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ANTONIOS KOURRIS

v.

THE SUPREME COUNCIL OF JUDICATURE

[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

ANTONIOS KOURRIS,

Applicant,

and

THE SUPREME COUNCIL OF JUDICATURE,

Respondents.

(Case No. 6/72).

Administrative acts or decisions (or omissions) of an organ, person or authority exercising executive or administrative functions—And which alone can be made the subject of a recourse under Article 146 of the Constitution—Paragraph 1 of that Article 146—Supreme Council of Judicature—Set up and functioning under section 10(1) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No. 33 of 1964)—It is the same institution as the Supreme Council of Judicature established by Article 157.1 of the Constitution but with a new composition—Decision of the Supreme Council promoting the District Judges named (the interested parties) to the post of Acting President of District Court instead of the applicant (a District Judge)—Said decision is not an act or decision of an organ etc. exercising executive or administrative functions, within the aforesaid paragraph 1 of Article 146 of the Constitution—Acts or decisions (or omissions) of the said Supreme Council of Judicature as aforesaid cannot be challenged by the recourse under that Article—Because the functions of the Supreme Council are very closely connected with the exercise of judicial powers—Consequently the Supreme Court has no jurisdiction to entertain the present recourse directed against the aforesaid promotions of judicial officers (Judges)—Recourse dismissed on that ground i.e. *on the ground that it is not maintainable.*

Recourse under Article 146 of the Constitution and the Jurisdiction of the Supreme Court on such recourse—Criterion adopted for the exercise of such jurisdiction is that of the essential nature of the decision, act or

omission which is being challenged—See further supra.

Construction and Interpretation of Constitutional provisions—Article 146.1 of the Constitution—Act or decision (or omission) of an organ, authority or person exercising executive or administrative functions—See also supra.

Statutes—Construction—Construction of section 10(1) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No. 33 of 1964).

Supreme Council of Judicature—Established by section 10(1) of the aforesaid Law No. 33 of 1964—It is the same institution as the Supreme Council of Judicature established by Article 157.1 of the Constitution—See also supra.

Recourse under Article 146 of the Constitution—It does not lie against decisions or acts (or omissions) of the Supreme Council of Judicature concerning appointments, promotions etc. of judicial officers (Judges etc.).

Judicial Service—Judicial appointments or promotions—Made by the Supreme Council of Judicature set up under section 10(1) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No. 33 of 1964)—No recourse under Article 146 of the Constitution lies against the validity of such appointments or promotions.

Advocates and Recourse under Article 146 of the Constitution—Advocates—Conduct and Etiquette—Law Officer (Senior Counsel of the Republic) on leave prior to leaving the Public Service—Enrolled as an advocate and holding the relevant annual licence to practise—Section 11(1)(a)(b) of the Advocates Law, Cap. 2 (as amended)—Whether he can validly file a recourse against the State—He can, irrespective of whether or not the act of the said counsel is against the rules of etiquette.

Recourse under Article 146—Advocates—See immediately hereabove.

The applicant is a judicial officer holding the substantive post of a District Judge. The Supreme Council of Judicature promoted the interested parties to the post of Acting Presidents, District Courts, instead of the applicant. By his present

recourse under Article 146 of the Constitution the applicant seeks a declaration of the Supreme Court to the effect that: (1) the aforesaid decision of the Council is null and void, and (2) that the refusal (or omission) of the Council to consider a written application or complaint of the applicant regarding the said appointments is null and void.

The point in issue in this case is whether the *sub judice* decisions (or omissions) of the Supreme Council of Judicature can be said to be acts or decisions (or omissions) of an organ, person, authority etc. exercising administrative or executive functions within the ambit of paragraph 1 of Article 146 of the Constitution; in which case only the said acts or decisions etc. can he held to be amenable to the jurisdiction of the Supreme Court on a recourse under that Article 146.

The Supreme Court by majority *(HadjiAnastassiou and A. Loizou, JJ. dissenting)* dismissed the recourse on the ground that it is not maintainable under the said Article 146 of the Constitution and held that the Supreme Council of Judicature, established by section 10(1) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No. 33 of 1964), being the same institution as the Supreme Council of Judicature established by Article 157.1 of the Constitution but with a new composition, it follows that the Court has no jurisdiction to entertain a recourse under Article 146 against any act, decision or omission of the said Council because the functions of such Council *are very closely connected with the exercise of judicial power.*

It is to be noted that the Court unanimously disposed of a minor issue *viz.* whether the present recourse having been filed by a Senior Counsel of the Republic on leave prior to retirement, it can be held that the recourse has been validly filed. The answer to that was given by the Court in the affirmative holding:

(1) Though as a matter of professional etiquette and practice the recourse ought not to have been filed by counsel for the applicant, nevertheless the question whether the applicant should be deprived on this ground of his right to proceed with his recourse is an altogether different matter.

(2) Irrespective of the fact that counsel for the applicant was at the material time on leave prior to the taking

of effect of his resignation from the post of Senior Counsel of the Republic, he was, however, an advocate enrolled under the relevant Law and he had taken out the annual licence to practise as an advocate as required by the relevant Law (*viz.* The Advocates Law, Cap. 2).

(3) On the other hand, it was never the practice of the Supreme Constitutional Court (and in dealing with this recourse we are exercising the powers of such Court) to allow formalities to prevent it from dealing with a case before it (see, for example, *The Attorney-General and Kouppi,* 1 R.S.C.C. 115).

(4) In the light of the above and taking also into account that counsel acted in perfect good faith, we hold that the recourse was duly filed on January 10, 1972.

Cases referred to :

The Holy See of Kitium and The Municipal Council of Limassol, 1 R.S.C.C. 15, at p. 21;

Kyriakides and The Republic, 1 R.S.C.C. 66, at pp. 69, 73;

Demetriou and The Republic, 3 R.S.C.C. 121, at pp. 127, 128;

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

Papaphilippou and The Republic, 1 R.S.C.C. 62, at pp. 64, 65;

Stamatiou and The Electricity Authority of Cyprus, 3 R.S.C.C. 44, at p. 46;

Eraclidou and Hellenic Mining Co. Ltd. and Others, 3 R.S.C.C. 153, at p. 156;

Constantinides and The Cyprus Broadcasting Corporation, 5 R.S.C.C. 34, at p. 39;

Sevastides v. *The Electricity Authority of Cyprus* (1963) 2 C.L.R. 497, at pp. 500, 502;

The Greek Registrar of the Co-operative Societies v. *Nicolaides* (1965) 3 C.L.R. 164, at pp. 170, 171;

Police and Hondrou, 3 R.S.C.C. 82, at p. 85;

Sofocles Demetriades and Son v. *The Republic* (1969) 3 C.L.R. 557;

Gavris v *The Republic,* 1 R.S.C.C. 88, at p. 93;

Xenophontos and The Republic, 2 R.S.C.C. 89, at p. 92;

In re C.H. an advocate (1969) 1 C.L.R. 561;

HadjiKyriacou and Hadjiapostolou, 3 R.S.C.C. 89;

Valana and The Republic, 3 R.S.C.C. 91;

Charalambides and The Republic, 4 R.S.C.C. 24;

Pilavaki v. The Republic, 1964 C.L.R. 164;

In re C.D. an advocate (1969) 1 C.L.R. 376;

Pyx Granite Co. Ltd. v. *Ministry of Housing and Local Government* [1960] A.C. 260, at p. 286;

In re S. (a barrister) [1969] 1 All E.R. 949;

The Minister of Finance v. *The Public Service* Commission (1968) 3 C.L.R. 691;

The Attorney-General and *Kouppi,* 1 R.S.C.C. 115;

Haros and *The Republic,* 4 R.S.C.C. 39, at p. 43;

Decisions of the Greek Council of State:

Nos. 1486/1950, 1093/1955, 168/1956, 2027/1965, 718/64, 1344/1964, 184/1947, 1042/1951, 1633/1951, 905/1946, 812/1947, 2360/1947;

Case No. 812/1947 reported in "Themis", 1947, p. 141;

Decisions of the French Council of State:

Falco et Vidaillac, April 17, 1953 (v. Les Grands arréts de Jurisprudence Administrative, 1969, p. 392);

Decisions of the French Tribunal of Conflicts:

Préfet de la Guyane (see Les Grand Arréts etc., *supra,* p. 379).

Recourse.

Recourse against the validity of the decision of the respondent relating to the temporary appointments of five District Judges as Presidents of District Courts and against the refusal or omission of the respondent to deal

with a written complaint of the applicant in connection with the said appointments.

K. Talarides, for the applicant.

L. Loucaides, Senior Counsel of the Republic, for the Attorney-General.

L. Clerides, for the Bar Council of Cyprus.

Cur. adv. vult.

