The Case of Ibrahim: The Doctrine of Necessity and the Republic of Cyprus

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The Republic of Cyprus and the Doctrine of Necessity

Edited by Achilles C. Emilianides, Christos Papastylianos, Costas Stratilatis
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The case that introduced the doctrine of necessity in to the Cypriot legal system turned 50 years old recently (see *the Mustafa Ibrahim case,* 1964).[1] The anniversary gave rise to fresh authorship on this subject, an excellent sample of which are the books under review. The distinguished Cypriot lawyer and legal scholar Polyviou delivers us a comprehensive work that serves for getting acquainted with the case, the facts preceding, the decision's reasoning and its conclusions, the current state of the Cypriot law of necessity, as well as framing some of the major constitutional issues raised by the case (dealing mostly with *types and criteria of constitutional change*).

The second oeuvre, consisting of three lengthy contributions[2] by the academics

1 To sketch out a brief summary: Following the inter-communal conflicts of 1963 and the subsequent, withdrawal of Turkish Cypriot officials from functions and bodies of the Republic, the Cypriot legal system ended up at once unable to reproduce itself by, and in accordance with, its own framework and legality (of which the principle of bi-communality was a basic constitutional trait). The Parliament, consisting solely from now of Greek Cypriot members, passed a law that overrode certain provisions of the Constitution related to the bi-communal composition of the judicial bodies and the adoption and promulgation of legislation. The Supreme Court rendered the pivotal decision The Attorney General of the Republic v. Mustafa Ibrahim and others [1964] CLR 195, ruling famously that the aforementioned legislation is not subject to unconstitutionality, due to the 'law of necessity' (fundamental maxim of which, as stated, is that the salvation of the Republic should be the supreme law, see 'salus populi [rei publicae], suprema lex'). Judgement available at: http://www.uniset.ca/other/cs2/1964CLR195.html.

2 Elaborated forms of the papers they presented in a conference, held by the Law Department and the Department of International Relations and European Studies (now the Department of Politics and Governance) of the University of Nicosia, on 3 June 2014 (Conference title: 'The Doctrine of Necessity and the Cyprus Republic. 50 years from the *Ibrahim* case').

Emilianides, Papastylianos and Stratilatis, elaborates on several aspects of the *Ibrahim* case, while getting deeper into the background legal theory questions: What are the fundamentals, if any, of a constitutional polity that is worthy of its name? Does it truly make sense to distinguish *legality* from *legitimacy*? Is the *juridical* (just) a polished version of the *political* – and the *political* possibly a metonymy for the *distinction between enemies and friends*? Do exceptional cases make bad law[3] or maybe do *extremely exceptional* cases make *no law at all*?

Polyviou offers a clear, detailed overview of the material facts, the ruling and the impact of the *Ibrahim* case (up to page 122). Still, the most intriguing part of the book, in our opinion, is the analysis and argumentation sketched out in chapter 8 of the book (pp. 149 ff., under the title 'Revolution, necessity, legal discontinuity'). The chapter draws upon Kelsen's 'legal theory of revolution'[4] to pinpoint similarities and differences between *necessity* and *revolution* as instances of legal rupture. A revolution takes place – from the juridical point of view – when a new legal and political system has been brought about without reference to the old one and its provisions. According to Kelsen, the new ('revolutionary') legal system turns valid when, over and above the rupture incurred, it becomes *effective,* by its implementation on behalf of the officials and its acceptance on behalf of the people.

Polyviou stresses, then, that both 'revolutionary law' and 'necessity law' share the same basic foundation (i.e., that *factual realities override and supercede given legal systems*) and same legitimacy criteria (see *legal effectiveness* and *popular acceptance*). However, they differ substantially in regards to the following: necessity is deemed to be derived from – and justified by – an unwritten or an implicit, yet undoubtedly *legal*, principle. Revolutions mean to declare that a *new legal order begets and claims its own legality,* whereas necessity rather suggests that *legality itself requires and begets a modified order.*

Polyviou builds on the above to reach his main conclusion (stated at the ending of the book, pp. 221-222). When a court decides, as in the *Mustafa Ibrahim* case, that the legal order is to be preserved solely by resorting to the 'law of necessity', it basically reaffirms its own allegiance to legality: 'in effect takes the view (whether one calls it a legal or ultimately

3 There is a saying among lawyers, according to which 'exceptional cases make bad law'. The saying, by itself, does not say a lot about which cases count as exception or how they should relate to law. By coining the phrase bad law, though, it seems to welcome the suggestion that 'exceptional facts' may require a ruling actually not applying but altering the content of the general legal rule(s) applicable. The underlying assumption of such a view resonates with the key-positions of a certain legal theory school of thought, known as 'legal realism'. Legal realists tend to reason, from the (correct) starting-point that the rules and concepts of law are subject to interpretation, to the conclusion that the legal authorities apply them in whatever policies they happen to pursue or favor, an inference not actually self-standing or valid by itself. We shall retouch briefly this issue by the end of the present review. For a comprehensive introduction to the main themes-ideas of legal realism see Michael Freeman, *Lloyd's Introduction to Jurisprudence* [8th ed.], London, Sweet & Maxwell, 2008, 985 ff., 1209.

