1972
Febr. 29

RITA MESSARITOU

v.

THE CYPRUS BROADCASTING CORPORATION

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

RITA MESSARITOU,

Applicant,

and

THE CYPRUS BROADCASTING CORPORATION,

Respondent.

(Case No. 407/70).

Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law No. 61 of 1970)—Sections 2, 3 and 4—Not unconstitutional as being contrary to Articles 122-125 of the Constitution—Consequently, the repondent Cyprus Broadcasting Corporation was duly empowered to effect the promotion complained of—And the enactment of the aforesaid Law having been held to have been justified by the law of necessity, it is not necessary that each particular act done thereunder should be separately justified on the ground of necessity (Bagdassarian v. The Electricity Authority *(1968) 3 C.L.R. 736 and* Iosif v. The Cyprus Telecommunications Authority *(1970) 3 C.L.R. 225,* distinguished).

Cyprus Broadcasting Corporation—Appointments and Promotions—Competence—Law No. 61 of 1970 (supra)—*Not unconstitutional—Justified by the law of necessity—See further* supra.

Constitutional law—Article 179 of the Constitution—Law or doctrine of necessity—Prerequisites which must be satisfied before it may become applicable—Principles governing question that measures provided by a legislative provision are wider than required to meet any necessity which may have existed—Scope and extent of the law (or doctrine) of necessity.

Necessity—Law or doctrine of necessity—See supra passim.

In the present case the Court held that there is nothing unconstitutional in sections 2, 3 and 4 of the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law 61/70) enabling, *inter alia,* the respondent Cyprus Broadcasting Corporation to deal with matters regarding appointments or promotions etc. of personnel and that the aforesaid legislative provisions were justified by the law or doctrine of necessity. The facts of this case are very briefly as follows :-

The applicant, a Senior Technical Operator in the service of the respondent Cyprus Broadcasting Corporation, by her present recourse seeks the annulment of the promotion of C.K. —the interested party—in preference to and instead of, herself. It is common ground that the promotion in question was effected by the respondent Corporation acting under the provisions of the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law No. 61 of 1970) and in particular sections 2, 3 and 4 thereof.

The first ground of law upon which the application is based is that the aforesaid provisions of Law No. 61 of 1970 (*viz.* sections 2, 3 and 4 thereof) under which the promotion complained of was effected, contravene Articles 122-125 of the Constitution, in that in accordance with the said Articles the only appropriate organ to effect appointments and promotions, *inter alia,* in the Cyprus Broadcasting Corporation is the Public Service Commission. It is not in dispute that under Articles 122 and 125 of the Constitution all matters relating, *inter alia,* to the appointments and promotions in the respondent Cyprus Broadcasting Corporation were vested exclusively in the Public Service Commission. On the other hand it is also agreed by all that the aforesaid legislative provisions could only be defended as constitutional if same were justified by the law of necessity, that is to say for the preservation of a fundamental service in the State, as that intended to be rendered by the respondent Corporation under section 17 of the Cyprus Broadcasting Corporation Law, Cap. 300A.

The facts leading up to the promulgation of the aforementioned Law No. 61 of 1970 *(supra)* are very briefly as follows :

Up to December 1963 all questions relating to the

employees of such Authorities as the respondent Corporation were exclusively dealt with by the Public Service Commission established under the Constitution (Articles 122-125). Since the well known events of December, 1963, the Turkish members of the Public Service Commission refrained from participating in its work together with the withdrawal of Turks from all the services and departments of the State. The Public Service Commission without its Turkish members strove for its existence until the appointment of all its members expired on the 15th August, 1966, whereupon on the authority of *Bagdassarian's* case *(infra)* the Public Service Commission established under the Constitution ceased to exist. In order to preserve such a service indispensable as it is for the functioning of the State, the Public Service Commission (Temporary Provisions) Law, 1965 (Law No. 72 of 1965) was enacted. Be that as it may, in June 1967, the Public Service Law, 1967 (Law No. 33 of 1967) was promulgated repealing expressly the aforesaid Law No. 72 of 1965 and establishing a new Public Service Commission but without any competence regarding employees in the service of Public Corporations such as the respondent Cyprus Broadcasting Corporation. This was the state of affairs which rendered imperative the enactment of the aforesaid Law *i.e.* the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law No. 61 of 1970) *(supra)* enabling, *inter alia,* the respondent Corporation to deal with matters such as appointments, promotions etc. of personnel in its employment.

