

# The Proliferation of Cypriot States of Exception: The Erosion of Fundamental Rights as Collateral Damage of the Cyprus Problem

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## Abstract

*This paper argues that, despite some promising signs in the early 2000s that the 'Cypriot states of exception' might be superseded with a rights-based normality via the resolution of the Cyprus Problem together with accession to the EU, we instead have witnessed a proliferation of regimes of exception and derogation of rights. After briefly discussing the diminishing potential for solving the Cyprus Problem and the faltering EU integration process as a rights-based democratic space, the paper focuses on developments within the Republic of Cyprus. It demonstrates that, despite some welcome developments in the institutional frame as a result of acceding to the EU as well as implementing the Charter of Fundamental Rights, there are two tiers of problems the Republic of Cyprus faces. As an EU member, it is plagued by a triple crisis undermining fundamental rights in the Union and its members: securitisation, particularly after 9/11 and recent terrorist attacks; austerity measures following the financial crisis; and the post-2015 'refugee crisis', which has unleashed disintegration processes, right-wing anti-Europeanism and leaving the EU. This second tier of problems relate to the Cypriot states of exception. The paper illustrates that these processes have intensified the deteriorating situation at the expense of fundamental rights, particularly since the financial crisis-and-austerity packages in post-2013, into four distinct areas: (1) many aspects involving Turkish-Cypriots; (2) migration and free movement; (3) economic and financial aspects relating to the causation and management of the financial crisis; and (4) environmental issues. Finally, it proposes a schematic theoretical critique of how to go beyond the logic of 'states of exception'.*

## Introduction

The potential for peacefully resolving the Cyprus Problem is diminishing with new tensions over the exploitation of gas in horizons, but also, the EU integration processes is increasingly a faltering project; despite some positive developments with the Charter of Fundamental Rights a decade ago, there is triple crisis plaguing the enhancement of fundamental rights in the Union and its members: securitisation after 9/11 and the recent terrorist attacks; austerity measures following the financial crisis; and, the post-

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2015 ‘refugee crisis’, which has unleashed processes of disintegration, right-wing anti-Europeanism and members’ desire to leave the EU. This paper illustrates that these processes have intensified the deteriorating situation at the expense of fundamental rights, particularly since the financial crisis-and-austerity packages in post-2013. In particular, it has affected (a) many aspects involving Turkish-Cypriots; (b) migration and free movement; (c) economic and financial aspects relating to the causation and management of the financial crisis; as well as (d) environmental issues.<sup>2</sup>

After summarising the basic argument about the location of the Cypriot states of exception, this paper illustrates how this operates, primarily focusing on the first three spheres. The *Cypriot states of exception* derived from the particular historical antecedents that shaped the ‘Cyprus Problem’. It must be noted from the outset that the law of necessity cases, in view of the judgments of the ECHR, are somewhat different from the ‘economic crisis cases’, as, in the latter cases, necessity was a sort of ‘background’ issue. Nonetheless, the issue of ‘economic necessity’ due to ‘exceptional circumstance’ was invoked and was discussed in the cases, and as such it forms an important dimension of the necessity and exception arguments in Cypriot jurisprudence.

This article argues that the proliferation of states of exception has three interconnected aspects:

- First, there is a ready-made tradition in the form of Supreme Court jurisprudence from the 1960s that is the so-called doctrine of necessity, which provides the foundation for the court’s granting wide discretion to the executive, and is derived from the ethnic/state conflict of a small island state, which is semi-occupied.
- Second, there was a strategic decision to facilitate rapid economic development, particularly after the devastation of the conflict and the 1974 war, that generated a broader socio-legal foundation as part of it. This is how Greek Cypriot policy-makers understood their mission in government; it was Greek Cypriots, who, *de facto*, formed the Government after 1963 when Turkish Cypriots ‘abandoned’ the consociational power-sharing posts of the Republic. Policy-makers in this small divided state saw themselves as having a ‘national mission’ to rebuild the country. In the immediate aftermath of the war in 1974, this logic took the form of ‘crisis management’, subsequently, managing rapid economic development for the ‘survival’ of a small country under external threat. This has meant that ‘development’ was to be achieved by ‘any means necessary’, with

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2 This article does not address this issue, as it requires considerable discussion on environmental issues and law. For more on this see M. Hajimichael and K. Papastyliou, *Environmental Protection and Cooperation in an (Ethnically) Divided Island: The Case of Cyprus* (Oslo: PRIO Cyprus Centre Report, 2019); N. Trimikliniotis, «Υπόθεση Αστροσολ και το Κυπριακό καθεστώς εξαίρεσης στο περιβάλλον», in *Περιβαλλοντικές Προκλήσεις και τα Κοινά*, ed. A. Zissimos (Nicosia: Promitheas, 2019).

loose and flexible possibilities for capital expansion and accumulation at the expense of labour rights and the environment, whilst simultaneously guarding the notion of sovereignty and broadly interpreting executive discretion and authoritarian control of immigration and borders.

- The third relates to the diminishing prospects for solving the Cyprus Problem and the potential for an escalation of conflict, as a result of the failure to utilize the ‘opening’ provided by what is referred to as the ‘Euro-Cypriot conjuncture’, which is a manifestation of the combined transformations at local levels as well as broader regional and global world order since the late 1990s.<sup>3</sup> There is currently a new ‘closure’ with potential tensions emerging over the natural gas issue, the faltering of the EU integration process, the rise of authoritarianism in Turkey and the Middle East (Israel, Egypt, etc.), and the regional geopolitical alliances between the RoC and Middle Eastern autocratic regimes, such as Sisi’s Egypt and Netanyahu’s Israel.<sup>4</sup>

### **The Peculiarities of Cyprus and the Case of *Ibrahim***

The peculiarities of the Cypriot constitutional history and development is the starting point of a post-colonial state a society with a number of peculiar and problematic features: it was set up as consociational republic, a bicomunal state, which prohibiting amendment of certain articles of the constitution and imposing external ‘guarantors’ of the constitutional order.<sup>5</sup> However, the games played by actors within and outside played rather than iron out and resolving the political and constitutional problems, they did the exact opposite, accentuating and generate the long-drawn conflict that followed.<sup>6</sup>

The Cyprus Supreme Court, 54 years ago in 1964, when the Republic was facing a ‘crisis government’,<sup>7</sup> declared for itself that it is performing the function of reflecting

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3 N. Trimikliniotis, *The Nation-state Dialectic and the State of Exception—Sociological and Constitutional Studies on the Eurocyprian Conjuncture and the National Question* [in Greek], (Athens: Savalas, 2010).

4 N. Trimikliniotis, ‘The Cyprus Problem and imperial games in the hydrocarbon era: From a place of arms to an energy player?’, in *Beyond A Divided Cyprus: A State and Society in Transformation*, eds N. Trimikliniotis and U. Bozkurt (MacMillan Palgrave, New York, 2012); N. Trimikliniotis, ‘The national question, partition and geopolitics in the 21st century: the Cyprus Problem, the social question and the politics of reconciliation’, *Global Discourse*, Vol. 18, Nos. 2/3 (2018), 303-320, DOI.org/10.1080/23269995.2018.1461440; N. Trimikliniotis, ‘Η Εποχή της Φρίκης: Ένας παγκόσμιος απολογισμός της πενταετίας’ [“The era of horror: A five year global review”], ΕΠΙΘΕΩΡΗΣΗ Ιστορίας, Κοινωνίας και Πολιτικής (*Promitheas Annual Review, History, Society and Politics* (Nicosia: Promitheas Research Institute, 2018, January).

5 S. A. De Smith, *The New Commonwealth and Its Constitutions*. London: Stevens, 1964. Constantinou, 2008; N. Trimikliniotis and U. Bozkurt, *Beyond A Divided Cyprus*.

6 N. Trimikliniotis and U. Bozkurt, *Beyond A Divided Cyprus*.

7 S. Kyriakides, *Cyprus Constitutionalism and Cyprus Government* (Philadelphia: University of Pennsylvania

on the social situation of a crisis-ridden society and is obliged to seek legal solutions to continue the very functioning of the state. In 1963, the Cypriot President Archbishop Makarios proposed 13 amendments to the Constitution, which, if accepted, they would have by and large removed many consociational element from the Constitution by limiting the communal rights of the Turkish Cypriots. The Turkish Cypriots withdrew from the State administration in protest. Since then, Greek Cypriots have administered the Republic. With the Turkish Cypriots out of governance, the control of the Republic remained in the hands of the Greek Cypriots. In July 1964, a law was enacted to provide that the Supreme Court should continue the jurisdiction of both the Supreme Constitutional Court and of the High Court.<sup>8</sup>

Half a century later, the doctrine of necessity was invoked for economic reasons. The court had to deal with the argument the case of *Alexandros Phylaktou v. the Republic of Cyprus*,<sup>9</sup> in the context of the austerity package deducting salaries of public sector employees, discussed in detail later in this paper: the attorney general unsuccessfully invoked the case of *Ibrahim*, which invented the ‘doctrine of necessity’, in arguing that the imperative ‘economic necessity’ for the austerity salary cuts of all public servants, including judges, was part of the doctrine of necessity. In contrast, back in 1964, the then attorney general, the occupier of the this all-powerful post in the Cypriot legal order,<sup>10</sup> succeeded in his argument and the Supreme Court assumed authorship of the doctrine of necessity so that ‘the state must go on’ in a protracted ethnic/state conflict that continues to this day as ‘the Cyprus Problem’.<sup>11</sup> This is how ‘the Cypriot states of exception’ was born.<sup>12</sup> One remarkable excerpt of *Ibrahim* is indicative of how the Court considered its own ‘extraordinary social function’:<sup>13</sup>

This court now, in its all-important and responsible function of transforming legal theory into living law, applied to the facts of daily life for the preservation of social order, is faced with the question whether the legal doctrine of necessity discussed earlier in this judgment, should or should not, be read in the provisions of the written Constitution of the (RoC). Our unanimous view, and unhesitating answer to this

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Press, 1968).

8 Administration of Justice (Miscellaneous Provisions) Law 33 of 1964.

9 Αλέξανδρου Φυλακτού, *Επαρχιακό Δικαστήριο Πάφου και Κυπριακής Δημοκρατίας, μέσω Γενικού Λογιστή Υπόθ.* 397/2012397/2012 και 480/2012.

10 D. Kyprianou, *The Role of the Cyprus Attorney General's Office in Prosecutions: Rhetoric, Ideology and Practice* (Heidelberg: Springer, 2010).

11 See N. Trimikliniotis, ‘The Cyprus Problem and imperial games in the hydrocarbon era: From a place of arms to an energy player?’, in *Beyond A Divided Cyprus*, eds Trimikliniotis and Bozkurt.

12 Constantinou, 2008.

13 *The Attorney-General of the Republic v Mustafa Ibrahim and others*, Criminal Appeals No. 2729, 1964 Oct. 6, 7, 8, Nov. 102734, 2735, (1964) CLR 195. The matter was considered to be of such significance that it was placed in the summary judgment, 97.

question, is in the affirmative.

In the leading case of *Ibrahim* 1964, the Supreme Court ruled that the functioning of the government must continue on the basis of the ‘doctrine of necessity’. In his reasoning, Judge Josephides said:<sup>14</sup>

In the light of the principles of the law of necessity as applied in other countries and having regard to the provisions of the Constitution of the Republic of Cyprus... I interpret our Constitution to include the doctrine of necessity in exceptional circumstances which is an implied exception to particular provisions of the Constitution and this to ensure the very existence of the State. The following pre-requisites must be satisfied before the doctrine may become applicable:

1. An imperative and inevitable necessity of exceptional circumstances;
2. No other remedy can apply;
3. The measure taken must be proportionate to the necessity; and
4. It must be of a temporary character limited to the duration of the exceptional circumstances.

Admittedly, the absence of Turkish Cypriots from the State administration, irrespective of how it came about, led to a multi-layered crisis that had to be addressed. The Greek Cypriot judiciary found the doctrine of necessity as the most suitable way to address this crisis as regards the functioning of the Courts and, ultimately, the functioning of the State itself. A decade later, this doctrine was extended to cover the measures adopted in order to address the situation created by the Turkish invasion.

Through the years, the judicial approach to this doctrine took several forms but it was invariably upheld by judges, often unanimously, in order to deny rights to Turkish Cypriots because of their ethnicity. Even though the judicial approach to the doctrine of necessity cannot be summarized in a few lines, below are a few examples, selected either for their significance or because they represent the most recent trends.