The following decisions were read :

TRIANTAFYLLIDES, P. : On the 10th January, 1972, the applicant, who is a District Judge, filed the present recourse by means of which he attacks the validity of a decision of the Supreme Council of Judicature relating to the temporary appointments of five other District Judges as Presidents of District Courts and complains against the alleged refusal or omission of the Supreme Council of Judicature to deal with a written complaint of his in connection with the said appointments.

On the 11th January, 1972, the attention of counsel for the applicant was drawn, by the Registry, to the fact that when he filed this recourse on behalf of the applicant he was still holding the post of Senior Counsel of the Republic, as he was on leave prior to his resignation from such post which was due to take effect on the 14th February, 1972; counsel was further informed that when he was issued, on the 21st December, 1971, with an annual licence to practise as an advocate in 1972 it was not known by the Chief Registrar that his resignation was not effective before the 14th February, 1972; counsel's views were sought as to whether in view of his holding at the time of the filing of this recourse the post of Senior Counsel of the Republic he could have validly filed the recourse.

There followed relevant correspondence between the Chief Registrar and counsel for the applicant, who insisted that the recourse was properly filed and that it should take its course through being served on the respondent Supreme Council of Judicature. Such correspondence lasted until the 13th March, 1972, when the Supreme Court directed that arguments had to be heard on the 25th April, 1972, regarding the validity, in the circumstances,

of the filing of the recourse, in view too of the fact that on the 31st January, 1972, the Bar Council—to which the matter had been referred—decided, under section 24 (1) (c) of the Advocates Law, Cap. 2, that it was contrary to the etiquette of the profession for an advocate to undertake, while being a public officer on leave prior to leaving the public service, a case against the State of which he still continued to be an employee («Θὰ ἦτο ἀντίθετος πρὸς τὴν δεοντολογίαν τοῦ δικηγορικοῦ ἐπαγγέλματος ἡ ὑπὸ δικηγόρου, δημοσίου ὑπαλλήλου τελοῦντος ἐπ' ἀδείᾳ πρὸ τῆς ἡμερομηνίας τῆς ἀφυπηρετήσεως αὐτοῦ, ἀνάληψις ὑποθέσεως ἐναντίον τοῦ Κράτους τοῦ ὁποίου εἰσέτι ἐξακολουθεῖ νὰ εἶναι ὑπάλληλος»). There were notified in writing accordingly the applicant, the respondent Supreme Council of Judicature, the five judicial officers affected by the recourse, the Attorney-General of the Republic and the Bar Council. It was further directed by the Court that on the same date any party appearing before it could also raise the question of the jurisdiction of the Court to entertain the recourse under Article 146 of the Constitution—under which it was made—as this cardinal legal issue had not been determined in any previous case.

There appeared before the Court counsel for the applicant, for the Attorney-General and for the Bar Council; the respondent Supreme Council of Judicature informed the Chief Registrar that it had decided not to take part at that stage of the proceedings but it reserved the right to raise the issue of jurisdiction later if it were not decided at such stage. The five affected judicial officers chose not to take part at all in the proceedings. Counsel for the Bar Council was heard on the issue of the validity of the filing of the recourse and counsel for the Attorney-General raised the issue of the jurisdiction of the Court to entertain the recourse; and counsel for the applicant was heard in reply on both issues; I feel that the highest appreciation of the Court should be expressed for the very able and learned arguments put forward by all counsel. The hearing regarding the above two preliminary issues was concluded on the 22nd June, 1972, and the decision on both of them was reserved. On the 6th July, 1972, the Court announced its decision to treat the recourse as duly filed on the 10th January, 1972, and stated that it would give its reasons therefor later together

with its decision on the issue of jurisdiction. Thus, today, before proceeding to deal with the issue of jurisdiction, the reasons will be given for treating the recourse as duly filed :

When the applicant instructed his counsel to file this recourse, as well as when such counsel proceeded to file it, they were both acting in good faith, honestly believing that counsel for the applicant was entitled to act as he has done. The recourse was accepted by the Registry of this Court on the 10th January, 1972, and it was only afterwards that it was noticed that counsel for the applicant was still on leave prior to the taking of effect of his resignation from the public service. So what we had to decide was whether the applicant should be deprived of his right to proceed with a recourse which had already been filed.

The aforementioned decision of the Bar Council, regarding the professional etiquette and practice aspect of the matter, is undoubtedly correct; and sight has not been lost of the provisions of section 64 of the Public Service Law, 1967 (Law 33/67) which restrict the right of a public officer to undertake private work while in the public service. But the matter of the validity of the filing of this recourse could not be decided on the basis either of professional etiquette and practice or of the provisions of section 64 of Law 33/67; and, actually, counsel for the Bar Council pointed out, very fairly indeed, that though as a matter of professional etiquette and practice the recourse ought not to have been filed by counsel for the applicant nevertheless the question whether the applicant should be deprived on this ground of his right to proceed with his recourse was an altogether different matter.

By the Supreme Constitutional Court Rules, which are applicable to the present proceeding it is provided (see rule 3) that "Whenever anything may be done by any person or organ or authority of, or in, the Republic, it may, unless the context otherwise requires, or the Court otherwise directs, be done by an advocate acting on behalf of such person, organ or authority and duly authorized in writing for the purpose."

Counsel for the applicant was duly authorized in writing—as it appears from the file of the proceedings—

to make this recourse on behalf of the applicant; and, at the material time, irrespective of the fact that he was on leave prior to the taking of effect of his resignation from the post of Senior Counsel of the Republic, he was an advocate enrolled under section 11(1)(a) of Cap. 2 and he had taken out an annual licence to practise as an advocate in 1972 under section 11(1)(b) of Cap. 2. The proviso to section 11(1) of Cap. 2, which states that nothing in section 11(1) shall apply to any Law Officer, is not intended to preclude a Law Officer, such as a Senior Counsel of the Republic, from being enrolled or licensed; it merely exempts Law Officers from the obligation to enrol or to take out a licence.

Rule 19 of the Supreme Constitutional Court Rules provides that "At any stage of the proceedings the Court or a judge may give such directions as the justice of the case may require"; and it was never the practice of the Supreme Constitutional Court—(and in sitting to deal with this recourse we are exercising the powers of such Court) —to allow formalities to prevent it from dealing with a case before it; in, for example, the case of *The Attorney-General* and *Kouppi*, 1 R.S.C.C. 115, the Court took the view that though a reference of an issue of unconstitutionality, made to it by another Court under Article 144 of the Constitution, had not been made in the proper manner as regards formalities, it should non the less proceed to deal with such issue, because, as stated in its judgment (at p. 117), it decided in the interests of justice and in the public interest in general and in order to avoid further delay, to direct that the reference should be accepted by the Registry of the Court and filed therewith in spite of the fact that it was still in an unsatisfactory form; such course was adopted without in any way intending it to become a precedent.

In the light of the above and in view of the very special circumstances of the matter—such as that counsel for the applicant when he filed this recourse was entitled, under Cap. 2, to practise as an advocate and that he acted in perfectly good faith—we decided to hold that the recourse was duly filed on the 10th January, 1972.

I come next to the issue of the jurisdiction of this

Court to entertain the applicant's recourse under Article 146 of the Constitution; as in relation to this issue the Court is not unanimous—as it is in relation to the matter of the validity of the filing of the recourse—I shall proceed to state my own opinion regarding such issue.

It has to be decided whether as regards the matters complained of by the applicant a recourse can be made under Article 146; and to decide this it is necessary to construe the relevant part of Article 146, which is its paragraph 1 and reads as follows :-

> "1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person."
>
> («Τὸ Ἀνώτατον Συνταγματικὸν Δικαστήριον κέκτηται ἀποκλειστικὴν δικαιοδοσίαν νὰ ἀποφασίζῃ ὁριστικῶς καὶ ἀμετακλήτως ἐπὶ πάσης προσφυγῆς ὑποβαλλομένης κατ' ἀποφάσεως, πράξεως ἢ παραλείψεως οἱουδήποτε ὀργάνου, ἀρχῆς ἢ προσώπου ἀσκούντων ἐκτελεστικὴν ἢ διοικητικὴν λειτουργίαν ἐπὶ τῷ λόγῳ ὅτι αὕτη εἶναι ἀντίθετος πρὸς τὰς διατάξεις τοῦ Συντάγματος ἢ τὸν νόμον ἢ ἐγένετο καθ' ὑπέρβασιν ἢ κατάχρησιν τῆς ἐξουσίας τῆς ἐμπεπιστευμένης εἰς τὸ ὄργανον ἢ τὴν ἀρχὴν ἢ τὸ πρόσωπον τοῦτο.»)