It is precisely under the provisions of that Law (No. 61 of 1970) *(supra)* that the promotion complained of in the present case was effected by the respondent Cyprus Broadcasting Corporation, the argument set forth on behalf of the applicant being that the said promotion is null and void on the ground that it was made under statutory provisions (*i.e.* Law No. 61 of 1970, *supra)* offending against the Constitution, in particular Articles 122-125, establishing the Public Service Commission, which Commission continues to be the only appropriate organ to effect such appointments or promotions in the respondent Corporation. It was argued by counsel for the applicant that it is not enough for the legislator to invoke the law of necessity. It is the Court that has to be satisfied as to the necessity and that the application of the doctrine of necessity has to be examined in relation to the circumstances of the particular case in issue

and on the material before the Court. Counsel went further and said that even if it was necessarry to have a caretaking body, the *sub judice* promotion was not necessary to be made for the functioning of the respondent Corporation and, therefore, even if there was necessity for other functions, there was no necessity for this particular case.

Rejecting the argument propounded on behalf of the applicant and taking the view that the doctrine or law of necessity fully covers this case, the Court :

Held, (1) I am faced in the present case with the problem that there is no longer in existence the Public Service Commission envisaged by the Constitution and the Public Service Commission established under the Public Service Law, 1967 (Law No. 33 of 1967) has no competence to entertain matters relating to the personnel of the respondent Corporation as well as of that of the other three Authorities mentioned in Article 122 of the Constitution. As a result those Authorities found themselves indeed in a very difficult situation. They are all Authorities which render to the State important services of public utility, all having a vast number of employees, the respondent over four hundred. On the other hand their attempt to function on the law of necessity and without any legislative authority, met with no success if one sees the annulment of their decision in the cases of *Bagdassarian (infra) and Iosif (infra).*

(2) The Law by virtue of which the *sub judice* promotion was reached *(viz.* Law No. 61 of 1970, *supra)* could only be defended on the doctrine of necessity, which has been found to exist implicitly in Article 179 of the Constitution (see *Ibrahim's* case *(infra)* at p. 215 per Vassiliades P., at p. 234 per Triantafyllides J., and at p. 264. per Josephides J.).

(3) (a) In the present case (as in the Ibrahim's case, *infra)* counsel for the applicant raised the question that the measures taken by the *sub judice* provisions were wider than required to

meet any necessity which may have existed.

(b) The principles governing such a contention were given by Triantafyllides J. in the Ibrahim's case *(infra)* at p. 238 of the report (N.B. this passage from *Ibrahim's* case is quoted *post* in the Judgment of the Court in the present case).

(c) It is, therefore, a question to be determined in the circumstances of each case whether the *legislative measure* taken was justified in the circumstances, and also whether it was not a wider measure than what it ought to have been (see also *Iosif's* case *(infra)*, at pp. 230-231).

(4) Now, the aim of the said Law *(viz.* The Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law No. 61 of 1970)) was to fill the vacuum created by the aforesaid circumstances and in particular the expiration of the term of office of the members of the Public Service Commission (i.e. on August 15, 1966). It needs little effort to realise how important it was to take the appropriate measures so that matters of personnel would be solved. It was, therefore, a matter of necessity that this problem should have been resolved in the best way under the prevailing conditions.

(5) And I am satisfied that in enacting the Law under consideration (Law No. 61 of 1970, *supra*) the Government obviously acted within the narrow limit of the discretion it possesses, regarding the appropriate measure to be adopted for the purpose of meeting such necessity.

(6) Instead of improvising new methods it was, to my mind, reasonable to revert to the pre-existing state of affairs. And it cannot be said that the measure taken is wider than what it should have been or that it was unreasonable to entrust personnel matters to the Governing bodies of the Corporations concerned in such a temporary way as shown by the preamble of the said Law No. 61 of 1970 *(supra)*.

