowledges that there are various fields of contract law where notions such as good faith and honest contractual behaviour, as well as the need

to protect economically vulnerable groups and consumers, have become of significance, and have been used so as to extend the limits of traditional contract law. Contractual freedom has thus been restricted in recent decades as a result of the wider political and social changes, and statutory initiative to restrict such freedom has been considered as necessary.

II. Law of torts

Polyviou first published a comprehensive book on the law of negligence as applied in Cyprus in 2019.⁵ He subsequently published a, wider in scope two-volume book on the law of torts in 2020.⁶ Polyviou has also published two volumes on the specific tort of defamation, the first in 2013,⁷ and an updated one in 2019,⁸ as well as a related volume on the protection of the right to personality.⁹

The methodology of the Cypriot law of torts presents a number of similarities to what has already been discussed with regards to contract law. Tort law is also based on a statutory legal instrument, but it is expressly complemented by common law, and Polyviou correctly assesses the provisions of Cypriot law within the wider framework of common law and precedents. Notions such as duty of care, standard of care, causation, and public policy, apply as requisites for liability in the Cypriot law of negligence. Section 51 of the Civil Wrongs Law, Cap. 148 purports to codify the English common law regarding the tort of negligence, and the Supreme Court of Cyprus has held that it should be interpreted and applied in such a manner as to give effect to the will and intention of the legislator and in order to apply to the living conditions prevailing in Cyprus. The manner in which similar provisions have been construed and applied in another jurisdiction is extremely helpful to the court, but the aim should always be to serve the people of Cyprus by applying the provisions as they were statutorily enacted by the country's legislator. However, in practice, the Supreme Court has been eager to adopt the development of the English case law regarding negligence, and has rarely engaged into its own attempt to construe the statutory provisions regarding negligence. Consequently, the Supreme

⁵ Π. Πολυβίου, *Η Αμέλεια στο Κυπριακό Δίκαιο*, Χρυσσαφίνης και Πολυβίου: Λευκωσία, 2019.

⁶ Π. Πολυβίου, *Αστικά Αδικήματα στο Κυπριακό Δίκαιο*, Χρυσσαφίνης και Πολυβίου: Λευκωσία, τ. I-II, 2020.

⁷ Π. Πολυβίου, *Το Σύγχρονο Δίκαιο της Δυσφήμισης*, Χρυσσαφίνης και Πολυβίου: Λευκωσία, 2013.

⁸ Π. Πολυβίου, *Η Δυσφήμιση στο Κυπριακό και Ευρωπαϊκό Δίκαιο*, Νομική Βιβλιοθήκη: Αθήνα, 2019.

⁹ Π. Πολυβίου, *Το Δικαίωμα στην Προσωπικότητα στο Κυπριακό Δίκαιο*, Χρυσσαφίνης και Πολυβίου: Λευκωσία, 2018.

Court has departed from the exhaustive and detailed list included in section 51 of Cap. 148 and has adopted the English case law setting out the requirements for negligence. This has been overall positive, since the modern common law of negligence, derives from the leading English case of *Donoghue v. Stevenson*, which due to time-constraints had not been taken into account when drafting section 51 of Cap. 148. However, it also confirms that in practice the courts are often willing to ignore the wording of the statutory instruments in favour of common law developments, which had also been a finding of Polyviou during his analysis of the law of contracts described above.

Polyviou analyses remedies, specific torts, as well as specific issues of negligence such as liability of professionals, and liability of the State, in an exhaustive manner, with comparative analysis of multiple common law jurisdictions, always focusing on how they apply in Cyprus. His work is both illuminating and critical on how the Cypriot courts have approached the issues. Other than negligence, defamation is the most challenging tort, and it makes sense that Polyviou, other than his general work, has authored separate monographs on negligence, and defamation. The Supreme Court of Cyprus has repeatedly held that a person's reputation has to be protected, as reputation is an integral part of the dignity of the individual, forming the basis for his/her well-being in a democratic society; damaging one's reputation with unfounded accusations is contrary to the public interest. There is no field where the direct correlation between human rights and the law of torts is more evident than in the law of defamation. In defamation cases there are two conflicting human rights which need to be balanced: the right of freedom of speech and of expression, on the one hand, and the right to safeguard one's personality, fame and integrity, on the other hand. In Cyprus, this second right is safeguarded under Article 15 of the Constitution and under Article 8 of the ECHR. Both rights are equally important. The courts should therefore express care and sensitivity so as to safeguard that any restrictions to either right are absolutely necessary. It has accordingly been held by the Supreme Court that the right to personality is recognized as one of the grounds on the basis of which the right to freedom of expression may be restricted. There is thus no general right to defame another person. When examining cases of defamation, the courts should strive to balance the two rights on the basis of the principle of proportionality, in order to assess whether in each given case the protection of the personality of an individual should be considered as more worthy of protection than the freedom of expression or the freedom of the

