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[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, LORIS, STYLIANIDES AND KOURRIS, JJ.]

MICHAEL NICOLAOU PASTELLOPOULOS,

Appellant,

v.

THE REPUBLIC OF CYPRUS,

Respondent.

(Question of Law Reserved No. 220).

Constitutional Law—Constitution—Articles 30, 152.1 and 157.2—The provisions of sections 103 and 104 of the Military Criminal Code and Procedure Law 40/64 regarding the constitution and composition of the Military Court are repugnant to and inconsistent with the provisions of Articles 30.2, 152.1 and 157.2 but not with the provisions of Article 30.1 of the Constitution.

Constitutional Law—Constitution—Article 11—A replica of article 5 of the European Convention on Human Rights—The judgment of the European Court on Human Rights in the case of Engel and Others *(infra), in which the right of liberty in the context of Military Service was considered, was cited by the Court with approval.*

Constitutional Law—Constitution—Articles 112.2 and 113.2—The provisions of section 106 of Law 40/64 are neither repugnant to nor inconsistent with the said Articles.

Constitutional Law—Constitution—Articles 129-132—The Forces of the Republic.

Law of Necessity—National Guard, establishment of—Warranted by doctrine of necessity—And the establishment of a Military Court is justified by the need of functioning of the Army of the Republic and the creation of the National Guard—But such need as aforesaid does not by itself support the provisions of ss. 103 and 104 of Law

40/64—As there is no need to deviate from the Constitutional provisions relating to the administration of Justice.

Military Court—Constitution and composition of, ss.103 and 104 of Law 40/64—Repugnant to and inconsistent with Articles 30.2, 152.1 and 157.2 of the Constitution.

Military Court—Jurisdiction of—S.138 of Law 40/64—Does not import in the procedure of the Military Court the holding of a preliminary inquiry for offences which under the ordinary law are indictable.

Criminal Procedure Law, Cap. 155, section 148(1)—Question of Law Reserved—Meaning of "a question of law arising during trial"—The power under s.148(1) has to be sparingly used—Highly desirable that the trial Court should first express its own opinion on the question of law raised before it.

Michael Nicolaou Pastellopoulos, serving in the National Guard, was prosecuted before the Military Court in Case No. 232 on 15 counts. The offences in the charge-sheet carry punishment of imprisonment and some of them life-imprisonment.

Before the accused was arraigned, his counsel raised three questions of law. As a result the said questions were reserved, under s. 148(1) of the Criminal Procedure Law, Cap. 155, for the opinion of the Supreme Court. They are the following:

(a) Whether the provisions of sections 103 and 104 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964) relating to the constitution, composition and functioning of the Military Court are repugnant to or inconsistent with the provisions of Articles 30.1, 2, 152.1 and 157.1, 2, 3 of the Constitution.

(b) Whether the provisions of section 106 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964) relating to the appointment, function and power of the Military Prosecutors are repugnant to or inconsistent with the provisions of Article 112.2 and 113.2 of the Constitution.

(c) Whether the non-holding of a preliminary inquiry in the present case in which charges of felony are included renders the whole proceedings invalid by virtue of the provisions of s. 138 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964), s.92 of the Criminal Procedure Law, Cap. 155, and s. 24 of the Courts of Justice Law, 1960 (Law No. 14 of 1960).

Held, (A) (1) "A question of law arising during trial" in section 148(1) of the Criminal Procedure Law, Cap. 155 means a question arising during the trial at a stage at which it has to be decided in order to enable the trial to proceed further in accordance with the law and rules of practice relating to Criminal Procedure.

(2) The question of law has to be reserved by a Court exercising criminal jurisdiction. In the present case the Military Court was established by law. Its existence is not contested. The constitutionality of its constitution and composition is presumed until the contrary is declared by this Court.

(B) *As to question under (a) above, Loizou, J. dissenting:*

(1) The establishment of the National Guard by the National Guard Law 20/64 with the object of aiding the army of the Republic is an exceptional measure warranted by the doctrine of necessity that is implied in Article 179 of the Constitution and is found expounded in the judgments delivered by he Supreme Court in the case of the *Attorney-General* v. *Ibrahim* (infra). The doctrine of necessity is mainly based on the maxim "salus populi est suprema lex" and the exceptional circumstances which impose a duty to take exceptional measures for the salvation of the country.

(2) It is well settled that measures taken in circumstances allegedly justifying resort to the "law of necessity" are subject to judicial scrutiny and control. The need for the establishment of a Military Court is justified by the functioning of the Army of the Republic and the creation of the National Guard. The Military Court established by the Military Criminal Code and Procedure Law

40/64 has a very wide competence to try criminal cases—offences created by this Law, by the Criminal Law of the Land and by any other law, committed by members of the Army. The word "army" is defined by s. 2 of the said law to include "the army of the Republic, the National Guard and any other military force established by Law". In some cases the Military Court has jurisdicion on civilians. The Military Court may impose, depending on the offence, sentences ranging from fine to incarceration and even death.