(7) It remains, however, to consider whether, having found that the law of necessity justified the enactment of the said Law No. 61 of 1970, each particular act thereunder should be separately justified on the ground of necessity. I cannot agree with such proposition. It would have been too far fetched to say that the said Law is justified on the doctrine of necessity but every appointment or promotion etc. made thereunder has to be justified as coming, or not, within that doctrine. There cannot be such a distinction (certain dicta in the cases of *Bagdassarian (infra)* and *Iosif (infra) considered*).

(8) In the light of the above the hearing of this case will proceed on the remaining issues. Respondent's costs in cause.

Order accordingly.

Cases referred to :

Markoullides and *The Republic,* 3 R.S.C.C. 30;

The Attorney-General of the Republic v. Ibrahim and Others, 1964 C.L.R. 195;

Bagdassarian v. The Electricity Authority (1968) 3 C.L.R. 736;

Iosif v. Cyprus Telecommunications Authority (1970) 3 C.L.R. 225.

Recourse.

Recourse against the decision of the respondent to promote the interested party Costas Kalogheras to the post of Studio Manager in preference and instead of the applicant.

A. Triantafyllides, for the applicant.

G. Polyviou, for the respondent.

S. Georghiades, for the Attorney-General of the Republic, as *amicus curiae*.

Cur. adv. vult.

The following decision was delivered by :-

A. Loizou, J. : The applicant, a Senior Technical Operator in the service of the respondent, by her present recourse seeks the annulment of the promotion of Costas Kalogheras—hereinafter to be called the interested party —to the post of Studio Manager in preference and instead of herself.

The first ground of law upon which this application is based, is that the Public Corporations (Regulation of Personnel Matters) Law, 61 of 1970, and in particular sections 2, 3 and 4 thereof, are unconstitutional, as being contrary to Articles 122-125 of the Constitution, in that in accordance with the said Articles the Public Service Commission is the only appropriate organ to effect appointments and promotions in the Cyprus Broadcasting Corporation.

In view of the nature and seriousness of the unconstitutionality issue raised, the Attorney-General of the Republic was invited to take part and address the Court. Furthermore, on the suggestion of counsel for both sides, the case has been heard on the issue of unconstitutionality only and this interim decision is intended to resolve same.

It is common ground that the promotion in this case was effected by the respondent Corporation, as provided by Law 61/70. It is also agreed by all that this Law could be defended as constitutional only if it was justified by the law of necessity, that is to say for the preservation of a fundamental service in the State, as that intended to be rendered by the respondent Corporation under section 17 of the Cyprus Broadcasting Corporation Law, Cap. 300A.

It is the contention of learned counsel for the applicant that it is not enough for the legislator to invoke the law of necessity. It is the Court that has to be satisfied as

to the necessity and that the application of the doctrine of necessity has to be examined in relation to the circumstances of the particular case in issue and on the material before the Court. He went further and said that even if it was necessary to have a caretaking body, the *sub judice* promotion was not necessary to be made for the functioning of the respondent organization and, therefore, even if there was necessity for other functions, there was no necessity for this particular case.

Under Article 122 of the Constitution "Public service" includes service under the Cyprus Broadcasting Corporation, the Cyprus Inland Telecommunications Authority and the Electricity Authority of Cyprus. Consequently, under Article 125 of the Constitution the allocation of public offices between the two communities and all matters relating to the appointment, confirmation and placing on the permanent or pensionable establishment, promotion, transfer, retirement and exercise of disciplinary control either including dismissal or removal from office of public officers, were vested exclusively in that Public Service Commission. That these Authorities were divested of their right to deal on their own with matters relating to their employees, has been confirmed by a number of judicial pronouncements beginning with the case of *Markoullides* and *The Republic*, 3 R.S.C.C., page 30.

Up to 1963 all questions relating to the employees of such Authorities were exclusively dealt with by the Public Service Commission established under the Constitution. The happenings of the events of December, 1963, are of such general knowledge that are capable and have been in fact judicially noticed by the Supreme Court in the case of the *Attorney-General of the Republic* v. *Mustafa Ibrahim & Others*, 1964 C.L.R. p. 195. I need not go into an extensive exposition of the state of affairs prevailing in the Republic since December 1963, suffice it to say for the purposes of this case that since then the Turkish members of the Public Service Commission refrained from participating in its work together with the withdrawal of Turks from all the services and departments of the State.

