[VASSILIADES, TRIANTAFYLLIDES AND JOSEPHIDES, JJ.]

THE ATTORNEY-GENERAL OF THE REPUBLIC,

Appellant,

v.

MUSTAFA IBRAHIM AND OTHERS,

Respondents.

(*Criminal Appeals No.* 2729, 2734, 2735)

Constitutional Law—Constitution of the Republic—Doctrine of necessity—Constitution, Articles 153.1, 133.1, 146, 152, 159.1, 159.2, 155.3 *and* 179*—Administration of Justice* (*Miscellaneous Provisions*) *Law*, 1964, *sections* 3 (1), (2), 9, 11 *and* 12 vis-a-vis *such Articles—Necessity as a course of legislation.*

Constitutional Law—Promulgation and publication of Law—Articles 47 (*e*) *and* 52 *of the Constitution—Language of text of Law—Article* 3.1 *and* 2 *of the Constitution—Doctrine of necessity.*

Constitutional Law—Unconstitutional Laws etc.—Procedure for a reference under Article 144 *of the Constitution no longer applicable or necessary—Question of alleged unconstitutionality to be treated as issue of law and be subject to revision on appeal—In view of the provisions of the Administration of Justice, etc. Law*, 1964 (supra).

Administration of Justice (*Miscellaneous Provisions*) *Law*, 1964 (*Law* 33 *of* 1964)*—Sections* 3 (1) *and* (2), 9, 11 *and* 12 *validly enacted.*

Supreme Court—Court of Appeal—Quorum of three judges also competent to determine constitutional questions—Administration of Justice (*Miscellaneous Provisions*) *Law*, 1964, *section* 11 (1) *and* (3).

Criminal Procedure—Bail—Appeal by Attorney-General against order granting bail—Matters to be considered in granting bail—Interpretation of the phrase "if it thinks proper" in section 157 (1) *of the Criminal Procedure Law, Cap.* 155.

The above three appeals were filed by the Attorney-General of the Republic against decisions of District Judges granting bail to accused persons who had been committed for trial by Assizes. The accused persons in question are Turkish Cypriots and they are charged with offences of preparing war or warlike undertaking and of using armed force

against the Government, contrary to sections 40 and 41 of the Criminal Code, Cap. 154. Before the hearing on the merits of these appeals, counsel for respondents raised the following preliminary objections :

(1) that this court, as constituted, had no jurisdiction to hear the appeals as the provisions of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33 of 1964), setting up a Supreme Court, were contrary to the Constitution, that is to say :

(*a*) section 3 (1) and (2) was contrary to the provisions of Article 153.1 and 133.1 of the Constitution ;

(*b*) sections 9 and 11 were contrary to Articles 146 and 152 ;

(*c*) section 12 was contrary to Articles 159.1, 159.2 and 155.3 ; and

(*d*) section 15, read in conjunction with section 2, was contrary to Article 179 ;

(2) that the present composition of three judges of this court was only empowered to hear appeals and not questions of constitutionality of law, and that only the Full Bench of five was empowered to do so under the provisions of section 11 (1) of the aforesaid Law 33 of 1964 ;

(3) that the provisions of Article 144 of the Constitution were still applicable on matters of procedure and that the present composition of three Judges should refer the matter to the Full Bench for determination :

(4) that the said Law 33 of 1964 was not duly promulgated and published in accordance with the provisions of Articles 47 (*e*) and 52 of the Constitution ; and

(5) that Law 33 of 1964 was not published in Turkish in the official Gazette of the Republic, contrary to the provisions of Article 3.1 and 2, and that, consequently, that Law has not come into force.

The court gave its ruling in the above preliminary objections on the 8th October, 1964, (Ruling published post, at p. 199) and then, on the 10th November, 1964, the court proceeded and gave its reasons for such ruling. (*Vide* judgments published post, at p 200 *et. seq.*).

Held, (A) on the legal points raised by counsel for the respondents :

(1) Sections 3 (1) and (2), 9 and 11 of the Administration of Justice (Miscellaneous Provisions) Law, No. 33 of 1964,

have been challenged on behalf of the respondents as unconstitutional, have been validly enacted. The same applies to section 12 of the Law, which has also been challenged by learned counsel for the respondents, as an integral part of the system of the administration of justice set up by Law 33 of 1964.

(2) The wording of section 11.3, read together with subsections (1) and (2) of the same section, makes it abundantly clear that a division of three Judges duly nominated, as the present one, is fully authorised to hear an appeal, including constitutional matters, raised in the appeal.

(3) The procedure for reference under Article 144 of the Constitution, by all courts, to the Supreme Constitutional Court, is no longer applicable or necessary, as the provisions of that Article have been rendered inoperative owing to the non-functioning of the Supreme Constitutional Court and the merger of the jurisdictions vested in that Court and the High Court into the New Supreme Court established under the provisions of Law 33.

(4) Consequently, all questions of alleged unconstitutionality should be treated as issues of Law in the proceedings, subject to revision on appeal in due course, so far as the lower Courts are concerned. Where the question of unconstitutionality is raised in the course of an appeal, as in the present case, the matter may be decided by a quorum of three Judges of this court hearing the appeal, without reference to the Full Bench.

(5) Law 33 of 1964 was duly promulgated by publication in the official Gazette of the Republic in the Greek language and that it came into operation on the day of its publication in the Gazette, *viz.* on the 9th July, 1964.

(B) On whether the legal doctrine of necessity, should or should not, be read in the provisions of the written Constitution of Cyprus :

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 Republic of Cyprus. Our unaminous view, and unhesitating answer to this question, is in the affirmative.

(C) On the substance of the appeal (No. 2729) :

(1) The appeal of the Attorney-General against the order for bail, is allowed as it is obvious that in the circumstances appearing on the record of this case, and the conditions prevailing in the Island at the material time, as described in the judgments delivered, the order for bail should not have been made.

(2) There is ample precedent in this connection in Cyprus, especially during the last ten years. *Rodosthenous* v. *The Police* (1961) C.L.R. 50, followed repeatedly in subsequent cases, fully covers the question before us. Apart of the matters to be considered as set out in *Rodosthenous* case, when a person is charged with serious crime and the evidence against him before the committing court presents good reasons for which the accused should not be allowed to circulate at large amongst the community, pending his trial, the words " if it thinks proper " in the third line of section 157.1 of the Criminal Procedure Law, Cap. 155, should be given their full effect in considering an application for bail. In each case the matter must be decided judicially, in the particular circumstances of the case. And every such decision is subject to further consideration on appeal at the instance of either side. A speedy trial is always desirable in all cases ; but bail, only if the court " thinks it proper ", in the circumstances.

Appeal allowed. Order for bail set aside.

Cases referred to :

Rodosthenous, Lefkios and another v. *The Police* (1961), C.L.R. p. 50.

Vedat Ahmed Hasip v. *The Police* (Reported in this Volume at p. 48 ante ;)

Marbury v. *Madison*, decided by the United States Supreme Court in 1803; (Dowling, cases on Constitutional Law, 6th Ed. pp. 77–78).

Decision 566 *of* 1936 *of the Greek Council of State.* (Vol. 1936 A II p. 442).

Decision 601 *of* 1945 *of the Greek Council of State.* (Vol. 1945 B p. 464).

Decision 624 *of* 1945 *of the Greek Council of State.* (Vol. 1945 B p. 517).

Decision 86 *of* 1945 *of the Supreme Court of Greece.*

Decision 556 *of* 1945 *of the Greek Council of State.* (Vol. 1945 B p. 361).

Resolution of the Security Council of the United Nations of the 4th March, 1964 (S/5575).

Gompers v. *United States,* 233 U.S., 604, 610.

Missouri v. *Holland,* 252 U.S., 416, 433.

Syndicat national des chemin de fer de France, etc. (18th July, 1913, Rec. 875).

Heyries (C.E. 28 June 1918, Rec. 651).

Case No. 43 *of* 1919 *of the Supreme Court of Greece.*

Case No. 2 *of* 1945 *of the Greek Council of State.* ("Θέμις" (1945) Ν Στ.' (56), page 95, 99).

Case No. 13 *of* 1945 *of the Greek Council of State.*

Case No. 68 *of* 1945 *of the Greek Council of State.* ("Θέμις" 1945) Ν Στ.' (56), σελίς 135, 140).

Appeal.

Appeal by the Attorney-General of the Republic against the order of the District Courts of Kyrenia (Ilkay D.J. Cr. Appeal No. 2729) Paphos (Malyali D.J. Cr. Appeal No. 2734) and Limassol (Malyali D.J. Cr. Appeal No. 2735) whereby the respondents were released on bail pending their trial by the Assize Court upon completion of their Preliminary Inquiry into charges of carrying warlike undertaking without lawful authority against the Greek Community of Cyprus, contrary to sections 40 and 20 of the Criminal Code, Cap. 154, as amended by Law 3 of 1962.

Appellant Cr. G. Tornaritis, Attorney-General of the Republic, in person with *A. Frangos,* Counsel of the Republic.

A. M. Berberoglou, for the respondents.

The court, on the 8th October, 1964, gave the following ruling :

VASSILIADES, J. : I am afraid we have kept you longer than we thought. The reason is that we had to deal with a rather thorny problem calling for an immediate answer.

Normally, we would let the case stand until we were ready with our final judgment on the whole matter, considered and prepared in the light of the valuable assistance we have had at the hearing, especially on the legal background of

the case, from the learned Attorney-General as appellant, and from Mr. Berberoglou for the respondents. But keeping the Courts in suspense for, perhaps, quite a few days, on points which were not new to us, was, we thought, undesirable, in the circumstances. We have, therefore, decided to give the Court's ruling now, especially in view of any uncertainties which may have arisen about the system of administration of justice now in force ; and to give our reasons at a later date.

Before proceeding further, however, I should state that one of the Members of the court felt—as it was his absolute right to feel—that he should have the opportunity of considering fully the questions raised in this appeal, in the light of the elaborate submissions made, before taking a final decision in the matter. And this is how the present ruling should be understood.

The other two Members of the court are of the opinion that the court is now in a position to rule that sections 3 (1) and (2) ; section (9) ; and section 11 of the Administration of Justice (Miscellaneous Provisions) Law, No. 33 of 1964, which have been challenged on behalf of the respondents, as unconstitutional and as not having come into force at all, have been validly enacted. The same applies to section 12 of the Law, which is also challenged by learned counsel for the respondents, as an integral part of the system of the administration of justice set up by Law 33 of 1964.

Moreover, the court has reached the conclusion that, in view of the enactment of the Law in question, the procedure for a reference under Article 144 of the Constitution by any court to the Supreme Constitutional Court, is no longer applicable or necessary ; and all questions of alleged unconstitutionality should be treated as issues of law in the proceedings, subject to revision on appeal, in due course.

On the 10th November, 1964, the following judgments were delivered :

VASSILIADES, J. : As the three appeals before us do not stand consolidated, I propose taking the first one, *i.e.* No. 2729 for the purposes of this judgment.

This is an appeal by the Attorney-General of the Republic, from an order for bail, made by a District Judge in the District Court of Kyrenia, at the conclusion of a Preliminary

Inquiry resulting in the committal of the respondents herein (accused in the criminal proceeding) for trial by the next Assizes.

The charges upon which the respondents were committed to take trial, were for carrying a warlike undertaking against a section of the people in the Republic, contrary to section 40 of the Criminal Code ; for endeavouring to overthrow the Government by armed force, contrary to section 41 ; and for carrying rifles and ammunition, contrary to the Firearms Law, and the Explosive Substances Law— (Cap. 154 ; Cap. 57 ; Cap. 54, respectively ; and Law 3 of 1962). The seriousness of the charges is obvious ; and I need only add here, that the main offences charged are punishable, under the Criminal Code, with imprisonment for life. (Sections 40 and 41 of Cap. 154).

The accused in the case—respondents in this appeal— are four young men ; a barman, age 22 ; a mason, age 23 ; a blacksmith, age 17 ; and a shepherd, age 20, all caught and arrested on the Kyrenia Mountains, on the 25th April, last, carrying their rifles loaded with .303 bullets, and their ammunition belts well supplied.

There is ample material on record, to show the conditions prevailing in the Republic at the material time ; and the circumstances under which the respondents were arrested. Indeed anybody living in the Island since the 21st of December, 1963, must have had sufficient occasion, some way or another, to acquire knowledge of the warlike emergency, harassing the people of Cyprus, during the last, nearly ten months now.

As the subject-matter of this case, however, is still sub judice, I must avoid going further into the factual part of the case, excepting so far as it is necessary for determining the legal issues under consideration in this appeal. I shall therefore take the factual position from the existing record and from what I think I can take judicial notice of, subject to proof at the trial. I find such position at the material time, namely in July last, when The Administration of Justice (Miscellaneous Provisions) Law, 1964, was published as Law of the Republic No. 33 of 1964 (9.7.64) and on the 1st August, 1964, when the order for bail now under appeal, was made, as follows. There existed within the territory of the Republic of Cyprus, the following conditions :

(*a*) a state of revolt ; *i.e.* armed rebellion and insurrection against the established Government of the Republic ;

(*b*) armed clashes between organised groups resisting the authority of the State, and the forces authorised by the Government to assert the authority of its organs ;

(*c*) loss of life ; damage to property ; interruption of communications ; and upsetting of law and order in the affected areas, with all the consequent repercussions on life in general, within the territory of the State ;

(*d*) assertion of authority and actual physical control, over areas of State territory, by the insurgents and their political leaders and commanders, to the exclusion of the authority of the established Government of the Republic ;

(*e*) presence, with the consent of the Government, of international troops within the State territory, under a Commander acting for, and upon orders from an authority outside the State *i.e.* the Secretary-General of the United Nations and the Security Council thereof, for the declared purpose, *inter alia*, of preventing armed clashes between combatants, with a view to the maintenance of peace and the prevention of bloodshed ; without, however, exercising government authority, or assuming in any way government responsibility ;

(*f*) inability of the State-Government, pending a political settlement in international circles, to combat the insurgents in order to re-establish its authority and resume its responsibilities in the affected areas, owing to the presence and intervention of the said foreign troops ; and corresponding uncertainty, as to when the one or the other of the combating forces may eventually prevail, so as to assume the responsibility of government in the maintenance of law and order in the territory of the Republic ; and

(*g*) duration of such conditions over a period of several months.

Whether these assumed conditions constitute present reality in the Republic of Cyprus, may, for the purposes of this case, remain a matter of proof ; but they are conditions material in considering the legal issues arising in the appeal. And although I am inclined to think, that having lived in Cyprus during this period, I can take judi-

cial notice of the existence of such conditions, as suggested by the Attorney-General, I prefer to act upon them as assumptions, in view of the pending trial.

On the other hand, I do not think that this court should embark on the consideration of a delicate and important legal problem, without setting down the factual foundation upon which the solution must be sought. Academic pronouncements, as well as statements of judicial authorities, cannot be fully or correctly appraised, without the factual background in which they are made. In the courts, precedents are distinguished on their facts.

Returning now to the case in hand, we have the application for bail, made on behalf of the respondents, upon their committal for trial by the Assizes, for the charges already described. The application was made under the appropriate provisions of the Criminal Procedure Law (Cap. 155) *i.e.* section 157, which reads :

> " 157 (1) Subject to the provisions of sub-section (2) of this section, any court exercising criminal jurisdiction may, if it thinks proper, at any stage of the proceedings, release on bail any person charged or convicted of any offence, upon the execution by such person of a bail bond as in this Law provided.
>
> (2) In no case a person upon whom sentence of death has been passed shall be released on bail ; and no person charged of any offence punishable with death shall be released on bail, except by an order of a Judge of the Supreme Court."

I would underline, for the purposes of this appeal the words " if it thinks proper " and " charged or convicted " in sub-section (1) ; and the last part of sub-section (2).

The respondents were already in custody since their arrest on the 25th April. The next Assize Court in the District of Kyrenia, was due to sit on the 19th of October. There was, upon these considerations, apparent justification for making an application for bail.

On the other hand, counsel acting for the Attorney-General, strongly opposed bail, mainly on the ground that if the accused persons were released from custody, they would, most likely, endeavour to escape into the neighbouring areas controlled by the armed insurgents, when it would be unreasonable to expect that they would turn

up for trial. Moreover, the nature of the case against them, and the evidence upon which they were committed, weighed strongly against bail.

One need hardly go into the legal and practical considerations governing bail, in normal conditions, as declared in precedent such as *Rodosthenous* v. *The Police* (1961, C.L.R. p. 50) referred to in this case ; or in any other of the numerous reported and unreported cases, in this connection, in order to reach the correct conclusion. The unusual conditions imposed by the learned trial Judge, indicate sufficiently that he had reasons to apprehend the existence of unusual circumstances. Nevertheless a conditional order for bail was made ; and it is against that order that the Attorney-General, exercising powers vested in him by law, took the present appeal, upon the eight different grounds set out in the notice filed.

At the opening of the case before us, and before the appellant had the opportunity to commence the presentation of his appeal, learned counsel for the respondents took objection to the legality of the proceeding. His objection is that this court, constituted and purporting to function under The Administration of Justice (Miscellaneous Provisions) Law, 1964, has no legal existence, and no power to deal with the matter in hand, as the Law in question is unconstitutional, and therefore a nullity.

To this, appellant's reply was that if the Law, from which this court derives its existence, is a nullity, how can the court be asked to deal with the constitutionality, or indeed, on what authority can it pronounce upon the validity of the Law in question?

Attractive as this argument may logically be, I have no difficulty in holding that once the court has been seized of the case, it must assume the competence and responsibility to deal with all matters raised therein, including questions going to the legality of its existence, or the lack of jurisdiction to deal with the matter in hand, until it reaches, in due course, a judicial decision on the questions raised. And if the effect of such decision, is to put an end to the whole proceeding, the court should make its judicial pronouncement accordingly.

I, therefore, take the view that the court should proceed to deal with the merits of the objections raised by Mr. Berberoglou on behalf of the respondents.

Learned counsel put his client's case in this connection, on two legs :

1. Assuming that the Administration of Justice (Miscellaneous Provisions) Law, 1964, is valid, and that there exists now in the Republic, the Supreme Court established thereunder, this Court of Appeal, as now constituted, has no power under the said Law, to deal with the matter in hand ; and

2. The statute in question (The Administration of Justice (Miscellaneous Provisions) Law, 1964) purporting to establish the present Supreme Court, is unconstitutional in matters going to its root and is, therefore, a complete nullity.

The learned Attorney-General on the other hand, in a carefully considered and well presented argument, opposed the objection taken, on both its grounds.

For the purposes of convenience, I shall refer hereafter to The Administration of Justice (Miscellaneous Provisions) Law, 1964, as the " new Law ".

Mr. Berberoglou's objections, on the assumption that the new Law was duly enacted, may be summarised as follows :

The Court is vested with " the jurisdiction and powers " hitherto exercised by the Supreme Constitutional Court and the High Court, as defined in section 2 and as provided in section 9 (*a*). Such jurisdiction and powers, shall be exercised, according to section 11 (1), by the full court ; that is to say by the court established under section 3 (2) consisting of five Judges. The court as now constituted by three Judges, cannot deal with the matter before it.