### ***Ibrahim*, Half a Century Later**

On the 50<sup>th</sup> anniversary of the decision of *Ibrahim Mustafa* sparked an interesting debate amongst academics and lawyers in Cyprus. During the previous decade, the

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14 Attorney General of the Republic v Mustafa Ibrahim (1964) CLR at 264-265. See Nedjati (1970); C. M. Pikiş, *Constitutionalism, Human rights-Separation of Powers, The Cyprus Precedent* (Leiden/Boston: Martinus Nijhoff, 2006), 27-40; C. M. Constantinou, ‘On the Cypriot states of exception’. *International Political Sociology*, Vol. 2 (2008), 145–164.; N. Trimikliniotis and C. Demetriou, ‘Evaluating the anti-discrimination law in the Republic of Cyprus: A critical reflection’, *The Cyprus Review*, Vol. 20, No. 2 (2008); N. Trimikliniotis, ‘Exceptions, Soft Borders and Free Movement for Workers’, in *Free Movement of Workers: The European Challenges Ahead*, eds P. Minderhoud and N. Trimikliniotis (Nijmegen: Wolf Legal Publishers, 2009): 2010a.

first serious challenges to the ‘doctrine of necessity’ occurred within Greek Cypriot academia.<sup>15</sup> Turkish Cypriot academics had questioned the validity of the doctrine.<sup>16</sup> However, the dominant Greek Cypriot paradigm remained essentially as apologetics for the order produced following the collapse of the bicomunal Republic and the running of the Republic by Greek Cypriots.<sup>17</sup>

The interest in the subject was revived amongst Greek Cypriot and Greek academics and lawyers over the last five years with public debates and publications. There are some interesting and critical insights by scholars who delved deeper to uncover the inner Schmittian logic of the ‘necessity’ in Cyprus, coming from two Greek academics who are based in Cyprus, Costas Stratilatis (2016) and Christos Papastylianos (2016).<sup>18</sup> The arguments of Stratilatis has much to do with Carl Schmitt. According to an interpretation, which has a general concern for his interest in territoriality, it could be taken as an indirect link to Schmitt’s interest in geopolitics in his *Nomos of the Earth*. Papastylianos’ arguments are not Schmittian, rather they form a possible line of argumentation to transcend Schmitt.

The other scholars who intervened had some critical comments but overall are defenders of the doctrine. Kombos provides of a dense and ambivalent legalism with some side-criticisms, but essentially defends the doctrine,<sup>19</sup> whilst Emilianides, Loukaides and Polyviou consider the doctrine to be a legitimate *extension of the rule of*

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15 Constantinou, ‘On the Cypriot states of exception’; N. Trimikliniotis, «Το Κυπριακό «δόγμα της ανάγκης»: Μια (μη-)δημοκρατία σε κατάσταση εξαιρέσεως», *Περιπέτειες Ιδεών, Politis*, Vol. 15 (2007, September 2), ‘Exceptions, Soft Borders and Free Movement for Workers’, 2010; 2013.

16 K. Özersay, ‘The Excuse of State Necessity and Its Implications on the Cyprus Conflict’, *Perceptions* (Winter 2004–2005), available at <http://sam.gov.tr/wp-content/uploads/2012/02/KudretOzersay.pdf>; A. Sozen and K. Özersay, ‘The Annan Plan: State Succession or Continuity’, *Middle Eastern Studies*, Vol. 43, No. 1 (2007).

17 C. G. Tornaritis, *Cyprus and its Constitutional and Other Legal Problems*, 2<sup>nd</sup> ed. (Nicosia, 1980), «Η Γένεση της Κυπριακής Δημοκρατίας και οι Συνέπειες Αυτή», in *Κύπρος- Ιστορία, Προβλήματα και Αγώνες του Λαού της*, eds G. Tenekides and G. Kranidiotis (Athens: Hestia, 1981), *Το πολιτειακό δίκαιο της Κυπριακής Δημοκρατίας* (Nicosia, 1982); C. Christostomides, *Το κράτος της Κύπρου στο διεθνές δίκαιο* (Athens: Sakkoulas, 1994); Pikiis, *Constitutionalism*, L. Papaphilippou, *Το Δίκαιο της Ανάγκης στη Κύπρο* (Nicosia, 1995); E. Nicolaou, *Ο έλεγχος της συνταγματικότητας των νόμων και της κατανομής των αρμοδιοτήτων των οργάνων του κράτους στην Κύπρο* (Athens, Sakkoulas 2000), A. C. Emilianides, *Η υπεράβαση του Κυπριακού Συντάγματος* (Athens: Sakkoulas, 2006).

18 C. Stratilatis, ‘Η άδοξη καριέρα του στη Κύπρο: Η δημιουργία και τα πρώτα έτη του βίου της Κυπριακής δημοκρατίας από σμιτιανή σκοπιά’, in *Η Κυπριακή Δημοκρατία και το δίκαιο της ανάγκης* eds A. Emilianides, C. Papastylianos and C. Stratilatis (Athens: Sakkoulas, 2016); C. Papastylianos, ‘Το δίκαιο της ανάγκης και τα θεμελιώδη δικαιώματα των Τουρκοκυπρίων: Η εδαφικότητα και η κυριαρχία ως προϋποθέσεις άσκησης των δικαιωμάτων’, in *Η Κυπριακή Δημοκρατία και το δίκαιο της ανάγκης*.

19 C. Kombos, *The Impact of EU Law on Cypriot Public Law* (Athens: Sakkoulas 2015), *The Doctrine of Necessity in Constitutional Law* (Athens: Sakkoulas, 2015).

*law*.<sup>20</sup> Polyviou raises questions which could undermine the legalistic approach to the doctrine of necessity if taken seriously: for instance his chapter on the relation of *Ibrahim* with the question of constituent power could undermine the whole ‘rule of law’ based reading of *Ibrahim*. Polyviou’s ‘legalism’ is a peculiar mixture of an empiricist politics of convenience and a kind of professionalised deference to law over politics that derives from the privilege position as one of the major law firms in Cyprus, rather than a serious and systematic academic analysis.

Emilianides, on the other hand, adopts primarily a Hartian approach rather than a Kelsenian approach.<sup>21</sup> The significance of this is that the ground of the rule of recognition in Hart has to do not only with the stance of state organs but also with some sort of popular acquiescence in the rule. Kombos is only remotely connected to Kelsen and Hart for that matter.<sup>22</sup> It is questionable whether Kombos’ overall argument is that *Ibrahim* should be read as an application of Kelsen’s understanding of a legal revolution. In any case, Kelsen devoted just a few lines on this issue as, in reality, Kelsen hardly has a developed theory about a ‘legal revolution’. Kombos’ approach is a rather commonsensical legal positivism, and he does not frame his theory within the premises of Kelsen or any other theoretical. Little can be made from the few lines Kombos refers to Kelsen so as to distinguish *Ibrahim* from cases the theory of legal revolution.

More serious engagement with theory would certainly be welcome and would open new ways of reading the Cyprus Problem, legally, sociologically and politically. It is necessary to make connections and common threads. In this sense, one can identify a common approach that denies any connection or lineage to Schmitt and prefers to place themselves within the positivist frame of ‘pure law’ or other positivist law arguments that can be traced to Hart, Kelsen etc.. Their argument is in fact squarely placed within the logic of legitimising the ‘state of exception’ and ‘decisionism’, i.e. Schmittian logic. There are indeed common ideological threads which also correspond to ideological shifts of dominant sections of the Greek Cypriot establishment, such as the establishment connected to the administration of post-1963 regime in

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20 Emilianides, *Η υπερβασή του Κυπριακού Συντάγματος*, 2015; Emilianides, ‘Το δίκαιο της ανάγκης 50 χρόνια μετά: Σκέψεις επί του Κυπριακού «μηδενικού νόμου»,’ in *Η Κυπριακή Δημοκρατία και το δίκαιο της ανάγκης*, eds Emilianides et al., Loukaides (2015), P. Polyviou, *The case of Ibrahim the Doctrine of Necessity and the Republic of Cyprus* (Nicosia: Chrysafinis and Polyviou, 2015).

21 Emilianides, *Η υπερβασή του Κυπριακού Συντάγματος* and ‘Το δίκαιο της ανάγκης 50 χρόνια μετά’; H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’, *Harvard Law Review*, Vol. 71 (1958), *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012); Kelsen 1967; 1982; 1991; B. H. Bix, ‘Kelsen, Hart, and legal normativity’, *Revus*, Vol. 34 (2008), DOI.org: 10.4000/revus.3984.

22 Kombos, *The Impact of EU law and The Doctrine of Necessity*.

Republic of Cyprus. The status quo of the Greek Cypriot-run Republic of Cyprus with Turkish Cypriots as a minority at best, should constitutional order ‘return’ to the Republic, is the entrenched legal position of the state. This is the imposition of the post-1964 regime, not as a ‘necessary’ and ‘limited’ deviation from the rule of law of the constitutionalism of the Republic but as ‘transcendence’ of the Republic of Cyprus Constitution.<sup>23</sup> This is based on denialism of any ideological elements, as if constitutional reality is free from ideology, which is something impossible.<sup>24</sup> It rests on *their word* as the key argument that their approach is not ideological – simply their argument is as follows: ‘The approach is not ideological because we are based on pure law’, and ‘Ideological are those who critique the pure law approach, as there is no ideology in pure law’.<sup>25</sup>

The hegemonic view is premised on the opinion that that judiciary, on the advice of the attorney general, who at the time was none other than Criton Tornaritis QC, had discharged its constitutional duty in resolving the constitutional crisis that had started earlier with the dissolution of the Supreme Constitutional court and its merger with the High Court.<sup>26</sup> In the context of Cyprus, despite the different opinions and perspectives derived from the point of view of being a holder of a legal office of the Republic’s administration serving a different function, there is a blurring and convergence between the executive, the judiciary and the high level administrative officers, such as the attorney general, particularly when it comes to major ‘national’ constitutional issues. The ethnic conflict between the Greek Cypriot and Turkish Cypriot ruling elites is such an instance. Of course the conflict was not confined to the ruling class but it extended to the popular classes. Moreover, the blurring of the distinction of who holds what view is illustrated in the case of *Ibrahim*: the attorney general, who is in independent legal advisor to the Government (i.e., the executive), is a legal personality whose function and role in the juridical and constitutional affairs made him interwoven within the judicial echelons.

Tornaritis is the most prominent example. He was born in 1908, and graduated from the University of Athens, obtaining a distinction of excellence, and was nominated for a doctorate in 1923. He went on to postgraduate studies in London and become

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23 Emilianides, *Η υπερβαση του Κοπριακού Συντάγματος; Το δίκαιο της ανάγκης*.

24 D. Dimoulis, *Το Δίκαιο της Πολιτής, Μελέτες Συνταγματικής Θεωρίας και Ερμηνείας* (Athens: Ellinika Grammata, 2001); G. Frankenberg, *Political Technology and the Erosion of the Rule of Law, Normalizing the State of Exception* (Cheltenham: Edward Elgar, 2014).

25 Rather than engaging with the critique of the doctrine of necessity Emilianides, *Το δίκαιο της ανάγκης*, brands the critiques as ideological. Contrary to this Stratilatis, ‘*Η άδοξη καρέρα του στη Κύπρο*’, illustrates the contradictions and seriously engages with the arguments.

26 Tornaritis, *Cyprus and its Constitutional and Other Legal Problems*; «*Η Γένεση της Κυπριακής Δημοκρατίας*», in *Κύπρος- Ιστορία, Το πολιτειακό δίκαιο της Κυπριακής Δημοκρατίας*.



a barrister-at-law in 1946. In 1940, he was appointed as a district judge in Nicosia and thereafter, in 1942, he became the first Cypriot to be president of the District Court of Famagusta. He served as solicitor general from 1944 until 1952 and then as attorney general from 1952-1960, under the British colonial rule.<sup>27</sup> From 1960 to 1984, he was the RoC's attorney general. Tornaritis had the opinion that any deviation from the rule of law by invoking the doctrine of necessity, which derived somehow from the 'inner logic' of constitutionalism, would restore the rule of law. Of course there is another interpretation here: the argument in *Ibrahim*, as advanced by Tornaritis and accepted by the Court, is *not* premised on the fact that there is something called 'rule of law' in the first place, and then we try to accommodate the legal situation within this something. The doctrine of necessity is not an expression of rule of law, classically understood, so to speak. For the defenders, or better the apologist of the doctrine of necessity, it is more a transformed notion of the rule of law within the particular (political, legal and geopolitical) situation in which history brought the Republic. However, this is not just a matter of opinion. It is an issue of fundamental disagreement about the nature of the democratic order and the will of the people. Fifty years later we find the same basic position as essentially an apologetics of the 'doctrine of necessity' with some criticisms on the application in later times. Kombos does not offer anything *substantially* different from the established apologetics of *Ibrahim*: there is no fundamental questioning of the validity and adequacy of the reasoning. In this sense, it is part of same Greek Cypriot legal scholarship mentioned earlier. However, Kombos does engage in criticisms about how the application of the doctrine developed later lacked consistency and systematisation and was 'often bordering on conservative formalism'.<sup>28</sup> Most significantly, he is critical of the jurisprudential inconsistency in the reversal of the Supreme Court's opinions on the constitutional amendment. Nonetheless, he considers the *Ibrahim* decision to be 'the apogee of the discharge of the constitutional function and responsibility'.<sup>29</sup>

The Kelsen-Schmitt disagreement over *who is the sovereign*, i.e. the executive leader versus the Court, in declaring the 'state of exception', has to be seriously adapted to see it in the Cypriot context and to examine the deeper logic, rather than to examine matters at a formal level, although it is significant in general terms as to the nature of liberal democracy.<sup>30</sup> There are three key elements that must be taken into account: (a)

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27 During the period of 1955-1959, he was detached as Legal Adviser to the Colonial Office in London and as Commissioner for the Reviewing of Cypriot Legislation.