(3) Article 30.1 of the Constitution prohibits the establishment of judicial committees or exceptional Courts under any name whatsoever. In accordance with section 102 of Law 40/64 the criminal justice in the army is administered (a) by a Military Court of first instance and (b) by the Supreme Court as appellate. The Military Court, the establishment of which is envisaged in sections 103 and 104* of Law 40/60 is neither a judicial committee nor an exceptional Court and, therefore, these sections are neither repugnant to nor inconsistent with the provisions of Article 30.1 of the Constitution.

(4) The term "independent" in Article 30.2** ot the Constitution refers to the independence of the Court from the executive and the parties. It includes enjoyment by the Judge of a certain stability that does not necessarily imply that it should be stability for life but at least for a specific period. The Judge should not be subject to any authority in the performance of his duties. This provision of the Constitution embodies the English legal Maxim that "justice must not only be done, it must also be seen to be done".

"Impartiality" in this sense does not refer to personal impartiality of the member of the Court as any Judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the Courts must inspire in the public in a democratic society.

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* These provisions are quoted at pp. 181-183 post.
** Article 30.2 of the Constitution is quoted at p. 183 post.

In the light of the above the provisions of section 103 and 104 of Law 40/64 are repugnant to and inconsistent with Article 30.2 of the Constitution.

(5) The judicial power in the Republic is exercised by the Supreme Court of Justice and such inferior Courts as may, subject to the provisions of the Constitution, be provided by law made thereunder (Article 152.1 of the Constitution). The appointment, promotoin, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers are exclusively within the competence of the Supreme Council of Judicature. (Article 157.2 of the Constitution).

The President of the Military Court is appointed by the Council of Ministers. The other two members of the Court are appointed for each case at hoc by the Commander of the Force. Its place of sittings is fixed on each occasion by the Commander of the Force.

The involvement of the Executive Branch of the State in the appointment etc. of the Military offends agains the basis of our constitutional structure. The need for the establishment of a Military Court does not by itself support the provisions of ss. 103 and 104 of Law 40/64. No need arises for deviation from the express provisions of the Constitution on the administration of Justice. The provisions of ss. 103 and 104 are, therefore, repugnant to or inconsistent with Articles 152.1 and 157.2 of the Constitution.

(B) *As to question (b) above:* Section 106 of Law 40/64 for the appointment and exercise of duty of the Military Prosecutors is neither repugnant to nor inconsistent with the provisions of Articles 112.2 and 113.2 of the Constitution. Sub-section (3) of section 106 of Law 40/64 provides that the Military Prosecutors in the exercise of their duties are subject to the Attorney-General of the Republic. Their military rank is only virtute officio. They are not members of the Army, but members of the legal service of the Republic.

(C) *As to question (c) above:* The non-holding of a

preliminary inquiry does not render invalid the proceedings in this case. The Military Court is vested with power to try all offences at first instance. Section 138 of Law 40/64 cannot be construed as importing in the procedure of the Military Court the holding of a preliminary inquiry for offences which under the ordinary law are indictable. The establishment of the Military Court with the competence vested in it by Law 40/64 intends to help in the proper and speedy administration of Justice that is to the benefit of the accused and is not obnoxious to the liberty of the citizen, provided that his rights under Articles 12 and 30 of the Constitution are safeguarded.

Opinion as above.

Cases referred to:

The Republic v. *Kalli (No. 1)*, 1961 C.L.R. 266;

The Republic v. *Liassis* (1973) 2 C.L.R. 283;

In re Charalambous and Another (1974) 2 C.L.R. 37;

The Republic v. *Sampson* (1977) 2 C.L.R. 1;

Police v. *Ekdotiki Eteria* (1982) 2 C.L.R. 63;

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

Christou and Others v. *The Republic* (1982) 3 C.L.R. 365;

Pitsillides and Another v. *The Republic* (1983) 2 C.L.R. 374;

Georghiades v. *The Republic* (1966) 3 C.L.R. 317;

Papapantelis v. *The Republic* (1966) 3 C.L.R. 515;

Hji Georghiou v. *The Republic* (1966) 3 C.L.R. 504;

Georghiades v. *The Republic* (1966) 3 C.L.R. 252;

Bagdassarian v. *The Republic* (1968) 3 C.L.R. 736;

Poutros v. *The Cyprus Telecommunications Authority* (1970) 3 C.L.R. 281;

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

Messaritou v. *The Cyprus Broadcasting Corporation* (1972) 3 C.L.R. 100;

Ploussiou v. *The Central Bank of Cyprus* (1973) 3 C.L.R. 539;

Theodorides v. *Ploussiou* (1976) 3 C.L.R. 319;

Aloupas v. *National Bank of Greece* (1983) 1 C.L.R. 55;

Engel and Others, (European Court on Human Rights), Series A, Judgments and Decisions, Vol. 22;

Delcourt Judgment (European Court on Human Rights) Series A, Vol. 11, p. 17;

Le Compte, Van Leuven and De Meyere, Vol. 53, Opinion of Commission 14.12.79;

Papaphilippou v. *The Republic,* 1 R.S.C.C. 62;

Police and Hondrou and Another, 3 R.S.C.C. 82;

Keramourgia "AIAS" Ltd. v. *Christoforou* (1975) 1 C.L.R. 38.