Reminded that the Court, in this case, was exercising appellate jurisdiction under the provisions of section 11 (3), upon nomination by the full court, not only in due course prior to the proceeding, but also after discussion in camera when the court adjourned the case in view of the objection taken, Mr. Berberoglou submitted that there was no provision in the new Law authorising the full court to nominate three of its Judges to hear and determine questions going to the constitutionality of legislation.

In this connection, the gist of the submission made by the Attorney-General is that, " the jurisdiction and powers which have been hitherto vested in, or capable of being

exercised by the Supreme Constitutional Court " in section 9 (a) of the new Law, must be sought in the Constitution, which, in different articles, conferred a variety of jurisdiction and powers to the Supreme Constitutional Court. And section 11 (1) of the new Law must be read and interpreted accordingly. Moreover, the procedural provisions in Article 144 (1) of the Constitution, obviously necessary when there was a clear-cut division between the fields of jurisdiction of the two branches of the judicial system, *viz.* the Supreme Constitutional Court on the one hand, and the High Court of Justice with the subordinate civil and criminal courts on the other, now, with the merger of the two superior courts in the present Supreme Court under the new Law, become clearly inoperative. And, therefore, both section 11 of the new Law, and Article 144 of the Constitution, must be read and applied accordingly.

We felt no difficulty whatever, in deciding this question. And we have announced our decision in our ruling of the 8th October, upon the conclusion of the argument before us. We unanimously now hold that the procedure for reference under Article 144 (1) of the Constitution, by any court, to the Supreme Constitutional Court, is no longer applicable or necessary ; and all questions of alleged unconstitutionality should be treated as issues of law in the proceedings, subject to revision on appeal, in due course. The procedure for reference introduced into our legal system by the Constitution, has caused in actual practice during the four-year period of its life, obstruction, delay and expense in ordinary litigation, of which parties are now relieved by the new Law.

We, moreover, unanimously hold that the cumulative effect of sections 3 (1) and (2) ; section 9 (*a*) ; and section 11 (1) and (3), read together as parts of the new law, is that this Court, as at present constituted by three of the five Judges of the Supreme Court, duly nominated by the full court to exercise the court's appellate jurisdiction at the material time, has the competence and jurisdiction to deal with all questions raised in the appeal.

I may now proceed to deal with Mr. Berberoglou's second and principal objection ; namely that the new law is unconstitutional in matters going to its root ; and is, therefore, null and void.

Learned counsel opened his attack in this respect, by reference to Articles 133.1 and 153.1 of the Constitution ; and to Article 179.1. The first provides for the establishment

of " a Supreme Constitutional Court of the Republic, composed of a Greek, a Turk and a neutral judge "; and places " the neutral judge " as President of the Court. The second (Article 153.1) provides for the establishment of " a High Court of Justice composed of two Greek judges, one Turkish judge and a neutral judge "; and placing the " neutral judge " as President of the Court, supplies him with " two votes ". The third (Article 179.1) provides that " this Constitution shall be the supreme law of the Republic ". The new Law, learned counsel submitted, apparently inconsistent with the first two articles, must invevitably fall to pieces under the weight of Article 179.1.

On its face value, this argument would seem to be sufficient to seal the fate of the new Law. I believe that there can be no doubt that if the new Law came to be enacted within the first months of the life of the Republic, (to satisfy, for instance, the provisions of Article 190) it could not stand the weight of this argument. In fact both the Courts established under Articles 133.1 and 153.1 of the Constitution, came into life accordingly, in due course ; and performed their respective functions for a considerable period. Notwithstanding appreciable difficulties, felt with growing anxiety as time went on, no attempt was made, so long as the courts functioned, to meet at least some of the difficulties, by amalgamating the two superior Courts, and avoiding the cumbersome procedure imposed by Article 144 (1).

But the time came, as the Attorney-General of the Republic pointed out in his argument, that first the Constitutional Court, as from August, 1963, and later, the High Court, as from June, 1964, ceased to function. The reasons why such state of affairs came to exist, may well be traced in the Constitution itself. But do they really matter, as far as this appeal is concerned ? I do not think they do. The fact remains that both these superior Courts, ceased to function ; and together with them the whole system of the administration of Justice in the Republic, was in danger of collapse.

Mr. Berberoglou blamed the Government for these conditions ; and invited us to uphold the relative constitutional provisions, regardless of the obvious consequences to the State and its people.

The Attorney-General, on the other hand, blamed the insurgents, and the conditions created by their prolonged activity ; and submitted upon a well supported argument,

that the new Law was enacted on sound legal foundation : the generally accepted principle of the law of necessity for the preservation of fundamental services in the State. The preservation of the administration of Justice itself, in this case.

I do not think that for the purposes of this appeal, it is necessary to speculate into the causes of the present unfortunate conditions in the Island, set out earlier in this judgment. It is sufficient, I think, for me to say here that I firmly believe that the present difficulties of the people of Cyprus, and of their Republic, originate to a considerable extent, in the sin of ignoring time and human nature in the making of our constitution. Time moves on continuously; man is, by nature, a creature of evolution and change, as time moves on. The Constitution was, basically, made fixed and immovable. Article 182 provides that the basic articles thereof " cannot, in any way, be amended, whether by way of variation, addition or repeal ". As time and man moved on, while the Constitution remained fixed, the inevitable crack came—(perhaps a good deal sooner than some people may have thought)—with grave and far reaching consequences.

Be that as it may, however, I shall now proceed to consider the legality of the new Law, in the circumstances in which it was enacted.

In addition to its apparent inconsistency with the text of Article 133 (1) (et seq.) and Article 153 (1) (et seq.) of the Constitution, which, Mr. Berberoglou submitted, renders the new Law unconstitutional, the manner in which it purports to have been promulgated and published, violating express constitutional provisions, renders the new Law invalid, counsel argued. Article 47 (*e*) provides that the promulgation of a new law by publication in the official Gazette, is part of the executive power exercised conjointly by the President and the Vice-President of the Republic. It cannot be exercised singly, learned counsel submitted, as each of these executive officers has the right of return to the House of Representatives, or the right of reference to the Supreme Constitutional Court, as provided in Article 52. Moreover Article 3 (2) requires that legislative, executive and administrative acts and documents, shall be drawn up in both official languages, Greek and Turkish ; and shall, where promulgation is required " be promulgated by publication in the official Gazette of the Republic in both official languages ". The new Law, counsel contended, has neither been promulgated as required

by the Constitution, nor has it been published in both languages. And furthermore Article 82 provides that a law of the House of Representatives, as the new Law purports to be, shall come into operation on its publication in the official Gazette, (unless another date is provided by such law) which must be construed to mean, counsel argued, that it does not come into operation unless and until so published, in both official languages, according to the Constitution.

It was not contested by the Attorney-General, that the new Law was not promulgated by both the President and the Vice-President of the Republic ; nor that it was not published in the official Gazette in both languages, as required by the Constitution. But " the law of necessity " was again invoked in justification of the omission ; which in any event, it was submitted, could not affect the validity of the enactment. The court at this stage of the case, it was said, must take a statutory enactment as it finds it in the official publication which purports to contain it.

So it seems to me that it is really, on the force of the legal concept—or expediency—known to jurisprudence as the defence of necessity, that the case for the appellant rests, in support of the validity of the new Law. And on the sound practical view, that law is made for man ; and not man for the law.

The existence, the validity, and the force of the Constitution, are not in question. That the new law has not been promulgated, or published according to the written text of the relative part of the Constitution, has not been contested. That it is not in accordance with certain constitutional provisions, especially Articles 133.1 and 153.1, in material particulars, there can be no doubt. And the fact that the Attorney-General of the Republic defends this new Law, by the defence of necessity, points, I think, in the direction that its validity cannot otherwise be defended. The reasonable inference is that had it not been for " the necessity " which caused its enactment, the new Law, probably, would not have been enacted ; and if enacted, it might well be challenged as unconstitutional. This is the position in which I see the question for consideration in the light of the submissions before us. And it seems to me that the onus of establishing this " defence of necessity ", lies upon the side which invokes it.

Opening his article on the subject, in the sixth volume of the publications of the Faculty of Laws, of the Univer-

sity College, London, Current Legal Problems, (1953) at page 216—(referred to by the learned Attorney-General)—Professor Glanville Williams says :

> " The defence of necessity is not so much a current as a perennial legal problem "..... " When I started to prepare this lecture—he writes at p. 217—I thought of necessity as a definite kind of defence, occupying its own niche in the Law. But the authorities led me into unexpected paths."

And after going as far back as Bacon, and Blackstone, the learned jurist observes :

> " In a manner of speaking the whole law is based upon social necessity ; it is a body of rules devised by the judges and the legislature to provide for what are felt to be reasonable social needs. Obviously our present concern is with something narrower than this. What we have to study is how far the notion of necessity can create new rules or serve as an excuse for dispensing with the strict law, where the exigency requires it."

The eminent professor then confirms that the classical writers abound in maxims upholding the plea of necessity. And quotes a line of them, out of which, I think, two are of particular value in dealing with this case. They were both cited from Bacon : " Privilegium non valet contra rempublicam " and " Salus populi, suprema lex ". The eminent author concludes this part of his article, with a citation from Sir William Scott that " Necessity creates the law,- it supersedes rules ; and whatever is reasonable and just in such cases, is likewise legal ".

At page 224 of the same book one reads from the same author : " The law, in a word, includes the doctrine of necessity ; the defence of necessity is an implied exception to particular rules of law. Even a criminal statute that makes no mention of the doctrine, can be regarded as impliedly subject to it, just as such a statute is impliedly subject to the defence of infancy or insanity or self-defence ".

Indeed, our Criminal Code (Cap. 154) does incorporate the legal doctrine of necessity, in the part dealing with general rules as to criminal responsibility. Section 17 reads :

> " An act or omission which would otherwise be an offence may be excused if the person accused can show that it was done or omitted to be done only in

order to avoid consequences which could not otherwise be avoided, and which if they had followed, would have inflicted upon him or upon others whom he was bound to protect, inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided."

The learned Attorney-General, in his able and most helpful address, referred us to reports of superior judicial authorities, and to writings of eminent jurists showing how this doctrine of necessity has long been accepted and applied in France, Germany, Italy, Greece, and how it is also found in that treasure of practical legal wisdom, the Mejelle, (articles 17, 18, 21 and 22) which the elder of us, still remember with profound respect. I would have to go into great lengths in this judgment, if I were to cite the guidance and assistance which I found in all those sources of legal knowledge, in considering the problem in hand.

Mr. Berberoglou confined himself in this connection, within the stronghold of the Constitution ; and, quite understandably, avoided going into the marches of necessity. He almost denied their existence. In a way this would tend to indicate that if " the necessity " really existed at the material time, its force and effect on the case in hand, could not be denied.

I find it unnecessary to go into the history of the circumstances under which, our Constitution came to be part of the law of this country. Not only it is now part of the law in force, but it is the basic law of the Republic. (Article 179.1). Its makers, however, must be presumed to have been conscious of the fact that they were legislating for the people of this country ; regardless of the interests or objects of foreign powers. That they were making the constitution of a State, belonging to its people ; a State which, according to the opening words of Article 1, would be an " independent and sovereign Republic ". The Republic of the people of Cyprus. The whole people, Greeks, Turks, Armenians, Maronites, Latin Catholics and all others. That was a cardinal and fundamental fact, which could not, and should not have been ignored. And any mistake in the correct appraisal of that fact, could not but result, sooner or later, in proportionate consequences.

Furthermore, arbitrary manipulations of generally accepted legal rules in our times, however skilfully perform-

ed, could not but produce corresponding human reactions. When Article 6 made discrimination "subject to the express provisions of this Constitution", it did not prohibit, but it incorporated and sought to establish, under a cloak of prohibition, repugnant rules of discrimination into our legal system.

The fundamental rights and liberties of the people of Cyprus, well settled in their legal system and vigilantly sustained by their unified courts, long before the birth of the Constitution, were now methodically classified in Part II thereof, and they were elevated to the importance of constitutional rights. But, on the other hand, they were henceforth to be enforced by a new judicial system, lamentably divided, and deplorably based on communal discrimination, which was now introduced for the administration of justice, and was embedded into the Constitution.

I do not need to stress here the importance of a properly functioning judicial system, for the life of the State, for the existence of the community, and for the daily life of every person living within the territorial boundaries of the Republic. Nor do I find it necessary to touch upon any of the serious consequences of the division of the courts upon a communal basis, since the establishment of the State of Cyprus under its present Constitution. It is sufficient to say, that since the unfortunate events in December last, and the conditions created in the Island thereafter, the judicial system established under the Courts of Justice Law, 1960 (No. 14 of 1960) upon the relative provisions of the Constitution, could not, and in fact did not properly work.

Greek Judges, lawyers, litigants and public could not have access to courts situated within areas held by the armed forces opposing the State; and Turkish Judges, lawyers, litigants and public had great difficulty in obtaining permission from commanders to move out from areas controlled by Turkish armed forces in order to have access to courts or other places situated within the areas controlled by the State Government. The causes which produced this result, and which prevented or obstructed the Judges, Greeks and Turks, from regularly attending their courts, do not form part of the issues for decision in this case. They were causes which the State Government were, in fact, unable to remove, during the several months which have elapsed between the outbreak of this emergency, in December 1963, and the enactment of the new Law, in July 1964.

The extremely difficult position of State Judges and their families, living within areas controlled by armed forces opposing the State-Government, needs no description here. Nor is it, I think, necessary to point out how such a position could well interfere with their judicial functions ; and, to that extent, with the administration of justice in the Republic.

I shall only refer to what was said in the course of the judgment of the High Court in *Vedat Ahmed Hasip* v. *The Police* (reported in this vol. at p. 48 *ante*) on the 23rd May, 1964. That case gives a picture of the conditions prevailing in the Island at that time, regarding the application and enforcement of the law by the State-Courts ; a picture which, it was the responsibility of the Government to take seriously into account. It was said in that case :

> " There is one more point that I should like to touch before leaving Article 159 ; a point which does not call for decision in this case, but is closely connected with the article in question, and may give cause for serious consideration in the circumstances now prevailing in the Island. It seems to me that Article 155 (3) and Article 159, rest on the postulate that there are available in all courts, at all material times, judges belonging to both the communities upon which the constitutional structure was made. So long as that postulate did in fact exist, no difficulty ever arose in this connection. But unfortunately it is now a fact only too well known to the people of Cyprus, that at present, there are certain areas in the territory of the Republic, where persons belonging to the one community or to the other, cannot, for reasons beyond their control, or for reasons of personal safety, make themselves available, or have access for any purpose. A proceeding connected with a murder case before the District Court of Famagusta recently, brought on the surface this factual position . . . . . I would be very reluctant to hold that because the factual postulate upon which the provisions in question were placed by the makers of the Constitution, has intentionally or unintentionally, been removed, the legal rights of a great number of people become unenforceable. I touched the point in this case, because I consider it too serious to be passed unheeded."

Conditions in the Island, reflected in this judgment in May, were much the same in July, when the new Law was

enacted. If anything, they became more pressing, as in the meantime the High Court ceased to function, for reasons very closely connected with such conditions.

So the evil depicted in the preamble of the new Law, which the House of Representatives, exercising the legislative authority in the State, came to remedy, at the instance of the Government, constitutes a facet of the necessity which, in the submission of the Attorney-General, justifies the enactment of the new Law, notwithstanding any apparent inconsistency with the text of the relative provisions in the articles of the Constitution referred to, by Mr. Berberoglou. Another facet of the conditions which form the necessity in question, appears in the first part of the present judgment.

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 Republic of Cyprus. Our unanimous view, and unhesitating answer to this question, is in the affirmative.

The next matter for consideration, is the form which this notion should take in its application to the case in hand. A convenient and well-balanced form, in my opinion, is that found in section 17 of our Criminal Code. I need not read the text again. The effect is as follows :

> The enactment of the Administration of Justice (Miscellaneous Provisions) Law, 1964, which would otherwise appear to be inconsistent with Articles 133.1 and 153.1 of the Constitution, can be justified, if it can be shown that it was enacted only in order to avoid consequences which could not otherwise be avoided, and which if they had followed, would have inflicted upon the people of Cyprus, whom the Executive and Legislative organs of the Republic are bound to protect, inevitable irreparable evil ; and furthermore if it can be shown that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by the enactment in question, was not disproportionate to the evil avoided.

Applying now the law of the Republic, developed under the sun of experience, with the doctrine of necessity, in this well balanced form, I reach the conclusion that in the conditions prevailing at the material time, the enactment

of the new Law was legally justified, notwithstanding the provisions of Articles 133.1 and 153.1 of the Constitution.

The same conclusion results, in my opinion, from the application of the law to the circumstances pertaining to the promulgation of the enactment in question, by the House of Representatives, notwithstanding the provisions of articles 47 (*e*) and 52. When the two principal organs of the Executive Authority in the Republic, The President and the Vice-President, found it impossible to co-operate in any way, in the execution of their duty to the people of Cyprus during the whole of that period, one could hardly expect compliance with the provisions of Article 47 (*e*), for the promulgation of this Law.

Mr. Berberoglou invoked Article 183 in support of his submission that in the absence of a Proclamation of Emergency, promulgated and published as therein provided, no state of emergency can exist in Cyprus ; and therefore no " necessity " to justify departure from constitutional or statutory provisions.

I would be prepared to concede that learned counsel may be academically right. But this argument, far from removing the painful emergency which has in fact been harassing the people of Cyprus for nearly ten months, with such terrible effects for so many of them, only establishes in a very convincing manner, how far from reality some of our constitutional provisions can now be found ; and how badly our Constitution requires injections of the doctrine of necessity to keep some of its parts alive. A mere perusal of the text of Article 183 is sufficient, I think, to show how its provisions are completely inadequate to meet the present emergency.

Where, however, in my opinion, this case presents a real difficulty is in connection with the non-publication of the new Law in both the official languages of the Republic, as required by Article 3 paragraph 2. The learned Attorney-General tried to explain and justify this omission, by the non-attendance of Turkish Officers in the Government Departments concerned. I must say that it is with the greatest difficulty and the utmost strain, that I found myself able to reach eventually the conclusion, that this necessary legislation, should not stumble and fall upon this omission in the conditions prevailing at the time of its publication.

The provisions in Article 3 requiring legislative acts and documents to be drawn up in both official languages, and to be " promulgated by publication in the official Gazette

of the Republic in both languages", are clear, and I think, imperative. And at a time when many thousands of Turkish Cypriots are still to be found in areas controlled by Government, a good deal more should, I think, be done in the search of suitable persons to draw and print the Turkish text of legislative enactments, before it can be said that the omission to have them drawn and published according to the Constitution, could not be avoided; or, "that the evil inflicted by such omission was not disproportionate to the evil avoided". As I said, it is with great difficulty that I found myself able to reach the conclusion that the omission was justified by the law of necessity, in the conditions prevailing in July last.