28 Kombos, *The Impact of EU Law and The Doctrine of Necessity*. Neither does Emilianides (*Η υπεράσπιση του Κοινοβουλίου Συντάγματος* and *Το δίχτυο της ανάγκης*) or Polyviou, *The Case of Ibrahim*.

29 Kombos, *The Doctrine of Necessity*.

30 See L. Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015), DOI.org:10.1017/CBO9781316136256.2015.

the historic subservience of the courts to the executive since colonial times;<sup>31</sup> (b) the consensus amongst the Greek Cypriot political, legal, administrative and economic elites pertaining to Greek Cypriot control of the Republic as ‘a national issue’ contra the challenge by the Turkish Cypriot elites and Turkey; (c) the blurring and intermingling of the judicial, legal and political elites, who are currently facing serious controversy about nepotism, favouritism and corruption between judges, large legal firms and political figures.

At the level of the theoretical debates, there are references to Kelsen to legitimise the doctrine of necessity and rejections of any Schmittean connections; however, the only serious engagement with the Kelsen-Schmitt debates is made by Stratilatis, who wrestles with the two ‘alternative’ approaches in Cyprus. He concludes that whilst Kelsen’s ‘pure law’ approach prevails at a formalistic and referential level, he nonetheless considers that underlying the Kelsian surface in the *Ibrahim* case are critical Schmittean moments.<sup>32</sup> It is beyond the scope of this paper to discuss the debate on constituent power and who had the power to exercise it in the context of Cyprus during colonial and postcolonial times: this is a crucial debate that underlies not only the historical issue of the doctrine of necessity but also as to how to resolve the Cyprus Problem.

### **The European and Cypriot States of Exception Reloaded: The Example of the Migration States of Exception**

We need to unravel certain aspects of the Cypriot regime that are particularities of the ‘Cypriot states of exception’ and that are part of a much broader argument.<sup>33</sup> The basic argument is as follows: the Cypriot migration regime must be within a broader frame, which is both the paradox of processes which is simultaneously both increasingly *Europeanized* but increasingly *localized*. The Cypriot migration regime is operating largely under the general rubric of ‘the state of exception’,<sup>34</sup> as part of the ‘Cypriot states of exception’<sup>35</sup> which can be typically found in liberal capitalist states: immigration control, which grants immigration authorities wide discretion as executive prerogative, is perceived as a manifestation of the sovereignty of the state. When it

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31 This is a subject that requires serious research to be elucidated further. Future research could examine specific indices to uncover how this operates.

32 Stratilatis, *‘Η άδοξη καριέρα του στη Κύπρο’*, 79.

33 For a more comprehensive approach of the broader argument, analysis, and empirical backing see Constantinou, ‘On the Cypriot states of exception’; N. Trimikliniotis, *Η Διαλεκτική του Έθνους-Κράτους και το Καθεστώς Εξάφρασης: Κοινωνιολογικές και Συνταγματικές Μελέτες για την Ευρω-Κοινοτική Συγκοπή και το Εθνικό Ζήτημα* [in Greek]. (Athens: Savalas, 2010); Trimikliniotis and Bozkurt, *Beyond a Divided Cyprus*.

34 G. Agamben, *State of Exception* (London: University of Chicago Press, 2005).

35 Constantinou, ‘On the Cypriot states of exception’.

comes to immigration and asylum, the EU legal order has by and large *supplemented* and *modified* rather than *replaced* the national legal order.

This was followed by the ‘economic miracle’, which needed managing, until the economic meltdown in 2013. In the late 1980s, the Government, responding to labour shortages, introduced a system of migrant labour. However, the system was, and continues to be, based on two distinct classes of migrants: (a) elite migrants, who would invest and/or bring their entrepreneurship, know-how, and networks, and whose presence would be as stable and permanent as possible; (b) the vast majority of migrant workers, who would be temporary and cover the basic low-skilled jobs which Cypriots were not interested in. These migrants were thought to be temporary; their employment was short-term and precarious, and hence, they are also referred to as *subaltern migrants*. The legal and policy framework is premised on this distinction. With this context in mind, one can understand the marginality of the latter, the second class of migrant workers. Third-country nationals (TCNs) have a worse situation than European Union Nationals (EUNs), however they are both subaltern migrants, as is shown in this paper.

When it comes to controlling migration and populations, that is, controlling who enters the borders and who belongs to the nation, States of the liberal capitalist type tend to consider this control as a vital expression of sovereignty. Thus, authorities are generally granted wide discretion as an essential ingredient of their prerogative powers. Migration control is the policy field where *authoritarian statism* thrives, and it can be seen as a state of exception par excellence in perpetuity. This is largely, but not exclusively or exhaustively, regulated by legislation and EU Directives, particularly in the case of detention, expulsion, deportation, and entry bans of foreign citizens, including EU nationals. For EU citizens, however, the free movement of workers is safeguarded, as provided by the EU *acquis* (as per Art. 45 of the TFEU). Only in exceptional situations, restrictions are allowed on the right of free movement and residence on grounds of public policy, public security, or public health. Expulsion of EU citizens and their family members is permitted only ‘on grounds of public policy or public security’.<sup>36</sup> The scope for such measures is ‘limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family, and economic situation and the links with their country of

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36 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *Official Journal of the European Union* L 158/77.

origin'.<sup>37</sup> To expell EU citizens, the situations must be exceptional – a subject we return to later on to examine how this is applied in the context of Cyprus. The EU acquis, codified in the *Return Directive 2008/115/EC* on common standards and procedures in Member States for returning illegally resident TCNs, introduced rather low standards<sup>38</sup> merely referred to as 'common standards' rather than *minimum safeguards*. Moreover, when it comes to migration and citizenship, Courts typically grant the executive residual powers well beyond those provided by the regulations in the form of the wide margin of discretion afforded. It is no surprise that the acquis regulating the migration of TCNs is particularly weak, despite pledges to develop a common immigration and asylum policy.

Unfortunately, the Strasbourg Court, which is bound by the ECHR rather than the EU legal order, is often also trapped in the very same logic. The ECtHR case of *Saudi v. UK* is said to 'exemplify the limits and blind spots of the contemporary European system of the protection of human rights to those who are "out of place" in the global territorial waters'.<sup>39</sup> The notion of 'community' is increasingly 'globalized', but simultaneously in an ever more fragmented world is 'a blind spot in constitutionalism', ultimately failing in its universal human rights and the rule of law goals: 'By failing to question the way in which territoriality implicates the interests of the individual, modern constitutionalism silences and obscures claims for justice by those who are affected by State power whenever its exercise is based upon territorial sovereignty'.<sup>40</sup> Moreover, ECtHR case law on the detention of immigrants is 'exemplifying the blind spots of a constitutionalism, despite paying lip service to the universality of human rights [and] has serious difficulties accommodating claims for individual justice that cannot be fitted neatly within the traditional Westphalian frame'.<sup>41</sup> Paradoxically, the relation between 'illegal migration' and globalization has enhanced the role of immigration law and immigration regimes. Under globalizing forces, migration law has been transformed into the last bastion of sovereignty, which explains the worldwide crackdown on extra-legal and irregular migration and informs the shape of this crackdown that is taking place.<sup>42</sup> As States pursue what they refer to as combating

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37 Ibid.

38 Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *Official Journal of the European Union* L 348/98.

39 *Saudi v. UK*, ECtHR case no.13229/03, 2008. G. Cornelisse, 'A New Articulation of Human Rights, or Why the European Court of Human Rights should Think beyond Westphalian Sovereignty', in *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, eds M. B. Denbour and T. Kelly (London: Routledge, 2012).

40 Ibid.

41 Ibid.

42 W. Walters, 'Anti-illegal Immigration Policy: The Case of the European Union', in *Governing*

‘illegal migration’, the phenomenon becomes more significant legally, politically, ethically, and numerically: migration law is in this sense crucial to understanding globalization in what is a paradigm shift in the rule of law. Having recognized this, it must be stressed that we are dealing with a dynamic situation, which is prone to pressure from below and above. There is certainly scope for challenge, resistance, and struggles, which may well shift the frontiers of the law in the direction of enhancing the rights of migrants and non-citizens *vis-à-vis* nation-states; it may, however, go in different directions. There are limits, but we are far from exhausting them. Indeed, in the recent case of *M.A. v the Republic of Cyprus*,<sup>43</sup> the ECtHR goes well beyond the EU *acquis* to force a nation-state to provide an effective remedy with automatic suspensive effect to challenge the applicant’s deportation.

In the global context, matters become more complicated and negative for migrant rights as public order is increasing ‘securitized’, particularly after the so-called war on terror since 2001. Caution must be exercised so as not to fall in the trap of assuming that the problem suddenly appeared, particularly after September 11, 2001, dubbed as ‘the terrorism-immigration nexus’.<sup>44</sup> There is certainly an all-encompassing vigour about security and antiterrorism; however, as various scholars illustrate, securitization is common, and in fact, *central to liberalism*.<sup>45</sup> This is connected to the changing function and meaning of borders, which interconnects questions of security to migration control. The ‘securitization of migration’ is an issue of concern in European and international literature over the last years. Invoking the ‘dangers’ posed by migrants, especially by certain categories deemed as ‘dangerous migrants’, which cultivates fears and insecurity amongst the host population, is hardly novel. The alleged connection between terrorism and migration, including the use of ‘racial profiling’ as a police method to ‘predict behaviour’ of ‘potential terrorists’, is a controversial issue for civil libertarians.<sup>46</sup> Such debates have been taking place in the EU and USA recently, which uses anti-terrorism as an excuse to pass measures curtailing civil liberties.

However, it is superficial to assume that the changes occurred merely or primarily

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*International Labor Migration, Current Issues, Challenges and Dilemmas*, eds C. Gabriel and H. Pellerin (London: Routledge, 2008); C. Dauvergne, *Making People Illegal, What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008).

43 *M.A. v the Republic of Cyprus*, ECtHR case, application no. 41872/10 (23 July 2013).

44 A. Tsoukala, ‘The Terrorism-Immigration Nexus in the EU, in the Post-11 September Era: An Analysis of the Political Discourses in the British Press’, in *Irregular Migration, Informal Labor and Community: A Challenge for Europe*, eds E. Berggren, G. T. Likic-Brboric and N. Trimikliniotis (Maastricht: Shaker, 2007).

45 D. Bigo and A. Tsoukala, *Terror, Insecurity and Liberty, Illiberal Practices of Liberal Regimes after 9/11*, (London: Routledge, 2007), 198.

46 Tsoukala, ‘The Terrorism-Immigration Nexus’.

due to the programme of particular heads of state. The changes are deeper and of a longer term. In the current climate, there seems to be an increasingly frequent use of the alleged connection between ‘migration’ and ‘security’: ‘illiberal practices’ are used by so-called liberal regimes, particularly but not exclusively after 9/11.<sup>47</sup> The ‘war on terror’ is ‘a state of exception’, invoked as a justification for liberal states to suspend civil liberties and human rights. Migrants and asylum seekers bear most of the brunt of these tough measures. In Cyprus these measures add further discretion to the immigration authorities to act with impunity. Perhaps there is more continuity than rupture in the current Supreme Court ruling than what appears at first sight: whilst the Supreme Court *rejected* the attorney general’s invocation of the ‘doctrine of necessity’ to counter the judicial claim to be exempted from the general public sector austerity cuts, the ruling in fact was exactly the opposite: it defined a new exception. Paradoxically, in the very rejection of the logic articulated as an *imperative economic necessity* in the rubric of the doctrine of necessity, the Court generated yet another ‘Cypriot state of exception’, precisely reasserting the Court’s claim to the Schmittean logic: ‘Sovereign is he who decides on the exception’.<sup>48</sup>

### **The Cypriot Courts and the Proliferation of the Cypriot States of Exception**

This article will now use Cypriot cases which went before the Supreme Court in recent years to illustrate the proliferation of states of exception and the extension of the logic of the doctrine of necessity. Many of these cases are cases involving discrimination.<sup>49</sup> It critically evaluates the rare cases where the attorney general invoked necessity arguments but the Court rejected them. Those cases involved cuts in benefits and pay for judges themselves or privileged high-earners’ pensions as part of the austerity packages agreed with the troika. Therefore, the Supreme Court legitimised the highly privileged receiving treatment that differed from the rest of the population: Unlike the rest of population who faced severe cuts in wages and pensions due to austerity measures, no salary cuts were allowed to occur for high-earners, including the judges themselves.