It should be borne in mind that the jurisdiction to grant a remedy by means of a recourse for annulment as provided by Article 146.1 is not an innovation of the drafters of the Constitution of Cyprus but it was vested in the Supreme Constitutional Court in order to create thus an administrative court on the model of administrative courts, such as Councils of State, in other countries. This has been recognized on more than one occasion by the Supreme Constitutional Court (see, *inter alia, The Holy See of Kitium* and *The Municipal Council of Limassol*, 1 R.S.C.C. 15, at p. 21, and *Kyriakides* and *The Republic*, 1 R.S.C.C. 66, at p. 69). So, even though

the wording of Article 146.1 is somewhat different from provisions defining the jurisdiction of administrative courts in other countries, general principles of Administrative Law governing the availability of the remedy under Article 146.1 have to be taken, as far as possible, into account in defining the extent of the jurisdiction under the said Article (see, *inter alia, Kyriakides, supra,* at p. 73, and *Demetriou* and *The Republic,* 3 R.S.C.C. 121, at p. 128).

The fact that by virtue of sections 9(a) and 11 of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64) (regarding the constitutionality of which see the judgments in *Attorney-General* v. *Ibrahim*, 1964 C.L.R. 195)—the jurisdiction under Article 146.1 is not now exercised by the Supreme Constitutional Court but is exercised by this Supreme Court does not affect at all the extent of such jurisdiction; section 9(a) provides, in effect, about the vesting in this Court of, *inter alia*, the jurisdiction under Article 146.1 and section 11 provides about the manner, from the procedural point of view, of the exercise of such jurisdiction; neither of these two sections nor any other provision of Law 33/64 can be properly construed as having enlarged or restricted in any way the said jurisdiction which exists by virtue of the Constitution.

An examination of our case-law shows that the applicability of Article 146.1 has as a rule been tested mainly on the basis of the essential nature of the decision, act or omission being challenged (see, *inter alia, Papaphilippou* and *The Republic*, 1 R.S.C.C. 62, at p. 65; *Stamatiou* and *The Electricity Authority of Cyprus*, 3 R.S.C.C. 44, at p. 46; *Demetriou, supra, at* p. 127; *Eraclidou* and *Hellenic Mining Co. Ltd. and Others*, 3 R.S.C.C. 153, at p. 156; *Constantinides* and *The Cyprus Broadcasting Corporation*, 5 R.S.C.C. 34, at p. 39; *Sevastides* v. *The Electricity Authority of Cyprus* (1963) 2 C.L.R. 497, at p. 502, and *The Greek Registrar of the Co-operative Societies* v. *Nicolaides* (1965) 3 C.L.R. 164, at p. 170); the nature of the organ, authority or person from which a decision or act emanated, or which was allegedly guilty of an omission, has been treated as a relevant, but not always necessarily decisive, consideration in determining the essential nature of such decision, act or omission (see,

inter alia, Papaphilippou, supra, at p. 64; *Police* and *Hondrou,* 3 R.S.C.C. 82, at p. 85; *Constantinides, supra,* at p. 39; *Sevastides, supra,* at p. 500; Nicolaides, *supra,* at p. 171, and *Sofocles Demetriades & Son* v. *The Republic* (1969) 3 C.L.R. 557).

In relation to the interpretation of Article 146.1 the framework of our Constitution should be borne in mind, especially because such framework undoubtedly establishes the separation of powers (see, *inter alia, Papaphilippou, supra,* at p. 65; *Haros* and *The Republic,* 4 R.S.C.C. 39, at p. 43); it is on the basis of this constitutional framework, as well as in the light of relevant principles of Administrative Law, that decisions, acts or omissions closely connected with the exercise of the legislative power, even though not actually amounting to the exercise of such power, have been found to be outside the ambit of Article 146.1 (see, *Papaphilippou, supra,* at p. 64); and, likewise, decisions, acts or omissions closely connected with the exercise of the judicial power have been found to be outside the ambit of such Article (see, *inter alia, Kyriakides, supra,* at p. 73; *Gavris* and *The Republic,* 1 R.S.C.C. 88, at p. 93; *Xenophontos* and *The Republic,* 2 R.S.C.C. 89, at p. 92, and *In re C.H. an advocate* (1969) 1 C.L.R. 561).

That the provisions of Article 146.1 cannot be interpreted without reference to relevant principles of Administrative Law is shown, also, by case-law by which it has been laid down that the remedy under Article 146.1 is available only in relation to administrative decisions, acts or omissions in the domain of public law (see, *inter alia, HadjiKyriacou* and *Hadjiapostolou,* 3 R.S.C.C. 89; *Valana* and *The Republic,* 3 R.S.C.C. 91; *Charalambides* and *The Republic,* 4 R.S.C.C. 24, and *Pilavaki* v. *The Republic,* 1964 C.L.R. 164), even though the wording of Article 146.1 might otherwise be taken as warranting its applicability to administrative decisions, acts or omissions in the domain of private law too.

With the foregoing in mind I shall now proceed to examine whether the appointments challenged, and the omission complained of, by the applicant in this case come within the ambit of Article 146.1. Such appointments were made by, and the omission is attributed to, the

Supreme Council of Judicature which has been set up under section 10(1) of Law 33/64; this section reads as follows :

"10.—(1) The Supreme Council of Judicature for the exercise of the competence and the powers in respect of appointments, promotions, transfers, termination of appointments, dismissals and disciplinary matters of judicial officers shall be composed of :-

(a) the Attorney-General of the Republic;

(b) the President and the two senior judges of the Court:

(c) the senior President of a District Court and the senior District Judge; and

(d) a practising advocate of at least twelve years' practice elected at a general meeting, convened for the purpose, of the Cyprus Bar Association for a period of six months and not being eligible for re-election for the next five years :

Provided that in case of absence or temporary incapacity of the President or a judge of the Court or of the senior President of a District Court or of the senior District Judge, the judge or President of a District Court or District Judge, as the case may be, next in seniority shall act as a member of the Council :

Provided further that in case of absence or temporary incapacity of the practising advocate provided by paragraph (d) of this subsection the practising advocate elected as an alternate member of the Council at the same meeting of the Bar Association shall act."

(«10.—(1) Τὸ Ἀνώτατον Δικαστικὸν Συμβούλιον διὰ τὴν ἐνάσκησιν τῶν ἁρμοδιοτήτων καὶ ἐξουσιῶν αὐτοῦ καθ' ὅσον ἀφορᾷ εἰς διορισμούς, προαγωγάς, μεταθέσεις, τερματισμοὺς ὑπηρεσίας, ἀπολύσεις καὶ πειθαρχικὰ παραπτώματα δικαστικῶν λειτουργῶν, συγκροτεῖται ἐκ τῶν ἀκολούθων :

(α) τοῦ Γενικοῦ Εἰσαγγελέως τῆς Δημοκρατίας·

(β) τοῦ Προέδρου καὶ τῶν δύο ἀρχαιοτέρων Δικαστῶν τοῦ Δικαστηρίου·

(γ) τοῦ ἀρχαιοτέρου Προέδρου Ἐπαρχιακοῦ Δικαστηρίου καὶ τοῦ ἀρχαιοτέρου Ἐπαρχιακοῦ Δικαστοῦ· καὶ

(δ) ἐξ ἑνὸς δικηγόρου μὲ δωδεκαετῆ τοὐλάχιστον πρακτικὴν ἐξάσκησιν τοῦ ἐπαγγέλματος αὐτοῦ ἐκλεγομένου εἰς γενικὴν ἐπὶ τούτῳ συγκαλουμένην συνεδρίασιν τοῦ Δικηγορικοῦ Συλλόγου Κύπρου διὰ περίοδον ἓξ μηνῶν καὶ μὴ ὄντος ἐπανεκλεξίμου διὰ τὰ ἑπόμενα πέντε ἔτη :

Νοεῖται ὅτι ἐν περιπτώσει ἀπουσίας ἢ προσωρινῆς ἀνικανότητος τοῦ Προέδρου ἢ Δικαστοῦ τινος τοῦ Δικαστηρίου ἢ τοῦ ἀρχαιοτέρου Προέδρου Ἐπαρχιακοῦ Δικαστηρίου ἢ τοῦ ἀρχαιοτέρου Ἐπαρχιακοῦ Δικαστοῦ καθήκοντα μέλους τοῦ Συμβουλίου ἀσκεῖ ὁ ἑπόμενος εἰς ἀρχαιότητα Δικαστής, ἢ, ἀναλόγως τῆς περιπτώσεως, Πρόεδρος Ἐπαρχιακοῦ Δικαστηρίου ἢ Ἐπαρχιακὸς Δικαστής :

Νοεῖται περαιτέρω ὅτι ἐν περιπτώσει ἀπουσίας ἢ προσωρινῆς ἀνικανότητος τοῦ ἐπαγγελλομένου τὸν δικηγόρον μέλους τοῦ προνοουμένου ἐν παραγράφῳ (δ) τοῦ παρόντος ἐδαφίου, καθήκοντα μέλους τοῦ Συμβουλίου ἀσκεῖ ὁ ἐκλεγεὶς κατὰ τὴν αὐτὴν συνεδρίασιν τοῦ Δικηγορικοῦ Συλλόγου ὡς ἀναπληρωτικὸν μέλος τοῦ Συμβουλίου δικηγόρος»).

The "Court" in section 10(1) is this Supreme Court.

