

# **Divide et...abi:**

## **India, Pakistan....and Cyprus.**

### **A British Coincidence?**

#### **I. Prolegomena**

Once more, India and Pakistan find themselves in a clash situation presently, a ceasefire just having been agreed on. This newest incident follows a history of friction, including several warlike situations (e.g. 1947-1949, a good part of the 1960's, the early 1970's etc.), focusing mainly (but not exclusively) on the Kashmir region. Comparable clashes emerged between the Greek and Turkish Cypriots from 1963 on, culminating in the 1974 tragedy and division of Cyprus. On first sight, the Indian and Pakistan and Cyprus cases seem (not only geographically) quite far away: But there is a connection: Their respective colonial pasts as well as constitutional transition to independence. Constitutional transitions which caused trouble: The present contribution aims to show that a common denominator layed some groundwork for the abovementioned clashes.

The respective constitutional processes in both cases were more or less initiated by the British colonial power, who was about to leave the Indian subcontinent (1947)<sup>1</sup> as well as Cyprus (1960)<sup>2</sup> to their

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<sup>1</sup> Cf. in the following *Dimitrios Parashu*, *The Constitution of India at 75: An Analysis*, Berlin 2024, pp. 13 et seqq.

respective independence. An Independence Act created by the British, actually a precondition for following constitutional developments on the Indian subcontinent, included a partition plan of Kashmir that has historically proved not to be an efficient solution; on the other hand, the Cyprus Constitution, developed under British supervision, created constitutional dysfunctions in reality through excessive veto rights for the Turkish Cypriot minority.

## II. Indian context<sup>3</sup>

The 1858 Government of India Act had already emphasised that absolute control and power in India were located in hands of the British Crown; it further laid the groundwork for the following decades of British administration there. Consecutive public legal acts led the British to ultimately relinquish power, through the 1947 Indian Independence Act: Based on its Sec. 1, two separate Dominions, namely India and Pakistan, were established. This was further concretised through Sec. 2-3. Hence, to also mirror the religious component, a partition between India and Muslim Pakistan was created. This partition did not mirror historic realities of previous centuries, though: For instance, the Maharadja of Kashmir, himself (unlike most of his subjects) a Hindu, preferred Kashmir becoming a part of secular India.

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<sup>2</sup> Cf. in the following *Dimitrios Parashu*, Das zyprische Repräsentantenhaus zwischen Verfassungsvorgaben und Teilungsnot: Entwicklungen seit 1960, in: ZParl, Vol. 4/2009, pp. 840-859; as well as *same author*, Aus Geschichte, Rechtsgrundlagen und Rechtsprechung des Verfassungsgerichtshofes der Zyprischen Republik (1960-1963). Jubiläumsschrift zum 75. Geburtstag von Jörg-Detlef Kühne, Berlin 2017, pp. 1 et seqq.

<sup>3</sup> Cf. in the following *Parashu* (Fn. 1), pp. 2 et seq./100 et seq.

One could get the impression that the partition plan rather highlighted and incited preexisting tensions in 1949, under the *aegis* of the United Nations, it was divided by the Karachi agreement (Annex 26 of UNCIP Third Report - S/1430 Add 1 to 3),<sup>4</sup> later (1972) consolidated through the Simla agreement, as it is the current *status* (which the ongoing situation in early 2025 has put in jeopardy).

From the Indian Independence Act on, commencing on 15 August 1947, India became the autonomous as well as independent Dominion of India. An Assembly of 389 members (296 from British India and a minority of 93 from the Indian princely states) adopted the Indian Constitution on 26 November 1949: it came to effect on 26 January 1950, forming the beginning of the Indian Republic.

Art. 370 et seqq. of that Constitution have included certain more specific provisions for various Indian States, including the (temporarily meant) special status of the Princely State of Jammu & Kashmir. This provision led to the fact that the people of Jammu & Kashmir were governed by a special set of laws, regarding matters of (*e.g.*) citizenship and property. A variety of Presidential Orders had been issued in respect to Jammu & Kashmir since 1950: Through such an Order of 5 August 2019, Art. 370 was effectively abrogated, putting Jammu & Kashmir under the direct *aegis* of the Indian Constitution and hence under the control of the Indian Government. The region's legal status is therefore clear, but unrest remains, which seems difficult to be overcome.

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<sup>4</sup> Annex 26 of UNCIP Third Report - S/1430 Add 1 to 3.

### III. Cypriot context<sup>5</sup>

The Cypriot Republic (Κυπριακή Δημοκρατία/Kıbrıs Cumhuriyeti) has had a turbulent history, not just since its independence from the United Kingdom in 1960. It is well known that since the summer of 1974 the island has been *de facto* divided into two geographical parts: the Greek south (internationally recognised as the Republic of Cyprus) and the Turkish north (recognised only by Ankara as an independent "republic").