4 See Hans Kelsen, *Pure Theory of Law*, trans. from German by Max Knight, University of California Press, Berkley and Los Angeles, 1967, chapter V, 193 ff.

policy decision, does not really matter) that it is better to preserve the original Constitution even if deviations from it are to be permitted', instead of 'allowing the matter of legitimacy to be resolved by external forces with no allegiance to the existing political and legal order'. The author firmly shares the view that grave consequences depend on whether necessity is to be considered *lawful* or not; yet by leaving unanswered whether the proper response falls within law or an ultimate policy decision, he ends up redoubling the question. To borrow the expression coined by David Dyzenhaus, the *legal puzzle of necessity* remains: is necessity just *declared* and *justified through law* or is it, instead, *prescribed by law* and moreover *bound by law*?[5] The collective work of Stratilatis, Emilianides and Papastylianos touches extensively, in our opinion, on this.

In his paper, Stratilatis scrutinizes the whole issue through the lens of the juridical-political theory of Carl Schmitt. Schmitt proves to be the evident theoretical reference when touching on such matters, since he contests the very idea of the self-styled 'rule of law', by which the exercise of power is – said to be – delimited and governed. Schmitt insists not only on (a.) that the legal rules are not at all operable under atypical conditions, but furthermore on (b.) that the very distinguishing between the legal *normal* and *exceptional* is itself a matter of political decision.[6]

In regard to his theoretical-methodological choices, Stratilatis distances himself from the *legal positivist* standpoint (which casts out all history references when commenting on law) as much as the *historical positivist* standpoint (which, in turn, works on history apart from all evaluative judgements). Stratilatis discerns the traits of a Schmittian presence back already to the origins of the Cyprus Republic. Following the author, we could read the initial constitutional profile of Cyprus under the light of Schmitt as tantamount to the *repulsion* of antagonistic power politics (i.e., rival nationalisms, guarantor countries aspirations etc.) *via a pseudo-neutral Fundamental Law*, and, at the same time, the *consolidation* of the conflictual structure through its dysfunctional and non-revisable provisions (see pp. 22-42).

Accordingly, the author queries whether *Ibrahim* case-law should be accurately considered as an instance of the *rule of law* or of (Schmittian) *decisionism*. Bringing necessity under judicial control – as in the case, by adjudicating on the urgency and the gravity of the situation, the absence of alternatives, the temporary nature of the emergency measures etc. – seems, after all, to discard the famous saying that 'necessity knows no law'. The decision, as we shall see in more detail below, concluded actually that necessity stood not *as a breach* of the Constitution, but as a *constitutional rule implicit within* it. However,

5 See David Dyzenhaus, 'The puzzle of martial law', *University of Toronto Law Journal,* Vol. 59 (2009), 2-3.

6 To paraphrase the famous Schmittian citation, the sovereign is not only he who decides on the state of exception, but also the one who decides upon its lawfulness, see Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (1922), trans. by G. Schwab (Chicago: University of Chicago Press, 2005), 5.

the author insists on the hidden 'Schmittian moments' (see pp. 78-79) of the case. Leaving aside whether the *formal* Constitution allowed indeed for the above interpretation, from the very fact that this substantially modified the *material* Constitution (providing for the continuity of the Republic on a non-bicommunal basis), the whole case could easily line up with Schmitt: serving as the *sovereign decision for a new condition of normality*. Stratilatis concludes that the only way to get out of the indeterminacy is through the democratic re-appropriation of the sovereign decision, in other words through the *exercise of constitution-making power 'from below', on behalf of the people* (pp. 90-91).

Emilianides, in his paper, elaborates upon a certain line of argumentation stressed in the Ibrahim decision by Judge Triantafyllides, in particular that the 'law of necessity' does not somehow refer to an extra-legal source or a supra-constitutional principle, but actually *is an intrinsic part* of the constitutional corpus. More specifically, it is deduced from the proper interpretative reconstruction of the art. 179 of the Constitution, that declares constitutional supremacy (primacy of the Constitution over ordinary norms). The author suggests the view that the law of necessity was rightfully understood as a methodological precondition for the legal system as a whole; by rendering the Constitution viable, necessity turned out to be the pivotal *norm of norms*. Emilianides then denominates it colorfully as the 'zeroth law', in the sense that all the other – enumerated – articles of the Constitution, apply only insofar as *the zeroth law enables so* (see pp. 103-105).