We first briefly discuss the case of *Aziz*, which went to the ECtHR and set out a frame for limiting the doctrine of necessity, before examining the various cases.

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47 Groenendijk, ‘Legal concepts of integration in EU Migration Law’; ‘Integration of Immigrants’.

48 C. C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005), 5.

49 See C. Demetriou, Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC Country report 2017, Cyprus. (European Network of Legal Experts in the Non-Discrimination Field, 2017). For a discussion of discrimination in Cyprus see N. Trimikliniotis and C. Demetriou, ‘Evaluating the anti-discrimination law in the Republic of Cyprus: A critical reflection’. *The Cyprus Review*, Vol. 20, No. 2, (2008).

### ***The Case of Ibrahim Aziz***

One of the very first cases to challenge the doctrine of necessity was that of Ibrahim Aziz, a Turkish Cypriot with a long-term residence in the areas controlled by the Republic of Cyprus. In 2001, Aziz applied to be registered on the electoral roll in order to vote in the forthcoming elections. His request was refused on the ground that, under the Constitution,<sup>50</sup> Turkish Cypriots could not be registered in the Greek Cypriot electoral roll. Indeed, the Constitution did provide for separate electoral lists for Greek Cypriots and for Turkish Cypriots, but this was suspended in 1963. Following the rejection of his application, the complainant appealed to the Supreme Court, relying on Article 3 of Protocol No. 1 of the European Convention on Human Rights and arguing that, following the dissolution of the Communal Chambers in 1963, the Republic failed to set up two separate electoral lists to protect the electoral rights of members of both communities. The Supreme Court rejected his application, holding that the applicable legislation<sup>51</sup> did not provide for Turkish Cypriots living in the south to be included in the Greek Cypriot electoral list and that the national Courts had no power to reform the Constitution. Following this rejection, the complainant applied to the European Court of Human Rights who ruled in favour of the complainant.<sup>52</sup> The Court found that Cyprus was in violation of Article 3, Protocol 1 of the ECHR for denying the complainant ‘the very essence of the applicant’s right to vote’, and in violation of Article 14 of the same Convention, as the difference in treatment Aziz complained about was a result of the complainant’s ethnic origin, and such difference could not be justified on reasonable and objective grounds. The Republic’s failure to pass legislation to resolve the problem which arose in 1963 from the suspension of several constitutional rights of Turkish Cypriots produced a clear inequality of treatment in a citizen’s right to vote.<sup>53</sup>

### ***The Case of Arif Mustafa***

The Court’s approach in the case of Arif Mustafa remains unique in the sense that most subsequent decisions consciously choose to sidestep the reasoning behind the case. The government adopted a new policy following this decision that allowed Turkish Cypriots to access their properties on certain conditions and subject to restrictions in order to contain a potential crisis that would erupt if Turkish Cypriots would seek en

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50 Article 63 of the Cyprus Constitution.

51 Article 63 of the Constitution and Article 5 of Law No. 72/79, relating to the election of members of parliament.

52 *Ibrahim Aziz v. Republic of Cyprus*, ECHR/no. 69949/01 (22 June 2004), available online: <http://www.echr.coe.int/eng/Press/2004/June/ChamberJudgmentAzizvCyprus220604.htm>.

53 On 23 January 2006, a new law was enacted purporting to comply with the ECtHR decision. The law grants Turkish Cypriots the right to vote as part of the same electoral roll as Greek Cypriots.

mass to reclaim their properties in the Republic-controlled areas. Arif Mustafa was a Turkish Cypriot residing in the Republic-controlled south of the island since 2002. He had sought to recover possession of his property in Limassol, which was administered by the Interior Minister in his capacity as ‘Guardian’ of Turkish Cypriot properties; his application was rejected. He applied to the Supreme Court for cancellation of the minister’s decision, and the Supreme Court ruled in favour of the applicant.<sup>54</sup>

The Court accepted the applicant’s arguments that he does not fall within the definition of ‘Turkish-Cypriot’ as enshrined in the law, because since 2002 he had his ordinary residence in the south, and that with the lifting of the restrictions in movement from north to south, the need on which the law is based, which is to protect the properties in the owners’ absence, has expired; and that the law contravenes Article 28 of the Constitution, which embodies the equality principle and the prohibition of discrimination. The Court rejected the Government’s argument that the criterion to be used in order to determine ‘ordinary residence’ is where the applicant was resident at the time of the law entered into force. The decision was controversial at the time, and the then attorney general filed an appeal against the Supreme Court decision. Arif Mustafa told the press that he was ready to take his case to the ECtHR if the decision was overturned. Realising that an ECtHR ruling against Cyprus could prove very awkward for the government, the appeal was subsequently withdrawn.

Following this decision, a new policy was put in place, allowing Turkish-Cypriots residing in the south for at least six months to repossess their properties. This case established that the law on Turkish Cypriot properties can be challenged on the basis that it is discriminatory, which could potentially have far-reaching legal implications. Since then, several Turkish Cypriots sought to repossess their properties in the south and many reached the Courts, including the ECtHR. Most cases were settled out of court settlements to avoid establishing precedents that would lead to far reaching consequences. To this date, the discriminatory treatment of Turkish Cypriots as regards their access to their properties remains an open issue.

### **Court Decision on the Right of Turkish Cypriots to Vote in the May 2014 European Parliament Elections**

In 2013, the Law on electing members of the European Parliament was amended to provide the right to vote to those Turkish Cypriots who reside in the areas which are not under the control of the Republic of Cyprus, i.e. the northern part of Cyprus (hereinafter ‘the north’). The amendment provides that the Civil Registry Department may record in a special electoral register those Cypriot citizens residing in the north

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54 Supreme Court of Cyprus, *Arif Mustafa v. The Ministry of Interior through the Limassol District Administration*, Case No.125/2004, 24.09.2004.



provided they are over 18 and are in possession of an identity card of the Republic. The law further provides that the persons listed in this special electoral register must, on the date of the elections, submit a written statement on a special specimen stating their address in the north,<sup>55</sup> whereas persons not listed in any electoral registers would not be allowed to vote.<sup>56</sup> All persons who were already on the register of the Civil Registry Department on 6 February 2004 (the date on which the law came into effect) were also automatically registered on the permanent electoral register (Scenario A). Alternatively, persons entitled to vote could submit an application to be registered on the electoral register (Scenario B). A third option was the automatic registration, by way of data transfer from the register of the Civil Registry Department onto the electoral register (Scenario C). The public announcements issued by the Ministry of the Interior ahead of the 2014 elections did not clarify that Turkish Cypriots residing in the north were required to make any prior registration in order to be allowed to vote. The public announcement issued by the office of the European Parliament in Cyprus stated that those Turkish Cypriots who were in possession of the ‘new type’ of identity card and had declared an address in the north would be automatically registered in the special electoral register of the European elections. The announcement urged those Turkish Cypriots who were not sure if they had declared an address in the north to contact the authorities to declare their current address of residence by 2 April 2014.

The applicants, like many other Turkish Cypriots, did not think it was necessary to take steps to register themselves in any electoral registry. Since they had identity cards of the Republic, they assumed they would be able to vote using those cards, just like the Greek Cypriots, and that they would be able to fill out the special specimen form on the spot. On the day of the election, a number of Turkish Cypriots appeared at electoral centres to vote but were prevented on the justification that their names were not registered on any electoral roll. They were also denied the opportunity to register on the spot and vote. The applicants applied to the Court claiming that they should have been allowed to register on the spot and vote under scenario C, since they were already included in the registry of the Civil Registry Department and were in possession of identity cards of the Republic. They argued that the authorities’ interpretation of the law on the day of the elections amounted to an infringement of the non-discrimination principle because of the applicants’ ethnic origin, in violation of articles 6 and 28 of the Constitution, of article 21 of the EU Charter for Fundamental Rights, of Council Directive 2000/43 as incorporated into Law 59(I)/2004 and article 14 of the ECHR.

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55 Law on the election of members of the European Parliament N. 10(I)/2004 as amended, Article 9(1A), available at [www.cylaw.org/nomoi/enop/non-ind/2004\\_1\\_10/full.html](http://www.cylaw.org/nomoi/enop/non-ind/2004_1_10/full.html).

56 Law on the election of members of the European Parliament N. 10(I)/2004 as amended, Article 10(3).

They further claimed that the authorities' interpretation of the law led to a violation of their right to vote in European Parliament Elections, violating articles 31 and 63 of the Constitution, articles 39 and 40 of the EU Charter, Council Directive 94/80 and article 3 of Protocol 1 to the ECHR. The claim also referred to the ECtHR ruling in the case of *Aziz v Cyprus*<sup>57</sup> which concluded that the failure of the Cypriot authorities to secure the right of Turkish Cypriots to vote in national parliamentary elections amounted to a clear inequality of treatment in the enjoyment of the right to vote, in violation of Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1.

The Court rejected the claim on the grounds that the act they complained of, i.e. preventing the applicants from voting at the elections, could not be challenged through judicial review because it was merely an 'executory' act of informatory nature. It was, according to the Court, merely an act of communicating to the applicants the contents of the regulation in place and implementing the said regulation. The law is clear that no one could vote unless they were registered, and the applicants were not on any electoral register under scenarios A, B or C. As for scenario C, which according to the applicants should have been utilised to automatically place them on the electoral register, the Court concluded that this gave the Civil Registry Department *discretion but no duty* to register persons residing in the north on the electoral roll. The filling out of the special specimen allowing Turkish Cypriots to vote would have been possible only if the Civil Registry Department had exercised its discretion to register persons, which was not the case at present. The applicants had failed to prove that the authorities had any clear legal duty to act in a certain way. The Court did not respond to or made any reference to the discrimination component of the claim.<sup>58</sup>

It is noted that the Turkish Cypriot applicants were holders of identity cards of the Republic of Cyprus. These identity cards are sufficient for Greek Cypriots to vote and there is little justification for the reason why special provisions and procedures were put in place for Turkish Cypriots. Each identity card carries a unique number and there can be no error as to the identity of the holder, irrespective of the address of residence. The problem affecting Turkish Cypriots was aggravated by the fact that the special provisions applying to them were complex and not clearly defined in the various announcements published. The announcements the Cypriot authorities published only contained the text of the law, which offered no indication as to what Turkish Cypriots should do in order to be able to vote.

The Court's decision and its failure to consider the issue of discrimination raises

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57 *Ibrahim Aziz v. Republic of Cyprus*, ECHR/no. 69949/01 .

58 *Administrative Court, Senner Hassan et al v. The Republic of Cyprus*, Cases 989/2014, 1103/2014, 1104/2014, 1105/2014, judgement delivered on 25 July 2018.

important legal questions with regard to the implementation of the equality *acquis* and the equality principle in general, as enshrined in other instruments (the Constitution, the EU Charter, etc.). The law transposing the Racial Equality Directive (hereinafter ‘the law’) contains a number of obscure provisions regarding the courts’ competency as well as what to do about discriminatory provisions contained in laws or regulations.

The law states: Without prejudice to the *exclusive* jurisdiction of the Administrative Court under Article 146 of the Constitution (emphasis added) the competent court for examining disputes under this law in relation to discriminatory treatment is the District Court (verbatim translation by the expert).<sup>59</sup> The law further states that in the event of an action before the District Court *under Article 146(6) of the Constitution* (emphasis added) and provided the preconditions of the substantive right to fair and reasonable compensation are met, the District Court grants compensation.<sup>60</sup> Article 146(6) of the Constitution gives rights of compensation to persons aggrieved by an administrative decision declared void under paragraph 4 of this Article, i.e. a decision successfully challenged through a judicial review procedure. Since the judicial review process of article 146 is so intrinsically linked to the operation of the law transposing the Racial Equality Directive, it is necessary to examine whether the preconditions of Article 146 are in line with the equality *acquis*. In this case, the judge found that the judicial review process should fail because the act complained of was not executory and because the claimants had failed to show there was any legal duty on the authorities to act in a particular way. The judge decided the authorities had discretion to register or not register the claimants in the electoral register and they had no legal duty to use that discretion or to interpret the regulation in a manner that would be in line with the equality *acquis*, the EU Charter, the ECHR or the Constitution.

The judicial review process has additional disadvantages over and above the restriction regarding executory acts. Judicial review is available only to those persons who have a ‘legitimate interest’, i.e. legal standing,<sup>61</sup> which ipso facto excludes organisations acting on behalf of victims. There is a 75-day limit following which the right to apply to Court is lost.<sup>62</sup> Also, no legal aid is available for administrative recourses (save in specific circumstances such as asylum or return). More importantly, the judicial review process is intended to challenge administrative decisions on the basis of the decision-making process (proper investigation, sufficient justification etc.)

