The Doctrine of Necessity in Constitutional Law

Constantios Kombos
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In his monograph, *The doctrine of necessity in Constitutional Law*, Constantinos Kombos approaches a classic issue in Cypriot law. There is no doubt that the doctrine of necessity represents the most characteristic aspect of the idiosyncrasy of constitutional law in the Cypriot legal order. The deep concern to safeguard constitutional law under the specific historic circumstances in Cyprus had led to a judicial commitment on interpreting the constitutional provisions so as to ensure the functional continuity of the State. In other words, the self-preservation and continuation of the State, as well as the pressing need to find solutions for situations which had not been taken into consideration or foreseen by those who had drafted the constitutional text, led the legal praxis to develop the doctrine of necessity.

Since 16 August 1960, the Republic of Cyprus was established as an independent and sovereign state and obtained a constitution which was a result of major compromises, not really reflecting the free will of people living on the island.[1] Although the constitutional provisions were supposed to form a sovereign state, in fact, this was not exact: the United Kingdom, Greece and Turkey disposed remarkable authority of intervention in Cyprus. As a result of the violent disturbances between the Greek and Turkish communities in 1963 – armed conflicts, extensive damage to property, victims on both sides and rebellion against the established government – the two highest tribunals of the Republic, the Supreme Constitutional Court and the High Court, had become inoperative: the President of the Supreme Court resigned and the Turkish judges vacated their offices. In view of the aforementioned situation the dilemma was existential: 'to follow the letter of the Constitution or to resort to the only constitutional alternative that would enable the functioning of the State until a political compromise was reached'.[2] Under this pressure for the survival of the Republic, the

1 As Professor A.C. Emilianides underlines: 'undoubtedly one of the most rigid and detailed constitutions of the world', cf in 'Accession of the Republic of Cyprus to the EU, the Constitution and the Cypriot doctrine of necessity', http://www.academia.edu/4050764/Accession_of_the_Republic_of_Cyprus_to_the_EU_the_Constitution_and_the_Cypriot_Doctrine_of_Necessity.

2 C. Kombos, *Report on Cypriot constitutional law*, (2016), available at http://www.iconnectblog.com/2017/12/developments-in-cypriot-constitutional-law-the-year-2016-in-review.

House of Representatives proceeded, in the absence of Turkish Cypriot members, to adopt Law 33/64 on the *Administration of Justice (Miscellaneous Provisions)*. According to this law, the Supreme Constitutional Court and the High Court, provided in the Constitution as appellate courts, were merged into a new court: the Supreme Court.

The constitutionality of this law had been examined in the landmark judgment *Mustafa Ibrahim*. The legal doctrine of necessity was invoked to justify the compatibility of the law in question with the constitutional order as follows: 'The legal doctrine of necessity is in reality the acceptance of necessity as a source of authority for acting in a manner not regulated by law but required, in prevailing circumstances, by supreme public interest, for the salvation of the State and its people'.[3]

According to the Court, the crucial prerequisites for the application of the doctrine of necessity are the following: (a) an imperative and unavoidable need or exceptional threat against the existence of the State; (b) no other alternative or remedy; (c) the proportionality of the action adopted as to the exceptional situation; and, (d) the temporary character of the measure and its duration strictly for no longer than the emergency exists.

As Kombos points out, 'the *Ibrahim* judgment is an example of solid and thoughtful legal argumentation that can be regarded as the leading and most important contribution of the Cypriot legal system to legal science in general'.[4] In essence, the *Ibrahim* judgement emphasizes that a state could not pathetically 'sign' its self-destruction by admitting the insufficiency of its constitution. Moreover, it has been alleged that 'the doctrine of necessity is […] neither an extraconstitutional, nor a supraconstitutional principle; it is rather a constitutional principle per se, which indirectly forms a part of article 179 of the Constitution of the Republic of Cyprus. Thus, the doctrine of necessity should be considered to be an indispensable part of the constitutional order and the ultimate rule of recognition of the Republic of Cyprus'.[5]

In this context, the author of the present monograph, having the Cypriot paradigm of the doctrine of necessity at the epicenter of his study, seeks to establish a dialogue with the scientific community on the Cypriot experience. That is to say that Kombos insists on the comparative and outward looking approach of the national specificity and focuses on the substantial added value of such a theoretical framework. It is obvious that the Cypriot experience on the issue provides remarkable cases which are of great interest not only for the scholars but also for all those who are involved in the

3 *The Attorney General of the Republic v. Mustafa Ibrahim*, 1964, CLR 195.

4 Kombos, 6.

5 Emilianides, 'Accession of the Republic of Cyprus to the EU, the Constitution and the Cypriot doctrine of necessity'.

legal praxis (lawyers, judges, administration, etc.).