Questions of Law Reserved.

Questions of Law reserved by the Military Court for the opinion of the Supreme Court under section 148 of the Criminal Procedure Law, Cap. 155 upon an objection taken by counsel for the defence before arraignment of the accused charge with various offences. The questions of law reserved were: (a) Whether the constitution and composition of the Military Court are repugnant to or inconsistent with Articles 30.1, 2, 152.1 and 157.1, 2, 3 of the Constitution, (b) Whether section 106 of Law 40/64 is repugnant to or inconsistent with articles 112.2 and 113.2 of the Constitution and (c) Whether the non-holding of a preliminary inquiry in this case in which charges of felony are included renders the whole proceedings invalid by virtue of the provisions of section 138 of the said law.

A. Panayiotou, for the appellant.

R. Gavrielides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The opinion of the Members of the Court, except H.H. A. Loizou who will express his own opinion, will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: The opinion of this Court on the questions reserved by the Military Court are given only in respect of the case in which they arose.

The Supreme Court, having considered the three questions of law reserved by the Military Court in the present case, is of the following opinion -

1. The provisions of Sections 103 and 104 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964) regarding the constitution and composition of the Military Court are repugnant to and inconsistent with the provisions of Articles 30.2, 152.1 and 157.2 of the Constitution. They are not repugnant to or inconsistent with the provisions of Article 30.1.

2. Article 106 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964) for the appointment and exercise of duty of the Military Prosecutors is neither repugnant to nor inconsistent with the provisions of Articles 112.2 and 113.2 of the Constitution.

3. The non-holding of a preliminary inquiry does not render invalid the proceedings in this case.

The case is remitted to the Military Court for compliance with the above opinion.

Michael Nicolaou Pastellopoulos serving in the National Guard was prosecuted before the Military Court in Case No. 232 on 15 counts. The offences in the charge-sheet carry punishment of imprisonment and some of them life-imprisonment.

Before the accused was arraigned, counsel for the defence raised three questions of law. The Military Court heard argument by counsel for the defence and the Military Prosecutor on the questions raised. Before delivering its ruling on the application of the defence, supported by the prosecution, the three questions of law were reserved,

under s. 148(1) of the Criminal Procedure Law, Cap. 155, for the opinion of the Supreme Court. They are the following:-

(α) Κατά πόσον αι διατάξεις των άρθρων 103 και 104 του Στρατιωτικού Ποινικού Κώδικος και Δικονομίας Νόμου Ν. 40 του 1964 αι αφορώσαι εις τα της συγκροτήσεως, συνθέσεως και λειτουργίας του Στρατιωτικού Δικαστηρίου αντιβαίνουν ή είναι ασύμφωνοι προς τας προνοίας των άρθρων 30.1, 2, 152.1 και 157.1, 2, 3 του Συντάγματος.

(β) Κατά πόσον αι διατάξεις του άρθρου 106 του Στρατιωτικού Ποινικού Κώδικος και Δικονομίας Νόμου Ν. 40 του 1964 αι αφορώσαι εις τα του διορισμού, των λειτουργιών και εξουσιών του Στρατιωτικού Εισαγγελέως αντιβαίνουν ή είναι ασύμφωνοι προς τας προνοίας των άρθρων 112.2 και 113.2 του Συντάγματος.

(γ) Κατά πόσον η παράλειψις διενεργείας προανακρίσεως εις την παρούσαν υπόθεσιν εις την οποίαν περιλαμβάνονται κατηγορίαι αι οποίαι συνιστούν κακουργήματα καθιστούν άκυρον την όλην διαδικασίαν δυνάμει των διατάξεων των άρθρων 138 του Στρατιωτικού Ποινικού Κώδικος και Δικονομίας Νόμου Ν. 40 του 1964, 92 του περί Ποινικής Δικονομίας Νόμου, Κεφ. 155, και 24 του περί Δικαστηρίων Νόμου Ν. 14 του 1960.

((a) Whether the provisions of Sections 103 and 104 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964) relating to the constitution, composition and functioning of the Military Court are repugnant to or inconsistent with the provisions of Articles 30.1, 2, 152.1 and 157.1, 2, 3 of the Constitution.

(b) Whether the provisions of Section 106 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964) relating to the appointment, function and power of the Military Prosecutors are repugnant to or inconsistent with the provisions of Articles 112.2 and 113.2 of the Constitution.

(c) Whether the non-holding of a preliminary inquiry in the present case in which charges of felony are included renders the whole proceedings invalid by virtue of the provisions of s. 138 of the Military Criminal Code and

Procedure Law, 1964 (Law No. 40 of 1964), s.92 of the Criminal Procedure Law, Cap. 155, and s. 24 of the Courts of Justice Law, 1960 (Law No. 14 of 1960)).

Section 148(1) of Cap. 155 reads as follows:-

> "148. (1) Any Court exercising criminal jurisdiction may, and upon application by the Attorney-General shall, at any stage of the proceedings, reserve a question of law arising during the trial of any person for the opinion of the Supreme Court".