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59 Law on equal treatment (racial or ethnic origin) N.59(I)/2004, article 8(1), available at [www.cylaw.org/nomoi/enop/ind/2004\\_1\\_59/section-sc9e9ad049-e62a-2597-2aca-9eacd8c587bd.html](http://www.cylaw.org/nomoi/enop/ind/2004_1_59/section-sc9e9ad049-e62a-2597-2aca-9eacd8c587bd.html).

60 Law on equal treatment (racial or ethnic origin) N.59(I)/2004, article 8(3).

61 Constitution of the Republic of Cyprus, article 146(2). [www.cylaw.org/nomoi/enop/ind/syntagma/section-sc26b4a5c6-5493-b01e-9d76-560d2e45d284.html](http://www.cylaw.org/nomoi/enop/ind/syntagma/section-sc26b4a5c6-5493-b01e-9d76-560d2e45d284.html)

62 Constitution of the Republic of Cyprus, article 146(3). Available at [www.cylaw.org/nomoi/enop/ind/syntagma/section-sc26b4a5c6-5493-b01e-9d76-560d2e45d284.html](http://www.cylaw.org/nomoi/enop/ind/syntagma/section-sc26b4a5c6-5493-b01e-9d76-560d2e45d284.html)

and not on its merits. Challenging the merits of a decision would, in the eyes of the Court, amount to an interference with the mandate of the legislative branch of the state, that is, Parliament.

The restrictions surrounding the judicial review process are very likely to lead any discrimination claim to fail. Because of this, it is necessary for the legislature, on the one hand, to clarify under which circumstances a claimant is obliged to use the judicial review process to challenge a discriminatory administrative act and, on the other hand, to amend Article 146 so as to remove the restrictions that lead to an infringement of the equality acquis.

The second question that requires clarification is the process through which a discriminatory law or regulation may be amended. The law regulating the mandate of the Equality Body provides for a procedure whereby the Equality Body must refer to the attorney general all laws, regulations and practices containing discrimination, following which the attorney general is obliged to advise the minister concerned and to prepare the necessary amendment in the discriminatory law or practice.<sup>63</sup> This is far from being a guarantee that the discriminatory provision will be annulled, and in fact the Equality Body's referrals to the attorney general, under Article 39, were in many cases ignored. Beyond the Equality Body's domain, the law transposing the Racial Equality Directive provides for another vague procedure for amending discriminatory laws and regulations which has also failed to bear fruit. According to the law:

- Every provision in force at the time of adoption of this law (April 2004) is annulled to the extent that it contains discrimination.<sup>64</sup> This seems to exclude provisions enacted after this date, as was the case at hand.

- The competent authority is under a duty to recall or modify any administrative act which is contrary to the provisions of this law.<sup>65</sup>

- *Without prejudice to the exclusive jurisdiction of the Administrative Court under Article 146* (emphasis added), if there is doubt as to whether a certain law was annulled or not, the matter is to be resolved by the District Court. Nevertheless, any other Court may, in the course of exercising its own powers also adjudicate on this matter if this is necessary for the completion of the procedure before it.<sup>66</sup>

The above provision raises a number of questions on the procedure for annulment and the redress mechanism when the competent authority does not recall a

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63 Law on Combating Racial and Other Forms of Discrimination (Commissioner) N.42 (I)/2004, article 39. Available at [www.cylaw.org/nomoi/enop/ind/2004\\_1\\_42/section-sc225d534d-b19b-b3e2-748b-a68d02297762.html](http://www.cylaw.org/nomoi/enop/ind/2004_1_42/section-sc225d534d-b19b-b3e2-748b-a68d02297762.html)

64 Law on equal treatment (racial or ethnic origin) N.59(I)/2004, article 10(1), available at [www.cylaw.org/nomoi/enop/ind/2004\\_1\\_59/section-scc41c9869-9de2-31bc-8b0b-d3b776a58c88.html](http://www.cylaw.org/nomoi/enop/ind/2004_1_59/section-scc41c9869-9de2-31bc-8b0b-d3b776a58c88.html)

65 Article 10(2), Law on equal treatment (racial or ethnic origin) N.59(I)/2004.

66 Article 10(3), Law on equal treatment (racial or ethnic origin) N.59(I)/2004.

discriminatory decision or the Court fails to adjudicate on the compliance of a certain law with the equality acquis. Prior to this decision, case law had established that the Court will not interfere with acts of Parliament, as that would infringe on the doctrine of the separation of powers. This long judicial tradition comes into direct conflict with the above provision of the law that requires the Court to check that laws comply with the equality acquis. This decision has widened this problem by establishing that the Court will not interfere in how the administration chooses to exercise its discretion, even if such exercise results in discriminatory treatment of persons on the ground of a protected characteristic.

### ***The Family Exception to the Exception***

An interesting issue arises over the Family Appeals Court decision on the jurisdiction of the Courts to try disputes between members of the Turkish community. The Court found that courts in the Republic of Cyprus have no jurisdiction to try disputes between members of the Turkish community. The appellant and the respondent are Cypriot citizens and members of the Turkish community. In 2003, they got married in the office of the Islamic community and resided in the RoC controlled-area (the south). They subsequently split up and the wife (the appellant) applied to the Family Court to resolve property differences with her estranged husband (the respondent). The appellant also sued a third party as a trustee of property to whom the respondent had allegedly transferred property. The trustee argued that no court had jurisdiction to try the case.

At first instance, the Family Court decided that it had no jurisdiction to try the case. In support of this, the court cited Article 152(2) of the Constitution, which provides that civil disputes relating to personal status are matters for the Communal Chambers and are under the jurisdiction of the Communal Courts of each Community. Although a law adopted in 1965 abolished the Greek Communal Chamber and the Greek Communal Court, providing that the jurisdiction of the Greek Communal Court should pass to the District Court,<sup>67</sup> no equivalent provision was made for the Turkish Communal Court. When the sealed barbed wire was opened in 2003, making it possible for Turkish Cypriots to move and /or settle in the south, a law was adopted providing for the District Court to replace the dissolved Turkish Communal Court but only in matters relating to the dissolution of marriages.<sup>68</sup> The trial court found

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67 Law on the transfer of the exercise of jurisdiction of the Greek Communal Chamber and on the Ministry of Education of 1965 (Ο περί Μεταβιβάσεως της Ασκήσεως των Αρμοδιοτήτων της Ελληνικής Κοινοτικής Συνελεύσεως και περί Υπουργείου Παιδείας Νόμος του 1965) Ν. 12/1965, available at [www.cylaw.org/nomoi/enop/non-ind/1965\\_1\\_12/index.html](http://www.cylaw.org/nomoi/enop/non-ind/1965_1_12/index.html).

68 Law providing for the application of the marriage law of 2003 to the members of the Turkish Community (Νόμος που προνοεί για την προσωρινή εφαρμογή του Περί Γάμου Νόμου του

that the scope of the 2003 law does not cover property disputes, as it is restricted to ‘marital disputes’ defined in the law as alimony and custody issues. The application was rejected at first instance and the applicant (the appellant in this case) was ordered to pay half of the costs of the respondents. The appellant filed for an appeal arguing that the failure of the court to try her claim infringes articles 13 and 14 of the ECHR (right to an effective remedy and prohibition of discrimination). No invocation was made to the Racial Equality Directive or the national law purporting to transpose it.

The Appeals Court rejected the appeal, upholding the Trial Court’s findings. It concluded that the Turkish Communal Courts have not been officially dissolved and upheld the Trial Court’s finding that the marriage law of 2003 could not be extended to cover property differences between spouses. The Appeals Court concluded that the legal gap cannot be remedied through a court decision but only through a legislative act and recommended that a procedure be introduced for the resolution of property disputes between Turkish Cypriots. The Appeals Court did not consider the question of discrimination and did not take into account the appellant’s references to ECHR articles 13 and 14.<sup>69</sup>

The right to equality before the law is spelled out in preamble Article 3 of the Directive; the failure to safeguard the Turkish Cypriots’ access to justice is not an apparently neutral provision but a directly discriminatory practice specifically targeting a group of persons identified through their common ethnicity. The Racial Equality Directive does not foresee any exceptions in cases of direct discrimination. Furthermore, according to Article 2(2) of the Racial Equality Directive, discrimination is established where there is less favourable treatment, without the need to prove prejudicial motive.

A number of Equality Body decisions in the past have also established discrimination in the differential treatment of Turkish Cypriots when trying to access state services, such as to exercise the right to marry and to register their newborn children in the official Registry. It is recalled that in the ECtHR ruling in *Aziz*,<sup>70</sup> Cyprus was found guilty of violating Article 14 of the ECHR for its failure to regulate the right of Turkish Cypriots to vote; the justification offered by the Cypriot government at the time, which was the irregular situation that emerged following the Turkish invasion, did not satisfy the criterion of reasonable and objective justification. The ECtHR has repeatedly ruled that the sensitive nature of peace processes or post-conflict

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2003 σε μέλη της Τουρκοκύπριας Κοινότητας) N. 120(I)/2003, available at [www.cylaw.org/nomoi/arith/2003\\_1\\_120.pdf](http://www.cylaw.org/nomoi/arith/2003_1_120.pdf).

69 Family Court, Appeal Jurisdiction, *G.M. v. H.V. and L.A.* (2018), Appeal No. 38/2015, judgement delivered on 10 September 2018, available at [www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_1/2018/1-201809-38-15fam-anony.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%2A%20and%202018](http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2018/1-201809-38-15fam-anony.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%2A%20and%202018).

70 *Ibrahim Aziz v. Republic of Cyprus*, ECHR/no. 69949/01

arrangements do not justify differential treatment on the grounds of ethnic origin.<sup>71</sup>

As regards the field of application and the definition of ‘services available to the public’ in the case of *CHEZ Razpredelenie Bulgaria AD*,<sup>72</sup> the CJEU concluded that all state services available to the public are covered by the scope of the Directive. The approach taken by the Cypriot courts was that, although they recognised that a gap existed, they were unwilling to take steps to deliver justice by examining the appellant’s claim. In essence, the non-discrimination principle foreseen under legislation which ranks higher than national law, such as the EU *acquis*, the ECHR and the Constitution, was not applied because there was no specific law specifically granting the Greek Cypriot courts the jurisdiction to try disputes between Turkish Cypriots.

Article 14 of the Directive requires member states to take the necessary measures to ensure that discriminatory laws and practices are abolished. The Cypriot government did not take measures to bring national legislation in line with this principle and to safeguard the Turkish Cypriots’ access to justice in the same way as it did for the Greek Cypriots. In the case at hand, the courts failed to give effect to the principle established by the CJEU in *Mangold*,<sup>73</sup> that national courts are responsible for safeguarding the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law.

By refusing to try the dispute between the two parties, the Court denied the Turkish Cypriot applicant access to justice which is available to all Greek Cypriots, essentially treating her in a less preferential manner on account of her ethnic origin. In most issues affecting Turkish Cypriots’ access to state services, the differential treatment is sanctioned by a law, such as with Turkish Cypriot properties in the south, which are managed by the state until ‘resolution of the Cyprus Problem’. In the case at hand, the reason for denying the applicant access to justice was the failure of Parliament to specifically legislate on the jurisdictional transition from one court to another. However, given the hierarchy of the EU *acquis* over national law, the Court could have tried the case in order to safeguard the applicant’s right to non-discrimination.

### **Arbitrary ‘Economic Necessity’: Crisis, Banking and Double Standards**

The appellant was senior executive director at the Bank of Cyprus (the bank) from 2005 until 2012. Following the 2012 EU-level decision to increase all banks’ Tier 1 capital, the

71 European Court of Human Rights, *Sedjic and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06; European Court of Human Rights, *Dokic v Bosnia and Herzegovina* (Case No. 6518/04), 27 May 2010, available at <https://hudoc.echr.coe.int/webservices/content/pdf/001-98692>.

72 Court of Justice of the European Union, Case C-83/14 (2015, July 16), available at <http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0083&lang1=en&type=TEXT&ancre=>.

73 C-144/04, *Mangold*, 22 November 2005, available at <http://eur-lex.europa.eu/legal-content/EL/TEXT/HTML/?uri=CELEX:62004CJ0144&from=HR>.

bank's deficit was found to be €1560 million, which had to be covered by 30 June 2012. The bank announced that it was lacking €673 million, which, however, it was planning to secure through various actions. A few months later, the bank announced that its deficit was reduced to about €200 million. However, the deadline of June 2012 was approaching, and meanwhile, another large Cypriot bank had received state support which led to the zeroing of the value of its shares. A few days before the deadline of 30 June 2012, at the shareholders' annual ordinary meeting, the shareholders demanded to know the bank's shortfall for its recapitalisation. The atmosphere at the meeting was described as 'explosive', because if it turned out that the bank could not cover the shortfall, this would lead to state support and to a reduction of the value of its shares. The appellant responded to the shareholders' questions claiming that the deficit was €200 million, which would be covered by the bank and that 'there was no reason for concern'. It turned out that the appellant's statement regarding the bank's shortfall was inaccurate; the real shortfall was at least €280 million and was expected to rise further. On the day following the shareholders' meeting, the appellant drafted and signed a statement estimating the capital shortfall at €400.