I think that Mr. Berberoglou's submission that he could have been approached in this connection, as he had been asked to help with other legislation before the emergency, contains a most commendable offer, which, one may hope that Government will not wish to miss. In any case I wish to take this opportunity to stress the importance which in my opinion should be attached to the requirement of the Constitution that "legislative, executive and administrative acts" affecting so many thousands of Cypriot Turks still living in areas controlled by the Government, should be made available in the official Gazette "in both official languages".

Having now reached the conclusion that the Administration of Justice (Miscellaneous Provisions) Law, 1964, is, as far as it is decided in the present appeal, a valid enactment, we only have to refer to our ruling of October 8th, in this appeal, already announced,* that this Court constituted as it has been under the provisions of section 11 (3) of the Law in question, is competent to deal with the appeal in hand; and that for the reasons stated today, the position stands as ruled.

We now propose to hear the parties on the substance of these appeals, if they have anything to add to what is already on record in connection with the orders for bail.

TRIANTAFYLLIDES, J.: These three appeals were filed by the learned Attorney-General of the Republic against the granting of bail, pending trial by Assizes, to the accused in criminal cases 184/64 (DCK), 369/64 (DCP) and 3182/64 (DCLl). The said accused persons are Turkish Cypriots and are charged with offences of pre-

*See ante, at p. 199.

paring war or a warlike undertaking and of using armed force against the Government, contrary to sections 40 and 41 of the Criminal Code Law, Cap. 154, respectively.

Before the hearing on the merits of these appeals, counsel for respondents took two preliminary objections :

(*a*) that the Administration of Justice (Miscellaneous Provisions) Law, 1964, (Law 33/64), under which the Supreme Court of Cyprus has been established and has proceeded to take cognizance of these appeals, has never come into force due to lack of proper promulgation, as required under Articles 47 (*e*) and 52 of the Constitution, and, also, due to lack of proper publication, as required under Article 3 (1) (2) of the Constitution :

(*b*) that the said Law is void for unconstitutionality in that section 3 (1) (2) thereof contravenes Articles 153 (1) and 133 (1) of the Constitution, section 9 contravenes Articles 146 and 152, section 12 contravenes Articles 159 (1) (2) and 155 (3) and section 15 contravenes Article 179 (1) (2).

During the course of the argument counsel for respondents amplified objection (*b*), above, by challenging also the constitutionality of section 11 of the same Law, as a necessary consequence of his having challenged the constitutionality of the other aforesaid sections of such Law.

Counsel for the respondents has also submitted that his objections cannot be dealt with by the three Judges of the Supreme Court originally nominated to hear these appeals, even though such Judges had been expressly authorized so to deal with them by a unanimous decision of the full membership of the court taken after such objections were raised ; he argued that, under Article 144 of the Constitution, the matter had to be referred to the full Supreme Court and the hearing of the appeals had to be stayed in the meantime.

The court has been greatly assisted by a thorough development of the above objections on the part of counsel for respondents and by a meticulously considered and presented reply thereto by the Attorney-General of the Republic.

On the 8th October, 1964, at the conclusion of the hearing of arguments, the court, in view especially of the need to deal with any uncertainties which might have ari-

sen about the system of administration of justice in force, proceeded to give its ruling at once, stating that sections 3 (1) (2), 9, 11 and 12 of Law 33/64 have been validly enacted ; furthermore, that no reference under Article 144 was necessary. It reserved its reasons to be given later, a thing which is being done now by means of this judgment.

In the said ruling no mention was made of section 15 of Law 33/64 because, as it transpired during the argument, counsel for respondents had attacked its validity on the assumption that it provides that in case of any conflict between Law 33/64 and " any other law ", *including* the Constitution, the former would prevail. The Attorney-General, however, has stated to the court, in reply, that this was so, as far as this section 15 was concerned, in the case of " any other law ", *not including* the Constitution. After this statement, respondents' counsel did not appear to press his objection to section 15, itself, any more. In any case the same considerations, as set out in this judgment, which have led me to the conclusion that the other sub judice sections of Law 33/64 have been validly enacted, would lead to the same conclusion with regard to section 15 also.

It is proper to deal first with objection (*b*), above, of counsel for respondents ; this is the substantive objection in these cases.

I have reached the conclusion that for the purposes of deciding on this objection it is not necessary to determine the fundamental question as to what extent the constitutional structure existing in Cyprus on the 21st December, 1963, has been affected by the internal anomalous situation which has supervened since then. For the purposes of this judgment it has been sufficient to deal with the relevant constitutional provisions as one finds them set out in the text of the Constitution. Respondents' counsel, in correlating certain sections of Law 33/64 and certain articles of the Constitution, has alleged, in effect, that such sections, by violating the respective articles, are, in accordance with Article 179 of the Constitution, void for unconstitutionality. Article 179 provides that the Constitution shall be the supreme law of the Republic and that no law or decision of the House of Representatives, *inter alia*, shall, in any way, be repugnant to, or inconsistent with, any of the provisions of the Constitution.

In my opinion, as it will be seen from what follows in this judgment, in deciding on respondents' objection under

examination, Article 179 has to be read together with Articles 1, 61 and 182 of the Constitution. Article 1 lays down that the State of Cyprus is an independent and sovereign Republic with a presidential regime, Article 61 provides that the legislative power of the Republic shall be exercised by the House of Representatives in all matters except those expressly reserved to the Communal Chambers (with which latter organs we are not concerned in this judgment) and Article 182 provides that the provisions of the Constitution which have been incorporated from the Zurich Agreement dated 11th February, 1959 are made basic articles and they cannot be amended in any way.

Moreover, it is necessary, in due course, to examine the origins and nature of the Cyprus Constitution the "supreme law", as provided for by Article 179, which, though being the constitution of an independent and sovereign Republic, set up under Article 1, with a legislature competent to legislate in all matters, by virtue of Article 61, has at the same time been deprived, by Article 182, of the possibility of ever being amended in so far as are concerned basic provisions incorporated from an international agreement, the Zurich Agreement, entered into in February, 1959, nearly a year and half before Cyprus became independent on the 16th August, 1960.

The problem whether or not a measure such as Law 33/64, enacted in circumstances such as those in which it was enacted, in the exercise of the legislative power of the House of Representatives, is rendered invalid by Article 179, because of alleged conflict with the supreme law of the State, has to be resolved not in abstracto, on the basis only of generalities of principle, but within the concrete framework of Cyprus State realities.

The concept of the inviolability of a "supreme" or "fundamental" or "higher" law is peculiar to countries where written constitutions are in force, as, for example, the United States of America. Under such concept, the legislature has to exercise its powers within the limits laid down by the supreme law and any legislative measures which offend against it are liable to be declared unconstitutional through judicial review. This is a notion unknown in countries where no written constitution exists, such as the United Kingdom, where the legislature is sovereign.

One of the sources of this doctrine of supreme law is the case of *Marbury* v. *Madison* decided by the United States Supreme Court in 1803. In his judgment Chief Justice Marshall said :

> " The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States ; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.
>
> That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion ; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent."

(*vide* Dowling, Cases on Constitutional Law, 6th Ed. pp. 77–78).

From the above extract it appears that Marshall C.J. based his doctrine of fundamental law on the assumption that a written constitution is the product of the exercise of the " original right " of the people to choose what " shall most conduce to their own happiness ". He also accepted that, even after the original adoption of the fundamental law, such right might still be exercised again, though not frequently—and in spite of the view taken by Marshall C. J. that it is difficult to exercise such right often-the fact remains that no less than 24 amendments have been made to the Constitution of the United States.

In his treatise on " The Higher Law Background of American Constitutional Law " Professor Corwin, one of the foremost constitutional experts of his country, writes at p. 89 : " In the first place, in the American written Constitution, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a statute emanating from the sovereign people. Once the binding force of higher law was transferred to this new basis, the notion of the

sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a sovereign law-making body which is subordinate to another law-making body ".

Thus, it is clear that the concept of the inviolability of a supreme law is by its very nature inseparably related to the premise that the constitution embodies the sovereign will of the people which can be exercised at any time, even though seldom, in order to amend it.

Article 179 has formally introduced the supreme law concept in the constitutional order of the Republic of Cyprus.

It is, therefore, useful to examine how far the principle behind Article 179 corresponds to the realities of the Constitution of Cyprus.

In the course of this examination certain matters which are generally known may be judicially noticed. As laid down by the Supreme Court of the United States in dealing with constitutional questions " We take judicial cognizance of all matters of general knowledge ". (*Muller v. Oregon*, vide Dowling, above, p. 742).

The Constitution of Cyprus has emanated in its present form, not through the exercise of the " original right ", of the sovereign will, of the people of an independent Cyprus ; it is the product of an international agreement signed in Zurich on the 11th February, 1959, and ratified in London, without the opportunity for any amendments having been afforded in the meantime, on the 19th February, 1959. At Zurich no Cypriots at all participated, in London the leaders of the Greeks and Turks of Cyprus took part and signed the Agreement.

The Constitutional Commission, which was set up immediately thereafter, for the purpose of drafting the formal document of the Cyprus Constitution, was an international technical body, only,—anything but a Constituent Assembly. According to its terms of reference, it was given the " duty of completing a draft constitution for the independent Republic of Cyprus, incorporating the basic structure agreed at the Zurich Conference " " . . . . and shall in its work have regard to and shall scrupulously observe the points contained in the documents of the Zurich Conference and shall fulfill its task in accordance with the principles there laid down ". The Zurich Agreement itself provides, in Point 27 : " All the above Points shall be considered to be basic articles of the Constitution of Cyprus ".

On the 16th August, 1960, when Cyprus became an independent State the Cyprus Constitution came into force as a step in the process of the grant of independence. It came into force in accordance with an Order-in-Council of the British Government made in London on the 3rd August, 1960, and published in Supplement No. 2A of the Cyprus Gazette of the 11th August, 1960.

The coming into force of the Constitution, as above stated, on Independence Day, was in fact a landmark on the road leading out of the narrow valley of a colonial regime into the open spaces of independence and the freedom of choice that goes with it. Even though the London Agreement was signed by the leaders of both the Greek majority and the Turkish minority in Cyprus and such leaders were subsequently elected to the offices of President and Vice President, nevertheless, the fact remains that all these—and any other step taken prior to the 16th August, 1960, towards implementing the Zurich and London Agreements—took place while Cyprus was still a colony, and under a state of emergency and with the leader of the Greek Cypriots kept banished from his own country until after the signing of the said Agreement. Such circumstances cannot be treated as conducive to the exercise of the free will of a people either directly or through its leadership.

The Cyprus House of Representatives has not ever adopted or ratified the Constitution of Cyprus. Thus, such Constitution, which was conceived, drafted and came into force whilst circumstances were such as not to render it the unquestionable outcome of the free choice of the Cyprus people or of its leadership, was never ratified by an unfettered expression of judgment on behalf of the people of Cyprus, after it had become independent.

The Cyprus Constitution contains very rigid provisions for its future amendment—and even this in certain non-basic respects only. It affords no possibility for amendment as far as basic Articles are concerned. Regarding its basic provisions, in respect of matters which were incorporated from the Agreement in Zurich, including provisions such as Articles 153.1, 133.1, 159.1.2, no amendment is possible ; not even by unanimous consensus of all members of the House of Representatives. Thus, it has been deprived of the opportunity of representing the sovereign will of the people of the country at any given time in the future ; this is a vital and decisive difference between this Constitution and other written constitutions, which are subject

to amendment, through processes ensuring the exercise of the sovereign will of the people of each country, so as to ensure that they give continuous expression to such will, on which after all their supremacy depends.

It is to be reasonably concluded from the foregoing that the Constitution of Cyprus, though invested with the sanctity of a supreme law, under Article 179, is found not to be in reality compatible with the principles which led Marshall C. J. to propound the doctrine of the supreme law in *Marbury* v. *Madison*. It cannot, in reality, be regarded as the ultimate outcome of the exercise of the "original right" of the Cyprus people "to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness"—in the same manner as Marshall, C. J., was, in *Marbury* v. *Madison*, entitled to regard the constitution of his own country as being the product of the will of its people—nor can the Cyprus Constitution be regarded as the *final* expression of the original right of the people, as presumed under Article 182— a thing which Marshall C. J. did not claim, and could not have claimed, in favour of the American or any other Constitution.

The examination of the origins and nature of the Cyprus Constitution has not been embarked upon with a view to considering if the whole or any part thereof has not properly come into force, as this question is outside the scope of this Judgment. As a matter of fact it has formally come into force, in the manner which has been described earlier, and it has been treated as being in force. This examination has been made with a view to determining, in its light, together with other considerations, to what extent the express letter of the Constitution should properly be taken as providing, by virtue of Article 179, an absolute limit to the exercise of the legislative power of the House of Representatives, under Article 61, particularly in circumstances such as those in which Law 33/64 was enacted.

It is now necessary to examine the said circumstances. They are the "recent events" referred to in the preamble to Law 33/64. They may be judicially noticed, too, being matters of general knowledge. Actually part of what is stated hereinafter has appeared to be common ground between the parties to these appeals.

Since the 21st December, 1963, there is unlawful armed opposition to the authority of the State by Turks, on an organized basis. As there are many peaceloving Turkish

citizens who are not parties to such unlawful activities this part of the Judgment must in no way be treated as prejudging the issue in any of the criminal cases in relation to which these appeals have arisen ; each case has to be determined on the basis of its circumstances.

Since last December the participation and co-operation of Turkish Cypriots in both the executive and legislative branches of the Government has ceased, at all levels, either through wilfully chosen course of anti-State conduct or through the person concerned being a victim of circumstances ; again each individual case has to be examined on its own merits. The fact remains that this is a situation which, together with the causes behind it, continues to exist.

Concerning the judiciary the following facts, *inter alia*, may be judicially noted : Before December 1963, as far back as since the end of July, 1963, the Supreme Constitutional Court had been rendered incapable of sitting in view of a vacancy in the office of its President who had resigned ; as the said court was about to resume its sittings (in view of the impending appointment of a new President in January 1964) the present anomalous situation supervened in December, 1963, frustrating such appointment.

Since the end of May, 1964, the High Court of Justice was condemned to inactivity through the resignation of its President, also.

It would have been impossible, in present circumstances, to secure the services of, and appoint, suitable persons to serve as neutral Presidents of the two said courts, as provided for by the Constitution.

Until about June, 1964, Turkish District Judges did not attend to their duties, as members of District Courts or Assize Courts ; from June they resumed attending, first at a reduced rate, until some time after the enactment of Law 33/64, when their co-operation in the administration of justice has fortunately reverted back, practically, to normal. The possibility, however, remains always, though it is to be hoped that such an eventuality will never arise again, that Turkish District Judges may find themselves obliged in future to absent themselves once again from the courts through the operation of the same factors which prevented them from attending to

their work for many months in the past ; it cannot be lost sight of that forces seeking disruption and anarchy are still active.

As a result of the above not only one but both the highest tribunals in Cyprus were found to be incapable of functioning as from the end of May 1964. No appeals, criminal or civil, could be adjudicated upon and no constitutional jurisdiction or any revisional jurisdiction in administrative law matters could be exercised.

Fundamental human rights, of ordinary citizens, both Greeks and Turks, could no longer be effectively safeguarded or vindicated through judicial process.

The District Courts or Assize Courts could not try Greeks who had committed offences against Turks, in view of the impossibility to form mixed courts of Greek and Turkish Judges as required by Article 159 of the Constitution and, likewise, Turks who had committed offences against Greeks or against the State could not be brought to trial. Mixed civil cases, which again under Article 159 would have required a mixed court could not be tried either. The administration of justice and consequently the protection of the rule of law and the preservation of public order could no longer be effectively achieved.

It has been argued by counsel for respondents that the court cannot take official cognizance of the existing emergency because the Council of Ministers has not issued a Proclamation of Emergency under Article 183 of the Constitution. In my opinion, the court cannot close its eyes to notorious relevant facts in deciding these cases. Article 183 is a provision enabling an emergency to be declared for certain limited purposes and through a specified procedure. The fact that in spite of what has been going on in Cyprus since December, 1963, no Proclamation of Emergency has been issued under Article 183, rather than indicating, contrary to glaring fact, that no such emergency exists, strongly indicates that the present emergency is one which could not be met within the express provisions of the Constitution. At a time when by a resolution, dated 4th March, 1964, of the Security Council of the United Nations an International Force has been dispatched to Cyprus to assist in the return to normality and a U.N. Mediator has been assigned to try and work out a solution of the Cyprus Problem, it would be an abdication of responsibility on the part of this court to close its eyes to the realities of the

situation, because, for any reason, no Proclamation of Emergency has been made under Article 183, and to hold that everything is normal in Cyprus. To pretend that the administration of justice could have functioned unhindered as envisaged under the Constitution, because a measure that could have been taken, under a provision of limited application, such as Article 183, has not in fact been taken, would be unreasonable. I pass no censure on counsel for respondents who has raised the point ; he has done so in the discharge of his duties to his clients, as, on its own part, the court has also to discharge its duty to all persons in Cyprus for the sake of all of them.

Granted that an emergency, as already described, exists the next thing to be examined is its relation to the basic theme of the constitutional structure.

Even a cursory glance through the Constitution of Cyprus will show that its fundamental theme and an indispensable prerequisite for its operation is the participation and co-operation in Government of Greek and Turkish Cypriots : this appears to have been assumed and taken for granted as a sine qua non premise. Even Article 183, which provides, as we have seen, for the issuing of a Proclamation of Emergency, appears to have been drafted on such an assumption. It follows, therefore, that in case of an emergency involving the discontinuance of the said participation and co-operation, such as the present one, then the resulting situation is one which has neither been foreseen by, nor may always be met within, the express provisions of the Constitution.

It cannot, of course, be argued that, because of such an emergency, constitutional deadlock or other internal difficulties, it is possible to question the existence of Cyprus as an independent State. The existence of a State cannot be deemed to be dependant on the fate or operation of its constitution ; otherwise, everytime that any constitution were upset in a country then such State would have ceased to exist, and this is not so. The existence of a State is a matter governed by accepted criteria of international law and in particular it is related to the application of the principle of recognition by other States. In the particular case of Cyprus there can be no question in this respect, because in spite of the current internal anomalous situation, the existence, not only of Cyprus as a State, but also of its Government, has been emphatically affirmed, for also purposes of international law,

by the Security Council of the United Nations, of which Cyprus became a member after it had become independent. In this respect judicial notice may be taken of the contents of the resolution of the United Nations Security Council of the 4th March, 1964, and also of its subsequent resolutions.

Once a State and its Government continue to exist then the duty to govern remains imperative, and in particular " the responsibility for the maintenance and restoration of law and order " in an emergency such as the present in Cyprus ; this was affirmed in unmistakable terms in paragraph 2 of the aforesaid resolution of the Security Council.