"A question of law arising during the trial" means a question of law arising during the trial at a stage at which it has to be decided in order to enable the trial to proceed further in accordance with the law and rules of practice relating to criminal procedure. It is highly desirable that in all cases in which a trial Court is faced with the possibility of having to resort to the procedure under Subsection (1) of Section 148, the trial Court should express its own opinion on the particular question of law raised before it, prior to deciding whether or not to actually exercise its discretionary powers under Subsection (1) of Section 148. This power has to be sparingly used. What is envisaged under the said subsection is a situation where a question of law is, so to speak, obtruding itself upon the trial Court and demanding an answer straightaway-(*The Republic* v. *Kalli (No. 1)*, 1961 C.L.R. 266; *The Republic* v. *Liassis*, (1973) 2 C.L.R. 283; *In re Charalambous and Another*, (1974) 2 C.L.R. 37, 41-42; *The Republic* v. *Sampson*, (1977) 2 C.L.R. 1, at, inter alia, pp. 18 and 81; *Police* v. *Ekdotiki Eteria*, (1982) 2 C.L.R. 63, at pp. 67, 81, 82).

The question of law has to be reserved by a Court exercising criminal jurisdiction. In the present case the Military Court was established by law. Its existence as a Court is not contested. The constitutionality of its constitution and composition is presumed until the contrary is declared by this Court.

The questions of law reserved by the Military Court demand for an answer in order to enable the trial to proceed further.

Part VIII of the Constitution under the heading "The

Forces of the Republic" comprises Articles 129-132, both inclusive. Article 129 reads:-

"1. The Republic shall have an army of two thousand men of whom sixty per centum shall be Greeks and forty per centum shall be Turks.

2. Compulsory military service shall not be instituted except by common agreement of the President and the Vice-President of the Republic".

After the establishment of the Republic the "army" envisaged by the Constitution was set up. That army, in so far as the Greek members are concerned, still continues to exist and function and its constitution is governed by the Army of the Republic (Constitution, Enlistment and Discipline) Laws, 1961-1975, and the Regulations made thereunder.

The National Guard Law, 1964 (Law 20 of 1964) was enacted on the 2nd June, 1964. By s. 3 of this Law the Council of Ministers was empowered to set up a military force called "The National Guard". Section 3(1) provides:-

"The Council of Ministers may, when it considers it expedient because of a threatened invasion or any activity directed against the independence or the territorial integrity of the Republic or threatening the security of life or property, proceed to the establishment of a force, to be called 'National Guard' with the object of aiding the army of the Republic or its security forces or both in all measures required for its defence".

In the preamble we read:-

"Whereas recent events rendered necessary the establishment of a separate force to assist the regular forces of the Republic, i. e. its army and the security forces of the Republic, in all measures necessary for its defence".

The "recent events", to which reference is made in the preamble, are matters of common knowledge of which

this Court can take judicial notice and they are enumerated in detail in the case of *The Attorney-General of the Republic* v. *Mustafa Ibrahim and Others*, 1964 C.L.R. 195. They include:-

(a) That since the 21st December, 1963, there was unlawful armed opposition to the authority of the State by Turks on an organized basis;

(b) The Republic of Turkey committed acts of aggression, intervention in the internal affairs of Cyprus by the threat and use of force against its territorial integrity and political independence. The air-space of Cyprus was violated by Turkish military aircraft.

For a decade—from 1964-1974—the insurgence was going on and this country was living under the threat and danger of foreign invasion by a neighbouring country. In 1974 Cyprus became the victim of that threatened invasion and ever since a substantial part of the area of the Republic is under foreign military occupation. The very existence of the State continues to be under express or latent danger.

The establishment of the National Guard by Law No. 20 of 1964, with the object of aiding the army of the Republic for the salvation of the country, is an exceptional measure warranted by the doctrine of necessity that is implied in Article 179 of our Constitution and is found expounded in the judgments delivered by the Supreme Court in the classic case on the matter *The Attorney-General of the Republic* v. *Mustafa Ibrahim and Others* (supra). The doctrine of necessity is mainly based on the maxim "salus populi est suprema lex" and the exceptional circumstances which impose a duty to take exceptional measures for the salvation of the country-(*Christou and Others* v. *The Republic*, (1982) 3 C.L.R. 365; *Pitsillides and Another* v. *The Republic*, (1983) 2 C.L.R. 374).

Triantafyllides, J,. as he then was, in the *Ibrahim* case at p. 234 said:-

> "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".

Josephides, J,. at pp. 264-265 said:-

"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".

It is well settled that measures taken in circumstances allegedly justifying resort to the "law of necessity" are subject to judicial scrutiny and control-(*Attorney-General* v. *Ibrahim* (supra); *Georghiades* v. *The Republic*, (1966) 3 C.L.R. 317; *Papapantelis* v. *The Republic*, (1966) 3 C.L.R. 515; *Hji Georghiou* v. *The Republic*, (1966) 3 C.L.R. 504; *Georghiades* v. *The Republic*, (1966) 3 C.L.R. 252; *Bagdassarian* v. *The Republic*, (1968) 3 C.L.R. 736; *Poutros* v. *The Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 281; *Iosif* v. *The Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 225; *Messaritou* v. *The Cyprus Broadcasting Corporation*, (1972) 3 C.L.R. 100; *Ploussiou* v. *The Central Bank of Cyprus*, (1973) 3 C.L.R. 539; *Theodorides* v. *Ploussiou*, (1976) 3 C.L.R. 319; *Christou* v. *The Republic*, (1982) 3 C.L.R. 365; and *Aloupas* v. *National Bank of Greece*, (1983) 1 C.L.R. 55).