Both the bank and its senior executive director were charged and convicted under national law on market manipulation,<sup>74</sup> which purports to transpose EU legislation on market abuse,<sup>75</sup> for knowingly disseminating misleading information about the bank's capital shortfall, which was closely connected to the value of the shares. The appellant was sentenced to two and a half years in jail and the bank was fined €120,000.

They appealed their conviction on a number of grounds, including the principle of *lex mitior* as enshrined in Article 15(1) of the International Covenant on Civil and Political Rights, recognised in the CJEU ruling in *Silvio Berlusconi et al*<sup>76</sup> and codified in Article 49(1) of the Charter. The appellant argued that the lower court had applied the 2005 law on market manipulation, however this law had meanwhile been replaced by a subsequent law in 2016 which is more favourable to him. The 2005 law had transposed the Market Abuse Directive (MAD) which gave the member states discretion to decide whether to introduce criminal sanctions. Cyprus exercised this option and did introduce criminal sanctions, which were embodied in the 2005 law. In 2014, a new Directive was adopted, namely 2014/57, known as MAD II in combination with Regulation

74 Cyprus, Law on the actions of persons in possession of confidential information and on actions of market manipulation (market abuse) of 2005 [Ο περί Πράξεων Προσώπων που Κατέχουν Εμπιστευτικές Πληροφορίες και των Πράξεων Χειραγώγησης της Αγοράς (Κατάχρηση Αγοράς) Νόμος του 2005], N. 116(I)/2005, available at [http://cylaw.org/nomoi/arith/2005\\_1\\_116.pdf](http://cylaw.org/nomoi/arith/2005_1_116.pdf).

75 Directive 2003/6/EEC, Directive 2003/124/EC, 2003/125/EC, Directive 2004/72/EC and Regulation 2273/2003.

76 CJEU, Joined cases C-387/02, C-391/02 and C-403/02, Criminal proceedings against Silvio Berlusconi et al., 3 May 2005.



596/2014. In order to transpose the new legal order of the EU, in 2016 the national law of 2005 was replaced with the new law transposing MAD II,<sup>77</sup> which introduced additional criteria in order for an act to be classified as criminal market manipulation: the act must have been committed with intent; the case must be serious, including having a serious impact on the integrity of the market; and, the dissemination of the information must be aimed at deriving a personal benefit. The appellant argued that the criteria introduced by the 2016 law were not met in his case and therefore his conviction had to be quashed.

The issue at stake here was whether the principle of *lex mitior* may extend beyond the confines of the imposition of the penalty in order to reverse a Trial Court decision which had convicted the appellant of a criminal offence. The appellant argued that under the 2016 law, which was adopted four years after he had made the misleading statement to the shareholders, the criminal offence for which he was convicted could not be established, as the prerequisites of the 2016 law were not met. The Court did not endorse the appellant's argument that the principle of *lex mitior* extends beyond the penalty to cover the entire criminal classification of the act. Instead, it found that neither Article 49 of the EU Charter nor Article 7 of the ECHR was interpreted as meaning that *lex mitior* could be used to annul a criminal offence except where this is explicitly provided for in the law.

The principle of *lex mitior* acquires retrospective force as far as the penalty is concerned, leading to the conclusion that the lesser penalty, foreseen in the 2016 law, may be imposed even if the offence took place in 2012. In support of this conclusion, the Court also cited Article 15(1) of the International Covenant of Civil and Political Rights, which was ratified in 1969; the interpretation of Article 49(1) of the EU Charter offered by the CJEU in the *Berlusconi* case,<sup>78</sup> the interpretation of Article 7 of the ECHR, offered by the ECtHR in the *Scoppola* case, which had established that the state's failure to grant the applicant the benefit of a more lenient penalty, foreseen in a law which had come into force after the commission of the offence, amounted to a violation of Article 7(1) of the ECHR;<sup>79</sup> and the interpretation of Article 29(1) of the EU Charter offered by the CJEU in the *Berlusconi* case.<sup>80</sup>

Nevertheless, although rejecting the argument that the conviction should be

77 Cyprus, Law on market manipulation of 2016 (Ο περί Κατάχρησης της Αγοράς Νόμος του 2016) Ν. 102(I)/2016, available at [www.cylaw.org/nomoi/arith/2016\\_1\\_102.pdf](http://www.cylaw.org/nomoi/arith/2016_1_102.pdf).

78 CJEU, Joined cases C-387/02, C-391/02 and C-403/02, Criminal proceedings against Silvio Berlusconi et al., 3 May 2005.

79 European Court of Human Rights, available at <https://hudoc.echr.coe.int/eng#%7B%22mdocnumber%22:%5B%22853866%22%2C%22itemid%22:%5B%22001-94135%22%5D%7D>.

80 CJEU, Joined cases C-387/02, C-391/02 and C-403/02, Criminal proceedings against *Silvio Berlusconi et al.*, 3 May 2005.

quashed on the basis of the *lex mitior* principle, the Court found another ground for quashing the conviction, which had not been invoked by the appellant. It concluded that the appellant's action lacked the subjective element of a guilty conscience, known in law as *mens rea*, as his statement before the shareholders was not intended to manipulate the market but rather to respond to pressing questions put to him in the context of an explosive environment. The Court found that the appellant's statements were intended to appease everyone and especially the shareholders in order to avoid negative reactions or market repercussions. Therefore, although the statement was knowingly false and misleading, it was not intended to manipulate the market. The Court allowed the appeal and quashed the appellant's conviction.

The decision was endorsed by two of the three judges on the bench. The third judge delivered a dissenting opinion, disagreeing with the other two judges on the lack of *mens rea*. Instead, the dissenting judge found that the appellant's statement to the shareholders was intentionally misleading and specifically intended to manipulate the market projecting inaccurate data intentionally presented as accurate. The decision established that convicted persons may benefit from a more lenient penalty foreseen in a law adopted subsequent to the commission of the act for which they were convicted, but a subsequent law may not be used to overturn a criminal conviction unless its text explicitly provides for it. Given that the UN Covenant on Civil and Political Rights was used in the judgement as an additional and alternative source of the same principle, then this applies also to convictions relying on laws which do not necessarily transpose the EU *acquis*.

### **A Public Law Encounter with Labour and Austerity: Exception for Judges to Necessity Arguments**

In *Alexandros Phylaktou versus the Republic of Cyprus*,<sup>81</sup> the Supreme Court ruled that the Law imposing pay cuts on judges in the effort to save the economy was contrary to the Constitution; the 'doctrine of necessity' cannot be invoked. The majority of district court judges had filed appeals citing Article 158.3 of the Constitution, which states that 'the remuneration and other conditions of service of any such judge shall not be altered to his disadvantage after his appointment'; however, many judges subsequently withdrew their claims.<sup>82</sup> The cuts were imposed by two laws.<sup>83</sup> It is noteworthy

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81 Α. Φυλακτού, *Επαρχιακό Δικαστήριο Πάφου και Κυπριακής Δημοκρατίας, μέσω Γενικού Λογιστή Υπόθ. 397/2012397/2012 και 480/2012*.

82 From the 84 appeals initially filed, 47 were later withdrawn 'in light of the deterioration of the state's general financial condition without however, the applicants accepting the legality of the contested decisions.'

83 By *The Special Contribution Officers Employees and Pensioners of the State and Public Sector Laws* (i.e. Ν.112(Ι)/2011) [Ο περί Έκτακτης Εισφοράς Αξιωματούχων Εργοδοτούμενων και Συνταξιούχων της

that law N.112(I)/2011 (dated 31.8.2011) had originally exempted members of the judiciary, the President and members of the Supreme Court, *inter alia*; however, judges were subsequently included on the basis of N.191(I)/2011 dated 30.12.2011. Law 193(I)/2011<sup>84</sup> provides for various pay cuts introduced as a result of the austerity package. Art. 3 of Law 112(I)/2011 provides for monthly pay cuts of officers and employees as an extraordinary contribution, whilst Law 113(I)/2011 provides for 3% monthly pay cuts of the employee's salary; Art. 5 provides for an additional 2% deduction of social insurance, despite previous laws or regulations.

In its decision, the Supreme Court considered that it was undisputed that 'the object of the article was to safeguard the independence of the judiciary as well as the separation of powers', and the matter could not be construed as a matter of equal treatment. The Court rejected pleas from the attorney general, who argued that given the country's imminent economic collapse and the imposition of pay cuts on all public servants, by exempting judges from pay cuts, the Supreme Court would be making an untimely and grave error in failing to appreciate the dire economic reality the country is facing. In his initial submission, which he subsequently retracted, the attorney general argued that any decision would directly affect the judges' interests and, given that there was no other Constitutional provision for the Supreme Court judges, they ought to be excluded from the case as adjudicators with personal interest, and adjudication amounts to a violation of the principle of natural justice, according to which *no one* should be a *judge in their own cause*. It was not a claim of personal bias from the judges, but from the point that justice should be seen to be done, he alleged. The court's rejection of the attorney general's arguments was outright devastating.<sup>85</sup> Such reduction could only be imposed through taxation that indirectly affected remuneration – the tax should be enforced across the board without discrimination.

The judgment is one of the most important decisions of the Cypriot Supreme Court so far that is related to the economic crisis and the austerity-driven policies imposed by the troika and agreed upon with the Cypriot authorities. The case brings out a number of aspects of as a global and European crisis, as legalised, localised and socially embedded in the Republic of Cyprus context. The subject matter cannot remain as exclusive to the specific situation in Cyprus, but must be placed within the

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Κρατικής Υπηρεσίας και του Ευρύτερου Δημόσιου Τομέα Νόμων, N.112(I)/2011 και 193(I)/2011] and *The Pension Benefits for Government Employees and Employees of Public Sector including Local Authorities (Provisions of General Application) Laws* (i.e. N.113(I)/2011) [περί Συνταξιοδοτικών Ωφελημάτων Κρατικών Υπαλλήλων και Υπαλλήλων του Ευρύτερου Δημόσιου Τομέα περιλαμβανομένων και των Αρχών Τοπικής Αυτοδιοίκησης (Διατάξεις Γενικής Εφαρμογής) Νόμων, N.113(I)/2011 και 191(I)/2011].

84 Published in the *Cyprus Gazette* on 30 December 2011.

85 The court considered the attorney general's arguments were emotional but 'poor in legal arguments'.

broader European and global debates over the crisis of welfare.

This must be placed in a wider context: it is an instance with its own particularities of a global phenomenon. Since neoliberalism became the orthodoxy we have witnessed the receding of labour law and the welfare state as the social functions of the state have been howling out, it is claimed that these days there is little ‘sensitivity over the economic and class dimension of social conflicts’, and what before was ‘an aspect inscribed in constitutional, administrative and public policy instruments’ which had imbued European constitutions with ‘a powerful passion of the second post-war period’.<sup>86</sup> By the same token, the very notion of ‘the value of labour’ appears to be losing the central role it had once occupied in those constitutions’, to the extent that was ‘stably still connected with the model of democracy’.<sup>87</sup> Other scholars remark on how hollow the post-Second World War social democratic and welfare state settlement resonates today, which perceived the first function of labour law<sup>88</sup> as being ‘to provide the basic conditions for effective political participation’.<sup>89</sup> Particularly, before the current economic (and multiple) crisis, it is a near consensus amongst public law and political philosophy scholars that the receding of labour law, hence ‘sensitivity over the economic and class dimension of social conflicts is reduced’, an aspect inscribed in constitutional, administrative and public policy instruments which had imbued European constitutions with ‘a powerful passion of the second post-war period’. This was explicitly connected to the ‘fiscal crisis of the state’, which as very much based on the doctrine reflecting a wider cultural setting where the private sector was prioritised and seen as superior and more efficient, once ‘freed from the chains of an excessively interventionist public sector’.<sup>90</sup> This process has intensified with the current crisis, particularly in the context of the EU’s austerity-stricken periphery, such as Cyprus. The welfare and social rights are eroded, as provided by the successive Memoranda of Understandings with the troika and approved by the Governments and to some extent national Parliaments. A revised version of the Memorandum was recently agreed upon

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86 See P. Ridola, *Ta θεμελιώδη δικαιώματα στην ιστορική εξέλιξη του συνταγματισμού*, eds Ch. Anthopoulos and Ch. Akrivopoulou (Athens: Papazisis, 2010), 122.

87 *Ibid.*, 122. Ridola cites art. 1 of the Italian Constitution as an example of this.