Organs of Government set up under a constitution are vested expressly with the competence granted to them by such constitution, but they have always an implied duty to govern too. It would be absurd to accept that if, for one reason or other, an emergency arises, which cannot be met within the express letter of the constitution, then such organs need not take the necessary measures in the matter, and that they would be entitled to abdicate their responsibilities and watch helplessly the disintegration of the country or an essential function of the State, such as the administration of justice. Notwithstanding a constitutional deadlock, the State continues to exist and together with it continues to exist the need for proper government. The Government and the Legislature are empowered and bound to see that legislative measures are taken in ensuring proper administration where what has been provided for under the constitution, for the purpose, has ceased to function. As it has been accepted by the Council of State in Greece, in time of emergency it is the responsibility of the Government to ensure the proper functioning of public services and of generally the machinery of the State (Decision 566/1936).

It is necessary next to examine Law 33/64, and particularly its provisions which are sub judice, as well as the Articles of the constitution relied upon by respondents.

The said Law was enacted on the 9th July, 1964, as an urgent measure and a temporary one.

Its purpose is clear from its Preamble in which it is stated :

" WHEREAS recent events have rendered impossible the functioning of the Supreme Constitutional Court

and of the High Court of Justice and the administration of justice in some other respects :

AND WHEREAS it is imperative that justice should continue to be administered unhampered by the situation created by such events and that the judicial power hitherto exercised by the Supreme Constitutional Court and by the High Court of Justice should continue to be exercised :

AND WHEREAS it has become necessary to make legislative provision in this respect until such time as the people of Cyprus may determine such matters : "

It may be judicially noticed, and it has also been stated by the learned Attorney-General and does not appear to be disputed, that " recent events " referred to in Law 33/64 are the current emergency, particularly in so far as it affected the courts.

Section 3 (1) (2) of Law 33/64 provides that for the purpose of having the jurisdiction exercised by the Supreme Constitutional Court and the High Court of Justice continued to be exercised there is established in the Republic a Supreme Court consisting of up to seven and not less than five Judges. It has been alleged that this provision is contrary to Articles 133.1 and 153.1. Article 133.1 provides that there shall be a Supreme Constitutional Court of the Republic composed of three Judges, two being Cypriots —a Greek and a Turk—and a neutral, who shall be the President of the Court. Article 153.1 provides that there shall be a High Court of Justice composed of four Judges, three being Cypriots—two Greeks and one Turk— and a neutral, who shall be the President of the Court with two votes.

It may be noted, while on this point, that by section 3 (3) of Law 33/64 the first five members of the Supreme Court are five Cypriot Judges, the three Judges of the High Court of Justice (the Turkish Judge of which has become also the President of the Supreme Court) and the two Judges of the Supreme Constitutional Court.

It may be further stated that section 3 (1) (2) has not legislated for the abolition of either the Supreme Constitutional Court or the High Court of Justice but merely made provision for the continuance of the exercise of their jurisdiction which they were not in a position to exercise any longer, for the reasons explained earlier.

Section 9 of Law 33/64 provides, in its material part, that the Supreme Court is vested with the jurisdiction and powers which had been vested in, or were capable of being exercised by, the Supreme Constitutional Court and the High Court of Justice. This provision is a logical consequence of section 3 (1) (2). Section 9 has been attacked as contravening Articles 146 and 152 of the Constitution. Article 146 provides that the Supreme Constitutional Court has exclusive jurisdiction to adjudicate finally on all recourses for annulment of administrative acts or decisions, or recourses in respect of administrative omissions. Article 152 provides that the judicial power, other than that vested in the Supreme Constitutional Court, shall be exercised by a High Court of Justice and subordinate courts as may be provided by law, except with respect to civil disputes in matters of personal status and religious matters, which come under the competence of communal courts —and we are not concerned at all with the competence of communal courts which has not been affected by the enactment of Law 33/64.

It is to be noted that, by section 9, Articles 146 and 152 have not been either repealed or otherwise interfered with. The competences provided for thereunder remain intact. Provision has been made only for the exercise of such competences by the Supreme Court (together with other competences vested in the Supreme Constitutional Court) in view of the impossibility to function of the Supreme Constitutional Court and of the High Court of Justice.

Section 11 of Law 33/64 makes provision about the mode of the exercise of its competence by the Supreme Court. It regulates the internal functioning of the Court. As stated, at the outset in this Judgment, the constitutionality of this section has been challenged as a sequence of the challenge of the constitutionality of other relevant sections of Law 33/64 and therefore its validity is to be judged on the same grounds as those applicable to the said other sections.

Section 12 of Law 33/64, though not directly relevant in these appeals, has been challenged as being part of the system of administration of justice set up under such Law and as being relevant to the trial of the three cases in which these appeals have arisen. It provides that any suborninate Court shall be composed of such Judge or Judges, irrespectively of the community of the litigants, as the Supreme Court may direct, and that any District Judge

may hear and determine any case within his jurisdiction, irrespective of the community of the litigants. It has been argued that it violates Articles 159.1.2 and 155.3 of the Constitution. Article 159.1.2 provides that a subordinate Court exercising civil jurisdiction in a case where both parties belong to the same community shall be composed only of a Judge or Judges belonging to such community, and that any Court exercising criminal jurisdiction, where the accused and the person injured belong to the same community or where there is no injured person, shall be composed of a Judge or Judges belonging to such community. Article 155.3 provides that the High Court of Justice shall determine the composition of Courts to try civil or criminal cases where the litigants, or the accused and the injured person, belong to different communities and that such courts shall be mixed Courts, with both Greek and Turkish Judges.

Thus, be means of section 12, the competence of the High Court of Justice to determine the composition of courts has been vested in the Supreme Court and has been extended to cover all cases and the requirement of particular cases being tried by particular Judges has not been retained. Again, there is no repeal of the provisions of Articles 155.3 and 159.1.2, but other arrangements have been legislated for in present circumstances.

The Attorney-General of the Republic, has based his submission in support of the validity of the enactment of the afore-mentioned provisions of Law 33/64 on the doctrine of necessity. He has assisted greatly the Court by an exhaustive and learned review of the relevant jurisprudence and authoritative writings in other countries.

Counsel for Respondents has argued, in rebuttal, *inter alia*, that in any case necessity could never justify interference by law with the manner in which the Constitution has regulated one of the three powers in a presidential regime *viz.* the judicial power. He also argued that the measures introduced by Law 33/64 went much beyond the needs of the situation which they were designed to meet.

Having considered the jurisprudence and authoritative writings of other countries to which this court has been referred, as well as some others, I am of the opinion that the doctrine of necessity in public law 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. In such cases " salus populi " becomes " suprema lex ". That being so, the doctrine of necessity has developed in accordance with the situations which have given rise to its being propounded or resorted to.

Thus in Greece, having already been propounded in earlier years, we find this doctrine of necessity applied, to meet the necessities existing at and after the end of the Second World War, in a manner authorizing deviations from the constitutional order. As stated in the Decision 2/1945 of the Greek Council of State « .... θὰ ἠδύνατο νὰ γίνῃ δεκτόν ὅτι, ἐὰν τυχὸν ἦτο τοῦτο ἀπαραιτήτως καὶ ἐπιτακτικῶς ἀναγκαῖον καὶ ἀναπόφευκτον, θὰ ἠδύναντο αἱ κυβερνήσεις αὗται νὰ ρυθμίσουν καὶ κατὰ παρέκκλισιν ἀπὸ τοῦ Συντάγματος θέματα ἀναγόμενα εἰς τὴν πραγματοποίησιν τῶν κυριωτέρων σκοπῶν δι' οὓς ἐκλήθησαν εἰς τὴν ἀρχήν, ἤτοι τῆς ἀποκαταστάσεως τῆς ἐννόμου τάξεως καὶ δημοσίας ἀσφαλείας καὶ τῆς ταχίστης διενεργείας τοῦ δημοψηφίσματος περὶ τοῦ πολιτικοῦ ζητήματος». (" .. it could be accepted, in case this was indispensably and imperatively necessary and unavoidable, that such governments were entitled to regulate, even in deviation from the Constitution, matters related to the primary purposes for which they were called to govern, namely the restoration of law and order and public security and the holding as soon as possible of the referendum on the political issue ").

Likewise in France the doctrine of necessity has been evolved as the doctrine of " exceptional circumstances " and in Italy it has been treated as an autonomous juridical situation by itself capable of legalizing an otherwise illegal act.

This Supreme Court of Cyprus when faced with an allegation that a certain enactment, such as Law 33/64, is valid by virtue of the doctrine of necessity, can receive only guidance, and should not be bound, from what happened or has been held elsewhere. Both because what has been propounded elsewhere, in a matter such as the doctrine of necessity, is intrinsically connected with the there prevailing situations which rendered necessary the invocation of such doctrine, and also because the mission of the supreme judicial organ in any State is to lay down authoritatively its own law and not to apply the law of any other State, though past precedents anywhere are always of great help.

It is, thus, for this Court to decide if and to what extent the doctrine of necessity in public law has its place in Cyprus law and how far it is applicable in each case.

In the case of Law 33/64 a measure has been taken, in the course of a grave emergency, not by the Executive alone, but through the introduction of legislation which was enacted by the House of Representatives. It has to be determined, in the light, *inter alia*, of Articles 1, 61, 179 and 182 of the Constitution, whether such a measure is unconstitutional or, even if unconstitutional, whether it ought to be held as valid in the circumstances, notwithstanding its unconstitutionality.

The validity of the provisions, in question, of Law 33/64 has to be examined against the background of the origins of the constitution, its fundamental theme and the current emergency.

It has to be examined whether the constitution of Cyprus, being treated as a supreme law under Article 179, prevents in all and any circumstances, the enactment of a Law which in the opinion of the House of Representatives, acting under Article 61, is urgently needed in prevailing circumstances, especially where such circumstances have not been foreseen or provided for by the constitution itself. It has to be determined to what extent are the people of this country, who have elected the House of Representatives, prevented by the Cyprus constitution, (which has not originated through the exercise in times of freedom and independence of their original right, and through the sovereign will of whom it cannot be likewise amended—*vide* Article 182) from meeting an emergency situation which faces them, especially when such situation has neither been foreseen by the constitution, nor can it be resolved within its express letter but it also goes contrary to the very basic premise on which the constitution was conceived. To what extent is the House of Representatives, being an organ of the people and faced with a situation such as the present, entitled to act on behalf of such people and for their benefit in trying to meet such situation?

In answering the above questions two widely accepted principles of constitutional law are to be borne in mind :

(i) That the utmost restraint should be exercised by a court in approaching the issue of the alleged unconstitutionality of a law ; in case of doubt the court should lean in favour of the validity of such Law. In this respect it is useful to examine once again the position in the United States of America, where the possibility of judicial review of constitutionality has been accepted

since the beginning of the 19th century, leading later on to the adoption of similar patterns of judicial power in many countries in Europe and elsewhere. At p. 563 of an official publication, the " Constitution of the United States of America " (1952 ed.) the following commentary is to be found in relation to Article III section 2 of the American Constitution : " No act of legislation will be declared void except in a very clear case, or unless the act is unconstitutional beyond all reasonable doubt. Sometimes this rule is expressed in another way, in the formula that an act of Congress or a State legislature is presumed to be constitutional until proved otherwise ' beyond all reasonable doubt ' ".

(ii) that a court in interpreting and applying a constitution has to adopt, as much as possible, an experiential approach. The matter is put as follows by Pritchett on " The American Constitution " (1959) pp. 46–47 " Historical evidence as to the intent of the framers, textual analysis of the language of the Constitution, and application of the rules of logical thinking all have a useful place, but neither alone nor in combination can they supply the key to constitutional interpretation. There is a further factor, which Holmes designated as ' experience '. The experiential approach is one that treats the constitution more as a political than a legal document .... It frankly recognizes that interpretation of the constitution will and must be influenced by present-day values... The goal of constitutional interpretation, it may be suggested, is the achieving of consensus as to the current meaning of the document framed in 1787, a meaning which makes it possible to deal rationally with current necessities and acknowledge the lessons of experience while still recognizing guidelines derived from the written document and the philosophy of limited governmental power which it sought to express ".

With the above in mind let us approach the Cyprus Constitution and Law 33/64 which is alleged to be invalid for contravening it.

As we have seen the Cyprus Constitution is neither the product of, nor can it at any given time in future be taken to represent, the expression of the sovereign will of the people of Cyprus ; this is so both because of its origins and because of Article 182. Moreover it is based on the sine qua non assumption of co-operation in Govern-

ment of both Greek and Turkish Cypriots. Even its provision for meeting an emergency, Article 183, is based on the same premise. On the other hand it is the constitution of an independent and sovereign state, in accordance with Article 1. It cannot be interpreted or be applied to the detriment of such state. It follows, therefore, that the doctrine of necessity must be deemed to be part of the scheme of the constitutional order in Cyprus so as to enable the interests of the country to be met where the constitution, in view of its rigidity, one-sidedness and narrow ambit does not contain adequate express provision for the purpose. The less a constitution represents in fact the exercise of the original right of the people the more the Legislature ought to be treated as free to meet necessities.

I am of the opinion that Article 179 is to be applied subject to the proposition that where it is not possible for a basic function of the State to be discharged properly, as provided for in the Constitution, or where a situation has arisen which cannot be adequately met under the provisions of the Constitution then the appropriate organ may take such steps within the nature of its competence as are required to meet the necessity. In such a case such steps, provided that they are what is reasonably required in the circumstances, cannot be deemed as being repugnant to or inconsistent with the Constitution, because to hold otherwise would amount to the absurd proposition that the Constitution itself ordains the destruction of the State which it has been destined to serve.

Even though the Constitution is deemed to be a supreme law limiting the sovereignty of the legislature, nevertheless, where the Constitution itself cannot measure up to a situation which has arisen, especially where such situation is contrary to its fundamental theme, or where an organ set up under the Constitution cannot function and where, furthermore, in view of the nature of the Constitution it is not possible for the sovereign will of the people to manifest itself, through an amendment of the Constitution, in redressing the position, then, in my opinion according to the doctrine of necessity the legislative power, under Article 61, remains unhindered by Article 179, and not only it can, but it must, be exercised for the benefit of the people.

Then it cannot be said to be a case of legislation repugnant to, or inconsistent with, the provisions of the supreme

law, in contravention of Article 179, because it is legislation to meet a situation to which the supreme law itself is not, in view of its nature and provisions, applicable, and it cannot be made applicable to meet it ; there can thus be no question of the legislature exercising sovereignty in a field where the sovereignty of fundamental law is already established, by means of the Constitution. And with the Cyprus Constitution, in view of its origins and nature, it is all the more proper and necessary for the legislature to exercise its own powers, on behalf of the people, in matters of necessity.

I am of the opinion that because of the " recent events " mentioned in the preamble to Law 33/64, and described already in an earlier part of this Judgment, a public necessity of the first magnitude had arisen for the judiciary to be enabled to function urgently, properly and adequately.

That the proper discharge of the administration of justice constitutes a necessity, especially in times of upheaval, such as the present, cannot be reasonably disputed. It has been so aptly put in Decision 601/1945 of the Greek Council of State where it was held that the situation under consideration «...ἀπετέλει πρόδηλον, ἐπιτακτικὴν καὶ ἀναπότρεπτον ἀνάγκην, ἐπιβάλλουσαν ὅπως, πρὸ παντὸς ἄλλου, ἀποκατασταθῇ ἠθικὴ καὶ ὑπηρεσιακὴ τάξις ἐν τῇ λειτουργίᾳ τῶν δικαστικῶν ὑπηρεσιῶν, αἱ ὁποῖαι συμβάλλουσι θεμελιωδῶς εἰς τὴν ἐμπέδωσιν τῆς τάξεως καὶ τῆς ἀσφαλείας καὶ εἰς τὴν ἐνίσχυσιν τῆς πρὸς τὴν ἔννοιαν τοῦ κράτους δικαίου ἐμπιστοσύνης τῶν πολιτῶν, ἤτοι εἰς τὴν δημιουργίαν τῶν ἀπαραιτήτων προϋποθέσεων διὰ τὴν εἴσοδον τῆς χώρας εἰς τὴν πολιτικὴν ὁμαλότητα δι' ἐλευθέρων ἐκλογῶν....» (" . . .constituted an obvious, imperative and unavoidable necessity, making it necessary that, in priority to all else, order had to be restored from both the moral and service aspects in the functioning of judicial services, which contribute fundamentally to the restroration of order and security and to the strengthening of the confidence of the citizens in the rule of law, and, therefore, the creation of the indispensable conditions for a return of the country to normal political life through free elections . . . ") And this proposition was re-affirmed in Decision 624/1945 of the Greek Council of State, in identical terms.

I am, further, satisfied that, in all the circumstances described above, it was not possible for the necessity to be met adequately through operation of the system of administration of justice envisaged in the Constitution.

With all the above in mind, I have come to the conclusion that the provisions in question of Law 33/64 are not excluded by Article 179 because they provide, parallel to the Constitution, for matters in which what has been envisaged by the Constitution was not operative in the circumstances, and because they are the outcome of the exercise of legislative power to meet an urgent necessity. On the contrary, I am of the opinion that the said provisions of Law 33/64 are consistent with all-important provisions of the Constitution such as Article 30 (providing for the need for the administration of justice by courts), Article 35 (which states that the authorities of the Republic shall be bound to secure within the limits of their respective competence the efficient application of the Articles of the Constitution concerning Fundamental Rights and Liberties—and such application cannot be envisaged without functioning courts) and Article 1, (which lays down that the regime of the State of Cyprus is presidential—and it is an indispensable notion of such a regime, which always entails the separation of powers into executive, legislative and judicial, that all such powers shall be functioning at all times as a balanced whole).

Law 33/64 is a legislative measure which without purporting to repeal any of the relevant provisions of the constitution, which have been rendered inoperative by supervening events, sets up the necessary judicial machinery for the continued administration of justice in cases where the machinery provided for under the constitution has either broken down indefinitely or is liable to break down from time to time ; and it provides for the operation of such machinery through the same persons who had already been entrusted with the administration of justice by means of the machinery provided for in the constitution. Thus, the same Judges who were vested with the exercise of the jurisdictions of the two highest courts—and under Articles 153 (9) and 133 (9) the Judges of the Supreme Constitutional Court and of the High Court of Justice could act for each other in certain eventualities—were entrusted, as Judges of the Supreme Court, with the exercise of the jurisdictions of both such courts ; the absence of neutral Presidents and the need for maximum efficiency in the difficult times in which they had to exercise their said jurisdictions made it all the more reasonable and necessary for them to be brought together in one Supreme Court. Likewise, by making it possible for District Judges, subject to any direction of the Supreme Court, to try any case irrespective of the community of litigants, the

administration of justice has been enabled to go on even if Turkish Judges from time to time are to absent themselves from the courts as in the past.

Even if any of the provisions concerned of Law 33/64 were to be found to be repugnant to or inconsistent with any provision of the constitution, I would again pronounce for their valid applicability, in view of the necessity which has arisen and the temporary nature of Law 33/64, which has been enacted to meet it, at a time when such necessity could not have been met by operation of the relevant provisions of the constitution. In such a case 'necessity renders validly applicable what would otherwise be illegal and invalid.