Pursuant to the provisions of the National Guard Law, 1964 (Law No. 20 of 1964), a National Guard was set up.

The need for the establishment of a Military Court is justified by the functioning of the Army of the Republic and the creation of the National Guard.

Law No. 40 of 1964 provides for the establishment of a Military Court. It has a very wide competence to try criminal cases - offences created by this Law, by the Criminal Law of the land and by any other Law when committed by members of the Army.

"Army" is defined in s. 2 of the Military Criminal Code and Procedure Law, 1964 (Law 40 of 1964) to include "the army of the Republic, the National Guard and any other military force established by Law".

The Military Court has jurisdiction over the members of the Army of the Republic, including the National Guard and in some cases on civilians. It may impose, depending on the offence, sentences ranging from fine to incarceration and even death.

Article 11 of the Constitution provides:-

> "1. Every person has the right to liberty and security of person.

2. No person shall be deprived of his liberty save in the following cases when and as provided by law:-

(a) the detention of a person after conviction by a competent court;

(b) the arrest or detention of a person for non-compliance with the lawful order of a court;

(c) the arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

This is a replica of Article 5 of the European Convention on Human Rights.

The right of liberty in the context of military service was considered by the European Court on Human Rights in the case of *Engel and Others*, Series "A", Judgments and Decisions, Volume 22.

This Article applies both to servicemen and civilians.

Paragraphs 57, 58 and 59 of the decision in the *Engel* case read:-

"57. During the preparation and subsequent conclusion of the Convention, the great majority of the Contracting States possessed defence forces and, in consequence, a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians. The existence of such a system, which those States have retained since then, does not in itself run counter to their obligations.

Military discipline, nonetheless, does not fall outside the scope of Article 5 § 1. Not only must this provision be read in the light of Articles 1 and 14 (paragraph 54 above), but the list of deprivations of liberty set out therein is exhaustive, as is shown by

the words 'save in the following cases.' A disciplinary penalty or measure may in consequence constitute a breach of Article 5 § 1. The Government, moreover, acknowledge this.

58. In proclaiming the 'right to liberty', paragraph 1 of Article 5 is contemplating individual liberty in its classic sense, that is to say, the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Article 2 of Protocol No. 4). This is clear both from the use of the terms 'deprived of his liberty', 'arrest' and 'detention', which appear also in paragraphs 2 to 5, and from a comparison between Article 5 and the other normative provisions of the Convention and its Protocols.

59. In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must be his concrete situation. Military service, as encountered in the Contracting States, does not on its own in any way constitute a deprivation of liberty under the Convention, since it is expressly sanctioned in Article 4 § 3 (b). In addition, rather wide limitations upon the freedom of movement of the members of the armed forces are entailed by reason of the specific demands of military service so that the normal restrictions accompanying it do not come within the ambit of Article 5 either.

Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation. The bounds that Article 5 requires the State not to exceed are not identical for servicement and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 when it takes the form of restrictions that

clearly deviate from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question".

Article 30.1 prohibits the establishment of judicial committees or exceptional Courts under any name whatsoever.

Section 102 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964) provides that the criminal justice in the army is administered (a) by a Military Court of first instance and (b) by the Supreme Court as appellate.

Sections 103 and 104 read as follows:-

«103.- (1) Καθιδρύεται εν τριμελές στρατιωτικόν δικαστήριον με έδραν την Λευκωσίαν και με τοπικήν αρμοδιότητα ολόκληρον την Κύπρον.

(2) Το στρατιωτικόν δικαστήριον διαιρείται εις δύο τμήματα Α και Β άτινα, με διάφορον σύνθεσιν εκάτερον, δύνανται να συνεδριάζωσι συγχρόνως. Ο τόπος συνεδριάσεως του τμήματος Β ορίζεται υπό του Διοικητού δι' εκάστην περίπτωσιν.

(3) Το στρατιωτικόν δικαστήριον δικάζει αμέσως τα εν τω ακροατηρίω αυτού διαρκούσης της συνεδριάσεως πραττόμενα και επ' αυτοφώρω καταλαμβανόμενα αδικήματα, εφ' όσον ταύτα υπάγονται εις την καθ' ύλην αρμοδιότητα αυτού:

Νοείται ότι εάν το στρατιωτικόν δικαστήριον δεν είναι αρμόδιον να δικάση αμέσως το αδίκημα συλλαμβάνεται ο δράστης και παραπέμπεται εις την αρμοδίαν αρχήν. Εάν ο δράστης είναι δικηγόρος, συνήγορος ενός των διαδίκων, η σύλληψις εκτελείται μετά το πέρας της ασκήσεως των καθηκόντων αυτού εν τη δίκη.