88 The likes of H. Laski, *The Grammar of Politics* (Allen and Unwin) for instance is specifically referred to. However this was the logic of the welfare state since Beveridge (see C. Skidmore MP, *A New Beveridge: 70 years on - refounding the 21st century welfare state*, available at <http://chrisiskidmoremp.files.wordpress.com/2012/11/beveridge2.pdf>), the entire Western European post-war welfare regime and in some ways the post-Roosevelt USA.

89 E. Christodoulides (2007) ‘Against substitution: the constitutional thinking of dissensus’, in *The Paradox of The Constitutionalism, Constituent Power and Constitutional Form*, eds M. Loughlin and N. Walker (Oxford: Oxford University Press, 2007), 199.

90 Ridola, *Ta θεμελιώδη δικαιώματα στην ιστορική εξέλιξη του συνταγματισμού*, 122.

in Cyprus with the Government:<sup>91</sup> very much in mould of the IMF traditions of ‘tied aid’ and ‘structural adjustment programs’, the release of the bailout funds agreed is tied to the progress in the implementation.

A summary of the Court’s decision arguments is the following. Firstly, the Court considered that principles underwritten in the Constitution cannot be undone without the Supreme Court’s close scrutiny and supervision; the Court had no doubt that the reason the drafters of the Constitution inserted Article 158.3, safeguarding both the independence and impartiality of the judiciary as well as the separation of powers, which is in any case disseminated widely throughout the Constitution.<sup>92</sup> Secondly, the Court decided that judicial independence and the separation of powers is above other political concerns; however, how a pay cut in the salary and benefits of judges, when everyone’s pay is being cut, would undermine judicial independence was never discussed in the case. The issue of judges’ remuneration and how constitutional principles are affected is not unique to Cyprus. The Cypriot Supreme Court cited the US Constitution, which has a similar provision to the Cypriot Constitution, and extensively discussed the two landmark cases<sup>93</sup> which dealt with the subject. Also, it cited the recent decision of the Constitutional Court of the Republic of Latvia.<sup>94</sup> The Court quoted the following excerpt from the *Hatter* case:

We also agree with *Evans* insofar as it holds that the Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge/s pay, say, by ordering a lower salary. 253 U.S., at 254. Otherwise a legislature could circumvent even the most basic Compensation Clause protection by enacting a discriminatory tax law, for example, that precisely but indirectly achieved the forbidden effect.

Thirdly, the Court rejected outright the attorney general’s arguments that the decision would affect their immediate and direct interests, therefore judges should not have made such claims in the first place and, in any case, the Court ought to decline to deal with the subject. In addition, given the dire economic climate, judges themselves should voluntary contribute as per everyone else. Moreover, justice would be damaged irrevocably, no matter the outcome of the case. The Court went on the offensive and cited case law in Cyprus which illustrates how the Court had managed and regulated the affairs of judges with caution in the past.<sup>95</sup>

Fourthly, if there was imperative necessity, surely, the Court reasoned, the small

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91 Full Text of the Memorandum of Understanding with the troika (Cyprus News Agency, 2012, November 30), available at <http://www.cna.org.cy/webnews-en.aspx?a=06c552055fc54f508d6581b91d5bdbcc>.

92 As the Court asserted in the case of *Laoutas v. The Republic*, 48.

93 *United States v Hatter* 532 U.S. 557 (2001) and *Evans v. Gore*, 253 U.S. 245 (1920).

94 Case No. 2009-11-01, dated 18 January 2010.

95 *Λαούτας v Κοπριανής Δημοκρατίας* (2001) 2 ΑΑΔ.

numbers of judges allows for such an exception. After the decision, those who held the view that ‘whilst children are hungry, judges are not accepting pay cuts’<sup>96</sup> may feel vindicated by this argument: the cynical view is that the decision is a reflection of the interests of a small privileged group anxious to defend their privileges, whilst there is increase in unemployment and poverty for the rest. The Court quoted Lord Dyson in *R. V. Abu Hamza* stating their decision may be unpopular and may be disliked by the public and the state, however ‘as Judges, we can and should do only one thing, ignoring all else, and this is to administer the law whatever the consequences’.<sup>97</sup>

Remarkably, what is missing from the decision is any reference to the crucial question relating to the status of judges, not only as *holders of office* but also as *employees*, particularly given the CJEU’s decision in *O’Brien v. Ministry of Justice (2012) Case C393/10*, in response to a reference from the United Kingdom’s Supreme Court. A part-time judge claimed that he had been discriminated against on the grounds that he was not entitled to a pro-rata judicial pension on retirement as he was a fee paid part-time judge. But he claimed he should be entitled to the same pension as full-time judges and salaried part-time judges.<sup>98</sup> At least one of the matters referred to by the Court of Appeal is relevant to the Cypriot case: *Are Judges ‘workers’ according to EU law?* The British court ruled that ‘judicial office partakes of most of the characteristics of employment’ (Para. 27); however, it refused to rule conclusively on the subject, saying it is not possible for domestic law to be ‘readily disentangled from EU law’. Therefore, it referred the matter to the CJEU. The relevant question is:

Whether it was for national law to determine whether or not judges as a whole are ‘workers who have an employment contract or employment relationship’ within the meaning of clause 2 (1) of the Framework Agreement, or whether there was a European Community norm by which this matter must be determined.<sup>99</sup>

The CJEU at (paragraph 41) then held:

[T]he sole fact that judges are treated as judicial office holders is insufficient to deny them rights under the European legislation.

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96 See ‘Κληριδης v. Δικαστές: Παιδιά πεινούν και δικαστές δεν δέχονται αποκοπές’, *Alithia* (2013, March 12).

97 Not yet reported, April 2013.

98 Under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (‘the Regulations’).

99 The second question was ‘If judges are workers who have an employment contract or employment relationship within the meaning of clause 2 (1), whether it was permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions.’

This is also the position in English law as per Lord Nicholls [Para. 21]:<sup>100</sup>

If ‘office’ is given a broad meaning, holding an office and being an employee are not inconsistent. A person may hold an ‘office’ on the terms of, and pursuant to, a contract of employment.

However, what we are discussing in the current case is not the distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis and whether such a difference in treatment is justified by objective reasons. We know as a matter of law that *judges are also workers*. We are interested here in the broader question of *the rights and obligations of judges as workers or employees in EU and Cypriot law*. This matter has attracted significant attention throughout the globe.<sup>101</sup> The particular questions that the Court failed to address are the following:

- First, how the employment relationship/status of judges relates to their constitutional position and vis-à-vis other public sector employees, including holders of office. Are there any reasons that their specific constitutional position generates exceptions when it comes to austerity measures for all?
- Second, how does the fact that they are judges of their own affairs vis-à-vis other branches of Governance complicate or alter matters?

Administrative law scholars have dealt extensively with the question of the judge’s vicarious liability in tort, which as Wade and Forsyth point out ‘the relationship between the Crown and the judges is entirely unlike the relationship of employee and employer on which liability in tort is based’, given that ‘judicial independence is sacrosanct’.<sup>102</sup> Yet, *the employment relationship as such*, in terms of rights and obligations of judges *as workers*, remains underexplored, despite the more recent interest in the matter.<sup>103</sup>

There may be a more sympathetic approach, at least in part: the above absence may lend itself to another interpretation. The decision may be seen as displaced articulation of the right to decent standards of social welfare and labour, albeit limited to a privileged group of ‘workers’: a kind of ‘workers of a special type’, as uniquely defined by the constitutional principles. The Court decision can be construed as an attempt to halt the generalised logic of austerity, albeit for a narrow group, even if the

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100 *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28.

101 See for instance ‘A Comment On Justice Malcolm Wallis’s Paper, “Judges As Employees”’, JCA Colloquium, Fremantle, 6 October 2012, available at [http://www.jca.asn.au/colloquia/2012/Judges%20as%20Employees\\_commentary.pdf](http://www.jca.asn.au/colloquia/2012/Judges%20as%20Employees_commentary.pdf).

102 H.W.R. Wade and C.F. Forsyth, *Administrative Law* (Oxford: Clarendon Press, 1994), 830.

103 See for instance ‘A Comment On Justice Malcolm Wallis’s Paper, “Judges As Employees”’, which deals with the Australian context; E. Volokh, ‘Are Judges “Employees” Covered by State Antidiscrimination Law?’, *The Volokh Conspiracy* (2011, February 9), available at <http://www.volokh.com/2011/02/09/are-judges-employees-covered-by-state-antidiscrimination-law/>, which deals with the situation in the USA.

cynics have it their way that this is motivated by self-interest. If we are to believe the promise of the Lisbon Treaty to deliver a process to meet ‘the objective of gradual convergence inside a common “European administrative space”’,<sup>104</sup> then the Supreme Court decision can be interpreted as contributing to the creation of a multi-level governance in the form of a networked, multi-dimensional administrative law. The shadow of Cypriot and European Labour law encounters on the one hand *public law, both constitutional and administrative law*, and on the other what can be seen as *constitutionally inscribed social rights*, which are regulated by labour law and welfare law and social/public policy, in the era of financial crisis in the Eurozone, as manifested in Cyprus.

### **Conclusion: A General Critique of the States of Exception**

A genealogy of the ‘states of exception’ or other ‘necessity-related’ Schmittean ideas for suspending ‘normal’ rights and the rule of law illustrates their authoritarian core and lineages. The logic poses general dangers for democracy, ingrained with its usage within the current sovereignty debates. There is a trend in the jurisprudence and the praxis of governance that a critical approach cannot but decisively reject such vicious cycles of thinking that erode any notion of democratic rights and progressive politics. This is why beyond the legal critiques, one requires the political perspective, and hence, this author proposes an alternative Poulantzian schema that brings back to fore ‘authoritarian statism’.

Frankenberg provides a brilliant critical legal and sociology of law alternative by rejecting the Schmittean reactionary logic, which covers the space between extreme conservatism, Nazism and various authoritarian restoration approaches.<sup>105</sup> Frankenberg rightly argues that the ‘fascination with the exception’ and ‘preference for the extraordinary’ is an account which rests on rather soft foundations which is an oxymoron:<sup>106</sup> the logic of suspending the ‘norm’ of the legal-constitutional order as a necessity so that the norm is preserved and can be implemented after the erasure of the danger, is highly problematic. First, the whole fascination ends up in a mystification rather than providing a rational reading of the actual phenomenon of erosion of ‘rule-law’, as Frankenberg calls the Anglo-American ‘*rule of law*’, the German *Rechtsstaat* and the French *L’État de droit*. Second, once the legal order is suspended, it can never generate the same level of trust. Third, the suspension of the legal normality undermines the very foundations of its validity, even when the decision-maker of the state of exception revokes the suspension, as the old order resurrected is in reality

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104 See C. Harlow, ‘Three phases in the evolution of EU administrative law’, in *The Evolution of EU Law*, eds P. Craig and G. de Burca (Oxford: Oxford University Press, 2011).

105 Frankenberg, *Political Technology*.

106 *Ibid.*, 114.



‘merely a zombie’.<sup>107</sup> Fourth, once imposing a regime of emergency powers as rule, there is ‘a permanent alteration, always in the direction of an aggrandizement of the power of the state’. Once regimes of exception and emergency de facto suspend rights, they unleash broader and sociological implications and longer-term consequences on the sociolegal and political settings. They set in motion social processes that extend and proliferate the same regimes well beyond the populations they are supposed to be intended for, in other situations and for times well beyond those initially declared or planned for.

Political technology is a method that permeates the legal interventions and the exercise of political power that goes to the heart of ‘good governance’ and ‘statecraft’. This is highly relevant to migration and border regimes as particular ‘states of exception’. In Frankenberg, political technology, or its German original *Staatstechnik*, does not extend the argument to migration and border regimes of exception but the approach has an excellent application. Foucault’s ‘governmentability’ is the key influence on Frankenberg, who augments the Foucauldian notion of technology and applies it in a legal-constitutional and sociology of law setting. Frankenberg reads political technology as a method that ‘stresses statehood as a sphere activity and intervention for intersecting goals and operative strategies’, and law as a ‘form of intervention and basis of authority in the exercise of power’.<sup>108</sup> This is broad ‘techniques of government’ that encompass ‘the various mechanisms and measures of governing’ covering areas beyond the public sector, agencies and networks now operating in the private sector and civil society, including emerging areas loci and practices of exercise of power.<sup>109</sup> Four ideal types as methods for the exercise of power are identified, which bundle together various thinkers to illustrate the normalisation of states of exception with particular application to the justification of torture and combating terrorism. Frankenberg examines in depth the realm of sociology proper by formulating four ideal types of ‘political technology as mindsets’, to read them as ‘the mentality of engineers’. This captures the political technicians operating, i.e. thinking and acting as ‘engineers’ who ‘show primarily a technical interest in and a utilitarian and instrumentalist understanding of the exercise of power’.<sup>110</sup> statecraft is perceived as an instrumentalist ‘efficient and up-to-date use of power’, as US Department of State’s ‘21<sup>st</sup> century Statecraft’ programme reveals. The key here is the supposedly ‘value neutrality’ and ‘legitimacy of expertise’, where legal evaluations and monitoring are avoided, concentrating instead on locating what is ‘technically

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107 Ibid., 114.