The present Council is entrusted with the powers which were vested, by virtue of paragraph 2 of Article 157 of the Constitution, in the Supreme Council of Judicature created by paragraph 1 of the same Article: such Article reads as follows :-

"1. Save as otherwise provided in this Constitution with regard to the Supreme Constitutional Court, the High Court shall be the Supreme Council of Judicature, and its President shall have two votes.

2. 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.

3. No judicial officer shall be retired or dismissed except on the like grounds and in the same manner as a judge of the High Court."

(«1. Ἐπιφυλασσομένων τῶν περὶ τοῦ Ἀνωτάτου Συνταγματικοῦ Δικαστηρίου διατάξεων τοῦ Συντάγματος, τὸ Ἀνώτατον Δικαστήριον ἀποτελεῖ τὸ Ἀνώτατον Δικαστικὸν Συμβούλιον, ὁ δὲ πρόεδρος αὐτοῦ ἔχει δύο ψήφους.

2. Εἰς τὴν ἀποκλειστικὴν ἁρμοδιότητα τοῦ Ἀνωτάτου Δικαστικοῦ Συμβουλίου ὑπάγονται ὁ διορισμός, ἡ προαγωγή, ἡ μετάθεσις, ὁ τερματισμὸς τῆς ὑπηρεσίας καὶ ἡ ἀπόλυσις τῶν δικαστῶν, ὡς καὶ ἡ πειθαρχικὴ ἐξουσία ἐπὶ τούτων.

3. Οὐδενὸς δικαστοῦ ἀποφασίζεται ἡ ἀποχώρησις ἢ ἡ ἀπόλυσις, εἰμὴ ὑφ' οὕς ὅρους καὶ καθ' ὃν τρόπον προβλέπεται ἐν τῷ Συντάγματι διὰ τοὺς δικαστὰς τοῦ Ἀνωτάτου Δικαστηρίου»).

An examination of the provisions of Article 157 shows, among other things, that by paragraph 1 there was excluded the exercise by the Supreme Council of Judicature of any competence vested in the Supreme Constitutional Court, that by paragraph 2 there were vested in the Council certain specific powers in relation to judicial officers and that by paragraph 3 there was laid down the manner of the exercise of some of such powers.

The function of the Supreme Council of Judicature under Article 157.2 cannot be described as "judicial" in the strict sense because it does not entail dealing with litigation, but in my opinion such function, in view of its essential nature, is obviously so very closely connected with the exercise of the judicial power that, in the light of what has already been stated in this judgment in relation to the jurisdiction under Article 146.1, no recourse would lie, under Article 146.1, in respect of any decision, act or omission of the Council in the exercise of its powers under Article 157.2; and it is due to the very close connection of the function of the Council, under Article 157.2, with the exercise of the judicial power that Article 157 was included in Part X

of the Constitution which provides about the administration of justice by the High Court and subordinate courts.

In 1964, due to the events which are referred to in the preamble to Law 33/64 and are mentioned in the judgments in the case of *The Attorney-General* v. *Ibrahim* (*supra*), the functioning of the Supreme Constitutional Court and of the High Court was rendered impossible. As a result, by section 9(a) of Law 33/64, there were transferred to this Supreme Court, which was set up by section 3 of the same Law, the jurisdiction and powers which had been vested till then in, and were capable of being exercised by, the Supreme Constitutional Court and the High Court; and the powers of the Supreme Council of Judicature, under Article 157.2, were, by means of section 10(1) of Law 33/64, vested in the at present existing Supreme Council of Judicature—the respondent in this case—which was set up by means of such section.

A comparison of the texts of Article 157.2 and of section 10(1) of Law 33/64 shows that the powers which were being exercised by the previously existing Supreme Council of Judicature under Article 157.2, and which were vested, by means of section 10(1), in the present Supreme Council of Judicature are exactly the same; the essential nature of such powers has not changed at all; so the function of the present Supreme Council of Judicature, under section 10(1), is, as it was that of its predecessor under Article 157.2, very closely connected with the exercise of the judicial power; and, therefore, no recourse can be made under Article 146.1 in respect of any decision, act or omission of the Council in the exercise of its powers under section 10(1). It is due to the very close connection of the function of the Council, under section 10(1), with the exercise of the judicial power that such section forms part of Law 33/64, the long title of which is "A law to remove certain difficulties arising out of recent events impeding the administration of justice and to provide for other matters connected therewith" («Νόμος αἴρων ὡρισμένας δυσχερείας αἵτινες προέκυψαν συνεπείᾳ προσφάτων γεγονότων καὶ παρεμποδίζουν τὴν ἀπονομὴν τῆς δικαιοσύνης καὶ προνοῶν περὶ ἑτέρων συναφῶν ζητημάτων»).

Because of the above, as well as of what follows hereinafter, the applicant's recourse cannot be entertained under Article 146.1.

It is useful to note that in the case of *In re C.H. an advocate (supra)*, in which the point was taken that a decision of the Disciplinary Board, which has been set up under the Advocates Law, Cap. 2, and consists of advocates under the chairmanship of the Attorney-General, was an administrative decision which should have been challenged by recourse under Article 146.1, it was held that such decision was not within the ambit of the jurisdiction under Article 146.1 because advocates are officers of the Supreme Court—(see, also, section 15 of Cap. 2)—and disciplinary matters concerning them are considered as being related to the administration of justice.

A disciplinary decision of the Supreme Council of Judicature regarding a judicial officer, either under Article 157 or section 10(1) of Law 33/64, would, with stronger reason be a matter related to the administration of justice and, therefore, outside the ambit of the jurisdiction under Article 146.1; and if such a decision is outside the scope of Article 146 then surely a decision of the Council concerning the appointment of a judicial officer is, likewise, outside the scope of such Article.

Under section 10(1) of Law 33/64 the present Supreme Council of Judicature does not consist only of judicial officers of the highest rank—as was the position under Article 157—but, in addition to the President and the two senior judges of the Supreme Court, it comprises the Attorney-General of the Republic, the senior President of a District Court, the senior District Judge and a practising advocate elected by the Cyprus Bar Association. Though I do think that it is desirable to amend section 10(1) so as to make all the judges of the Supreme Court members of the Council (just as they are members of the legal Board which has been set up under the Advocates (Amendment) Law, 1961—Law 42/61), I have no doubt at all that the present composition of the Council cannot be treated as preventing its decisions, acts or omissions under section 10(1) from being so very closely connected with the exercise of the judicial power

as to be outside the ambit of the jurisdiction under Article 146.1; the majority of the members of the Council are judicial officers and, in this respect, I am not prepared to accept that the two less senior in rank judicial officers —the President of a District Court and the District Judge—can be regarded as being in the least less judicially minded than judges of the Supreme Court; the Attorney-General by virtue of both the nature of the duties of his office and the fact that he is the Chairman of the Bar Council is a person very closely related to the administration of justice; and, likewise, the practising advocate, being an officer of the Supreme Court (see section 15 of Cap. 2), ought to be regarded, also, as being closely related to the functioning of the judicial power.

The significantly very close connection of the advocates with the administration of justice is not only shown by the fact that, as stated, advocates are officers of the Supreme Court, but has, also, been judicially recognized (see, *inter alia, In re C.D. an advocate* (1969) 3 C.L.R. 376, and *In re C.H. an advocate, supra).* Also, in its decision in case 483/1930 the Council of State in Greece («Συμβούλιον Επικρατείας») stressed the quasi-judicial contribution of advocates in the administration of justice («...εἰς τὴν εὔρυθμον λειτουργίαν καὶ καλὴν ἀπονομὴν τῆς δικαιοσύνης, εἰς ἣν ὡς βοηθητικά, ἀλλὰ δικαστικὰ ὄργανα, συμβάλλουσιν καὶ οἱ δικηγόροι...»).

Section 10(1) of Law 33/64 has to be construed against the background of the developments (see in this respect the judgments in the case of *Attorney-General* v. *Ibrahim, supra),* which led to its enactment; and when this is done it becomes more than obvious that by means of such section there was not created a new institution but there was merely prescribed a new composition for an already existing institution, namely the Supreme Council of Judicature, so that it could continue to function notwithstanding the fact that the functioning in all respects of the High Court, which was under Article 157 the Supreme Council of Judicature. had been rendered impossible.