public to receive information on issues of general interest. Polyviou assesses this conflict within a comparative framework, focusing on an assessment of both the common threads and paradoxes of the existing case-law, including an analysis of several cases he handled personally.

III. Labour law

Polyviou first published a comprehensive two-volume work on the Cypriot contract of employment in 2016,¹⁰ which was restructured and updated in a new volume about labour law in 2018.¹¹ Labour law is generally classified as part of private law and is accordingly common law oriented. Employment relationships in Cyprus are governed by ordinary contract law principles and are supplemented by statutory rights and obligations where appropriate. Thus, labour law is closely associated with contract law. However, there are also aspects of labour law which are governed by public law, such as the constitutional safeguards for the right to strike and the freedom of workers to organize, whereas the government through the Ministry of Labour, Welfare and Social Insurance actively participates in the mediation procedures for resolving disputes between employers and trade unions. Labour law remains a central part of the development of Cypriot social policy.

As Polyviou correctly acknowledges, an analysis of Cypriot labour law cannot be restricted in questions regulated by statutory legislation and regulatory instruments, but should extend also to other institutions and procedures whose origin is not the State. One of the most defining characteristics of the 'Cypriot corporatist model' is its reliance on collective bargaining agreements, which involve negotiations between the parties concerned. The Industrial Relations Code is essentially a soft law document, a gentlemen's agreement that regulates the collective bargaining process, and presents a conflict resolution mechanism when employers' and employees' representatives fail to reach a mutually acceptable outcome. In the preamble to the Code, the then Minister of Labour and Social Insurance stated that its smooth application presupposes a spirit of responsibility for the faithful observance of the Code by both employers and employee organizations. A violation of the Code does not involve any legal sanctions. Nevertheless, deviations from the Code have been relatively rare, as it has always assumed a great degree of respect by all

¹⁰ Π. Πολυβίου, *Η Σύμβαση Εργασίας στο Κυπριακό Δίκαιο*, Χρυσ αφίνης και Πολυβίου: Λευκωσία, τ. Ι-ΙΙ, 2016.

¹¹ Π. Πολυβίου, *Το Εργατικό Δίκαιο της Κύπρου. Θεωρία και Πράξη*, Χρυσ αφίνης και Πολυβίου: Λευκωσία, 2018.

parties concerned. Collective agreements also have not been incorporated in legislation, and do not, as a principle, create rights and obligations under public law. However, their terms may be incorporated in individual employment contracts and so become binding on the parties thereto. A collective employment agreement may not prevail over an individual employment agreement, unless the terms of the collective agreement have been incorporated, expressly or impliedly, in the individual employment agreement.

Polyviou thus categorizes labour law as a distinct legal category consisting of sources of substantive law, institutions, and procedures; labour law is viewed as a mosaic of legal elements hailing from different parts of the law, and which also includes elements which are not strictly legal. As opposed to contract or tort law, the methodology of labour law is not a unitary one; the distinct methodologies of common law and continental law (especially through the application of Greek labour law authorities) co-exist, as heavily influenced by the application of the EU labour law. In addition voluntariness in the institutional tripartite co-operation is at the heart of the system. In this respect Polyviou argues that the contract of employment has evolved beyond a mere contract reproducing the agreement of the parties, to an employment relationship which covers also their reasonable expectations and the expectations of society as a whole. The employment contract does not therefore concern only the parties to it, but also society, as it has an effect to the overall societal and economic environment. This evolution of the employment contract, so as to include the wider expectations and demands of society is diligently addressed in Polyviou's work, who assesses the case-law through the lens of this evolution of modern labour law. There is little doubt that the EU accession has helped shape Cypriot labour law to a dynamic legal field, which is not restricted to judicial proceedings.