104.- (1) Παρά τω στρατιωτικώ δικαστηρίω διορίζονται υπό του Υπουργικού Συμβουλίου εις πρόεδρος

φέρων τον βαθμόν του συνταγματάρχου και εις αναπληρωτής αυτού φέρων τον βαθμόν του αντισυνταγματάρχου.

(2) Ουδείς θα έχη το προσόντα ίνα διορισθῇ ως πρόεδρος στρατιωτικού δικαστηρίου ή αναπληρωτής αυτού, εκτός εάν είναι δικηγόρος ασκών το επάγγελμα αυτού τουλάχιστον επί επτά έτη και είναι υψηλού ηθικού επιπέδου. Δια τους σκοπούς του εδαφίου τούτου 'άσκησις επαγγέλματος' περιλαμβάνει υπηρεσίαν εις οιανδήποτε δικαστικήν ή νομικήν θέσιν παρά τη Δημοκρατία και περιλαμβάνει και αποχωρήσαντας εξ οιασδήποτε τοιαύτης θέσεως.

(3) Ως δικασταί του στρατιωτικού δικαστηρίου διορίζονται δι' εκάστην υπόθεσιν υπό του Διοικητού αξιωματικοί από του βαθμού του λοχαγού και άνω.

(4) Ο πρόεδρος του στρατιωτικού δικαστηρίου οφείλει να γνωστοποιή εις τον Διοικητήν την δικάσιμον ημέραν μετά των προς εκδίκασιν υποθέσεων δέκα ημέρας προ αυτής».

("103 (1) There shall be established a Military Court composed of three members with territorial jurisdiction all over Cyprus; its seat shall be in Nicosia.

(2) The Military Court is divided into two divisions, A and B, each of which may, with a different composition, simultaneously with the other, hold sittings. The place of the sittings of Division B shall be fixed by the Commander of the Force in respect of each case.

(3) The Military Court shall immediately try all flagrant offences which may be committed in the Court-room during the hearing, if such offences are within its jurisdiction.

Provided that, if the Military Court has no jurisdiction immediately to try the offence, the perpetrator of the offence shall be arrested and sent to the competent authority. If the perpetrator of the offence is an advocate, being the advocate of one of

the parties, the arrest is made after the conclusion of his duties in the trial.

104 (1) The Council of Ministers shall appoint one person as the President of the Military Court, who shall have the rank of colonel and one person, as the deputy of the President, who shall have the rank of lieutenant colonel.

(2) No person shall be qualified to be appointed as President of the Military Court or as his deputy, unless such person is an advocate practising his profession for at least seven years and is of a high moral standard. For the purposes of this sub-section 'practising of the profession' includes service in any judicial post of the Republic or in any post in the legal service of the Republic and includes persons retired from such posts.

(3) For each case the Commander of the Force shall appoint as Judges of the Military Court officers from the rank and above the rank of Captain.

(4) The President of the Court should at least ten days prior to the day of any sitting of the Court notify the Commander of the Force of the day of such sitting and of the list of the cases due to be tried on that day").

The Military Court, the establishment of which is envisaged in Articles 103 and 104, is neither a judicial committee nor an exceptional Court and, therefore, these sections are neither repugnant to nor inconsistent with the provisions of Article 30.1 of the Constitution.

The material part of Article 30.2 reads:-

"30.2—In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law".

Undoubtedly the accused in the present case was charged with offences punishable by imprisonment and, therefore,

he was accused of a criminal offence and he was facing criminal charges against him which have to be determined by an independent and impartial Court. The Military Court as provided by Sections 103 and 104 hereinabove cited, is composed of a President appointed by the Council of Ministers and two officers above the rank of Captain appointed for each case by the Commander of the Force. The composition of the Court as well as the place of sittings of the second division are within the exclusive competence of the Commander of the Force.

The term "independent" refers to the independence of the Court from the Executive and from the parties. A judge's independence includes enjoyment of a certain stability that does not necessarily imply that it should be stability for life but at least for a specific period. The judge should not be subject to any authority in the performance of his duties as a judge. This provision of our Constitution, which is identical to the provisions of Article 6.1 of the European Convention on Human Rights, embodies the English legal maxim that "justice must not only be done, it must also be seen to be done" - (See *Delcourt Judgment*, Series "A", Volume 11, p. 17, paragraph 31; the case of *Le Compte, Van Leuven and De Meyere*, Volume 53, Opinion of Commission 14.12.79).

"Impartiality" in this sense does not refer to personal impartiality of the member of the Court as any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the Courts must inspire in the public in a democratic society.

In the light of the above we are of the opinion that the provisions of Sections 103 and 104 of the Military Criminal Code and Procedure Law are repugnant to and inconsistent with Article 30.2 of the Constitution.

The judicial power in the Republic is exercised by the Supreme Court of Justice and such inferior Courts as may, subject to the provisions of this Constitution, be provided by a law made thereunder - (Article 152.1).

The appointment, promotion, transfer, termination of

appointment, dismissal and disciplinary matters of judicial officers are exclusively within the competence of the Supreme Council of Judicature - (Article 157.2 of the Constitution).