108 Frankenberg, *Political Technology*, 1.

109 Ibid., x.

110 Frankenberg, *Political Technology*, 5.

feasible’, the ‘functionality and success’. In the engineers’ ‘ideology’, as aptly described by Frankenberg:<sup>111</sup>

Success is measured by the effective functioning of institutions and efficient implementation of policies; it can be assessed via the discrepancy between the defined and achieved goals as well as the ratio of costs and benefits of, for instance, sweeping surveillance measures, brutal interrogation methods or the military intervention in Iraq.

In this context, the engineer’s mentality is ‘little bothered by institutional or legal constraints, civil rights or proportionality’, as ‘public engineers’ consider that they are authorised to act and derive their ‘mandate from a superior good, their supposedly superior knowledge and technical expertise’.<sup>112</sup> In this context there is a flexible exercise of power, often delegated to private agencies to deliver, but often it is not specially empowered by law. Yet they are operating ‘in the shadow of hierarchy’, where the new public-private partnerships between state, supra-state agencies, private companies and NGOs are blurring the distinctions between legality and informality, ‘because it is always possible to fall back on the imperative arsenal of steering instruments in case of informal cooperation fails’.<sup>113</sup> Discretion is extended and stretched to the limit, but at the same time we have ‘a shift from prevention to pre-emptive measure or “hyper-prevention”’.<sup>114</sup> We can see this mindset underlying the operation of hot spots, where identification and security issues are at play for the so-called ‘mixed migration’ populations.

Frankenberg’s sociology of law is based on a re-reading of four ideal type methods of the exercise of power: First, ‘the method Machiavelli’. Of course there are issues with the construction of Machiavelli, who has been falsely equated with manipulative intrigues, even in Shakespearian times, when Machiavelli was equated with the devil. We find the usage of *method Machiavelli* in instances of invoking a state of exception, in what Frankenberg describes as a ‘camouflage’ of ‘pseudo-democratic’ or ‘pseudo-legalistic masquerades’,<sup>115</sup> which was the case when the European Central Bank Governor Mario Draghi argued that the ECB is ‘ready to do whatever it takes to save the euro’. The second is ‘*method Hobbes*’, where state sovereignty becomes paramount, given that the state is designated as ‘a peace machine’, the *Leviathan*, which for the first time introduces *security* as the most important consideration in the calculation of political technology. The social contract is based on the subject’s waiver of rights to

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111 Ibid.

112 Ibid., 6.

113 Ibid., 8.

114 Ibid., 9.

115 Frankenberg, *Political Technology*, 13.

the ruler to secure internal and external peace. Frankenberg considers Hobbes to be ‘the father of security’ but considers it unfair to reduce his work when designated as ‘the godfather of the preventive security state’.<sup>116</sup> In contrast to the *method Machiavelli*, where all pivots around the ruler, i.e., the Prince, in the *method Hobbes*, we have a state technology where the ‘art of government’ is justified on the basis of the ‘mutual benefit of sovereign and subject’. He cites Hobbes’ *Elements of Law* as containing a ‘dual strategy’, i.e., the preservation of the state and the safety of people, which ‘can be read as a manual for the sovereign to prevent revolt’. The notion of the threat to security, internal and external, is the Leviathan’s key task, which has survived its author in the modern era more successfully than the *method Machiavelli* by thriving on the mistrust of one’s neighbour. Prone to this mistrust are ‘most conservative political philosophers and security policy-makers’, a practice observed ‘even in consolidated constitutional democracies’. Hence, ‘conservative security “engineers”’ or other self-declared ‘fixers’<sup>117</sup> would ‘constantly update the Hobbesian question of how political rule can be protected from dangerous individuals (*Gefahrder*), harmful elements and exuberant, untamed initiatives of the citizenry’.<sup>118</sup>

Frankenberg’s third type is the ‘*method Lock*’, which reorganises the key elements in a triplex ‘property, liberty and security’ without vanishing security as *topos*, but receding it to the background. Frankenberg argues that the same frame is shared by other major Western philosophers, such as Montesquieu, Kant, Sieyes and Mills, in what he calls ‘the liberal moment’ constituted on the logic of a social contract.<sup>119</sup> This is because the liberal paradigm contains within it a twin logic of the ordinary and the exception. The *logic of the ordinary*, the norm, legally regulating the state of freedom, is constituted on the notions of Parliamentary sovereignty, limited government and fundamental rights for citizens. However, the *logic of exception* is ‘the dark side of the paradigm’, which may not be the centerpiece of the liberal paradigm, but nonetheless is an essential element ‘still claimed to be legal’ which rests on the prerogative derived from the monarch’s untamed and unrestrained power. In *the method Lock*, ‘martial law and executive powers as explicit emergency powers’ are very much part of the design; in the democratic logic, this seems quite absurd, but practiced in the 19<sup>th</sup> and 20<sup>th</sup> centuries ‘[t]hey appear as deviations from regular law – or more precisely, as exceptions to the law – and indicate the illiberal woven into the fabric of the liberal paradigm and its political rational’.<sup>120</sup> We find the development of a variant of the *method Lock* which has the

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116 Ibid., 16-17.

117 Sitas, 2014.

118 Frankenberg, *Political Technology*, 17.

119 Ibid., 18.

120 Frankenberg, *Political Technology*, 20.

Hobbesian security logic emerging as fallback in crisis situations.

Finally, *‘the method Foucault’*, according to Frankenberg breaks with the previous traditions by refusing to enter the terrain of legitimation and justifying the use of power and its limits. Instead, strategies and mechanisms, the technologies and ‘microphysics’ of power are analysed in the Foucauldian dispositive, which entails the heterogeneous ensemble of discourses and institutions, legislative rules and administrative measures, disciplinary techniques and practices.<sup>121</sup> This is a logic inscribed by seeking ‘to extract time and labour out of bodies rather than goods and services’: this is a method based on the mechanism for ‘continued monitoring, control and registration as well as discontinuously via the tax system and recurring obligations to pay charges and provide service’. In the Foucauldian world, society is enmeshed and soaked in power, the notion or relational power, hence there is a dissolution of sovereignty ‘into various manifestations of disciplinary power. Foucault, unlike Schmitt’s binary logic of defining the extraordinary situation vis-à-vis the enemy, is based on justifying and covering up ‘their extra-legal character’ which ‘ought not appear arbitrary or an abuse of power’, appearing as ‘an expression of care’: ‘this ubiquitous care is the face that the state exposes to its citizens’.<sup>122</sup> After all, rights, in Foucault, are results of ‘struggles for life’ of living bodies: ‘It was life more than the law that became the issue of political struggles, even if the latter were formulated through affirmations concerning rights’.<sup>123</sup>

Frankenberg’s contribution to overcoming the Schmittean-Agambean schema not only allows us to read sociologically and critically the proliferation of the European states of exception as erosion of the rule-law, but to transcend its very logic. There is a second important contribution of Frankenberg’s argument pertinent to transcending the Schmittean exceptionalism cul-de-sac that serves as apologetic of the ruler’s decisionism. Frankenberg’s core argument is that in the so-called state of exception is essentially the justification of the erosion of the rule of law in the way ‘the war on terror, organised crime and other targets has been normalised, the extraordinary has been reduced to a phenomenon of the everyday and even the taboo of torture has been breached upon – also under the cover of rule-law’.<sup>124</sup> The difference between Frankenberg and the Schmitt-Agamben-Arendt approach is another important aspect of the dissensus argument made in this book. There is a divide, a fundamental disagreement, a contestation as to the very logic of *what rule-law is about*. There is ambivalence over *what exactly constitutes rule-law*, the boundaries of rule-law (i.e., what is ‘in’ and what is ‘outside’ its remit), how to define, read and more importantly, what terms

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121 Ibid., 20-21.

122 Ibid., Foucault quoted by Frankenberg, 24.

123 Ibid., Foucault quoted by Frankenberg, 20-21.

124 Ibid., Foucault quoted by Frankenberg.

do we use to ‘defend democratic legitimacy against the phantasies of the extraordinary threats and extraordinary practices of power’.<sup>125</sup> Hence, we have the importance of dispelling the Schmittean ‘romance’ and ‘mystification’ of exception, which is shared by ‘latter days Schmitteans’ of different political and ideological persuasions. Even committed liberal democrats, such as Hans Kelsen, who vehemently opposed Schmitt’s reading, are prone to the same security-locked logics in the ‘Grundnorm’, or ‘the Basic Norm’, in Kelsen’s *Pure Theory of Law*, which essentially allows for the erosion of rule-law.<sup>126</sup> Frankenberg convincingly argues that his approach ‘prepared the transition from method Hobbes to method Lock’.<sup>127</sup> Legal positivists, such as Kelsen, with their apolitical ideology of law, not only replaced societal legitimation of law to adherence to a formalist self-mandating of the state itself but have developed legal schemas essentially operating as apologetics for state acts legitimised by the state itself.<sup>128</sup> The legitimising of authoritarian states of exceptions, which take us back to the Leviathan, is very much a manifestation of this.

Nation-states define their policies pertaining to security, migration and crime-control as requiring wide discretion as part of the executive prerogative and as a manifestation of the sovereignty of the state. The invocation of ‘exceptional’ and ‘emergency’ circumstances blurs the distinctions between ‘legality’ and ‘illegality’, and ‘normality’ and ‘abnormality’. It opens up opportunities for those in power to extend their discretion, which is part of *authoritarian statism*.<sup>129</sup> The alternative, which is a conservative and outright reactionary schema, was offered by Schmitt, who underlined, long established regimes of exception that allow the sovereign to decide *when* and *how* to invoke the emergency situation.<sup>130</sup> In emergency situations, the normal democratic order and rights are suspended, and power is exercised by the very forces who determine that it is an emergency situation and how long this would last. They may decide that this will last indefinitely.

However, the Schmittean-Agambean schema cannot capture the migration regimes which are generic, rather permanent and vary immensely from favourable treatment for some categories of immigrants, whilst being draconian and exclusivists

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125 Frankenberg, *Political Technology*, x.

126 H. Kelsen, *Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 1967); *General Theory of Norms*, trans. M. Hartney (Oxford: Oxford University Press, 1991); ‘The Concept of the Legal Order’, *American Journal of Jurisprudence*, Vol. 27, No. 1 Article 6, available at: <https://scholarship.law.nd.edu/ajj/vol27/iss1/6>.

127 Frankenberg, *Political Technology*, 74.

128 C. Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (Cambridge: Cambridge University Press, 2018), 66-77.

129 N. Poulantzas, *State, Power, Socialism* (London: Verso, 1980).

130 Schmitt, *Political Theology*.

for others. Thus, we ought to dispel some of the common assumptions about the state of exception. The ‘balancing act’ between ‘liberty’ and ‘security’, the constitutional device Courts are supposed to utilise in order to protect liberty is but a myth, as Neocleous persuasively illustrates rather provocatively that ‘liberalism’s key category is not liberty, but security’.<sup>131</sup> For modern liberal states, even the Lockean ‘liberal’ alternative to the Hobbesian insecure world is *always* subordinated to security. The ‘prerogative’ granted to the rulers means ‘powers which are legally indeterminate at best’ or ‘at worst, prerogative serves to place rulers beyond law’. Since the days of John Locke it was illustrated that when the maxim ‘*Salus Populi Suprema Lex*’ (the safety of the people is the supreme law) is invoked, then the praxis of the ruler is magically legitimised: ‘The Prerogative is certainly so just and fundamental a Rule that he who sincerely follows it, cannot dangerously err’.<sup>132</sup> In other words, prerogative ‘is, and always will be just so long as it is exercised in the interest of the people.’ Thus, there is generic tension in all ‘liberal’ and ‘illiberal’ states, which is located in the methods of governance, as elaborated by Frankenberg.<sup>133</sup>

This critique is pertinent in developing further the critique of the Cypriot states of exception. In this sense, the proliferation of Cypriot states of exception is a manifestation of a broader Cyprus Problem. Hence, the erosion of fundamental rights as collateral damage of the Cyprus Problem. Therefore, the point is to eradicate the Cypriot states of exception, but it will require that we resolve the Cyprus Problem first.

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131 M. Neocleous, ‘Security, liberty and the myth of balance: Towards a critique of security politics’, *Contemporary Political Theory* 6 (2007). Also see M. Neocleous and G. Rizakos, ‘Anti-security: A Declaration’, in *Anti-Security*, eds by M. Neocleous and G. Rigakos (Ottawa: Red Quill Books, 2011).

132 J. Locke, *Two Treatises of Government* (1690) (Cambridge: Cambridge University Press, 1988), 373–375, 377, 405.

133 Frankenberg, *Political Technology*.

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