IV. Criminal law

In 2021 Polyviou published a significant monograph on abuse of process and its emerging importance for criminal law proceedings.¹² Abuse of process was mainly used within the Cypriot law context in civil law cases; however, in a 2019 appellate judgment Polyviou, representing former directors of the Bank of Cyprus convinced the court to fully apply the common law principles on abuse of criminal process,

¹² Π. Πολυβίου, *Κατάχρηση Διαδικασίας στο Κυπριακό Δίκαιο*, Χρυσάφινης και Πολυβίου: Λευκωσία, 2021.

as well as Article 35 of the Constitution which imposes upon the courts a duty to safeguard that fundamental rights are not violated. The Supreme Court correctly accepted that its ultimate duty is to promote the interests of justice and to avoid causing injustice, and that subsequently abuse of judicial process cannot be tolerated merely in order to advance the alleged public interests of prosecuting. In cases of malpractice by law enforcement agencies, the courts should not convey the impression that it will adopt the approach that the end justifies the means, as otherwise the integrity of the criminal justice system would be hindered.

As Polyviou convincingly argues, relying on common law authorities, for a person to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to suspend or quash proceedings for abuse of process. The powers of the court to quash criminal proceedings have recently been used in high-profile financial criminal cases which were the outcome of the criminal investigation that followed the collapse of the economy of Cyprus in March, 2013, such as the Bank of Cyprus case, and the Christodoulou and Zolotas cases. The emerging importance of the exercise of the court's powers to prevent abuse of process in criminal cases before it is analysed by Polyviou with reference to common law.

IV. Human rights law

Polyviou first published a monograph in 2016 on administrative authorities which act as quasi-judicial tribunals, with a specific consideration of the Committee for the Protection of Competition, and the Cyprus Securities and Exchange Commission.¹³ This was further revised and updated in 2017.¹⁴ Polyviou argues that the structure and function of such administrative authorities are inconsistent with the right to a fair trial as safeguarded by Article 30 of the Constitution of Cyprus and Article 6 of the European Convention on Human Rights. Polyviou focuses on the fact that administrative organs having wide-ranging quasi-judicial powers may impose sanctions without adhering to the requirements for a fair trial. A similar argument had first been raised in the early 2000s, when Sigma, a TV channel attempted to challenge the sanctioning powers of the Cyprus Radio Television Authority, raising the claim that the sanctions were of a criminal character, and that the Authority acted at the same

¹³ Π. Πολυβίου, *Διοίκηση και Δικαιοσύνη. Η Επιτροπή Προστασίας του Ανταγωνισμού και η Επιτροπή Κεφαλαιαγοράς στο Κυπριακό Δίκαιο*, Χρυσάφινης και Πολυβίου: Λευκωσία, 2016.

¹⁴ Π. Πολυβίου, *Διοίκηση και Δικαιοσύνη. Η Επιτροπή Προστασίας του Ανταγωνισμού και η Επιτροπή Κεφαλαιαγοράς στο Κυπριακό Δίκαιο*, Χρυσάφινης και Πολυβίου: Λευκωσία, 2017.

time as a prosecutor, investigator-witness, and judge. The Full Bench of the Supreme Court of Cyprus had rejected these arguments. As regards compatibility of the proceedings with Article 6, paragraph 1 of the European Convention on Human Rights and Article 30, paragraph 2 of the Constitution of Cyprus, particular emphasis was placed on the possibility to challenge the sanctioning decisions of the administrative authorities before the administrative court. However, in these cases the administrative court may only exercise a limited judicial review, not having full jurisdiction to review the facts of the case. Cyprus adheres to the continental system standards of judicial review of administrative acts, in accordance to which the Supreme Court may not amend an administrative decision, but only annul it, and may not examine the merits of the administrative authority's decision and substitute it with its own judgment. Nor does the court have the competence to examine and assess the facts of the case, deciding upon them afresh. The European Court of Human Rights eventually dismissed an application by Sigma against Cyprus on this issue in 2011, and held that the powers of the administrative court were in principle adequate, insofar as it could have annulled the decisions on a number of grounds, including if the decision had been reached on the basis of a misconception of fact or law, there had been no proper enquiry or a lack of due reasoning, or on procedural grounds. However, the European Court's reasoning clearly relied on the facts of the case before it, leaving the question open for cases where questions of fact, or about the proper interpretation and implementation of the legislative provisions might be in dispute.