If the position was that the administration of justice and the preservation of the rule of law and order in the State could no longer be secured in a manner which would not be inconsistent with the constitution, a constitution under which the sovereign will of the people could not be expressed so as to regulate through an amendment of the fundamental law such a situation, then the House of Representatives, elected by the people, should be empowered to take such necessary steps as are warranted, by the doctrine of necessity, in the exigencies of the situation. Otherwise the absurd corollary would have been entailed *viz.* that a State, and the people, should be allowed to perish for the sake of its constitution ; on the contrary a constitution should exist for the preservation of the State and the welfare of the people.

This principle has found proper expression in Decision 86/1945 of the Supreme Court of Greece as follows :

«Κατὰ τὴν ἀναγνωρίζουσαν τὸ δίκαιον τῆς ἀνάγκης θεωρίαν, ἐρειδομένην ἐπὶ τοῦ ἀξιώματος *salus populi suprema lex*, δύναται ἡ ἐκτελεστικὴ ἐξουσία, ὑπὸ τὴν ἰδίαν της εὐθύνην, νὰ ἐκδώσῃ συντακτικὴν πρᾶξιν, δι' ἧς ἀναστέλλεται, τροποποιεῖται ἢ καταργεῖται διάταξις τοῦ συντάγματος, ἀλλ' ὑφ' ὡρισμένας προϋποθέσεις, ἤτοι ἐὰν ὑφίσταται ἐμπόλεμος κατάστασις ἢ στάσις, κατεπείγουσα ἡ ἀνάγκη πρὸς ἔκδοσίν της καὶ ἀδύνατος ἡ ρύθμισις αὐτῆς διὰ τῆς νομίμου ἐξουσίας. Ἡ ἐν καταστάσει ἀνάγκης ἐκδοθεῖσα ὑπὸ τῆς κυβερνήσεως συντακτικὴ πρᾶξις, ἀλλὰ κατὰ παράβασιν τοῦ συντάγματος, παραμένει μὲν ἀντισυνταγματική, δέον ὅμως νὰ ἐφαρμοσθῇ, καὶ τὰ δικαστήρια δὲν δύνανται νὰ ἀρνηθοῦν τὴν ἐφαρμογὴν αὐτῆς ὡς μὴ συμφώνου πρὸς τὸ σύνταγμα». (" In accordance with the theory which recognizes the law of necessity, based on the maxim *salus*

populi suprema lex, the executive power may, on its own responsibility, do acts of constitutional effect, by which a provision of the constitution is suspended, amended or repealed, but under certain circumstances, that is if it exists a state of war or revolution, an urgent necessity for their doing and it is impossible to regulate the position by lawful authority. An act of constitutional effect made by the government at a time of necessity, in contravention, however, of the constitution, remains unconstitutional, but it has to be applied and the courts cannot refuse to apply it on the ground that it is not made in accordance with the constitution").

It is to be noted that the case of necessity accepted in the above passage by the Supreme Court in Greece is even a more radical one than the one arising in relation to the validity of Law 33/64. There executive acts regulating matters with legislative and constitutional effect have been held to be validly applicable, whereas in the case of Law 33/64, it is an enactment properly emanating from a legislative organ, *i.e.* the House of Representatives and it does not purport to have constitutional effect but only it aims at filling a vacuum resulting through the inapplicability in prevailing circumstances of certain constitutional provisions.

Counsel for respondents has also raised the question that the measures taken by the provisions sub judice, of Law 33/64, are wider than required to meet any necessity which may have existed.

In accordance with principles properly applicable to cases where the doctrine of necessity has been invoked it is for the judiciary to determine if the necessity in question actually exists and also if the measures taken were warranted thereby (*vide*, *inter alia*, Decision of the Greek Council of State 556/1945).

It has already been found that a necessity existed and that Law 33/64 has been enacted to meet it. It has already been indicated that in my opinion the measures enacted, by means of the provisions concerned of such Law, were warranted by such necessity. The submission, therefore, to the contrary, made on behalf of respondents, cannot be upheld. It is useful in any case to bear in mind that the exercise of control in this sphere can only aim at ensuring that certain limits have not been exceeded and within such limits the Government has a discretion of its own as to the measures to be adopted,

for the purpose of meeting an existing necessity. (*Vide* in this respect the "Conclusions from the Jurisprudence of the Council of State" in Greece ((1929–1959) p. 38).

For all the above reasons objection (*b*) of counsel for respondents cannot be sustained.

If I may make here an observation, by way of parenthesis, I am of the opinion that the system of justice that has been set up under Law 33/64, apart from being necessary in the circumstances, is also more consonant with the notion of justice and its requirements than the one which has been provided for under the Constitution.

I come now to objection (*a*) taken on behalf of respondents, *viz.* that Law 33/64 lacks proper promulgation and publication.

The first thing to be noticed in relation to this objection is that the acts of promulgation and publication, though actions of the executive branch, are, nevertheless, in essence part of the legislative process involved in enacting legislation such as Law 33/64.

In the official *Gazette* in which the said Law was published it is stated that it has been duly promulgated under Article 52 of the constitution. This is sufficient *prima facie* evidence of regularity.

It has been, however, stated by the learned Attorney-General that in fact it has been promulgated only by the President of the Republic alone and that it has been published in the official *Gazette* only in Greek. As explained by the Attorney-General, this course was adopted in view of the non-participation in the Government, since December 1963, of any person acting in the capacity of a Vice-President and because of the absence from duty of the requisite staff for translating and publishing in Turkish the Law in question.

In view of what was put forward, as above, by the Attorney-General, which I accept as correct, I have come to the conclusion that Articles 47 (*e*), 52 and 3 (1) (2) have been substantially complied with, to the extent feasible in the circumstances, and that to the extent to which they have not been complied with, they had been rendered inoperative by superventing events. Promulgation and publication, being necessary formalities in the course of the legislative process, had to be effected as best as pos-

sible in the circumstances. It would otherwise be absurd to hold that a Law, such as Law 33/64, which has already been held to have been validly enacted by the Legislature, in view of existing necessity, has not attained formal validity due to defects arising again out of the same emergency which created the necessity which Law 33/64 has been enacted to meet. In the same way as the Lagislature, when faced with an unforeseen by the constitution situation has had to act in discharge of its general duty to the State, likewise the President of the Republic and any appropriate executive organ involved in the publication of the said Law had to discharge their duty to govern and effect promulgation and publication to the extent possible in the circumstances.

In circumstances such as the present, I am of the opinion, that the course adopted in promulgating and publishing Law 33/64 was duly warranted and validated by necessity.

At times when due to supervening events substantive constitutional provisions cannot operate, it is not logical or proper to hold that measures designed to ensure continuance of essential functions of the State, and being otherwise valid in substance, are invalid or not in force because of lack of formalities arising out of the very situation which the measures taken were designed to meet. I have come to the conclusion, therefore, that the manner in which promulgation and publication of Law 33/64 has taken place is not repugnant to or inconsistent with the constitution because the relevant Articles, 47 (*e*) 52 and 3, in laying down their prerequisites, pre-suppose the co-operation and participation in government of the Turkish Cypriot side, in so far as such participation is necessary for their operation ; and in the absence of such participation the requirements contained therein must be deemed to be applicable only in so far as they can reasonably be satisfied in the circumstances and abated as regards the rest.

No question could arise of any right of return having been defeated, because there can be no claim to the right of return by an organ not participating, at the time, in the discharge of the functions to which such right of return relates.

Concerning, lastly, the submission of counsel for respondents that the above objections ought to have been referred by this three-member court to the full court, I

am of the opinion that it is not properly founded, in view of the fact that paragraph 1 of Article 144 on which such submission was based has been rendered inoperative because of the non-functioning of the Supreme Constitutional Court.

The said paragraph 1 of Article 144 is a procedural provision, not a substantive one. Its usefulness, applicability and operation is inexorably dependant upon the existence of the dichotomy of justice provided for under the constitution. Since under Law 33/64 the parallel competences of the Supreme Constitutional Court, in constitutional matters, and of the High Court of Justice and subordinate courts, in civil and criminal matters, have been placed into one judicial stream leading, in any case, for its final destination to one and the same Supreme Court, a provision such as the said paragraph 1 can no longer be deemed to be necessary, applicable or operative since the conditions precedent for its operation have ceased to exist. It follows that any questions of alleged unconstitutionality of legislation must now on be treated as legal issues arising in the proceedings to be determined at all levels of jurisdiction, subject always to the final say of the Supreme Court.

The purpose for which such questions previously had to be referred to the Supreme Constitutional Court under paragraph 1 of Article 144 was because they were outside the competence of the High Court of Justice when sitting on appeal from subordinate courts in civil and criminal cases, except to the extent to which modifications under Article 188 were involved. Now that this court is vested with both the final competence to decide questions of alleged unconstitutionality and also with the competence of a final appeal tribunal the procedure under paragraph 1 of Article 144 has, by sheer force of events, been rendered both unnecessary and inapplicable. It is a procedural provision which because of its very nature and purpose cannot be applied, *mutatis mutandis*, within the realm of the exercise of the jurisdiction of the Supreme Court. So long as the Supreme Constitutional Court is not functioning as a separate judicial organ paragraph 1 of Article 144 has to be treated as non-operative.

The cognate objection of counsel for respondents that under section 11 (1) of Law 33/64 an appellate quorum of three Judges of this court has no competence to determine a question of unconstitutionality, is not valid either.

It is correct that sub-section (1) of section 11 provides that the competence vested in this court shall be exercised by its full Bench, subject to sub-sections (2) and (3) of the same section. Sub-section (3), which is material for the purposes of this issue, provides that the appellate jurisdiction is to be discharged by not less than three Judges nominated by the court for the purpose. In my opinion, appellate jurisdiction in sub-section (3) includes any competence of this court which has to be discharged for the purposes of proper disposal of an appeal, including the determination of a question of unconstitutionality which arises in the course of such appeal. It is, of course, always desirable that major questions, such as those decided in these cases, may be determined by the full Bench of the court and for this reason the full Bench was given an opportunity to consider, in camera, whether it should have sat for the hearing of these appeals. By unanimous decision, however, it has been decided that, in all the circumstances of these cases, it was more proper for the present appellate quorum of three Judges of the court to continue dealing with these appeals. In this way not only the letter but the very spirit of section 11 have been complied with.

In conclusion I would like to make the following general observations :

The problem facing the court in these appeals may not have been novel in its nature but the circumstances in which it has arisen are *sui generis* indeed, in view of the nature of the Cyprus Constitution and the events which have led to the enactment of Law 33/64. The court, therefore, has had to find its own way as a supreme and sovereign judicial organ, guided by signposts set by judicial organs elsewhere. It has had to lay down the doctrine of necessity as it appeared to be applicable in the particular cases under examination.

This judgment should not be considered as having indirectly resolved any problems other than those falling for decision in these cases.

The exact fate of the constitutional structure, or any part thereof, has not been pronounced upon as it was not in issue in these cases.

Each problem arising out of developments due to supervening events—and so much has happened since December, 1963—will have to be faced by this court only as and when it is raised before it.

The court will always be ready to do its duty, judicially and dispassionately, if called upon to do so by appropriate proceedings. It is a duty owed to the State and above all to the people, all the people, the fundamental rights and liberties of whom, in particular, this court will always safeguard as a sacred trust.

JOSEPHIDES, J. : The questions which we have to consider in these appeals raise points of great public importance. These questions were raised by counsel for the respondents in appeals made by the Attorney-General of the Republic against decisions of District Judges granting bail to Turkish Cypriot accused persons who had been committed for trial before the Assizes. The charges on which the respondents in Criminal Appeal No. 2729 were committed for trial were that they carried a warlike undertaking against the Greek Community of Cyprus, that they endeavoured by armed force to procure an alteration in the Government or laws of the Republic of Cyprus, and that they carried arms and ammunition. The offences were stated to have been committed on the 25th April, 1964, at " Pendadaktylos mountain range in the area of St. Hilarion ", Kyrenia District.

The main charges against the respondents in the other two appeals were that they carried on a war or warlike undertaking against the Greek Community of Cyprus at Ktima and Limassol, respectively, and that they endeavoured by armed force to procure an alteration in the Government of the Republic.

The questions raised by counsel for the respondents were the following :

(1) that this Court, as constituted, had no jurisdiction to hear the appeals as the provisions of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33 of 1964,) setting up a Supreme Court, were contrary to the Constitution, that is to say ;

(*a*) section 3 (1) and (2) was contrary to the provisions of Article 153.1 and 133.1 of the Constitution ;

(*b*) sections 9 and 11 were contrary to Articles 146 and 152 ;

(*c*) section 12 was contrary to Articles 159.1, 159.2 and 155.3 ; and

(*d*) section 15, read in conjunction with section 2, was contrary to Article 179 ;

(2) that the present composition of three judges of this court was only empowered to hear appeals and not questions of constitutionality of law, and that only the Full Bench of five was empowered to do so under the provisions of section 11 (1) of the aforesaid Law 33 of 1964 ;

(3) that the provisions of Article 144 of the Constitution were still applicable on matters of procedure and that the present composition of three Judges should refer the matter to the Full Bench for determination ;

(4) that the said Law 33 of 1964 was not duly promulgated and published in accordance with the provisions of Articles 47 (*e*) and 52 of the Constitution ; and

(5) that Law 33 of 1964 was not published in Turkish in the official *Gazette* of the Republic, contrary to the provisions of Article 3.1 and (2), and that, consequently, that Law has not come into force.

Question 1 : The Administration of Justice (Miscellaneous Provisions) Law, 1964 (to which for convenience I shall refer in this judgment as " Law 33 ") was enacted by the House of Representatives on the 9th July, 1964, and was " promulgated by publication in the official *Gazette* of the Republic in accordance with the provisions of Article 52 of the Constitution " on the same day (see *Gazette* dated the 9th July, 1964, first supplement, page 398).

So far as material for the purposes of this case, Law 33 provides for the establishment and constitution of a Supreme Court consisting of five or more, but not exceeding seven, judges, one of whom shall be the President (section 3 (1) and (2)). The court at present consists of the five Cypriot members of the High Court of Justice and the Supreme Constitutional Court, *viz.* three Greeks and two Turks, and the President is one of the Turkish Judges, being the senior member of the court (section 3 (3) and (4)). The court is vested with the jurisdiction and powers which have been hitherto vested in and exercised by the Supreme Constitutional Court and the High Court of Justice (section 9), and any jurisdiction, competence or powers so vested in the court shall be exercised by the full court, except that any appellate jurisdiction may be exercised by at least three judges nominated by the court, and any original jurisdiction may be exercised by such judge or judges as the court shall determine (section 11).

Section 12 provides that any court established by the Courts of Justice Law, 1960, or any other Law shall, in

the exercise of its civil or criminal jurisdiction under such Law, be composed of such judge or judges irrespective of the Community to which the parties to the proceedings belong as the Supreme Court may direct, and that any judge of a District Court may hear and determine any case within his jurisdiction irrespective of the community to which the parties to the proceedings belong.

Finally, section 15 provides that for any reference in any " law " in force to the Supreme Constitutional Court or the High Court or any judge thereof a reference to the court or a Judge, as the case may be, shall be substituted and where there is any conflict between the provisions of Law 33 and of " any other Law ", the provisions of Law 33 shall prevail. The expression " law " includes the Constitution (section 2).

The long title of Law 33 is " A Law to remove certain difficulties, arising out of recent events, impeding the administration of justice and to provide for other matters connected therewith ".

The *preamble* of this Law which, for the purposes of this case, is very material and revealing, as providing a key to the mind of the legislature, and the mischiefs which they intended to redress, reads as follows :

> " WHEREAS recent events have rendered impossible the functioning of the Supreme Constitutional Court and of the High Court of Justice and the administration of justice in some other respects :
>
> AND WHEREAS it is imperative that justice should continue to be administered unhampered by the situation created by such events and that the judicial power hitherto exercised by the Supreme Constitutional Court and by the High Court of Justice should continue to be exercised :
>
> AND WHEREAS it has become necessary to make legislative provision in this respect until such time as the people of Cyprus may determine such matters :
>
> NOW, THEREFORE, the House of Representatives enacts as follows : "

It will be seen that the preamble states that " *recent events* " have rendered impossible—(*a*) the functioning of the Supreme Constitutional Court and the High Court of Justice ; and (*b*) the administration of justice in some other respects ; that it is imperative that justice should

continue to be administered unhampered by the situation created by such events ; and that it has become *necessary* to make legislative provision until such time as the people of Cyprus may determine such matters.

Before I proceed further to consider the Law, it is necessary to ascertain what are the "*recent events*" which have brought about such a situation. In doing so, I shall endeavour to state the material facts briefly, sub-dividing them as follows :

(A) General facts relating to events in Cyprus since the 21st December, 1963.

(B) Facts relating to the functioning of the Supreme Constitutional Court and the High Court of Justice (sections 3 (1) (2), 9 and 11).

(C) Facts relating to the functioning of the District Courts with especial reference to the attendance of Turkish Judges and other connected matters (section 12).

(*A*) *General facts* :

It is a matter of common knowledge that the troubles broke out in Cyprus on the 21st December, 1963, that on the 25th December Turkish military aircraft flew over Nicosia and the Turkish contingent (stationed in Cyprus under the provisions of the Treaty of Alliance) moved out of their camp and took positions outside Nicosia. The situation having thus deteriorated the Cyprus Government accepted an offer that the forces of the United Kingdom, Greece and Turkey, stationed in Cyprus and placed under British command, "should assist it in its effort to secure the preservation of cease-fire and the restoration of peace". The joint Peace-Making Force was accordingly established and on the 30th December, 1963, the Political Liaison Committee, set up for the purpose of giving guidance to the Commander of the Force, concluded an agreement on the creation and patrolling of a neutral zone along the cease-fire line between zones occupied by the two communities in Nicosia (See United Nations Document S/5508). Following discussions in Nicosia between the Cyprus Government, the leaders of the Turkish community and the United Kingdom Government, an agreement was reached on the holding of a Conference in London, which was eventually opened on the 15th of January, 1964.

Meantime, on the 26th December, 1963, the Cyprus Government brought to the attention of the Security Council of the United Nations a complaint against the

Government of the Republic of Turkey for the acts of "(*a*) aggression, (*b*) intervention in the internal affairs of Cyprus by the threat and use of force against its territorial integrity and political independence perpetrated yesterday, 25th December", specifying the acts complained of as violation of the air-space of Cyprus by Turkish military aircraft, violation of the territorial waters of Cyprus, threats of use of force by the Prime Minister of Turkey stated to have been made on the 25th December, 1963, before the Turkish Parliament, and the movement of Turkish troops into Nicosia (see United Nations Document S/5488 dated the 26th December, 1963). This complaint was the subject of discussion in the United Nations Security Council on the 27th December, 1963.