Such construction of section 10(1) is, also, indicated by the following opening words of the section: *"The* Supreme Council of Judicature *for the exercise of the*

competence and powers in respect of appointments.... of judicial officers *shall be composed of*". (Τὸ Ἀνώτατον Δικαστικὸν Συμβούλιον διὰ τὴν ἐνάσκησιν τῶν ἁρμοδιοτήτων καὶ ἐξουσιῶν αὐτοῦ καθ' ὅσον ἀφορᾷ εἰς διορισμούς.... δικαστικῶν λειτουργῶν συγκροτεῖται ἐκ τῶν ἀκολούθων») the words which I underlined show an intention to provide a new composition for an existing institution. Another factor which supports this construction of section 10(1) is the fact that there exists no definition of the Supreme Council of Judicature in Law 33/64; and it is provided in section 2(2) thereof that expressions not otherwise defined in Law 33/64 shall, "unless the context otherwise requires", have the meaning assigned to them by the Courts of Justice Law, 1960 (Law 14/60), in which the Supreme Council of Judicature is defined, by section 2, as being the Supreme Council of Judicature established («Τὸ καθιδρυθὲν») under Article 157.1; it is clear, therefore, that the Supreme Council of Judicature established by section 10(1) is the same institution as the Supreme Council of Judicature established by Article 157.1, but with a new composition due to the cessation of the functioning of the High Court which acted as the Council under Article 157.1.

It might be observed in relation to the application of Laws 14/60 and 33/64 that there was no need to amend by Law 33/64 the definition of the Supreme Council of Judicature in section 2 of Law 14/60 because such definition must be read as having been modified by section 10(1) of Law 33/64 in so far as the composition of the Council is concerned; this being the outcome of the already referred to section 2(2) of Law 33/64 and of the provision in section 15 of the same Law to the effect that in case of any conflict between the provisions of Law 33/64 and of any other Law the provisions of Law 33/64 shall prevail.

In reaching my decision on the issue of whether this Court possesses jurisdiction under Article 146.1 to entertain the recourse of the applicant I have also examined the relevant law in Greece and France :

In Greece the jurisdiction which corresponds to that under our Article 146.1 is being exercised, by the Council of State, on the basis of the nature of the organ

concerned and not on the basis of the nature of the action the validity of which is being challenged; the criterion being whether the organ from which an act has emanated is an administrative organ, because only in relation to actions of administrative organs can a recourse for annulment be made (see, *inter alia*, The Conclusions from the Case-law of the Council of State—«Πορίσματα Νομολογίας τοῦ Συμβουλίου τῆς Ἐπικρατείας» 1929/1959, at p. 228); this is so due to the effect of relevant constitutional provisions (see Article 82 of the Constitution of 1911, Article 102 of the Constitution of 1927, Article 83 of the Constitution of 1952 and Article 107 of the Constitution of 1968) and of relevant legislation (see section 46 of Law 3713/1928).

It is to be noted that, though in Greece the basis for the exercise of the jurisdiction in question is, as stated above, the administrative nature of the organ from which an act complained of has emanated, acts which are related to the exercise of the judicial power have been treated by the Council of State as being outside the ambit of such jurisdiction even when emanating from administrative organs (see the Conclusions from the Case-Law of the Council of State 1929/1959, at p. 230). In this respect useful reference may be made to the following three cases which were decided by the Council of State :

In Case 1486/1950 it was held that no recourse could be made against a decision of the Minister of Justice about the transfer of a convict from one prison to another, because such decision related to the mode of execution of a sentence imposed by the judicial power and, therefore, it possessed no legal effect of an administrative nature («στερεῖται ἐννόμου ἀποτελέσματος διοικητικῆς φύσεως»); in Case 1093/1955 it was held that no recourse could be made against an administrative decision regarding the place where a Court order providing for police supervision would take effect, because such decision though emanating from an administrative organ was not of an administrative nature as it was closely related to the exercise of the judicial power; it, therefore, was not an administrative function («... αἴτησις ἀκυρώσεως ἐνώπιον τοῦ Συμβουλίου τῆς Ἐπικρατείας χωρεῖ κατὰ τῶν ἐκτελεστῶν πράξεων τῶν διοικητικῶν ἀρχῶν, ἤτοι κατὰ τῶν πράξεων ἐκείνων, αἵτινες προερ-

χόμεναι παρὰ διοικητικῶν ἀρχῶν εἰσὶ καὶ καθ' ἑαυτὰς διοικητικαὶ ... ἡ προσβαλλομένη ἀπόφασις .. συνδέεται στενῶς πρὸς τὴν ἄσκησιν τῆς ποινικῆς δικαιοσύνης καὶ τὴν ἐκτέλεσιν τῶν ἀποφάσεων αὐτῆς, ἐξερχομένη οὕτω τῶν πλαισίων τῆς διοικητικῆς λειτουργίας καὶ συνεπῶς δὲν εἶναι δεκτικὴ προσβολῆς ἐπὶ ἀκυρώσει»); and in Case 168/1956 it was held that no recourse could be made in respect of an omission by the Minister of Justice to institute criminal proceedings against judicial officers, as there were not within the jurisdiction of the Council of State not only judicial acts but also acts of an administrative nature which emanated from judicial or administrative organs and related to the exercise of the judicial power («... τῆς ἁρμοδιότητος τοῦ Συμβουλίου τῆς Ἐπικρατείας ἐξαιροῦνται οὐ μόνον αἱ καθαρῶς δικαστικαὶ πράξεις, ἀλλὰ καὶ αἱ διοικητικαὶ κατὰ τὸ περιεχόμενον πράξεις δικαστικῶν εἴτε καὶ διοικητικῶν ἀρχῶν, αἵτινες ὅμως ἀφορῶσιν εἰς τὴν εὔρυθμον λειτουργίαν καὶ ἀπονομὴν τῆς τακτικῆς δικαιοσύνης καὶ συνδέονται πρὸς τὴν ἄσκησιν τῆς δικαστικῆς λειτουργίας τῆς Πολιτείας»).

Under Article 90 of the Constitution of Greece of 1952 the—*inter alia*—promotions of judicial officers were to be made with the concurrence of a Supreme Council of Judicature («Ἀνώτατον Δικαστικὸν Συμβούλιον») consisting of members of the Supreme Court («Ἄρειος Πάγος»); and the third paragraph of the same Article provided that decisions of the Supreme Council of Judicature could not be challenged by proceedings before the Council of State. This exclusion of the competence of the Council of State was not an innovation introduced by a constitutional provision; Article 90 merely gave Constitutional effect to principles which had been expounded already by means of case-law (see Sgouritsas on Constitutional Law—«Σγουρίτσα Συνταγματικὸν Δίκαιον» —3rd ed., vol. A, p. 442, and Stasinopoulos on the Law of Administrative Disputes—«Στασινοπούλου Δίκαιον τῶν Διοικητικῶν Διαφορῶν»—4th ed., p. 157). As observed by Vavaretos in his Commentary on the Constitution of Greece of 1952—«Βαβαρέτου Τὸ Σύνταγμα τῆς Ἑλλάδος 1952»—3rd ed., p. 85, the third paragraph of Article 90 was based on the view that the Supreme Council of Judicature, though acting as a collective administrative organ, was not an organ of

the administration so that its decisions could be challenged by recourse to the Council of State («... τὸ Ἀνώτατον Δικαστικὸν Συμβούλιον ἐνεργεῖ μὲν ὡς συλλογικὸν διοικητικὸν ὄργανον, ἀλλὰ δὲν εἶναι ὄργανον τῆς διοικήσεως, ὥστε αἱ πράξεις του νὰ ὑπόκεινται εἰς προσφυγὴν ἐνώπιον τοῦ Συμβουλίου Ἐπικρατείας»).

Prior to the exclusion of the competence of the Council of State by means of Article 90, the Council of State had decided in Case 812/1947 (reported in Themis («Θέμις») 1947, p. 141) that a decision of the Supreme Council of Judicature for a promotion to the post of procurator («εἰσαγγελεὺς»)—who in Greece is a judicial officer—could not be attacked by recourse because the Supreme Council of Judicature was not an organ forming part of the administrative structure («.. ὡς ἐκδοθεῖσα παρ' ἀρχῆς μὴ ἐντεταγμένης εἰς τὴν Διοικητικὴν ἱεραρχίαν...»); as stated in its decision the Council of State followed in this respect its earlier case-law. The decision in Case 812/1947 was criticized in an article by Pratsikas (see Themis, *supra*, p. 141 et seq.); nevertheless the criticism of the learned professor did not prevent the inclusion in the Constitution of 1952 of the third paragraph of Article 90, which gave constitutional effect to the relevant case-law of the Council of State; and similar constitutional provision was made by Article 102 of the Constitution of 1968.

Decisions of organs which in Greece are part of the judicial structure, and not of the administrative structure, have been held by the Council of State not to be subject to a recourse for annulment; for example, in Case 2027/1965 it was held that the decision of a Board regarding appointments of clerks of Tribunals for Tax Cases was outside the jurisdiction of the Council, because the Board, in view of its composition and competence, was an authority forming part of the judicial structure, and not of the administrative structure, of the State («.. ἀποτελεῖ ἀρχὴν ἐντεταγμένην εἰς τὰ πλαίσια τῆς δικαστικῆς καὶ οὐχὶ τῆς διοικητικῆς ὀργανώσεως τῆς Πολιτείας»).