Polyviou analyses the Sigma case, and distinguishes it from the application of the principle of fair trial in the cases of the Commission for the Protection of Competition and the Cyprus and Securities Exchange Commission. He argues that the proceedings before the said two authorities should be understood as 'criminal charges' for the purposes of Article 6 of the European Convention on Human Rights, and that the administrative authorities accordingly lack the necessary independence and impartiality, which would necessitate that the reviewing court has full jurisdiction to carry out a review of the case. The limited administrative review is therefore not sufficient and violates the right to a fair trial. Polyviou's argumentation is a powerful one, and it is based on an extensive analysis of the case-law of the European Court of Human Rights.

The latest volume published by Polyviou at the time of writing is a monograph on search and seizure warrants.¹⁵ Polyviou had first written on this topic in 1982,

¹⁵ Π. Πολυβίου, *Εντάλματα Έρευνας και Κατάσχεση Πραγμάτων*, Νομική Βιβλιοθήκη: Αθήνα, 2021.

when he published a book on search and seizure with a comparison between US constitutional law and common law.¹⁶ His new publication assesses the Cypriot law of search and seizure within a comparative framework. Article 16 of the Constitution of Cyprus explicitly stipulates that every person's dwelling house is inviolable. The protection afforded by Article 16 is not restricted to domicilium, but is also extended to domus. The police or any other authority or person may not enter, or search the home of a person, irrespective of whether such home is of a permanent or temporary nature, unless such entry or search is in accordance with a duly reasoned judicial order as provided by law, or when the entry is made with the express consent of its occupant or for the purpose of rescuing the victims of any offence of violence or of any disaster. Polyviou rightly argues that the protection afforded by Article 16 of the Constitution, which is also part of Article 8 of the European Convention on Human Rights, is one of the most important human rights safeguards and at the core of a free society.

The classic question at the core of Polyviou's book is how to achieve a balance between protecting human rights on the one hand, and preventing and investigating crime and corruption on the other so as to safeguard security of the State and social cohesion. Polyviou argues that whereas Article 16 of the Constitution, and the case-law of the European Court of Human Rights, especially with regards to the principle of proportionality provide a powerful protection from arbitrary or unlawful search and seizure, the Cypriot legislation is on the contrary outdated and incompatible with the need to offer an acceptable level of human rights protection. He substantiates this by comparing the provisions of Cypriot statutory legislation with respective provisions in other countries, and analysing them within the framework of the case-law of the European Court of Human Rights. Polyviou further argues that the Cypriot legal provisions fail to take into account technological developments, and the technical nature of modern serious criminal offences, such as financial crime. These serious weaknesses of the system would necessitate a wide-ranging revision of the existing legislation.

Polyviou also argues, upon a reflection of the US case-law, for a re-interpretation of Articles 15 and 16 of the Constitution, so as to restrict the ambit of Article 16 of the Constitution to the 'home' of a person, excluding places where the person works; the latter should be protected by Article 15 which safeguards the right to private and family life, which is consistent with Article 8 of the European Conven-

¹⁶ P. Polyviou, *Search and Seizure: Constitutional and Common Law*, London: Duckworth, 1982.

tion on Human Rights. This would exclude professional homes from the stricter requirements needed in order to satisfy search and seizure under Article 16 of the Constitution. This is an important proposal that deserves to be discussed further.

Conclusion

The published work by Polyviou during the past years has enriched significantly the bibliography of Cypriot law, both with general works, and with detailed specific works. His work presents some main characteristics: constructive dialogue with case-law, often including – and commenting on – lengthy extracts from judicial decisions, a comparative scope focusing mainly on common law and its application in Cyprus, a discussion of the law both *de lege lata* and *de lege ferenda*, and a critical analysis on how balance can be achieved between conflicting rights or legal values, with emphasis on the need to apply the law carefully on a case-by-case basis. Polyviou's work is the outcome of five decades of continuous legal practice at a high level by a distinguished jurist, whose tenure as both an academic and professional has guided his thoughts on the law. Polyviou's work has already been cited in several judgments of Cypriot courts, and has been used extensively by practicing lawyers, judges, and students. The books reviewed herewith are not simply highly recommended, but are mandatory reading for anyone interested in Cypriot law.

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