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AUSTERITY MEASURES AND ECONOMIC CRISIS. THE CASE OF CYPRUS. A JUDGE'S APPROACH

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A JUDGE'S APPROACH

Cornerstone of democracy is an independent judiciary in the sense that it is distinct and autonomous, in its sphere of competence, from the Executive and Legislative branches of government. It is not controlled and not influenced by the other two powers of the State, the Executive and the Legislative. The independence of judicial power is inherent in the doctrine of separation of powers which was developed in antiquity by the ancient Greek philosopher Aristotle and more recently by the French political philosopher Montesquieu.

The doctrine of separation of powers stipulates that each of the three powers of the State operates within its own sphere of competence without intervening in the sphere of the other two. In this way we have the necessary constitutional checks and balances which are essential for the smooth functioning of democracy and a State governed by the Rule of Law.

In Cyprus, the doctrine of separation of powers is entrenched in the Constitution and it has been affirmed many times in the jurisprudence of the Supreme Court.

The independence of the Judiciary is evident by the way judges are appointed, their conditions of service (including their security of tenure) and the safeguards for their remuneration.

The judges of lower courts are appointed and promoted solely by the Supreme Council of Judicature (High Council of the Judiciary as it is often called), which is composed of the President and the Members of the Supreme Court only. By vesting the Supreme Council of Judicature with the exclusive competence with regard to the appointment and promotion of judicial officers, the independence of judicial power is guaranteed.

The President and the Members of the Supreme Court are appointed by the directly elected President of the Republic, securing in this respect the necessary democratic legitimacy. The President of the Republic of Cyprus normally follows the recommendation of the president and members of the Supreme Court regarding the appointment of the members of the Supreme Court, and by doing so any risk of political or other interference with the appointment of justices of the Supreme Court is eliminated.

The Justice system in Cyprus provides the substantive guarantees of independence and its standard is high, as it has been ascertained by objective European and international bodies.

Therefore it is capable and equipped to administer justice within the territorial boundaries of the Republic of Cyprus.

The Republic of Cyprus is a member of the European Union, the Eurozone, the Council of Europe, the British Commonwealth and the United Nations. It is a financial center in the Eastern Mediterranean region and it is a country providing various services inter alia shipping, banking, and corporate services.

Therefore the existence of an independent judicial system having the safeguards of fairness, efficiency and speed, is a necessary prerequisite for building confidence in the administration of justice among citizens and residents of the Republic, as well as among foreign investors and potential investors.

It is obvious that if foreign investors and entrepreneurs have no confidence in the law and judicial system of a country this would be a strong disincentive to make any investments in that country.

Despite the existence of those constitutional provisions and guarantees for the smooth functioning of the judicial system in Cyprus, there were periods of crisis and major difficulties for the Judiciary in the performance of its mission.

The first major crisis in the legal and judicial system of the Republic of Cyprus arose in 1964, after the intercommunal troubles of 1963-64 and the mass exit of Turkish Cypriot representatives from the institutions of the state. The Law on the Administration of Justice (Miscellaneous Provisions, Law No. 33/64), was enacted in order to address the enormous constitutional and legal difficulties that arose in the functioning of the State, with the withdrawal of the Turkish Ministers, MPs and Judges from its institutions.

Law No. 33/64 made several changes in the justice system, among which was the amalgamation of the Supreme Constitutional Court and the High Court in the present Supreme Court.

The leading case in our Constitutional Law, the Attorney General of the Republic v Ibrahim and Others (1964) CLR, 195 considered that the abovementioned Law 33/64 was constitutional under the doctrine of necessity.

As explained by the Supreme Court in that case, for the application of the doctrine of necessity, the following prerequisites must be satisfied:

1. An imperative and inevitable necessity or exceptional circumstances should exist,
2. There should be no other remedy available,
3. The measure taken should be proportionate to the necessity, and finally
4. The measure must be of a temporary character limited to the duration of the exceptional circumstances.

Since 1964, the doctrine of the law of necessity was invoked many times, including those cases when the Constitution of the Republic of Cyprus was amended.

Invoking the law of necessity, for fifty years, can be regarded as a constitutional "anomaly" but this, in fact, saved the Republic of Cyprus and allowed the continuation of the smooth functioning of the three powers of the state, despite the enormous difficulties.

Beyond the major constitutional issue, that has already been explained, the Cyprus Justice system faced and continues to face many other difficulties in its daily functioning.

Recently, due to the economic crisis facing the country, various agreements have been signed with the European Union and International Organisations, dictating the enactment of various laws in compliance with what has been agreed. Those laws have been challenged as unconstitutional i.e. as contravening basic human rights, including the right to property and the right of equality before the Law.

At the moment, we have important, pending, cases before the Supreme Court, concerning the reduction of salaries of civil servants and the reduction of pensions of retired civil servants and public officers who, after their retirement, have been re-employed in the public sector.

In the above cases, important issues of violation of human rights are raised, such as property rights, the right of equality before the Law and the obligation of all taxpayers to contribute to public burdens, according to their powers (capacity).