Useful reference may, also, be made to Cases 718/64 and 1344/1964 in which the Council of State in Greece held that no recourse for annulment could be made

against a decision of the Advocates' Supreme Disciplinary Board («Ἀνώτατον Πειθαρχικὸν Συμβούλιον Δικηγόρων»); the Board being composed of judicial officers and advocates. The Council of State took the view that no recourse would lie because the Board was an organ forming part of the judicial structure, and not of the administrative structure, of the State, even though its decisions were not decisions dealing with litigation («... ὅτι τὸ Ἀνώτατον Πειθαρχικὸν Συμβούλιον Δικηγόρων ἀποτελεῖ ἀρχὴν ἐντεταγμένην εἰς τὸ πλαίσιον τῆς δικαστικῆς, καὶ οὐχὶ τῆς διοικητικῆς ὀργανώσεως τῆς Πολιτείας καὶ ὅτι, ὡς ἐκ τούτου, αἱ ἀποφάσεις τοῦ Ἀνωτάτου Πειθαρχικοῦ Συμβουλίου δὲν εἶναι μὲν δικαιοδοτικαὶ δὲν συνιστῶσιν ὅμως πράξεις διοικητικῆς ἀρχῆς...»).

As was stated earlier in this judgment the criterion adopted in Greece in relation to the exercise of the jurisdiction of the Council of State, which corresponds to the jurisdiction under our Article 146.1, is that of the nature of the organ of which the action is being challenged; whereas here in Cyprus the criterion adopted in relation to the exercise of the jurisdiction under Article 146.1 is that of the essential nature of the action which is being challenged; and these different approaches are due to the differing effects of the respectively relevant enactments. But irrespective of the use of different criteria the true nature of the remedy by recourse for annulment, namely that it is a remedy in relation to matters within the province of the administration and not within the province of the judiciary, should not be lost sight of; and it is due, also, to such nature, which is defined by basic principles of Administrative Law applicable with equal force both in Greece and here, that I am of the already expressed in this judgment view that the remedy in question is not available in respect of the matters complained of by the applicant in the present recourse, because such matters are within the province of the judiciary, and not within the province of the administration; and, likewise, the respondent Supreme Council of Judicature is an organ within the judicial structure, and not within the administrative structure, of the State.

In France the criterion of competence in relation to a recourse for annulment made to the Council of State is that of the nature of the organ taking the action complained

of (see, *inter alia,* Les Grands Textes Administratifs, 1970, p. 528).

The French Council of State in the case of *Falco et Vidaillac,* which was decided on the 17th April, 1953, (see Les Grands Arrêts de la Jurisprudence Administrative, 1969, p. 392) held that it had competence, as an administrative Court, to deal with the validity of a decision, reached by a Board composed of judicial officers, regarding the election of a member of the Superior Council of Magistracy ("Conseil Superieur de la Magistrature"); thus the Council of State adopted apparently the distinction made on the 27th November, 1952, by the Tribunal of Conflicts ("Tribunal de Conflits") in the case of *Préfet de la Guyane* (see Les Grands Arrêts, *supra,* at p. 379) between the functioning of the judicial service and the organization of such service; it was held by the Tribunal that an administrative Court was competent regarding matters related to the organization, but not also to the functioning, of the judicial service.

The decision in the case of *Préfet de la Guyane* (*supra*) is commented upon in Les Grands Arrêts (*supra,* at p. 380) as having introduced a distinction—between the functioning and the organization of the judicial service—the application of which creates very delicate problems, especially as (see Les Grands Arrêts, *supra,* at. p. 386) the organization of a service is always a requisite for its functioning. Waline in "Droit Administratif" (9th ed., p. 80, paragraph 124) observes that the said distinction is in practice subtle and arbitrary; and in an article in the "Revue du Droit Public et de la Science Politique" (1953, p. 448 et seq.) he states, in relation to the decision in the case of *Préfet de la Guyane (supra),* that one can rightfully wonder if it is really a decision of principle or a decision of equity in view of the quite extraordinary circumstances of such case (namely, that there had been a cessation of the exercise of certain judicial jurisdictions due to failure to constitute the tribunals concerned). Also, Odent in "Contentieux Administratif" (1970—1971, p. 486) observes that the distinction between organization and functioning is not always easy, especially as one passes imperceptibly from

the one to the other and as many decisions or activities participate at the same time in both.

The decision in the case of *Falco et Vidaillac (supra)* has been severely criticized by many very eminent jurists such as Waline, Vedel, Eisenmann, Liet-Veaux and Mathiot (see Les Grands Arrêts, *supra*, p. 396) most of whom have stressed, *inter alia*, that the matter complained of in that case was not within the province of the administration and, therefore, the Council of State should not have held that it had competence to deal with it.

Also, Waline in his already referred to article in the "Revue du Droit Public et de la Science Politique" criticizes as not correct the decision in the case of *Falco et Vidaillac* (*supra*) and refers to case-law of the French Council of State by means of which there had been established that the judicial control of the Council of State did not extend to any act the object of which was to ensure the proper functioning of the judicial service.

As the correctness of the decisions in the cases of *Préfet de Guyane* (*supra*) and *Falco et Vidaillac* (*supra*) has been doubted very much indeed in France itself I do not think that I could be influenced by them to the extent of deciding—contrary to the already referred to case-law here and in Greece, which established that a matter closely connected with the exercise of the judicial power is not within the jurisdiction of an administrative Court—that this Court possesses competence under Article 146.1 to entertain the present recourse of the applicant.

It has been argued by counsel for the applicant that this Court should not deprive the applicant of a remedy by holding that it does not possess jurisdiction to entertain his recourse: In my opinion Article 146.1 cannot be construed in a manner inconsistent with its nature even for the worth-while purpose of providing a judicial remedy in a case in which there does not appear to exist any other remedy; such Article has to be interpreted strictly (see *Papaphilippou, supra*, at p. 64) and the ambit of the jurisdiction created thereby cannot be extended so as to avoid a legal vacuum

(see *Kyriakides, supra,* at p. 73). Also, it would not be correct to enlarge the scope of the jurisdiction under Article 146.1 merely because the respondent Supreme Council of Judicature has been established by a Law—(Law 33/64)—which is a measure resorted to in exceptional circumstances of necessity.

Before concluding I would like to observe that even though an aggrieved judicial officer in the position of the present applicant does not possess a right of recourse under Article 146.1, there exists, in a proper case, the possibility of having his complaint examined by the Supreme Council of Judicature, because the Council, like any other collective organ, has the right to review, if necessary, its own decisions.

Though we do not yet have here, as elsewhere (for example, in Greece), statutory provisions regulating such a process of review—and, therefore, it is governed only by the relevant general principles of law—I do think that such process constitutes a mode of redress which is much more compatible with the dignity of judicial office than litigation concerning the merits of judicial officers.

STAVRINIDES, J.: I have had the advantage of reading the judgment of the learned President and of discussing it with him. I concur and there is nothing that I wish to add.

MALACHTOS, J.: I also agree with the judgment just delivered by the learned President of this Court.

HADJIANASTASSIOU, J.: The Supreme Council of Judicature has been created for the first time in Cyprus as an independent collective organ, in accordance with the provisions of paragraph 1 of Article 157 of the Constitution of the Republic. Its competence, as well as its powers, have been determined under the aforesaid Article, as well as in accordance with ss. 8, 9(2) and section 10 of the Courts of Justice Law, 1960. Article 157 is in these terms :-

> "1. Save as otherwise provided in this Constitution with regard to the Supreme Constitutional Court, the High Court shall be the Supreme

Council of Judicature, and its President shall have two votes.

2. 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.

3. No judicial officer shall be retired or dismissed except on the like grounds and in the same manner as a judge of the High Court."

Pausing here for a moment, it is to be observed that under paragraph 3 relating to the retirement or dismissal of a judicial officer, such function is considered to be of a judicial nature, and the judge concerned shall be entitled to be heard and present his case before the Supreme Council of Judicature. Cp. paragraph 8 subparagraph 3 of Article 153 of the Constitution.

Section 8 of Law 14/60 provides for the remuneration and other conditions of service of the judiciary; s. 9 deals with the oath to be taken by judges, both of the High Court and of the District Court before assuming the duties of their office, and s. 10 deals with the temporary appointments of judicial officers. It reads as follows :-

"If it appears to the Supreme Council of Judicature that it is expedient so to do owing to the incapacity or absence of a President of a District Court or of a District Judge, as the case may be, or in order to avoid delay in the administration of justice in a district, the Supreme Council of Judicature may appoint a person having the appropriate qualifications provided in section 6 to act as a President of a District Court or as a District Judge for that district for such time as may be specified in the instrument of appointment.

(2) Any person appointed under this section shall, whilst so acting, have all the powers and may perform all the duties of a President of a District Court or a District Judge, as the case may be.

(3) A person so appointed under this section may be allowed such remuneration not exceeding the

amount, or if on an incremental scale, the minimum point in the scale provided for that office."