In such a manner, the author sums up (drawing upon the legal philosophy of H. L. A. Hart), the law of necessity modified the *rule of recognition* of the Republic of Cyprus, serving as a mode of transcending the original Cyprus Constitution (pp. 106-107, 148 ff.).[7] Under the influence of Hartian positivism, the author identifies here the legal content and authority of the law of necessity with the *empirical fact* of its effectiveness. For someone who is skeptical about legal positivism, however, this might be received as somehow cyclical: had it not been understood as a legal norm from the start, necessity could not in any case become effective. It is the former argument of Emilianides, in our opinion, that matters at this point. If the law of necessity proves to be an indirect manifestation of the integrity of law, we could add here that *it ought to be understood as well as embedded in – and subject to – the integrity of law* (the latter being preserved, as is well-known, under the aegis of fundamental principles such as *equality, human rights* etc.). And here, too, we find the appropriate resources of critique, in regards to the probable uses and misuses of the doctrine(s) of necessity.

Papastylianos directly contributes to the above discussion, since the questions mainly raised by his paper are the following: (a) should we legitimately accept that necessity might bear harmfully on political freedoms and individual and social rights? And (b) what are the dimensions that the doctrine of necessity acquires by the fact of the territorial division of the Republic, concerning the *implementation* of rights (and as regards the claims of

7 Emilianides has written in detail on this, see *Beyond the Cyprus Constitution* [in Greek] (Athens: Sakkoulas, 2006).

all right-holders, including members of the Turkish-Cypriot community)? In relation to (a), the author firmly answers that by no means should we take account of necessity as limiting the exercise of rights. Rather the opposite is – or should be – the case; it is the law of necessity that must serve to *implement* protection of rights, at this regard *under the new factual ensemble*. Thus, the author sheds some philosophical light on the Ibrahim case, usually absent from standard commentaries that align – uncritically – with the *salus reipublicae* thesis: As classical thinkers of the Enlightenment would say (the author, here, is referring to John Locke), the state is not an 'end in itself', but rather an *end that serves the common good and the equal rights of all*. Having clarified that, Papastylianos proceeds by dealing with (b).

The author then puts forward a powerful argument, resting on the assumption that in order to address the question of the effective exercise of fundamental rights we need first to reassess their normative content and its actual *ratio obligandi* (see the analysis on pp. 173 ff., 182-189). Accordingly, he elaborates on the distinct rationale behind the *individual rights* on one hand and the *political and the social rights* on the other. Individual rights, the author affirms, serve no other purpose than providing for individual spheres of action immune from state intervention (see private life, expression, property etc.). Applications of the doctrine of necessity should not, therefore, invalidate their specific structure as limits on state's powers. Territorial considerations, in the case, *may bear on the conditions of exercise* of an individual right, *but in no way prescribe its disqualification*. When it comes to asserting property rights, for example, under conditions of effective lack of ability to use immovable property, there is a strong case for an equitable and fair compensation (*validating*, thereby, the right's content *under conditions of necessity* and not the reverse: *denying the right* on *grounds of necessity*).

Things are different however in the case of political and social rights, since their ratio differs. The right to political participation is essentially tied with the state of *being subject to the legislation*, which you rightfully shape, and an actual *member of the community*, of which you claim a democratic share. In a somehow parallel way, claims on social redistribution (i.e. *social rights*) inextricably presuppose the initial contribution 'according to one's abilities' to the *distribuendum* (see *economic-social resources*). As Papastylianos concludes, territorial circumstances may and should serve as a defining factor for conditioning representative and distributive rights. What is essential here – and quite apart the concrete legal applications of the above (which has to do, for instance, with the criteria of entering the electoral roll or the list of beneficiaries of a given allocation) – is to point out that the author wisely departs from the discourse of necessity when it comes to rights. As we understand it, the author raises an argument that treats necessity status no more, no less than the factual context that helps to define/specify the exercise of each constitutional right *in accordance to* – and not *in default of – its general normative content*.

Even if we don't wholly agree in all lines of arguments of the books under review, or in any case endorse the same conclusions, we cannot but acknowledge that all contributions preserve the following critical idea: Despite the famous saying according to which 'necessity

knows no law', there are truly some *fundamental* and *distinctively legal* answers to ask. And this means, at least, that there are some self-styled 'necessity solutions' that are just hardly acceptable.

Contrary to *legal formalism* assumptions, abstract and 'black-letter' legal reasoning may – truly – be unable to decide *in extremis* or on so-called *exceptional circumstances*. That is, however, the case *for all legal cases:* either 'easy' or 'hard', 'typical' or 'atypical'. There remains always the need for what a Kantian would call *reflective judgement*, i.e. to 'find' the appropriate universal for a given particular, through systematic - teleological reconstruction of the existing legal landscape. Equally therefore in contrast to what *legal realists* or *political decisionists* assert or hope for, the impasse of formalism does not legitimize the move to the 'politics of law' or the 'struggles over the political decision'. And if the 'universal sought' is for an 'extreme particular' that has to do with the rescuing of the constitutional order, then the appropriate judgement necessarily draws upon the very presuppositions and rationale of the right itself 'to have a constitution' (*self-disposition of all* and *equal freedom for each*).

Stergios Mitas