When the London Conference on Cyprus failed to reach an agreement, the matter was again taken to the United Nations *Security Council* where a full discussion took place and eventually the following *resolution* was voted upon unanimously on the 4th March, 1964 (S/5575):

"THE SECURITY COUNCIL,

"Noting that the present situation with regard "to Cyprus is likely to threaten international peace and "security and may further deteriorate unless additional "measures are promptly taken to maintain peace and "to seek out a durable solution;

"Considering the positions taken by the parties "in relation to the Treaties signed at Nicosia on "16th August, 1960:

"Having in mind the relevant provisions of the "Charter of the United Nations and its Article 2, "para. 4, which reads: 'All members shall refrain "in their international relations from the threat or "use of force against the territorial integrity or poli-"tical independence of any State, or in any other "manner inconsistent with the purposes of the United "Nations'";

"1. Calls upon all Member-States, in conformity "with their obligations under the Charter of the United "Nations, to refrain from any action or threat of "action likely to worsen the situation in the sovereign "Republic of Cyprus, or to endanger international "peace;

"2. Asks the Government of Cyprus which has "the responsibility for the maintenance and resto-

" ration of law and order to take all additional measures " necessary to stop violence and bloodshed in Cyprus;

" 3. Calls upon the communities in Cyprus and " their leaders to act with the utmost restraint ;

" 4. Recommends the creation, with the consent " of the Government of Cyprus, of a United Nations " Peace-Keeping Force in Cyprus

" 5. Recommends that the function of the Force " should be, in the interest of preserving international " peace and security, to use its best efforts to prevent " a recurrence of fighting and, as necessary, to con- " tribute to the maintenance and restoration of law " and order and return to normal conditions.

" 6. Recommends that the stationing of the Force " shall be for a period of three months

" 7. Recommends further that the Secretary-Gene- " ral designate, in agreement with the Government of Cyprus and the Governments of Greece, Turkey " and the United Kingdom, a mediator, who shall " use his best endeavours with the representatives " of the communities and also with the aforesaid four " Governments, for the purpose of promoting a peace- " ful solution and an agreed settlement of the prob- " lem confronting Cyprus, in accordance with the " Charter of the United Nations, having in mind " the well-being of the people of Cyprus as a whole " and the preservation of international peace and " security. The mediator shall report periodically " to the Secretary-General on his efforts.

" 8. "

This resolution was reaffirmed on the 13th March, 1964, 20th June, 1964 9th August, 1964 and the 25th September, 1964 (see United Nations Document S/5986). The Force became operational on the 27th March, 1964, and its term has since been extended twice and is due to expire on the 26th December, 1964.

It is not necessary for the purposes of this case to determine the question concerning the responsibility for the fighting which has taken place in Cyprus since the 21st December, 1963. Suffice it to state that it is the official position of the Cyprus Government, which is acknowledged as having " the responsibility for the maintenance and restoration of law and order ", that there has

been a rebellion by Turkish Cypriots (see opening paragraphs of this judgment) who have attacked and killed unlawfully Greek Cypriots and members of the Republic's security forces. On the other hand, it is the contention of the Turkish Cypriot leaders that members of their community have been killed unlawfully by Greek Cypriots and members of the Republic's security forces, and that, as a result, there is no hope of co-existence or co-operation between the members of the two communities, and they advocate physical separation and separate administration. Part of Nicosia town and certain other territory in the Republic have been under the control of Turkish Cypriots who refuse access to Greek Cypriots by the force of arms.

Be that as it may, the fact remains that ever since the last week in December, 1963, neither the Turkish Vice-President nor the Turkish Ministers or Members of the House of Representatives have participated in the affairs of the Government. Furthermore, the Turkish civil servants have not, as a body, resumed their duties in the Government Ministries and offices ; and since the beginning of January statements have been made on behalf of the Turkish leadership that the Cyprus Government has lost its legality and that they do not recognise it as the lawful government any longer.

(B) Facts relating to the Supreme Constitutional Court and the High Court of Justice :

The President of the Supreme Constitutional Court, Prof. Forsthoff, a citizen of Western Germany, resigned his appointment with effect from the 31st July, 1963, having left Cyprus on vacation on the 26th April, 1963. Efforts were made to secure the services of a successor and, eventually, the appointment of an Australian Judge was announced on the 16th December, 1963. He was due to commence sittings in Nicosia on the 14th January, 1964, but following the outbreak of fighting in Cyprus, he did not take up his appointment, with the consequence that by the 9th July, 1964, when Law 33 was enacted, the Supreme Constitutional Court had been unable to function and no cases had been heard and determined for a period of 14 months. The number of cases awaiting trial by then exceeded 400.

With regard to the High Court of Justice the President, the Honourable Justice Wilson, a Canadian citizen, who was the second holder of the post since Independence, resigned his appointment with effect from the 31st May,

1964. Having regard to the abnormal conditions prevailing in Cyprus, the vacancies in the posts of President, High Court, and President, Supreme Constitutional Court were not filled. The constitution provides that the Presidents of these courts shall be appointed jointly by the President and the Vice-President of the Republic (Article 133.1 and 2 and Article 153.1 and 2), and, consequently, even if there were candidates willing to take up such appointments in Cyprus they could not be effected as the Vice-President had ceased participating in the Government since the end of December, 1963. The net result was that the two highest tribunals in the Republic had ceased to function.

(*C*) *Facts as to the District Courts and other connected matters :*

It is common ground that, with one or two exceptions, no Turkish or mixed cases were tried by the Turkish Judges of the District Court in all towns, except Nicosia, between the 21st December, 1963 and the beginning of June, 1964, as the Turkish Judges concerned did not attend their courts. In Nicosia the Turkish Judges dealt with Turkish cases only in the old District Court building, situate in the Turkish quarter. It was stated that the reasons why Turkish Judges failed to carry out their judicial duties was fear for their personal security, as court buildings were situated in the Greek sectors of the towns. Undoubtedly there may have been a few days earlier on, on which such fear would not be unreasonable ; and it was also likely that they might be inconvenienced by police searches if they had to travel from one town to another. But, although as a member of the High Court, which has been responsible for the administration of the courts in the Republic, I think that, by and large, the Turkish Judges of the District Courts tried to do their best under trying circumstances, I am not prepared to accept that, living as they did among their community, there were not other powerful factors (over which they had no control) influencing them with regard to their decision not to attend court. It will, I think, be sufficient for me to give the following instance :

Two Turkish accused persons charged with premeditated murder before the District Court of Famagusta had been remanded in custody since the 21st December, 1963, awaiting the holding of a preliminary inquiry by a Turkish District Judge. The preliminary inquiry was eventually fixed for the 25th February, 1964, but the Turkish Judge did not attend on that day although he had

been informed of the arrangement in time. Following that, the then President of the High Court (Hon. Justice Wilson) went to Famagusta personally, saw the District Judge concerned, took him to the court and made all necessary arrangements on the spot, including security arrangements, so that the preliminary inquiry should be held on the 3rd March, 1964. The Judge concerned was satisfied with the arrangements and he promised to attend court on the 3rd March, 1964. But again he did not. And this time his failure to attend was not due to any fear for his personal security on his part from members of the Greek community. There is no doubt that this Judge was prevented by members of his community from attending court for reasons unconnected either with the personal security of Turkish Judges in Greek quarters or the administration of justice. As a result of his non-attendance no Greek Judge could deal with the case, the accused could not be remanded in custody and the two Turkish Cypriots charged with premeditated murder had to be released, and eventually a *nolle prosequi* was entered.

Turkish Assizes in towns other than Nicosia had to be adjourned until the last week in May. No mixed cases were tried either in Nicosia, or in any other town from the 21st December, 1963, to the middle of June, 1964.

It may well be that those who have exerted pressure on Turkish Judges not to attend their courts are the same persons (*a*) who have refused access to the old Nicosia Court building, situated in the Turkish quarter of Nicosia, and the Lefka Court building, to members of the Greek community and the responsible authorities; (*b*) who have refused to allow the transfer of the books of the High Court library (in the Turkish quarter) to the new court premises in the Greek quarter for the use of the Judges and the legal profession, and who have refused to allow the transfer of court records and files from the old District Court building in the Turkish quarter to the new premises in the Greek quarter, with the result that many pending cases and other matters cannot be tried and determined by the District Court of Nicosia, even where all parties to the proceedings belong to the Greek community ; and (*c*) who have prevented the Turkish members of the Registry staff (with one or two exceptions) from resuming their duties in any of the District Courts, except in the old Court building in the Turkish quarter of Nicosia to which no Greeks have had access. From all these facts the inference may be drawn that, among the Turkish Cypriots, there are

persons who, to serve their own ends, are intent on disrupting the functioning of the courts of the Republic.

However, whether the absence of the Turkish Judges from their courts is due partly to any sense of insecurity they may have had in the Greek quarters and to possible difficulties in travelling, or to pressure emanating from members of their community or to any other factors connected with the present abnormal situation in Cyprus, it is not necessary for the purposes of this case to determine. The fact remains, that, with one or two exceptions, they did not attend their courts until June, 1964, and that, considering that the abnormal conditions which prevailed before July, 1964, still continue and may continue for some time, it is likely that they may not find it possible again to attend their courts in the near future.

On these " recent events " the learned Attorney-General of the Republic submitted that it was the duty of the State not to allow the judicial power to be paralysed but to make provision enabling the functioning of the judiciary. He further submitted that the constitutional provisions regarding the Courts and Judges of the Republic had not been repealed or abolished, but that provision was made so that their functions may be performed by another organ, that is to say, the new Supreme Court, for the duration of the prevailing abnormal situation ; the same applied to the provision regarding the other Courts under section 12 of Law 33. The creation of the new Supreme Court and other provisions of Law 33 were not, he said, contrary to the Constitution but parallel to it, and they were justified under the " law of necessity " or of " exceptional circumstances ", a principle universally accepted in Public Law. In his very able and exhaustive argument the learned Attorney-General of the Republic traced the origin of this principle in ancient times and cited a great number of authorities as to how this is applied today in many countries ; and I would like to express my appreciation for the help I have derived from his argument in deciding the points raised in this case.

Mr. Berberoglou, counsel for the Respondents, on the other hand, contended that the material sections of Law 33, *i.e.* sections 3 (1) (2), 9, 11, 12 and 15 violated Articles 153.1, 133.1, 146, 152, 159.1 and 2, 155.3 and 179, as stated in detail in the first part of this judgment ; and that Articles 153.1 133.1 and 159.1 and 2 are basic Articles and cannot be amended or repealed in any way, and that in any event the law of necessity was not applicable.

Before I come to consider these matters it is necessary to go into the history and provisions of our Constitution and the law of necessity as understood and applied in other countries.

Constitution : Various definitions of the word " Constitution " have been given by judges and publicists. I think that through all the definitions runs the idea that a Constitution contains the permanent will of the people and is the basis of organised government ; it is the creature of the power of the people, the instrument of their convenience designed for their protection in the enjoyment of their rights and powers.

This is how the term " Constitution " is defined in Coolie's " Constitutional Limitations " (pp. 68–9) :

> " The Constitution is not the beginning of a community nor the origin of private rights ; it is not the foundation of law nor the incipient state of government ; it is not the cause but consequence of personal and political freedom ; it grants no rights to the people but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of their rights and powers which they possessed before the Constitution was made ; it is but the framework of the political Government, and necessarily based upon the pre-existing condition of laws, rights, habits and modes of thoughts. There is nothing primitive in it ; it is all derived from a non-sourse. It presupposes an organised society, law, order, propriety, personal freedom, love of political liberty and enough of cultivated intelligence to know how to guard against the encroachments of tyranny."

The eminent American Judge, Justice Holmes, in interpreting the Constitution of the United States made these pronouncements :

> " . . .The provisions of the Constitution are not mathematical formulas having their essence in their form ; they are organic living institutions transplanted from English soil. Their significance is vital not formal ; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth " (*Gompers* v. *United States*, 233 U.S., 604, 610).
>
> " . . . When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realise that they have called into life

a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism ; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." (*Missouri* v. *Holland*, 252 U.S., 416, 433).

It is, I think, generally accepted that our Constitution is a very *sui generis* Constitution. It has a bicommunal basis and presupposes bona fide co-operation of the two communities and organs of State elected or appointed on a communal basis. Many organs of the State are appointed jointly by the President and Vice-President of the Republic, including the Presidents of the Supreme Constitutional Court and the High Court.

Our Constitution is based on the Zurich and London Agreements (dated the 11th February, 1959, and the 19th February, 1959, respectively), which include the " basic structure " of the Republic, the Treaty of Guarantee and the Treaty of Alliance. Cyprus was then a British Crown Colony and the British Parliament on the 29th July, 1960, enacted the Cyprus Act, 1960, providing for the establishment of the Republic of Cyprus. By an Order-in-Council made by Her Majesty the Queen on the 3rd August, 1960, under the provisions of section 1 of the Cyprus Act, the Constitution of Cyprus, which had been initialled at Ankara, on the 28th July, 1960, by the representatives of the governments concerned and of the Greek Cypriot and Turkish Cypriot communities, was declared to be the Constitution of the Republic of Cyprus and to come into force on the 16th August, 1960, on which day the Republic was eventually established. It will thus be seen that the Constitution of the Republic was not made by a constituent assembly of the people of Cyprus, but is the result of the aforesaid agreements.

The Republic of Cyprus was established on the 16th August, 1960, on the signing of the Treaty of Establishment between the United Kingdom, the Kingdom of Greece, the Republic of Turkey and the Republic of Cyprus.

The provisions of the constitution, so far as they are material for the purposes of this case, are the following :

Article 1 provides that the State of Cyprus is an " inde-

pendent and sovereign Republic with a presidential regime, the President being Greek and the Vice-President being Turk ".

Part II (Articles 6 to 35) provides for the fundamental rights and liberties of the people and is based on the Rome Convention for the Protection of Human Rights and Fundamental Freedoms, dated the 4th November, 1950. Part III (Articles 36 to 60) contains provisions regarding the *executive power* of the President and Vice-President of the Republic and of the Council of Ministers. The executive power is ensured by the President and the Vice-President of the Republic either acting jointly or separately in matters enumerated in Articles 47, 48 and 49. Under the provisions of Article 54 the Council of Ministers exercises the residue of the executive power (excepting some matters appertaining to the competence of the Communal Chambers).

Part IV (Articles 61 to 85) makes provision for the powers of the House of Representatives. Article 61 provides that the *legislative power* of the Republic shall be exercised by the House of Representatives in all matters except those expressly reserved to the Communal Chambers. Part V (Articles 86 to 111) provides for the competence of the Communal Chambers of the Greek and the Turkish communities, and for other matters of a communal nature.

Part IX (Articles 133 to 151) makes provision for the establishment of the *Supreme Constitutional Court*. Article 133.1 provides that this court shall be composed of a Greek, a Turk and a neutral Judge and that the latter shall be the President of the Court ; the President and other Judges of the Court shall be appointed jointly by the President and the Vice-President of the Republic. These provisions are basic and cannot be amended or repealed in any way (Article 182.1). The Supreme Constitutional Court, *inter alia*, has exclusive jurisdiction to interpret the Constitution and to decide on the constitutionality of any laws or decisions made by the House of Representatives or any of the Communal Chambers (Articles 144, 149, 180) ; it decides whether any law or decision of the House of Representatives, including the Budget, is discriminatory (Articles 137 and 138), and adjudicates finally upon conflicts or contests of power or competence arising between any organs of, or authorities in, the Republic (Article 139). It is also the Administrative Tribunal of the State (Article 146).

Part X (Articles 152 to 164) provides for the establishment of the *High Court of Justice* and the subordinate courts. The High Court is the highest appellate court in the Republic and has jurisdiction to hear and determine all appeals from any Court other than the Supreme Constitutional Court. Generally, the *judicial power* (other than that exercised by the Supreme Constitutional Court and the communal courts) is exercised by the High Court of Justice and the subordinate courts established under the provisions of the Courts of Justice Law, 1960 (Articles 152, 155 and 158). Article 153 provides that the High Court shall be composed of two Greek Judges, one Turkish Judge and a neutral Judge who shall be the President of the court and shall have two votes. The President and the other Judges of the High Court shall be appointed jointly by the President and the Vice-President of the Republic. This provision in Article 153 is one of the basic provisions and cannot, in any way, be amended or repealed (Article 182.1). The High Court is also the Supreme Council of Judicature with exclusive competence with regard to the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers (Article 157). This provision is also one of the basic Articles of the constitution and cannot be amended or repealed in any way.

Article 159 provides that Greek litigants shall be tried by Greek Judges and Turkish litigants by Turkish Judges and that mixed cases, that is, cases in which the parties belong to two different communities, shall be tried by Judges belonging to both communities, as the High Court shall determine (Article 155.3). Article 159 (paragraphs 1, 2, 3 and 4) is also one of the basic provisions and cannot be altered in any way.

Part XIII contains the following provisions :

Article 179 provides that the constitution shall be the Supreme Law of the Republic, and that no law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of the constitution.

Article 181 provides that the following Treaties shall have constitutional force :

(*a*) The Treaty guaranteeing the independence, territorial integrity and constitution of the Republic,

concluded between the Republic, the Kingdom of Greece, the Republic of Turkey and the United Kingdom ; and

(*b*) The Treaty of Military Alliance providing for matters of common defence, concluded between the Republic, the Kingdom of Greece and the Republic of Turkey. The contracting Parties thereby undertake to resist any attack or aggression directed against the independence or the territorial integrity of the Republic of Cyprus, and for this purpose Greece and Turkey are permitted to have military contingents stationed in Cyprus.

Article 182 provides that certain basic Articles of the Constitution incorporated from the Zurich Agreement " cannot ", in any way, be amended, whether by way of variation, addition or repeal. Otherwise any other provision of the Constitution may be amended by a majority vote of the House of Representatives, comprising at least two-thirds of the total number of the Greek Representatives and at least two-thirds of the total number of the Turkish Representatives. It will thus be seen that it is expressly provided that, even if all the Representatives belonging to the Greek Community and the Representatives belonging to the Turkish Community are in full agreement as to the necessity for the amendment or repeal of any of the basic Articles, it is impossible for them, at any time, either to amend or repeal such provision, which is really inconsistent with the sovereignty of an " independent and sovereign Republic " (see Article 1).

Article 183 provides for the proclamation of emergency in case of war or any other public danger threatening the life of the Republic (paragraph 1), but the only Articles which may be suspended during such emergency are some of the Articles contained in Part II of the Constitution concerning fundamental rights and liberties. No provisions regarding the Courts may be suspended in any way.

Law of Necessity : I shall now deal with the " law of necessity " as understood and applied in other countries. The classical writers abound in maxims upholding the concept of necessity. This is mainly based on the maxim " *salus populi est suprema lex* ". Judicial decisions in various countries have acknowledged that in abnormal conditions exceptional circumstances impose on those exercising the

power of the State the duty to take exceptional measures for the salvation of the country on the strength of the above maxim.