The birth of the Cypriot Republic was marked by the Zurich conclusion of relevant negotiations (11 February 1959) and the London Lancaster House Agreement (19 February 1959), through which the United Kingdom sought to grant independence to its former (from 1878/1914 on) Crown Colony. The Agreement, which one could easily call sort of a Cyprus Independence Act, in analogy to the aforementioned Indian one, contained general principles of state organisation, the 'Basic Structure of the Republic of Cyprus'.

Following that, unlike the more democratic Indian Constitution creation, various commissions were established - especially a 'mixed' one - in order to lay the groundwork for Cyprus's future Constitution: the latter commission consisted of representatives of the Kingdom of the Hellenes and the Turkish Republic, as well as the Greek Cypriot and Turkish population groups, and (as a neutral element) a representative from Switzerland (Professor *Bridel*, Lausanne). British influence on the commission remained apparent, though: The abovementioned 'Basic Structure' was vastly included in the text. The commission's work commenced on 20 April 1959, and the draft was

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<sup>5</sup> Cf. in the following *Parashu* (Fn. 2; Das zyprische Repräsentantenhaus (...)), pp. 840-859; cf. also *same author*, (Fn. 2, Aus Geschichte, Rechtsgrundlagen und Rechtsprechung (...)) (*passim*).

ultimately finalised and signed on 6 April 1960, effective 1 October 1960.

The 1960 Constitution, which is still in effect, proved to be the cradle of the Cyprus division which was to follow: The Constitution made institutional decision-making particularly difficult by including necessary bi-communal majorities that did not mirror neither historic realities of previous centuries, nor the contemporary population ratio, which meant that well over 80% on the island were Greek Cypriots (Orthodox Christians). As early as 1963, President *Makarios III* presented a 13-point proposal for a constitutional amendment; ethnic unrest followed, and it is since then that Turkish Cypriots do no longer participate in the island's constitutional bodies and procedures. A plot by the Athenian military junta against *Makarios III* in July 1974 gave Turkey the possibility to partially occupy the island. Since then, several attempts to overcome the *de facto* division of Cyprus have failed.

Due to the emergency situation described above, from 1963 onwards, the Republic of Cyprus (and thus also its constitutionally established state organs) found itself forced to legally guarantee the continued existence of the constitutional order. Such could be achieved on the basis of emergency law,<sup>6</sup> and the principle of "Salvus rei publicae suprema lex esto" was thus satisfied. One only has to consider the following:

Article 62 of the Constitution stipulates that the number of deputies to the Cyprus House of Representatives, which is the only legislative chamber, shall be 50 (*in praxi* 35 Greek Cypriots and 15 Turkish Cypriots), subject to a resolution by the House itself to increase this number; however, such a resolution would require a two-thirds majority of both Greek and Turkish Cypriot deputies. Article 182 of the Constitution requires at least 2/3 majorities of both, Greek and

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<sup>6</sup> Cf. the case "The Attorney-General of the Republic vs Mustafa Ibrahim et al." (CLR 195).

Turkish Cypriot members of the House of Representatives for any constitutional revision.

In the absolutely necessary order to stay functional, on 20 June 1985 the House of Representatives decided, by the required two-thirds majority of Greek Cypriot MPs, to increase its total number of seats to 80,<sup>7</sup> to "breathe life" into Article 62. Following the *de facto* division of the island, a relevant two-thirds majority of Turkish Cypriot MPs could not be obtained. As a result, 56 seats are now allocated to Greek Cypriot parliamentarians, and 24 to Turkish Cypriot ones, the latter seats remaining empty though.

An alternative Constitution for Cyprus, which could actually provide for viable solutions including both the Greek and Turkish Cypriot populations would need, in the first place, the present *de facto* situation of the island and the occupation of its Northern part to be resolved: This seems difficult to be accomplished.

#### **IV. A Common Denominator?**

India and Cyprus were British colonies for a rather lengthy time. Following the British significant loss of power in the 2nd part of the 20th century, both of them, as it happened to other parts of the world, were granted their independence. It came to a price, though: In both cases, an independence act was issued, causing - in the Indian case - a division into two Dominions (a division which especially in the Kashmir context does not mirror historic realities of previous centuries), and causing - in the Cypriot case - the establishment of a future Constitution which made a division of the island inevitable.

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<sup>7</sup> Law Nr. 124/1985.

One could get the impression that the former colonial power created, before leaving, further discord potential.

Both cases, despite the United Nations being heavily involved in finding possible solutions, remain unresolved. Could respective constitutional law be a solution to them? It most probably could, but the application of Art. 370 of the Indian Constitution faces challenges by local unrest, and, on the other hand, a new Constitution draft for Cyprus would call for the precondition of overcoming the occupation of the island's Northern part.