In these cases the Supreme Court will have to decide important Legal and Constitutional Issues such as:

(a) Whether the necessity of limiting human rights is established, and

(b) Whether the Laws in issue contravene constitutionally protected principles such as equality and proportionality.

A particular aspect of the Cyprus Economic Crisis was the Agreement for «Bail-in». This was an Agreement between the Government of Cyprus and the «Troika» (European Commission, European Central Bank and I.M.F.), that Cypriot Banks, in financial difficulties, would be rescued, if possible, not by taxpayers' money, but by their shareholders, creditors and depositors. For the first time, creditors and even depositors of a Bank, in trouble, were called upon to finance the Bank´s deficit.

The Supreme Court, in a majority Judgment, held that the «bail in» agreement was not a question of public law and therefore the recourses filed in order to annul the relevant acts were dismissed. The whole matter was a question of private law, and the persons aggrieved should file actions before the Common Courts of the Land, claiming breach of contract and/or negligence on behalf of the Authorities and/or the Banks, which caused damage to them. It will be a difficult task for the plaintiffs, as, according to the law, they will have to prove that they are worse off as a result of the «bail-in» and the Bank´s restructure, than if this was not taking place. I shall not discuss this case, further, as it is sub judice.

Another important judgment of the Supreme Court, in the middle of the economic crisis, was that on Judges´ Compensation (salaries). A law reducing Judges´ salaries in the same way as for all civil servants was challenged, as unconstitutional, in view of a specific constitutional provision forbidding the reduction of Judges´ salaries (Article 158.3). It was argued that the law was a general tax law, affecting all persons paid by the State. The Supreme Court declared the Law as unconstitutional, with respect to the Judges. In accordance with the Constitution and the relevant case law, Judges´ compensation could only be reduced by a general tax law, affecting all taxpayers in the country, and the challenged law, did not qualify as such.

The Attorney General raised the question of the application of the Doctrine of Necessity. He argued that, if the challenged Law is to be held unconstitutional, it should be saved on the basis of the Doctrine of Necessity, in view of the dramatic financial situation in which the country finds itself.

The Supreme Court noted, on that, that the legislative power that passed the challenged law, did not invoke such a necessity in order to justify its promulgation.

In any event, in order to successfully invoke the Doctrine of Necessity, in accordance with well-established case law, there must be an absolute necessity to safeguard the continuation of the effective functioning of the State. (See A-G v. Mustafa Ibrahim and others (1964) CLR 195).

It is, furthermore, a basic principle of Constitutional Law, as well as Anglosaxon Common Law, that for the Doctrine of Necessity, to be successfully invoked, the mischief which is sought to be averted should be greater than the mischief caused by the application of the Doctrine.

The Supreme Court found it difficult to perceive how the need to include a relatively small number of persons (the Judges) in those sharing the burden caused by the adverse financial situation in which the State finds itself, is more important than the need to safeguard the independence and impartiality of the Judiciary, which is the obvious purpose of the provisions of Article 158.3 of the Constitution, and a matter of supreme importance in terms of public interest.

It was held that Article 158.3 of the Constitution is so clear, that there can be no doubt as to the interpretation that has to be accorded to it. It is, as it was indicated, clear beyond any reasonable doubt, that the challenged law is not tax law, nor can it be said that it is generally applicable, therefore, it amounts to an impermissible adverse reduction of the judges´ compensation (remuneration), in contravention of the clear provisions of Article 158.3 of the Constitution. Furthermore, the Doctrine of Necessity did not apply to the case.

Apart from the Law of Necessity which is invoked in various laws, the Supreme Court of Cyprus is called upon, in some cases to decide whether the “public interest” or “the public utility” invoked in some Laws, in order to limit Human Rights, is justified.

The notion of public interest (or public utility) is a legal term and, in accordance with the jurisprudence, when it is invoked it has to be specified and justified. Public interest presupposes a general benefit and therefore the purpose of that benefit has to be explicitly stated.

The public interest should be “public” under the terms of a democratic society and within the framework of democratic notions. The public interest is determined by the concept of legitimacy, in relation to the aim pursued.

After recent Judgments of the Greek Council of State, (which have persuasive but not binding effect, in Cyprus), there was much controversy and debate regarding whether the term “public interest” encompasses the "financial or fiscal public interest" seen by some as the institutional transformation of the fiscal interest of the public, which was not considered by courts, in the past, as a good ground to deviate from, or limit individual rights.

In the Greek Council of State Case No. 668/2012 concerning the extent of budget cuts and reductions in the salaries and pensions of the public sector, the majority of the members of the Council of State referred to the application of fiscal public interest. It was stated that the challenged legislative measures, in that case, were not intended solely for the fiscal benefit of the public but were part of a wider program of fiscal adjustments and structural reforms to promote and strengthen the Greek economy. The measures when applied in their totality purported to serve the exceptional and urgent financial needs of the country, enhancing its financial credibility, serving thus goals that constitute serious grounds of public interest and at the same time they are common to the member states of the Eurozone.