The facts which have given rise to this litigation are as follows :-

The applicant joined the judicial service as a Magistrate on November 1, 1959. On September 6, 1971, the applicant, even before the publication in the official Gazette of the Republic dated October 1, 1971, addressed a joint letter (blue 6) to the President and members of both the Supreme Court and the Supreme Council of Judicature, complaining that four out of the five appointments made regarding temporary Presidents, were made in preference and instead of himself and should be considered as null and void. He further claimed that those appointments were made in contravention of s. 10 of the Courts of Justice Law, 1960. In his long letter, after putting forward various reasons, and particularly his seniority and successful service in the judiciary, he concluded by requesting both organs of the state to review the matter and reach such appropriate decisions in the light of what he has stated in his letter.

On September 7, in reply, (blue 8) Mr. Olympios, who signed as Chief Registrar, Secretary to the Supreme Council of Judicature, (hereinafter referred to as the Secretary) said, *inter alia,* (acting on instructions of the President of both organs) that his letter, in accordance with the established procedure of hierarchy ought to have been addressed through the President of the District Court.

On September 9, the applicant in reply (blue 9) (through the President of the District Court of Nicosia), tried to point out his failure to follow the correct procedure, adding that the reason being that there were no rules enabling a judicial officer to place before the Supreme Council of Judicature complaints or applications regarding the question of temporary appointments of judges in accordance with the provisions of s. 10 of the Courts of Justice Law, 1960.

On September 14, Mr. Olympios told the applicant (blue 10) that he was directed to inform him that the Supreme Court got to know of the contents of his letter

dated September 9, 1971, adding that in view of the fact that the temporary appointments complained of were made by the Supreme Council of Judicature, the Supreme Court had no intention to deal with that subject unless it was referred to it by the Supreme Council of Judicature.

On September 22, the Secretary wrote to the applicant (blue 11) in these terms :-

«Ἐνετάλην ὑπὸ τοῦ Ἐντ. Προέδρου τοῦ Ἀνωτάτου Δικαστηρίου νὰ ἀναφερθῶ εἰς τὸ ἔγγραφον σας ἡμερ. 9 Σεπτεμβρίου, 1971, τὸ ὁποῖον διεβιβάσθη μέσῳ τοῦ Προέδρου Ἐπαρχιακῶν Δικαστηρίων Λευκωσίας—Κυρηνείας πρὸς τὸ Ἀνώτατον Δικαστικὸν Συμβούλιον, καὶ νὰ παρακαλέσω ὅπως καθορίσητε μετὰ πάσης δυνατῆς σαφηνείας ἑκάστην τῶν ἀποφάσεων τὰς ὁποίας αἰτεῖσθε ὅπως τὸ Συμβούλιον λάβῃ κατὰ τυχὸν ἐπανεξέτασιν τοῦ θέματος τὸ ὁποῖον ἐγείρετε διὰ τοῦ ἐγγράφου σας.

Ἐπίσης δέον νὰ ἐξειδικεύσητε ἐν σχέσει πρὸς ἑκάστην αἰτουμένην ἀπόφασιν τοὺς λόγους διὰ τοὺς ὁποίους αἰτεῖσθε τὴν λῆψιν της.

Δέον νὰ προσθέσω ὅτι ἐκ τῆς μὴ περαιτέρω ἀναφορᾶς εἰς τὸ περιεχόμενον τοῦ ἐγγράφου σας δὲν ἐξυπακούεται (α) ἡ ὀρθότης τινων τῶν προβαλλομένων ἐν αὐτῷ ἰσχυρισμῶν, καὶ (β) ὅτι ὁ τρόπος ὑποβολῆς τοῦ σχετικοῦ παραπόνου σας εἶναι, κατὰ τὰ εἰωθότα τῆς δικαστικῆς ὑπηρεσίας, ὁ ἐνδεδειγμένος».

And in English it reads as follows :

("I have been directed by His Honour the President of the Supreme Court to refer to your document dated the 9th September 1971, which was forwarded through the President of the District Courts Nicosia-Kyrenia to the Supreme Council of Judicature and to request that you may specify with all possible clarity each one of the decisions which you apply that the Council may take in the event of re-examination of the matters raised in your document.

You should also, in connection with every decision you apply to be taken, specify the grounds

upon which you request that such decision be taken.

I should add that by not referring further to the contents of your letter it is not implied (a) that certain of the allegations therein are correct and (b) that the manner your relevant complaint was submitted is the appropriate one in accordance with the etiquette (iothota) of the Judicial Service").

On September 27, the applicant in reply (blue 12 and 13) after dealing with the question raised under paragraphs (a), (b), (i) and (ii), concluded in paragraph 3 as follows :- ".... I respectfully apply that a meeting of the full members of the Supreme Council of Judicature would be convened for the purpose of dealing with my application dated 6.9.71 and decide on the substance in accordance with the provisions of the Constitution and the relevant legislation."

Then on October 9, the Secretary again wrote a long letter requesting certain particulars (blue 14 and 15), and it reads, *inter alia,* as follows :-

«Ἐπειδὴ δὲν εἶναι δυνατὸν διὰ τὸ Ἀνώτατον Δικαστικὸν Συμβούλιον νὰ ἐπιληφθῇ τοῦ παραπόνου σας χωρὶς νὰ γνωρίζῃ ἐπακριβῶς τί αἰτεῖσθε καὶ διατί, παρακαλεῖσθε ὅπως προσπαθήσητε νὰ καταστῆτε ὅσον τὸ δυνατὸν σαφέστερος.

Καλεῖσθε ἐν προκειμένῳ ὅπως, μεταξὺ ἄλλων διασαφηνίσητε καὶ τὰ ἀκόλουθα :-

Διατί ἰσχυρίζεσθε ὅτι τέσσαρες ἐκ τῶν πέντε γενομένων διορισμῶν Προσωρινῶν Προέδρων Ἐπαρχιακῶν Δικαστηρίων φαίνεται ὅτι δὲν καλύπτονται ὑπὸ τῶν προνοιῶν τοῦ ἄρθρου 10 τοῦ περὶ Δικαστηρίων Νόμου τοῦ 1960' (ἐν περιπτώσει, βεβαίως, καθ' ἣν εὐσταθεῖ ἡ ἄποψις ὅτι οἱ τοιοῦτοι διορισμοὶ ἐγένοντο δυνάμει τοῦ ἐν λόγῳ ἄρθρου)· καὶ ποῖοι εἰδικῶς εἶναι οἱ τέσσαρες ἐκ τῶν πέντε διορισθέντων Προέδρων τῶν ὁποίων, κατὰ τὸν ἰσχυρισμόν σας, δυνατὸν νὰ θεωρηθῶσι ἄκυροι· οἱ διορισμοί ;

Ἐκ τῆς παραγράφου 2 τοῦ ἰδίου ἐγγράφου σας συνάγεται ὅτι παραπονεῖσθε καὶ διὰ τοὺς πέντε γενομένους διορισμούς. Αἰτεῖσθε τὴν ἀκύρωσιν ὅλων τούτων τῶν διορισμῶν ; Ἐὰν ναί, παρακαλεῖσθε

ὅπως παραθέσητε πλήρη στοιχεῖα διατί, δεδομένης οὔσης τῆς ἀρχαιότητος σας ἐν τῇ ὑπηρεσίᾳ, ἰσχυρίζεσθε ὅτι ἔπρεπε νὰ διορισθῆτε ὑμεῖς βάσει ἐπίσης ἀξίας, προσόντων κ.τ.λ. ἀντὶ ἑνὸς ἑκάστου ἐκ τῶν πέντε διορισθέντων.

Διὰ νὰ δύναται νὰ μελετηθῇ τὸ παράπονόν σας ὑπὸ τοῦ Ἀνωτάτου Δικαστικοῦ Συμβουλίου δέον νὰ ζητηθῶσι πληροφορίαι περὶ τῶν ὅσων ἀναφέρετε εἰς τὴν παράγραφον 3(γ) τοῦ ἐγγράφου σας. Διὰ τοῦτο παρακαλεῖσθε ὅπως μὲ πληροφορήσητε ποῖον ἦτο τὸ ἕτερον μέλος τοῦ Πλήρους Ἐπαρχιακοῦ Δικαστηρίου Ἀμμοχώστου κατὰ τὰ ἔτη 1966—1968 ὅτε, ὡς ἰσχυρίζεσθε, ἡτοιμάσατε ὅλας τὰς ἀποφάσεις τοῦ ἐν λόγῳ Δικαστηρίου.