The Public Service Commission without its Turkish

members strove for its existence until the appointment of all its members expired on the 15th August, 1966. As it was held in the case of *Bagdassarian* v. *The Electricity Authority* (1968) 3 C.L.R. 736, the Public Service Commission established under the Constitution ceased to exist on the 15th August, 1966. In order to preserve such a service indispensable as it is for the functioning of the State, the Public Service Commission (Temporary Provisions) Law 1965 (Law 72/65) was enacted. In June, 1967, the Public Service Law 33/67 was promulgated repealing expressly Law 72/65.

The constitutionality of Law 33/67 is not in issue before me as it was not in issue in the *Bagdassarian* case and I also leave this matter entirely open. It was, however, said in *Bagdassarian's* case at pages 743-744 that —

> "By reading section 5 of Law 33/67 together with the relevant definitions in section 2 of the Law, and by comparing the position thus resulting with that which results when Article 125 is read together with the relevant definitions in Article 122, one is led inevitably to the conclusion that the 'Public Service Commission' set up, as from the 1st July, 1967, under Law 33/67, possesses competence over members of the 'public service' which is defined in such Law in a manner not including the personnel of the Authority, whereas under Article 125 the Public Service Commission is entrusted with competence over the personnel of the Authority, in view of the definition of 'public service' in Article 122.
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> It follows, therefore, that when the *sub judice* appointment was made, after the promulgation of Law 33/67, there was not in existence a Public Service Commission empowered under Article 125 to make such an appointment, but only a 'Public Service Commission' set up under Law 33/67 and not so empowered."

I am faced, therefore, in the present case, with the problem that there is no longer in existence the Public Service Commission envisaged by the Constitution and

the "Public Service Commission" set up by Law 33/67, has no competence to entertain matters relating to the personnel of the respondent Corporation as well as that of the other three Authorities mentioned in Article 122 of the Constitution. As a result the three Authorities found themselves indeed in a very difficult situation. They are three Authorities which render to the State important services of public utility, all having a vast number of employees, the respondent over four hundred. Their attempt to function on the doctrine of necessity and without any legislative authority, met with no success, if one sees the annulment of their decisions in the cases of *Bagdassarian (supra)* and *Iosif* v. *Cyprus Telecommunications Authority* (1970) 3 C.L.R. 225.

As I have said, this law by virtue of which the *sub judice* promotion was reached, could only be defended on the doctrine of necessity. This doctrine has been found to exist impliedly in Article 179 of the Constitution in the *Ibrahim* case *supra,* where the following was said :-

By Vassiliades, J., at page 214 :-

> "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.
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> 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 :
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> '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'."

By Triantafyllides, J., at p. 234 :

"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."

By Josephides, J., at pp. 264—265 :-

"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 (including 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."

In the present case,—as in the *Ibrahim* case—counsel for applicant raised the question that the measures taken by the *sub judice* provisions were wider than required to meet any necessity which may have existed. The principles governing such a contention were given by Triantafyllides, J. at page 238 of the Report :-

"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)."

It is, therefore, a question to be determined in the circumstances of each case whether the legislative measure taken was justified in the circumstances, and also whether it was not a wider measure than what it ought to have been in the circumstances. As stated by Triantafyllides, J. in *Iosif* v. *Cyprus Telecommunications Authority* (1970) 3 C.L.R. 225, at pp. 230—231 —

> "A necessity which would go so far as to give legal validity to the relevant action taken by the respondent in the present instance ought to have amounted to a situation caused by exceptional circumstances which could not be otherwise dealt with (see *The Attorney-General* v. *Ibrahim*, 1964 C.L.R. 195); and on the present occasion, even if one were to regard as a situation caused by exceptional circumstances the non-existence, after the promulgation of Law 33/67, of a Public Service Commission empowered to act under Article 125 as the appointing authority in relation to the staff of the respondent, the obvious remedy, which ought first to have been urgently resorted to, was to draw the attention of the appropriate authorities of the Republic to the need to remedy the situation in such manner as they would deem best and in the meantime to take no steps other than measures of a temporary character, limited to the duration of the situation brought about by the exceptional circumstances and proportionate thereto (see the *Ibrahim* case, *supra*).