In the same case the majority of the Council of State, having observed that those measures, in principle, were not manifestly inappropriate for achieving the desired goals and they were necessary to address the extreme severity of financial crisis, they decided that those legislative measures were subject to only “marginal” judicial review.

According to the above decision, it seems that the fiscal public interest is acknowledged as public interest, subject only to marginal judicial review, on the basis of the facts that the Legislator had before him, during the enactment of the legislative act. Taking into consideration the procedural obstacle that someone faces when challenging the constitutionality of a law, i.e. to prove that the law is unconstitutional beyond reasonable doubt, there is a risk, in my opinion, that a serious margin of arbitrariness is left to the Legislator, free of judicial control.

Apart from the financial public interest, that serves the economic interest of the state, there is also the public interest for other major important issues, such as the protection of human rights, the proper functioning of the Constitution, including the rights and freedoms guaranteed by the Constitution and the proper administration of justice . I am, therefore, of

the opinion that, the fiscal public interest should not easily be referred to as the “ultimate public interest” superseding other kinds of public interests, as less important. If the fiscal public interest is acknowledged as an overriding public interest and if the position proclaimed by the majority decision of the Council of State that, only marginal judicial review, is applicable in such cases, then in my opinion there is the imminent danger of creating a legal and economic “totalitarianism”, which may lead to the weakening of the rule of law.

How could then, the courts, confront such danger? The courts certainly cannot disregard the serious dangers posed by the economic crisis and the need for the state to tidy up its public finances. If the situation is extreme, undermining the very existence of the state and its democratic functioning, then the doctrine of *«salus populi supeme lex esto»*, i.e. “the salvation of the people is the supreme law”, applies. In front of such danger all the rest subsides. But if the situation has not reached the aforementioned point, then, in my opinion, everything that is sacrificed in defending financial public interests should be well justified and balanced. Who will then judge whether the public interest justifies deviation from the usual norms of legitimacy? Surely the elected political leadership has broad and decisive responsibility to determine whether there are exceptional circumstances justifying such deviation. The Judge, however, has a paramount constitutional mission to set the limits, that is the framework, within which the political authority is to be exercised.

The courts have the necessary constitutional and legal tools enabling them to exercise control over the legality of executive and legislative acts. The legitimacy of those acts is tested by the courts by the following methods: (a) By examining the alleged inevitable urgency and need to take emergency measures or the alleged exceptional circumstances that impose the need for restriction of enshrined individual rights, taking into account of course the broad powers of the Executive in this field, (b) by reviewing the legitimacy of the extent of those measures, based on the principle of proportionality. The measures should be proportionate to the situation at stake, (c) by exercising judicial review based on the principle of good administration, and (d) on the principle of equality, according to which dissimilar situations are not to be equated and arbitrary differentiations among same situations are not to be made, (e) by applying the principle of expected trust, i.e that the citizen is entitled to expect from the Executive and the Administration that his/her case will be handled in a fair and equitable manner, and (f) by applying the principle that all taxpayers contribute to the tax burdens, in accordance with their capacity (powers).

There are acceptable and legitimate ways to improve state finances by taking measures that are of general application, well considered and conforming to the principles outlined above.

Undoubtedly, the legislator legislates in his wisdom and the judge applies the law. The Judge is not empowered, to either deny the expressed will of the legislature, nor to apply the law, in a way that he becomes Legislator himself. Nevertheless, the general principles of constitutional and administrative law require the legislator to give sufficient reasons, especially when invoking public interest, and the Judge has the right and duty to scrutinise those reasons and the justification given. Moreover the Judge, should not abandon his role as the guardian of legality and to allow, without skepticism, the subjection of basic individual rights to a “supreme " public interest, which is left unexamined and essentially uncontrolled. The judge ought to control the other two powers of the state in ways that are well known to him, having, of course, in mind that the other two powers have democratic legitimacy.

The duty of the Judge is imperative, within the operation of a democratic society, ensuring and safeguarding the existence of constitutional checks and balances. The Judge does not have the tools to examine policy considerations and therefore it is accepted that some acts (defined as Acts of Government) are not subject to judicial control, falling exclusively in the sphere of competence of the Executive. But Judges must defend the legal and legitimate rights and interests of all those who rely upon them.

In times of crisis, the role of the judge is more difficult and more critical, as there is a risk that the other two powers of the State will exercise pressure in order to limit or even abolish basic rights. The answer of the Judge, in this eventuality, is only one. That «*as Judges, we can and should do only one thing, ignoring everything else, and this is to apply the law, whatever the consequences.* » (See R. V. Abu Hamza, April 2013, not yet reported).

As emphasised in the case of Attorney General v. Sidereniou etc. (2008) 2 CLR 319 *" The judges continue their mission to administer justice, in accordance with the eternal principles of justice , as enshrined in the Constitution , the laws and international treaties*…."

The Judge, in accordance with his oath, should always administer justice to all, in accordance with the law, and without fear of prejudice or hope of advantage.