The President of the Military Court is appointed by the Council of Ministers. The other two Members of the Court are appointed for each case ad hoc by the Commander of the Force. The place of sittings is fixed on each occasion by the Commander of the Force.

Having given due consideration to the provisions of Sections 103 and 104 of Law No. 40 of 1964 and the doctrine of necessity, we have come to the conclusion that they are not justified or warranted by the law of necessity; no need arises for deviation from the express provisions of the Constitution on the administration of justice. The administration of criminal justice over members of the Army and the National Guard could not in this respect be differentiated from the administration of criminal justice over the civilian population. The need for the establishment of a Military Court does not by itself support the provisions of ss. 103 and 104 which are repugnant to and inconsistent with Articles 152.1 and 157.2 of the Constitution.

We have reached the conclusion that the involvement of the Executive branch of the State in the appointment, etc., of the Members of the Military Court offends against the basis of our constitutional structure - (See, inter alia, *Papaphilippou and The Republic,* 1 R.S.C.C. 62; *Police and Hondrou and Another,* 3 R.S.C.C. 82; *Keramourgia "AIAS" Ltd.* v. *Yiannakis Christoforou,* (1975) 1 C.L.R. 38). It follows that the Military Court was set up in an unconstitutional manner and could not consequently validly exercise the jurisdiction vested in it.

We expect that the appropriate organs of the State, when considering Sections 103 and 104 of Law No. 40 of 1964, will bring under their scrutiny other provisions of this Law which do not form the subject-matter of the questions of law reserved for our opinion.

QUESTION No. 2

The Attorney-General of the Republic is the Head of

the Law Office of the Republic which is an independent office, not under any Ministry - (Article 112.2 of the Constitution).

Article 113.2 reads:-

> "The Attorney-General of the Republic shall have power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the Republic. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions".

Under s. 116 of the Military Criminal Code and Procedure Law, 1964 (Law No. 40 of 1964) the prosecution is exercised by the Attorney-General in the name of the Republic.

Section 106 provides for the appointment, qualifications and exercise of the duties by Military Prosecutors. Under Subsection (1) the Council of Ministers appoints three Military Prosecutors, two of whom would have on their first appointment the rank of Major and the other the rank of Captain. The military rank is only virtute officio. They are not members of the National Guard - (See the definition of "officer" in s. 2 of the National Guard Law, 1964 (Law No. 20 of 1964)). They are not members of the Army but members of the legal service of the Republic.

Subsection (3) of s.106 provides that the Military Prosecutors in the exercise of their duties on the basis of this Law are subject to the Attorney-General of the Republic and they act in accordance with his instructions.

The provisions of s.106 are neither repugnant to nor inconsistent with the provisions of Articles 112.2 and 113.2 of the Constitution.

QUESTION No. 3

The Military Court is vested with power to try all offences at first instance. It is the only Court with such competence.

Preliminary inquiry originated in England. Its object was to consider whether there was such evidence that the accused might be sent to take his trial before another tribunal.

We need not delve into the history of preliminary inquiry and committal proceedings in England which received statutory authority since the passing of s.25 of the Indictable Offences Act, 1848. Suffices to say that the structure of the criminal Courts, as set out in s.24 of the Courts of Justice Law, 1960 (Law No. 14 of 1960), and the jurisdiction of the judges of the District Courts and of the Assizes do not have any resemblance with regard to competence with the Military Court in the sense that the Military Court is vested with competence to try all offences and its jurisdiction is unlimited. The holding of a preliminary inquiry is necessary for indictable offences to be tried by the Assizes as the punishment provided by law exceeds the jurisdiction of the judicial officers of the District Courts. The establishment of the Military Court with the competence vested in it by the Military Criminal Code and Procedure Law intends to help in the proper and speedy administration of justice that is to the benefit of an accused person and is not obnoxious to the liberty of the citizen, provided that his rights under Articles 12 and 30 of the Constitution are safeguarded.

Section 138 of Law 40 of 1964 cannot be construed as importing in the procedure of the Military Court the holding of a preliminary inquiry for offences which under the ordinary law are indictable offences. The whole tenor of this Law excludes the application of the provisions of Section 92 et seq. about preliminary inquiries from the procedure of the Military Court. The non-holding of a preliminary inquiry does not invalidate the proceedings before the Military Court.

A. Loizou J.: I regret that I cannot agree with the conclusions that my brethren have reached as regards the first question reserved by the Military Court in this case, namely that "the provisions of s.103 and 104 of the Military Criminal Code and Procedure Law 1964 (Law No. 40 of

1964) regarding the constitution and composition of the Military Court are repugnant to and inconsistent with the provisions and Articles 30.2, 152.1 and 157.2 of the Constitution..."

The relevant facts and arguments advanced on both sides are aptly set out in the judgment of the majority just read by my brother Stylianides, J., and I need not repeat them, as it serves no useful purpose, in fact, I am grateful to him, as it has made my task easier.

My approach to the matter in issue is an entitrely different one. The National Guard was established in 1964 by virtue of the National Guard Law 1964 (Law No. 20 of 1964), in which it was thought necessary to include a preamble which reads as follows:-

> "Whereas recent events have rendered necessary the establishment of a separate force to assist the regular forces of the Republic to wit its army and the security forces of the Republic in all measures necessary for its defence. Therefore, the House of Representatives enacts as follows:-..."