The book is divided into six chapters. In the first one, the author lines out the purpose of his study, as well as the methodological tools by which he intends to carry out his research. The second chapter treats the theoretical foundations of the doctrine of necessity, while the next one is devoted to the comparative approach of the question. In the fourth part, Kombos examines the historical constitutional circumstances which led to the tension and warlike situation between the two communities and finally to the collapse of the system. Then, a detailed analysis of all the aspects of the emblematic judgement *Ibrahim* is included in the fifth chapter. The next chapter 'scrutinises the subsequent application of *Ibrahim* to administrative acts that autonomously rely on the doctrine of necessity, to legislative enactments enabling the reformation of Organs of the State, to the application of the doctrine to fundamental rights and to the special case of constitutional amendments'.[6]

It would be useful to underline three undeniable merits of the present academic study:

(a) The author examines the evolution of the doctrine of necessity through its application by the courts. To this purpose, numerous decisions of the Supreme Court are identified in Kombo's analysis. The guiding authority of the judgement *Ibrahim* – not only on the level of national courts, but also, its impact on the international jurisprudence – proves the importance and the authenticity of the inspired solution as provided by this significant and well balanced decision. Although the international concept of law of necessity seems to be much more limited than the Cypriot case, the detailed analysis of the doctrine of necessity in Cypriot jurisprudence is still of great usefulness in general constitutional theory.

(b) Kombos tries to distinguish the doctrine of necessity from the doctrine of effectiveness. He clarifies that there is no doubt that both doctrines 'are placed on the verge of constitutional spectrum and this is a substantive realization that anyone must keep in mind when discussing their application. […] However, the real justification for the doctrine of effectiveness and the doctrine of necessity is to be found in pragmatism'.[7] Apart from this basic similarity, it must be taken into consideration that even if the doctrine of necessity could be regarded as part of the wider constitutional arsenal, it is not exactly the same for the doctrine of effectiveness. In other words, concerning the doctrine of effectiveness, it seems less certain that it could be also regarded as part of the same constitutional spectrum.

(c) As the doctrine of necessity is linked to exceptional circumstances and

6 In the author's words, cf. Kombos, 5.

7 Kombos, 240.

institutional abnormalities or political discontinuity, it is evident that an efficient system of checks and balances should be meticulously applied. To this purpose, the judicial review offers a reliable solution. That is to say, that through the power of the courts to examine the consistency of legislative or administrative acts with the constitution and the constitutional principles, the courts have always considerable discretion in appreciating the factual emergency of each case. In these terms, the intensity of judicial scrutiny seems to provide functional guarantees as far as the limits of the doctrine of necessity are concerned. On the other hand, it also keeps away the danger of abusive use of the doctrine of necessity which is crucial for such an exceptional legal concept.

Another remarkable contribution of the present monograph has to do with the author's critical approach as to the limits of the doctrine of necessity. More specifically, the doctrine of necessity, based on the old Roman law principle according to which '*salvus reipublicae suprema lex esto*', must be considered as an exceptional possibility for the state to protect itself from unforeseeable circumstances threatening its existence, or as a means of self-defense prevailing under boundary conditions. As a result of this, it is certain that the whole concept of necessity must be approached by the legal order with extreme caution and continual vigilance. To this purpose, it is mainly the judicial review that offers the most reliable guarantees. The power of the courts to examine whether administrative acts are consistent with the doctrine of necessity, or to examine whether the adoption of an act under the law of necessity is adequately reasoned, provides a safety net as far as the respect of the constitutional order is concerned. The intense judicial scrutiny responds to fears of abusive invocation of exceptional circumstances, justifying the application of the doctrine of necessity, and guarantees the courts' systematic control of the criteria related to the legal sense of 'necessity'.

However, Kombos does not hesitate to avoid that 'the required intensity of review was not present in an alarming and growing number of cases. The criteria of *Ibrahim* were often applied in an overlapping manner, while often there was considerable ease in attributing factual emergency to situations of mere expediency. This has been the most significant problem, since it creates a source for uncertainty and ambivalence as to the limits of the doctrine of necessity'.[8]

In this way, the author underlines the importance of strict, increased and methodical judicial control of the administrative decisions invoking the doctrine of necessity as an operative event of their adoption. Only such an approach can provide balanced solutions and prevent from exaggerations and superficial invocation of the concept of necessity.

8 Kombos, 247.

An additional contribution of Kombo's monograph consists in the emphatic way that the author approaches the role of constitutional principles in the interpretation and the durability of the constitution. There is no doubt that constitutional principles, as a substantial element of the legal structure, play a decisive role in the comprehension and the application of the constitutional rules. Their elasticity and adaptability usually lead to effective ways of safeguarding citizens' fundamental rights against dogmatic impasses and institutional embarrassments. From this point of view, Kombos elucidates the '"hidden" contribution of *Ibrahim* that is frequently ignored' as follows: '*Ibrahim* must be credited with the introduction of the principle of proportionality and with its unquestionable constitutionalisation."[9]

Finally, far from adopting an unrealistically optimistic stance, the monograph soberly examines and evaluates the impact of the doctrine of necessity in the history of institutions in the Cypriot law. For this reason and because '*Ibrahim* was the finest hour of the Cypriot judiciary despite the peripheral problems of the judgement',[10] Kombo's analysis is apparently of particular interest for those who insist on the merits of comparative law as *sine qua non* of any scientific legal approach.

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9 Kombos, 243.
10 Ibid., 13.