In *France* this doctrine is known as the theory of " exceptional circumstances ". According to Conseiller d' Etat Raymond Odent (" Contentieux Administratif ", University of Paris (1961), Volume 1, page 136), it is wholly founded on the predominance of the concept of public interest, of the safeguard of the State which is above all other considerations. " When the life of the country is threatened the exigencies of the moment prevail over the juridical scrupples of legality " (*ibid.* page 137). " It is the superior law of the nation to ensure its existence, to defend its independence and security " (see the case of " *Syndicat national des chemin de fer de France, etc.*" 18th July, 1913, Rec. 875). Although the French Constitution of 1875 did not provide for such a situation the Conseil d' Etat established it in the case of HEYRIES (C.E. 28 June 1918, Rec. 651) by acknowledging to the Government and the Administration the power to take measures even contrary to the express provisions of the law in order to ensure the functioning of the public services in exceptional circumstances as in time of war. This doctrine has since been applied by the Conseil d' Etat in many cases in exceptional circumstances other than time of war (*e.g.* riots, floods, grave epidemics), and has recently been incorporated in the French Constitution of 1958 (Article 16).

The following is an extract from Conseiller Odent's book (*ubi supra*) on the concept of exceptional circumstances (at pages 137–8) :

" (*a*) La notion de circonstances exceptionnelles :"

" La jurisprudence est partie de l' idée que toute l' organisation sociale est destinée à assurer la vie due pays, ou, pour employer une expression plus juridique, l' ordre public et que le droit est une technique qui a pour objet d' organiser les pouvoirs publics à cette fin supérieure. La jurisprudence a été ainsi conduite à estimer qu' il y avait une hiérarchie des normes juridiques et que les autorités exécutives se conformaient mieux à l' esprit des institutions constitutionelles en empietant provisoirement sur les prérogatives legislatives qu' en se cantonnant dans un formalisme etroit ou en demeurant dans l' inaction, lorsque cette inaction met en peril l' ordre publique. La jurisprudence administrative a donc toujours refusé de considérer que le pouvoir exécutif était irremediablement lie par une technique concue pur une période normale, adaptée aux besoins d' une période

normale, mais insuffisante en cas de circonstances exceptionnelles. Aussi, en cas de circonstances exceptionnelles, toute autorité relevant due pouvoir exécutif a juridiquement le pouvoir et moralement l' obligation de prendre pour la durée de ces circonstances, et sous le controle du juge administratif, toutes les mesures strictement nécessaires à l' accomplissement de la mission qui lui est confiée, même si les mesures prises relèvent normalement de la compétence législative (31 mars 1954, Baudet, 2ème espèce, p. 196). Pour que des autorités executives aient ainsi le pouvoir juridique d' excéder non seulement leur propre compétence normale, mais même la compétence normale due pouvoir exécutif, trois conditions doivent être simultanément réunies. Deux de ces conditions tiennent a la nature des circonstances : il faut, d' une part, que les circonstances de temps et de lieu aient un caractère incontestablement, manifestement exceptionnel ; il faut, d' autre part, que l' autorité normalement *competente* n' ait pas la *possibilité materielle ou juridique* d' intervenir et, par consequent, de prendre les mesures propres a pallier ces circonstances. La troisième condition tient au but à atteindre : il faut que ce but soit d' une importance telle que, s' il n' était pas atteint, l' une des tâches fondamentales des pouvoirs publics ne serait pas accomplie.

En outre les décisions prises dans le cadre de la théorie des pouvoirs exceptionnels de crise doivent par leur nature satisfaire a deux conditions : il faut d' une part, que ces décisions soient très exactement proportionnees au but à atteindre, et, d' autre part, que leurs effets lorsqu' il s' agit de décisions reglementaires soient limites dans le temps à la durée des circonstances exceptionnelles."*

In *Italy* the law of necessity has been accepted long ago as forming part of the law of the country. Eminent writers on Public Law adopt the principle that necessity constitutes an original source of law independently of the case where it is a prerequisite for the application of certain constitutional provisions for a state of emergency : See *e.g.* C. Mortati, Professor in the University of Rome : " Diritto Pubblico " (1962), 6th edition, page 174 ; and R. Alessi, Professor of Administrative Law in the University of Bologna : " Diritto Amministrativo Italiano " (1960), 3rd edition, page 218.

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* *Note :* An English translation of the above extract is to be found at the end of this judgment, at p. 271.

This is what Professor Mortati has to say on this point (*ubi supra*, at page 174) :

> " Invece la necessita, in un terzo significato, che e quello qui considerato, si presenta quale fatto di autonoma produzione giuridica quando opera all' infuori o anche contro la legge, apparendo di per se capace di legittimare l' atto, altrimenti illecito. Naturalmente perche tale effeto si produca la necessita deve avere, come si suol dire, carattere istituzionale, cioe deve essere desunta dalle esigenze di vita, dai fini dell' istituzione ossia dell' ordinamento giuridico al quale appartiene l' organo che opera sulla base di tale fonte. L' impiego di essa si giustifica appunto pel fatto che l' esistenza dell' istituzione e piu importante del rispetto della legge, apparendo questa solo uno strumento al servizio di quella (fiat iustitia ne pereat mundus)." †

In *Germany* the law of necessity has been accepted by famous writers on Public Law like Laband and W. Jellinek and was embodied in Article 48 of the Weimar Constitution (see Jellinek, " Gesetz und Verordung ", 1887, page 376).

In *England*, where there is no written constitution, this problem would not, strictly speaking, arise, but the defence of necessity is part of the common law which has been incorporated in section 17 of our Criminal Code as a complete defence in criminal cases. Dr. Glanville Williams contributes an interesting article entitled " The Defence of Necessity " in " Current Legal Problems 1953 ", at page 216 *et seq*. The following extract is, I think, to the point as analysing the doctrine of necessity (page 224) :

> " What it comes to is this, that the defence of necessity involves a choice of the lesser evil. It requires a judgment of value, an adjudication between competing ' goods ' and a sacrifice of one to the other. The language of necessity disguises the selection of values that is really involved.
>
> If this is so, is there any legal basis for the defence ? The law itself enshrines values, and the judge is sworn to uphold the law. By what right can the judge declare some value, not expressed in the law, to be superior to the law ? How, in particular, can he do this in the face of the words of a statute ? Does not the defence of necessity wear the appearance of an appeal to the judge against the law ?

† *Note :* An English translation of the above extract is to be found at the end of this judgment, at p. 273.

This difficulty is only apparent. 'The Law' is not a body of systematised rules enacted as a whole and fixed for all time. Judges have always exercised the power of developing the law, and this is now recognised to be a proper part of their function. 'The Law', in a word, includes the doctrine of necessity; the *defence of necessity is an implied exception to particular* rules of law. Even a criminal statute that makes no mention of the doctrine can be regarded as impliedly subject to it, just as such a statute is impliedly subject to the defence of infancy or insanity or self-defence."

In *Greece* the principle of the law of necessity has been accepted both by the "Arios Pagos" (the Supreme Court) and the "Symvoulion Epikratias" (Conseil d' Etat). The "Arios Pagos" has adopted this principle since 1919 (in case No. 43 of 1919) and the Greek Conseil d' Etat has ruled in many cases since 1945 that in exceptional circumstances the right must be acknowledged to the Government to regulate by legislation certain exceptional matters relating to the accomplishment of their mission, that is, the restoration of law and order and public security, "by deviating from the constitution" (κατὰ παρέκκλισιν ἀπὸ τοῦ συντάγματος) "if it is indispensably and imperatively necessary and inevitable" (see Conseil d' Etat case No. 2/1945). The validity of these laws is subject *to the searching control of the Conseil d' Etat regarding* the nature of the necessity and the measures taken, because only in this way the supremacy of the constitutional provisions may be ensured (Case 68/1945 ; and Professor Kyriakopoulos, "Greek Administrative Law" (1961) 4th Edition Vol. 1, p. 33). The law of necessity in Greece is clearly defined in three decisions of the Conseil d' Etat, Nos. 2/1945, 13/1945 and 68/1945. Extracts from two of these decisions are given below :

Συμβούλιον Ἐπικρατείας: Ἀριθμ. 2/1945

(«Θέμις» (1945) ΝΣΤ' (56), σελὶς 95, 99.)

Ὁ Πρόεδρος Παναγ. Πουλίτσας εἶπε τὰ ἑξῆς :

« . ...

«Ἤδη ἐν ψηφίσματι τῆς ἐν Ἄστρει τῷ 1823 συνελθούσης Β' Ἐθνικῆς Συνελεύσεως, ἐπαναληφθέντι καὶ ἐν τῷ ψηφίσματι τῆς Ιης Μαΐου, 1827 τῆς ἐν Τροιζῆνι συνελθούσης τῷ 1827 Γ' Ἐθνικῆς Συνελεύσεως, ρητῶς διετάχθη ὅτι «ἐπ' οὐδεμιᾷ προφάσει καί, περιστάσει δύναται ἡ

βουλὴ ἢ ἡ κυβέρνησις νὰ νομοθετήσῃ ἢ νὰ ἐνεργήσῃ τι ἐναντίον εἰς τὸ παρὸν πολιτικὸν Σύνταγμα». Ἀνεγνωρίσθη δὲ γενικῶς, καὶ ἀνεγράφη ρητῶς ὡς ἑρμηνευτικὴ δήλωσις ἐπὶ τοῦ ἄρθρου 50υ τοῦ Συντάγματος τοῦ 1927, ἡ ἀρχή, ὅτι «τὰ δικαστήρια ὑποχρεοῦνται νὰ μὴ ἐφαρμόζουν νόμον οὗτινος τὸ περιεχόμενον ἀντίκειται πρὸς τὸ Σύνταγμα». Ἀνατροπὴ ἢ μεταβολὴ τοῦ Συντάγματος πλὴν τῆς ἀναθεωρήσεως, θὰ ἠδύνατο νὰ γίνῃ ὑπὸ ἐπαναστάσεως, ἐπὶ τούτῳ γενομένης καὶ ἐδραζομένης ἐπὶ λαϊκῶν βάσεων, ἐγγυωμένων τὴν μονιμότητα τῆς ἀνατροπῆς καὶ τὴν ὑπὸ συντακτικῆς συνελεύσεως ψήφισιν νέου Συντάγματος ὑπὸ τὸ πνεῦμα τῆς ἐπαναστατικῆς μεταβολῆς. Ἡ τοιαύτη κύρωσις τῶν κατὰ τὰς περιόδους τῶν ἐτῶν 1917–1920, 1922–1923, 1926 καὶ 1935 ἐκδοθεισῶν ὑπὸ τῶν κυβερνήσεων πράξεων συντακτικοῦ περιεχομένου ἐκρίθη πάντοτε ἀναγκαία.

«Βεβαίως ταῦτα ἰσχύουσιν ἐπὶ νομίμων κυβερνήσεων, ἐπὶ κυβερνήσεων ἐχουσῶν συνταγματικὴν τὴν προέλευσιν καὶ πολιτευομένων συμφώνως πρὸς τὸ Σύνταγμα. Ἄλλως ἔχει τὸ πρᾶγμα ἐπὶ μὴ νομίμων, ἐπαναστατικῶν ἢ δικτατορικῶν κυβερνήσεων, εἴτε αὗται ἀρχῆθεν δὲν εἶχον συνταγματικὴν τὴν προέλευσιν, εἴτε μετὰ ταῦτα σαφῶς ἐδήλωσαν τὴν βούλησιν αὐτῶν περὶ μὴ τηρήσεως ἐφεξῆς τοῦ Συντάγματος. Αἱ κυβερνήσεις αὗται, ἐὰν ἐπεβλήθησαν καὶ ἀναγνωρίζονται ἐὰν ἀσκῶσιν ἢ δύνανται νὰ ἀσκήσωσι πραγματικῶς καὶ ἀκωλύτως πᾶσαν τὴν κρατικὴν ἐξουσίαν, τὴν ἐξουσίαν τοῦ ἐπιτάσσειν καὶ ἐξαναγκάζειν τὴν τήρησιν τῶν ἐπιταγῶν αὐτῶν, τελοῦσαι ὑπεράνω πάσης ἄλλης ἐν τῇ χώρᾳ δυνάμεως, αἱ κυβερνήσεις αὗται δὲν δεσμεύονται ὑπὸ τῶν περιορισμῶν τοῦ Συντάγματος, διότι τοῦτο κατελύθη καὶ ἔπαυσε πλέον ἰσχῦον.

«Ὅθεν ἐξεταστέον τυγχάνει τὶς ὁ χαρακτὴρ τῆς κυβερνήσεως, τῆς ἐκδούσης τὰς διαληφθείσας συντακτικὰς πράξεις. Ὡς εἶναι γνωστόν, τὰ μέλη τῆς κυβερνήσεως ταύτης, ὡς καὶ τῆς παρούσης, διωρίσθησαν ὑπὸ τοῦ Ἀντιβασιλέως, ἐνεργοῦντος ἐν ὀνόματι τοῦ Βασιλέως, ἐπὶ τῇ βάσει τοῦ ἄρθρου 31 τοῦ Συντάγματος, καθ' ὃ «ὁ Βασιλεὺς διορίζει καὶ παύει τοὺς ὑπουργοὺς αὐτοῦ», καὶ ὡρκίσθησαν νὰ φυλάξωσιν ὑπακοὴν εἰς τὸ Σύνταγμα. Ἑπομένως αἱ κυβερνήσεις αὗται, κατὰ τοὺς ὁρισμοὺς τοῦ Συντάγματος, κληθεῖσαι εἰς τὴν ἀρχήν, εἶναι θεωρητέαι ὡς νόμιμοι. Τοῦτο ἐνισχύεται καὶ ἐκ τοῦ τρόπου τῆς ἀποχωρήσεως τῆς προηγουμένης κυβερνήσεως. Ἀφοῦ δὲ καὶ μετὰ ταῦτα ἤσκησαν τὴν κυβερνητικὴν ἐξουσίαν γενικῶς ἐπὶ τῇ βάσει τῶν δια-

τάξεων τοῦ Συντάγματος, διετήρησαν τὸν χαρακτῆρα νομίμου κυβερνήσεως. Τὸ γεγονὸς τῆς ἐκδόσεως ὑπὸ τῆς προηγουμένης κυβερνήσεως πλειόνων συντακτικῶν πράξεων δὲν ἀρκεῖ νὰ ἀποστερήσῃ αὐτὴν τοῦ χαρακτῆρος τούτου, ἀφοῦ παρὰ τὰς πράξεις ταύτας, ἐξηκολούθησε νὰ πολιτεύηται γενικῶς συμφώνως πρὸς τὸ Σύνταγμα, καὶ δὲν ἐδήλωσε κατά τινα τρόπον σαφῶς ὅτι ἐφεξῆς θὰ κυβερνᾶ κατὰ παρέκκλισιν ἀπὸ τοῦ Συντάγματος.

«Τοιοῦτον νόμιμον χαρακτῆρα ἔχουσαι αἱ κυβερνήσεις αὗται καὶ ἐφ' ὅσον διατηροῦσιν αὐτὸν δὲν δύνανται αὗται καὶ ὁ Βασιλεύς, κατὰ τὸ ἄρθρον 44 τοῦ Συντάγματος νὰ ἔχωσιν ἄλλας ἐξουσίας, εἰμὴ ὅσας τοῖς ἀπονέμουσι ρητῶς τὸ Σύνταγμα καὶ οἱ συνάδοντες πρὸς αὐτὸ ἰδιαίτεροι νόμοι. Καὶ κατ' ἀκολουθίαν δὲν δύνανται νὰ ἐκδίδωσιν ὑφ' οἱονδήποτε ὄνομα διατάξεις καὶ πράξεις ἀντικειμένας εἰς τὸ Σύνταγμα, πλὴν τῶν ἀναγομένων εἰς θέματα, περὶ ὧν αὐτὸ τὸ Σύνταγμα ἐπιτρέπει τοῦτο, ὡς εἰς τὰς περιπτώσεις τῶν ἄρθρων 91 καὶ 39. Πέραν τῶν θεμάτων τούτων θὰ ἠδύνατο νὰ γίνῃ δεκτὸν ὅτι, ἐὰν τυχὸν ἦτο τοῦτο ἀπαραιτήτως καὶ ἐπιτακτικῶς ἀναγκαῖον καὶ ἀναπόφευκτον, θὰ ἠδύναντο αἱ κυβερνήσεις αὗται νὰ ρυθμίσωσι καὶ κατὰ παρέκκλισιν ἀπὸ τοῦ Συντάγματος θέματα ἀναγόμενα εἰς τὴν πραγματοποίησιν τῶν κυριωτάτων σκοπῶν δι' οὓς ἐκλήθησαν εἰς τὴν ἀρχήν, ἤτοι τῆς ἀποκαταστάσεως τῆς ἐννόμου τάξεως καὶ δημοσίας ἀσφαλείας καὶ τῆς ταχίστης διενεργείας τοῦ δημοψηφίσματος περὶ τοῦ πολιτειακοῦ ζητήματος.»

Συμβούλιον Ἐπικρατείας.

Ἀπόφ. 68/1945 ὁλομελείας («Θέμις» (1945) ΝΣΤ' (56), σελὶς 139, 140).