I need neither elaborate on what the "recent" then events were, nor relate what has followed ever since that culminated in the invasion of the Republic by the forces of Turkey and that brought about a division of the island into the occupied north and the free south. What appeared to be then a threat only, turned into an enhanced reality and remains to be so, rendering the very existence of the State and its population in constant danger. The need for the establishment of the National Guard with the object of aiding the army of the Republic for the salvation of the country is, as just stated by my brother Stylianides, J., "an exceptional measure warranted by the doctrine of necessity that is implied in Article 179 of our Constitution."

In the case of *Christou and Others* v. *The Republic*, (1982) 3 C.L.R. p. 365, this matter was the subject of judicial pronouncement by L. Loizou, J., who held that

> "Having regard to the events which are summarized in another part of the judgment which preceded the

establishment of the National Guard which are matters of common knowledge of which we could take judicial notice, those exercising the power of the State in Cyprus could, on the strength of the Law of Necessity take the exeptional measure of establishing the National Guard, with the object of aiding the army of the Republic, for the salvation of the country; and that since the army of the Republic envisaged by Article 129 of the Constitution still continues to exist and function and that the force created by means of s.3(1) of the National Guard Law was a different force, there was no need to comply with the provisions of Article 129.2 of the Constitution."

To my mind, the establishment of a Military Court is indispensable for the functioning of armed forces by taking care of matters relevant to the military discipline. This has been recognized through the centuries in all countries, and we see express reference in written Constitutions regarding the possibility of establishing Military Courts and relevant laws of Parliament such as the Army Act in England where there is no written Constitution, but the supremacy of Parliament prevails. In fact, the Army Act is an Act of Parliament dealing with discipline, court martial, enlistment billeting and other cognate subjects.

One of the purposes of Military Law is stated in the Manual of Military Law, Part 1, 1951:

"To provide for the maintenance of discipline among the troops and other persons forming part of or following the forces (acts and omissions which in civil life may be mere breaches of contract—e. g. desertion or disobedience to orders—must, if committed by soldiers even in time of peace, be made punishable offences, whilst in war, every act or omission which is likely to impair a man's fighting efficiency must be prevented)".

A reference to the nature of Military Courts, their history through the ages, is also to be found in Daskalakis' Handbook of Military Criminal Law, and I need not refer to it in any way.

To my mind, the establishment of a Military Court as the one under examination, was fully justified in the circumstances by the Doctrine of Necessity and the measures taken were necessary to meet the situation prevailing in the island and they were neither wider than nor disproportionate to the situation they were intended to meet than what they should have been in the circumstances. Nor was it unreasonable to follow in general lines the widely accepted system of constitution of Military Courts in other countries and the manner of appointments thereto. The fact that the Council of Ministers appoints the legally qualified Chairman of the Military Court does not change the situation. Nor does it deviate in any way from the accepted practice regarding Military Courts, the appointment ad hoc for each case of the two other members of the Court called judges in s. 104 of the Military Criminal Code and Procedure Law, 1964. Moreover, it should not be ignored, in any event, that there exists as of right an unlimited right of appeal to this Court which has wide powers under s. 25 of the Administration of Justice Law, 1960, in the exercise of such appellate jurisdiction. In fact, s. 102 of the Law emphasizes that Criminal Justice in the Army is administered by the Military Court in the first instance, and the Supreme Court on appeal.

Needless to say, the whole system of military justice has been functioning for the last 20 or so years smoothly on the whole, and the cases reported in our Law Reports speak for themselves. They do not by any means cause any offence to the sense of justice of the people.

It is obvious that the necessity spoken of, in fact exists and that the measures taken were duly warranted.

In conclusion, I would like to differentiate the case of *Keramourgia "AIAS" Ltd. v. Yiannakis Christoforou*, (1975) 1 C.L.R. p. 38 from the present one in as much as in that case there was an involvement of the executive branch of the State in appointment and laying down of the terms of service of the legally qualified Chairman of the Arbitration Tribunal, a judicial organ set up to resolve matters connected with ordinary employment and labour relations, and, therefore, the Constitutional provisions giving expression to the principle of the separation of powers had to be res-

pected, whereas in the present case we are dealing with the establishment of Military Courts which are indispensable for the smooth functioning of the National Guard, the existence of which was justified by the Doctrine of Necessity, on the basis of which I also find fully justified the establishment, composition and appointments thereof of the Military Courts in question. Hence, I have come to the conclusion that the provisions of ss. 103 and 104 of the Military Criminal Code and Procedure Law, 1964 (Law 40 of 1964) can validly be defended and the Doctrine of Necessity was reasonably required in the circumstances, and could not be deemed to be repugnant to or inconsistent with the Constitution. For when one gets into a game, one must play it in accordance with its generally accepted rules and cannot destroy it by introducing into it strange to it rules.

As regards the other two questions, I agree with the approach of my brethren and have nothing more to add to what has been said by my brother Stylianides, J. on these issues.

Opinion accordingly.