Subsequently to the *Ibrahim* case it was stressed in *Georghiades* v. *The Republic* (1966) 3 C.L.R.

317, *HadjiGeorghiou* v. *The Republic* (1966) 3 C.L.R. 504 and *Papapantelis* v. *The Republic* (1966) 3 C.L.R. 515 that the doctrine of necessity could not be validly resorted to for the purpose of taking administrative measures, in relation to personnel matters, which are of permanent or radical effect, and not merely of such temporary nature as may be required to meet, for the time being, the needs of the immediate necessity (see, also, in this respect, the Annual Survey of Commonwealth Law, 1966, at p. 89).

In particular, in the *Papapantelis* case *(supra)*, in which permanent promotions, which had been made without proper constitution of the appointing organ, were stated, in argument, to have been validly made by virtue of the doctrine of necessity, the following were said in the judgment (at pp. 518-519) :-

> '... that the existence of the prerequisites for the coming into play of the 'law of necessity' ought to have been established by reference to the specific circumstances in which the relevant executive action was taken; and on the material before me I am not satisfied that such prerequisites did exist in relation to the decision to promote the interested parties.
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> I do fail to see how the 'law of necessity' could have warranted the making of permanent promotions to the existing, at the time, vacancies in the post of Assistant Labour Officer; any urgent needs of the service could have been met by temporary acting appointments and that is all that, in my view, could have been justified in the circumstances under the 'law of necessity'."

As briefly as the nature of the issue under consideration permits, I have given an outline of the constitutional, legal and factual elements whose blending forms the background to the enactment of the *sub judice* provisions. The aim of this law was to fill the vacuum created by the aforesaid circumstances and in particular the expiration of the term of office of the members of the Public

Service Commission. It needs little effort to realise how important it was to take appropriate measures so that matters of personnel would be solved. The non-filling of posts, the inability to take disciplinary measures and the continued uncertainty in the careers of four hundred employees could not but inevitably have repercussions on the efficient performance of their duties, and consequently on the proper functioning of the corporation itself. It was, therefore, a matter of necessity that this should have been resolved in the best possible way under the prevailing conditions. I am satisfied that in enacting the law under consideration the Government obviously acted within the narrow limit of the discretion it possesses, regarding the appropriate measure to be adopted for the purpose of meeting such necessity. Instead of improvising new methods it was, to my mind, reasonable to revert to the pre-existing state of affairs with the existence of a Joint Consultative Selection Committee in which both the Staff Trade Union and the Managerial side of the respondent Corporation (see *exhibit* D. attached to opposition) are represented. It cannot be said that the measure taken is wider than what it should have been, or that it was, in the circumstances, unreasonable to entrust personnel matters to the Governing bodies of the three public authorities in such a temporary way, as shown by the preamble of the law. In the light of all the above the argument that sections 2, 3 and 4 of the Public Corporations (Regulation of Personnel Matters) Law of 1970 are unconstitutional fails.

It remains however to consider whether, having found that the law of necessity justified the enactment of the said law each particular act done thereunder should be separately justified on the ground of necessity. I cannot agree with such a proposition as in examining the circumstances which I have found satisfied the requirements of the doctrine of necessity, all the provisions of the law under consideration were considered and the pros and cons duly weighed in arriving at the conclusion that the scale has tipped on the side of accepting the justification of the enactment in view of the doctrine of necessity. It would have been too far fetched to say that the law is justified on that doctrine but every appointment, promotion or disciplinary proceeding taken

thereunder has to be justified as coming, or not, within the doctrine of necessity. There cannot be such a distinction and what has been said in the case of *Bagdassarian (supra)* and *Iosif (supra)* about the temporary or permanent character of the *sub judice* decisions in those two cases, cannot apply to the present case, as, in those cases, there was no enabling law, whereas, in the present case the *sub judice* promotion has been effected under the provisions of the said law. In my view, therefore, this second argument of learned counsel for the applicant must also fail.

In the light of the above the hearing of this recourse will proceed on the remaining issues.

As to costs, these should be respondent's costs in cause.

Order and order as to costs accordingly.