Δικασταί: Π. Πουλίτσας, Πρόεδρος

«Ἐπειδὴ ὡς ἤδη ἀπεφήνατο τὸ Συμβούλιον τῆς Ἐπικρατείας, εἰς ἣν γνώμην καὶ αὖθις κατέληξε καὶ μετὰ νέαν μετ' ἐπιστασίας ἐξέτασιν τοῦ ζητήματος ἐν τῇ εὐρυτέρᾳ ταύτῃ συνθέσει αὐτοῦ αἱ ἀπὸ τῆς ἀπελευθερώσεως τῆς χώρας κληθεῖσαι ἐπὶ τὴν ἀρχὴν κυβερνήσεις ἔχουσι τὴν προέλευσιν αὐτῶν οὐχὶ ἐπαναστατικὴν ἀλλὰ συνταγματικὴν καὶ νόμιμον ὡς προκύπτει ἐκ τοῦ διορισμοῦ αὐτῶν ὑπὸ τοῦ κατὰ τὸ Σύνταγμα ἁρμοδίου Ἀνωτάτου Ἄρχοντος, ἐκ τοῦ ὑπὸ τῶν μελῶν αὐτῶν δοθέντος ὅρκου ὑπακοῆς εἰς τὸ Σύνταγμα, καὶ ἐκ τῶν ἐπανειλημμένων προγραμματικῶν δηλώσεων αὐτῶν περὶ ἐμπεδώσεως τῆς νομιμότητος, τῆς ἰσοπολιτείας καὶ τοῦ

Κράτους δικαίου. Τοιοῦτον, νόμιμον, χαρακτῆρα ἔχουσαι αἱ κυβερνήσεις αὗται, καὶ ἐφ' ὅσον διατηροῦσιν αὐτόν, δὲν δύνανται, αὐταὶ καὶ ὁ Βασιλεύς, κατὰ τὸ ἄρθρον 44 τοῦ Συντάγματος, νὰ ἔχωσιν ἄλλας ἐξουσίας, εἰμὴ ὅσας τῷ ἀπονέμουσι ρητῶς τὸ Σύνταγμα καὶ οἱ συνάδοντες πρὸς αὐτὸ ἰδιαίτεροι νόμοι. Καὶ κατ' ἀκολουθίαν δὲν δύνανται νὰ ἐκδίδωσιν ὑφ' οἱονδήποτε ὄνομα διατάξεις καὶ πράξεις ἀντικειμένας εἰς τὸ Σύνταγμα, πλὴν τῶν ἀναγομένων εἰς θέματα, περὶ ὧν αὐτὸ τὸ Σύνταγμα ἐπιτρέπει τοῦτο, ὡς εἰς τὰς περιπτώσεις τῶν ἄρθρων 91 καὶ 39. Πλὴν τῶν θεμάτων τούτων λαμβανομένων ὑπ' ὄψιν τῶν ἐξαιρετικῶν πολιτικῶν περιστάσεων ὑφ' ἃς αἱ κυβερνήσεις αὗται ἐκλήθησαν ἐπὶ τὴν ἀρχήν, δέον κατ' ἀνάγκην νὰ ἀναγνωρισθῇ εἰς αὐτὰς καὶ τὸ δικαίωμα τῆς ρυθμίσεως, κατὰ παρέκκλισιν ἀπὸ τοῦ Συντάγματος, ἐφ' ὅσον τοῦτο εἶναι ἀπαραιτήτως καὶ ἐπιτακτικῶς ἀναγκαῖον καὶ ἀναπόφευκτον, ὡρισμένων ἐξαιρετικῶν θεμάτων, ἀναγομένων εἰς τὴν πολιτικὴν ἀποστολὴν τῶν κυβερνήσεων τούτων. Πέραν ὅμως τῶν ἐξαιρετικῶν τούτων θεμάτων ἐκδήλου, ἐπιτακτικῆς καὶ ἀπαραιτήτου ἀνάγκης, δὲν εἶναι ἐπιτετραμμένον, οὐδ' ἐκ τῶν πραγμάτων ἀναγκαῖον νὰ ἀναγνωρισθῇ καὶ συνταγματικὴ ἐξουσία εἰς τὰς κατ' ἀρχὴν νομίμους ταύτας κυβερνήσεις.

«Ἐπειδὴ ἡ ὕπαρξις τῶν διαληφθεισῶν Προϋποθέσεων ὑφ' ἃς δύναται νὰ ἀναγνωρισθῇ εἰς τὴν Ἐκτελεστικὴν ἐξουσίαν ὅλως ἐξαιρετικῶς, ἡ θέσπισις κανόνων δικαίου κατὰ παρέκκλισιν ἀπὸ τῶν ὁρισμῶν τοῦ Συντάγματος, ὑπόκειται εἰς τὸν ἔλεγχον τοῦ Συμβουλίου τῆς Ἐπικρατείας. Διότι τοῦτο ἔχον ἐξ αὐτοῦ τοῦ Συντάγματος καὶ τῆς διεπούσης αὐτὸ λοιπῆς νομοθεσίας ἁρμοδιότητα νὰ κρίνῃ περὶ τῆς νομιμότητος τῶν ἐνώπιον αὐτοῦ προσβαλλομένων διοικητικῶν πράξεων, δικαιοῦται καὶ ὑποχρεοῦται συνάμα νὰ ἐξετάσῃ τὸ ἔγκυρον καὶ δὴ τὴν συνταγματικότητα τῶν νομοθετικῶν διατάξεων, ἐφ' ὧν αἱ διοικητικαὶ αὗται πράξεις ἐρείδονται, ὀφεῖλον ἐν συγκρούσει πρὸς τὸ Σύνταγμα νομοθετήματός τινος νὰ μὴ ἐφαρμόσῃ αὐτό. Μόνον οὕτω ἀσφαλίζεται ἡ ἐπικρατεστέρα ἰσχὺς τῶν συνταγματικῶν διατάξεων, διὰ τοῦ ἐλέγχου ἐὰν πράγματι ὑφίσταται κατάστασις ἐκδήλου, ἐπιτακτικῆς καὶ ἀπαραιτήτου ἀνάγκης πρὸς ἔκδοσιν διατάξεως κατὰ παρέκκλισιν ἀπὸ τοῦ Συντάγματος.»

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* (in-

cluding the provisions of Articles 179, 182 and 183), 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 in order to ensure the very existence of the State. The following prerequisites must be satisfied before this doctrine may become applicable :

(*a*) an imperative and inevitable necessity or exceptional circumstances ;

(*b*) no other remedy to apply ;

(*c*) the measure taken must be proportionate to the necessity ; and

(*d*) it must be of a temporary character limited to the duration of the exceptional circumstances.

A law thus enacted is subject to the control of this court to decide whether the aforesaid prerequisites are satisfied, *i.e.* whether there exists such a necessity and whether the measures taken were necessary to meet it.

Coming now to the present case, the learned Attorney-General of the Republic referred to the " recent events ", as stated earlier in this judgment, and submitted that, faced with such a situation, it was the duty of the Government of the Republic of Cyprus, through its legislative organ, to make provision for the functioning of the courts which is one of the three indispensable powers of the State, and it thus proceeded—(*a*) with the establishment of the present Supreme Court to take over temporarily the functions performed by the Supreme Constitutional Court and the High Court, without abolishing such courts, and (*b*) with the enactment of a provision for the composition of trial Courts irrespective of communal criteria. In doing so, he said, the legislature relied on the law of necessity.

Mr. Berberoglou for the respondents submitted that all the authorities on the law of necessity assumed three prerequisites : (*a*) the existence of an emergency ; (*b*) the fact that the executive acted beyond the limits of administrative law ; and (*c*) an administrative act intended for the duration of the emergency.

As regards (*a*) he submitted that there is provision in our constitution, Article 183, paragraph 1, providing for the proclamation of an emergency and that no such pro-

clamation has been issued by the Council of Ministers. In the absence of such a proclamation, he said, it may be assumed that there was no public danger threatening the life of the Republic, that is, there was no emergency ; and, therefore, necessity could not be invoked by the Government in enacting Law 33.

Whether the Council of Ministers rightly refrained from issuing a proclamation of emergency it is not for us to decide. But, considering the fighting, the abnormal situation, the non-functioning of the courts, the resolutions of the United Nations Security Council, and all the other facts concerning the functioning of the courts of the Republic, as stated in the earlier part of this judgment, I fail to see what would amount to an emergency or exceptional circumstances for the purposes of the law of necessity, if the conditions prevailing in Cyprus aforesaid do not. It should also be added that the provisions of Article 183 are altogether inadequate to meet the abnormal situation under consideration which has not been foreseen nor provided for by the framers of the constitution.

As to (*b*) and (*c*), it is true that some of the Continental cases refer to instances where the executive acted beyond the limits of administrative law, but there are many cases where legislative action was taken. And, needless to say, if the executive has the power in exceptional circumstances to take all measures necessary for the accomplishment of the aim entrusted to it, even outside the limits of administrative law, *a fortiori* the legislature has both the power and the duty to do likewise, especially in Cyprus where the executive power is divided between the President, Vice-President and the Council of Ministers, and the legislative power of the Republic is exercised by the House of Representatives in all matters except those reserved to the Communal Chambers (Article 61).

In this case, as the Attorney-General was at pains to explain, the legislature has not abolished any organ of the State, *i.e.* any of the courts, but it simply legislated for another court to take their place during the period that they will not be functioning, and has made alternative provisions regarding the composition of the trial Courts.

Mr. Berberoglou conceded that until June, 1964, the Turkish Judges of the District Courts did not attend their courts but that they did so from June onwards. He further conceded that if any necessity arose out of the

vacancy in the posts of the Presidents of the two superior courts, then a temporary Law could have been enacted regarding these two courts, *i.e.* the High Court and the Constitutional Court ; but he submitted that it was not warranted to change altogether the judicial system and that Law 33 had gone beyond any necessity, if it existed.

As regards the two superior courts of the Republic I have no doubt that there was a necessity due to the vacancy in the posts of the two Presidents, that in the conditions prevailing in Cyprus it was not possible to comply with the constitutional provisions (see the facts given earlier under the heading "(B) Facts...."), and that it was the imperative duty of the Government to provide for the undelayed administration of justice and not let the functioning of the highest courts of the Republic be paralysed.

As regards the Turkish Judges of the District Courts, it is common ground that (with one or two exceptions) they did not attend their courts until the beginning of June. Irrespective of whether their non-attendance is due to one or more factors (see the facts given earlier under the heading "(C) Facts...."), and considering that the abnormal conditions which prevailed before July, 1964, still continue and may continue to prevail for some time, it is likely that the same factor or factors which prevented them from attending in the past may at any moment prevent them again from carrying out their judicial duties, however willing they may personally be to do so.

The Republic of Cyprus is an independent and sovereign State and the Government of the Republic has, *inter alia*, the responsibility for the maintenance and restoration of law and order (cf. U.N. Security Council Resolution of 4th March, 1964), and the normal functioning of the courts. Faced with the non-functioning of the two superior courts of the land and the partial breakdown of the District Courts, the Government had to choose between two alternatives, *viz.* either to comply with the strict letter of the constitution (the relevant articles being unalterable under any condition), that is, cross its arms and do nothing but witness the complete paralysis of the judicial power, which is one of the three pillars of the State (*vide* Prof. Alessi, *ubi supra*, at pages 218-9) ; or to deviate from the letter of the constitution, which had been rendered inoperative by the force of events (which situation could not be foreseen by the framers of the constitution),

in order to do what was imperatively and inevitably necessary to save the judicial power temporarily until return to normal conditions so that the whole State structure may not crumble down. I have no hesitation in arriving at the conclusion that in these exceptional circumstances it was the duty of the Government, through its legislative organ, to take all measures which were absolutely necessary and indispensable for the normal and unobstructed administration of justice. I agree with the submission of respondent's counsel that the measures taken should be for the duration of the necessity and no more. This is also conceded by the learned Attorney-General of the Republic.

The question now arises : Did the legislature do what was absolutely necessary in the circumstances or did it exceed it? Considering the " recent events " as stated in this judgment, and the provisions of sections 3 (1) and (2), 9 and 11, which refer to the establishment of the Supreme Court, and the provisions of section 12, which provides for the trial of cases in the subordinate courts by any Judge irrespective of community, I am of the view that the measures taken are warranted by the exceptional circumstances.

I should not, however, be taken as pronouncing on the necessity or validity of other provisions in Law 33 as the question does not arise in the present case. Other provisions in Law 33 may have to be considered in the future, *e.g.* whether the enactment of section 10, providing for a new composition of the Supreme Council of Judicature, was necessitated by the " recent events ", and whether the measure taken is proportionate to the necessity, having regard to the provisions of Article 157 of the constitution which provides for the composition and competence of the Supreme Council of Judicature (see under heading " Constitution " (Articles 152 to 164) in this judgment). I would leave that question open as it is not necessary to decide it for the purposes of this case.

With regard to Mr. Berberoglou's complaint regarding the provisions of section 15, to the effect that Law 33 is placed above the constitution, I think that from a perusal of that section it becomes abundantly clear that Law 33 shall prevail over all other statutes *except* the constitution, which, of course, is not unconstitutional.

Finally, considering the proportion of the Turkish citizens of the Republic to the total population and the

present composition (section 3 (3) and (4)) and powers of the Supreme Court established under Law 33, I do not think that it can be said that the intention of the legislature in enacting the said Law, which was passed to meet an imperative and inevitable necessity, was in substance to abolish any of the constitutional safeguards of the Turkish community.

In the result, I concur with the conclusion that sections 3 (1) and (2), 9 and 11 of the Administration of Justice (Miscellaneous Provisions) Law, No. 33 of 1964, which have been challenged on behalf of the respondents as unconstitutional, have been validly enacted. The same applies to section 12 of the Law, which has also been challenged by learned counsel for the respondents.

This concludes Question 1.

I shall deal briefly with the remaining questions.

Question 2 was that the present quorum of three Judges was not authorised to hear constitutional matters but only appeals. The wording of section 11 (3), read together with sub-sections (1) and (2) of the same section, makes it abundantly clear that a division of three Judges duly nominated, as the present one, is fully authorised to hear an appeal, including constitutional matters raised in the appeal. Moreover, in the present case it should, I think, be added that after the constitutional questions were raised the matter was again referred to the Full Bench for reconsideration of the nomination and the Full Bench affirmed the original nomination of three Judges, that is, the present quorum.

Question 3 was that Article 144 of the Constitution, which is procedural, is still applicable and that the present quorum of three Judges should refer the matter to the Full Bench. I agree with my brother Judges that the procedure for reference under Article 144 of the Constitution by all Courts to the Supreme Constitutional Court is no longer applicable or necessary, as the provisions of that Article have been rendered inoperative owing to the non-functioning of the Supreme Constitutional Court and the merger of the jurisdictions vested in that Court and the High Court into the new Supreme Court established under the provisions of Law 33. Consequently, all questions of alleged unconstitutionality should be treated as issues of law in the proceedings, subject to revision on appeal

in due course, so far as the lower Courts are concerned. Where the question of unconstitutionality is raised in the course of an appeal, as in the present case, the matter may be decided by a quorum of three Judges of this Court hearing the appeal, without reference to the Full Bench.

Question 4 was that Law 33 was not properly promulgated in accordance with the provisions of Articles 47 (*e*) and 52 of the Constitution ; and

Question 5 was that the said Law was not published in Turkish in the official *Gazette*, contrary to the provisions of Article 3, paragraphs 1 and 2, and, that, consequently, it has not come into force and that any action taken under it is null and void.

The learned Attorney-General of the Republic submitted that so far as the promulgation of the Law is concerned (*a*) the Vice-President of the Republic has ceased participating in the affairs of the Government since December last, and (*b*) that it was not possible to transmit the Law to the Vice-President's office, which is in the Turkish quarter of Nicosia and to which no Greek has access. As regards the non-publication of the Law in Turkish, which was admitted, the learned Attorney-General stated that, in the abnormal conditions prevailing at the time, it was not possible to have the Law translated and printed in Turkish at the Printing Office of the Republic as no Turkish public officers have attended their offices since December, last.

Having regard to these exceptional circumstances prevailing at the time (cf. *Barrot and others* (1957)), Conseil d' Etat of France, Sirey 1957, page 675), I come to the conclusion that Law 33 was duly promulgated by publication in the official *Gazette* of the Republic in the Greek language and that it came into operation on the day of its publication in the *Gazette*, *viz.* on the 9th July, 1964.

For these reasons I hold that this Court as constituted in these appeals has jurisdiction to hear and determine the appeals.

(After the reasons for the Court's Ruling of the 8th October, 1964,* on the preliminary objection raised on behalf of the respondent, the Court proceeded to hear counsel on both sides on the substance of the appeal (No. 2729), and DECIDED as follows :—)

* Ruling published ante, at p. 199.

VASSILIADES, J. : As regards the substance of the appeal, we have no difficulty whatever, in allowing the appeal of the Attorney-General against the order for bail. We think it is obvious that in the circumstances appearing on the record of this case, and the conditions prevailing in the Island at the material time, as described in the judgments just delivered, the order for bail should not have been made.

There is ample precedent in this connection in Cyprus ; especially during the last ten years. *Rodosthenous* v. *The Police* (1961) C.L.R. 50, referred to *supra* and followed repeatedly in subsequent cases, fully covers the question before us. Apart of the matters to be considered as set out in *Rodosthenous* case, when a person is charged with serious crime and the evidence against him before the committing court presents good reasons for which the accused should not be allowed to circulate at large amongst the community, pending his trial, the words " if it thinks proper " in the third line of section 157 (1) of the Criminal Procedure Law, Cap. 155, should be given their full effect in considering an application for bail. In each case the matter must be decided judicially, in the particular circumstances of the case. And every such decision is subject to further consideration on appeal at the instance of either side. A speedy trial is always desirable in all cases ; but bail, only if the Court thinks it " proper ", in the circumstances.

Appeal allowed. Order for bail set aside.

Appeal allowed. Order appealed from set aside.

TRANSLATION

The following translation of the extract in French included in the judgment of Josephides J., at pages 258-259 herein, is published for the convenience of the profession :

Conseiller R. ODENT : " *Contentieux Administratif* " (1961), Volume 1, pages 137-8 :

" The concept of exceptional circumstances : "

" The jurisprudence emanates from the thought that the whole social organisation is destined to ensure the life of the country or, to use a more juridical expression

public order and that law is a means the object of which is to organize the public powers to this superior end. Jurisprudence was thus led to appreciate that there was a hierarchy in the juridical rules and that the executive authorities were behaving more in conformity with the spirit of constitutional institutions by a temporary encroachment on legislative prerogatives than by limiting themselves to a narrow conventionality or by remaining inactive when such inactivity imperils public order. Administrative jurisprudence has therefore always refused to consider that the executive power was irremediably bound by a system conceived for a period of normality, adapted to the needs of a normal period, but inadequate in case of exceptional circumstances. Also, in case of exceptional circumstances all authority emanating from the executive power has the legal power and the moral obligation to take, for the duration of the circumstances and under the control of the administrative judge, all measures strictly necessary for the accomplishment of the mission entrusted to it even if the measures taken normally belong to the competence of the legislature (31 March, 1954, Baudet, 2nd type, p. 196). So that the executive authorities may have the legal power to exceed not only their own normal extent of authority, but even the normal extent of authority of the executive power, three conditions must exist simultaneously. Two of these conditions result from the nature of the circumstances : first, it is necessary that the circumstances, in terms of time and place, have an undeniable and patently exceptional character, secondly, it is necessary that the authority which has normal competence in the matter has not got the physical or juridical possibility to intervene and, consequently, to take proper steps to avert the circumstances. The third condition refers to the end to be achieved ; this end must be of such importance that if it were not achieved, one of the fundamental tasks, of public powers could not be accomplished.

Besides, decisions taken within the frame of the theory of exceptional powers in an emergency must be of such a nature as to satisfy two conditions : first, these decisions must be very precisely proportionate to the aim to be achieved, and secondly, in the case of decisions concerning regulations, they must be limited in time for the duration of the exceptional circumstances."

TRANSLATION

The following translation of the extract in Italian included in the judgment of Josephides J., at page 260 herein, is published for the convenience of the profession :

Prof. Mortati : " *Diritto Pubblico* ", (1962), 6th edition, p. 174 :

" While necessity, in a third meaning, which is that considered here, presents itself as a fact of autonomous juridical product, when it operates outside or even contrary to law, appearing by itself capable of legalising the act, otherwise illegal. Naturally for the production of that effect, necessity must have an *institutional* character, that is to say it must be deduced from the exigencies of life, from the purposes the political institution of the state is aiming at, that is to say of the juridical order to which appertains the organ operating on the basis of such source (" fonte ").

This function is justified by the fact that the existence of the institution is more important than the respect of the law, which is a mere instrument in the service of such institution (*fiat iustitia ne pereat mundus*) ".