Χρειάζεται δὲ περαιτέρω ὅπως ἔχω δήλωσίν σας ὅτι εἶσθε σύμφωνος ὅτι τὸ περιεχόμενον τῆς ἐν λόγῳ παραγράφου θὰ ἀνακοινωθῇ ὑπὸ τὴν πλήρη εὐθύνην σας, δι' οἱασδήποτε τυχὸν συνεπείας πάσης φύσεως, εἰς τὸ κατονομασθησόμενον ὑφ' ὑμῶν μέλος τοῦ Πλήρους Ἐπαρχιακοῦ Δικαστηρίου Ἀμμοχώστου ὡς καὶ εἰς τὸν κ. Χρ. Ἰωαννίδην, τὸν ὁποῖον ἔχετε ἤδη κατονομάσει εἰς τὴν παράγραφον ταύτην ἐν σχέσει πρὸς τὴν σύνταξιν τῶν ἀποφάσεων Πλήρους Ἐπαρχιακοῦ Δικαστηρίου ἐν Λευκωσίᾳ διὰ μίαν διετίαν μετὰ τὸ 1968.

Δέον νὰ σᾶς κατατοπίσω σχετικῶς ὅτι ἔχω ἐπὶ τοῦ παρόντος ὁδηγίας ὅπως μὴ θέσω ὑπ' ὄψιν τοῦ κ. Ἰωαννίδη τὸ περιεχόμενον τῆς ὡς ἄνω παραγράφου 3(γ) πρὶν ἡ οὗτος ἀναρρώσῃ πλήρως ἐκ τῆς προσφάτου ἀσθενείας του διὰ νὰ ἀποφευχθῇ, ὡς ἐκ τῆς φύσεως τῆς ἀσθενείας, οἱαδήποτε τυχὸν δυσμενὴς διὰ τὴν ὑγείαν του ἐπίπτωσις. Ἄλλως, θὰ πρέπει νὰ ζητηθῇ πρῶτον ἡ συγκατάθεσις τῶν θεραπόντων ἰατρῶν του καὶ δὲν κρίνεται ἐπιθυμητόν, ὑπὸ τοῦ Ἐντ. Προέδρου τοῦ Ἀνωτάτου Δικαστικοῦ Συμβουλίου ὅπως τὰ ὅσα ἀναφέρετε εἰς τὴν ἐν λόγῳ παράγραφον περιέλθωσιν εἰς γνῶσιν προσώπων μὴ ἐχόντων σχέσιν πρὸς τὴν δικαστικὴν ὑπηρεσίαν· ἰδίως δὲ διότι πρόκειται περὶ μιᾶς περικοπῆς τοῦ ἐγγράφου παραπόνου σας ἡ ὁποία δυνατὸν ἀργότερον νὰ θεωρηθῇ ὑπὸ τοῦ Συμβουλίου ὡς μὴ ἀποτελοῦσα κατὰ τὰ εἰω-

θότα τῆς δικαστικῆς ὑπηρεσίας ἐνδεδειγμένον τρόπον ἐνεργείας ἐκ μέρους σας.

Ἐνετάλην περαιτέρω νὰ σᾶς καλέσω ὅπως συμφώνως πρὸς τὴν καθιερωμένην τακτικὴν ἀποστέλλητε οἱανδήποτε περαιτέρω ἐπιστολήν σας πρὸς τὸ Ἀνώτατον Δικαστικὸν Συμβούλιον μέσῳ τοῦ Προέδρου τοῦ Ἐπαρχιακοῦ Δικαστηρίου ὅπου ὑπηρετεῖτε καὶ μέσῳ ἐμοῦ, ὡς Γραμματέως τοῦ Συμβουλίου, καὶ ὅπως μὴ συνεχίσητε νὰ παραβαίνητε, ὡς ἐπράττατε μέχρι σήμερον, τὴν τοιαύτην τακτικὴν διὰ τῆς ἀπ' εὐθείας διανομῆς ἀντιγράφων τῶν ἐπιστολῶν σας πρὸς μέλη τοῦ Συμβουλίου.»

("As it is not possible for the Supreme Council of Judicature to consider your complaint without knowing exactly what you are applying for and why, you are requested to try to become as clear as possible.

You are in this connection called upon to clarify, *inter alia*, and the following :-

Why are you alleging that four out of the five appointments of Acting Presidents District Courts 'appear not to be covered by the provisions of section 10 of the Courts of Justice Law 1960' (in case, of course that the view that such appointments were made under the said section stands); and who in particular are the four out of the five appointed Presidents whose appointments according to your allegation may possibly be considered void?

From para. 2 of your same document it is inferred that you are complaining against all the five appointments made. Are you applying for the annulment of all such appointments? If yes you are requested to set out full particulars as to why, accepting your seniority in the service, you are alleging that you should have been appointed on the basis also of merit, qualifications etc. instead of each one of the five ones appointed.

In order that your complaint may be studied by the Supreme Council of Judicature information should be supplied regarding the contents of para. 3(c) of your document. You are thus requested to

inform me who was the other member of the Full District Court of Famagusta during the years 1966—1968, when according to your allegation, you have prepared all the judgments of the said Court.

It is further required that I should have a statement from you to the effect that you are in agreement for the contents of the said paragraph to be communicated, under your full responsibility, in the event of consequences of any nature, to the member of the Full District Court of Famagusta to be named by you as well as to Mr. Chr. Ioannides whom you have alredy named in this paragraph in connection with the preparation of the Judgments of the Full District Court at Nicosia for a period of two years after the year 1968.

I should let you know in this connection that I have at present instructions not to communicate the contents of the said paragraph 3(c) to Mr. Ioannides before he recovers fully from his recent illness in order to avoid, in view of the nature of his illness, any unpleasant repercussions to his health. Otherwise, the consent of the doctors who are treating him should be sought and it is not considered desirable by the Hon. President of the Supreme Council of Judicature that what you have stated in the said paragraph should come to the knowledge of persons not connected with the Judicial Service; particularly because they refer to a passsage of your written complaint which later might possibly be considered by the Council as not constituting an appropriate mode of action by you in accordance with the etiquette (iothota) of the Judicial Service.

I have further been directed to call upon you that in accordance with the established practice you should send any further letter of yours to the Supreme Council of Judicature through the President District Court where you are serving and through me as secretary of the Council and that you should discontinue acting contrary to such practice, as you have been doing till the present day by distributing copies of your letter directly to the members of the Council").

On October 23, the legal adviser of the applicant, Mr. Josephides, wrote a long letter on behalf of his client, to the Supreme Council of Judicature (blue 16, 17 and 18) and after dealing with both the question of the correct procedure and making a plea that the application of the applicant should be heard by the Supreme Council of Judicature, he concluded :-

> "Judge Kourris has instructed me to express to the Honourable President and Honourable members of the Supreme Council of Judicature his esteem and at the same time his regret that he had to raise such a subject. He had to do so because of the circumstances which have created for him a serious matter regarding his future judicial career, and after 12 years service during which not a single complaint was made to him by his superiors before those appointments."

On November 6, the Secretary in reply to the said legal adviser had this to say :- (blue 19)

> "I have been instructed by the Hon. Chairman of the Supreme Council of Judicature to inform you—and through you your client His Honour District Judge A. Kourris, on whose instructions you have addressed to the Council and to me, respectively, two documents both dated the 23rd October, 1971—that, after careful consideration of the contents of the said documents,
>
> (a) It is not intended for the time being to comment, in any way, in relation to such contents, and
>
> (b) it does not appear to be the appropriate course to convene a meeting of the Council before your client acts in response to the matters mentioned in my letters to him dated the 22nd September, 1971 and the 9th October, 1971.
>
> I am, however, to make it clear, regarding (b) above, that any representations in support of the different view will be, of course, duly examined."

There was further exchange of correspondence between

the legal adviser of the applicant and the Secretary which went on until December 29, and the last letter (blue 28) reads, *inter alia,* as follows :-

«Δυστυχῶς ὁ κ. Κούρρης δὲν ἀπήντησεν ἀκόμη εἰς ἄλλα ἐρωτήματα περιεχόμενα εἰς τὴν ἐπιστολήν μου ἡμερομηνίας 9ης Ὀκτωβρίου, 1971. Διὰ νὰ ἀπαντήση εἰς αὐτά, καὶ καταστήση οὕτω σαφὲς ποίας ἀποφάσεις ζητεῖ ὅπως ληφθῶσιν ὑπὸ τοῦ Ἀνωτάτου Δικαστικοῦ Συμβουλίου, δὲν φαίνεται νὰ χρειάζεται γνῶσις τῶν πρακτικῶν τῶν συνεδριῶν καὶ ἀποφάσεων τοῦ Ἀνωτάτου Δικαστικοῦ Συμβουλίου ἐπὶ τοῦ θέματος τούτου καὶ τῶν σχετικῶν ἐπισήμων φακέλλων, ὡς ἰσχυρίζεσθε εἰς τὴν ἐπιστολήν σας ἡμερομηνίας 23ης Ὀκτωβρίου, 1971. Τοὐλάχιστον, ἐὰν ἔχητε ἀντίθετον γνώμην, καθορίσατε ἐν σχέσει πρὸς ποῖα ἐκ τῶν ἐρωτημάτων τούτων, καὶ διατί, ἀπαιτεῖται τοιαύτη γνῶσις, καὶ ἀπαντήσατε εἰς ὅσα δύνανται νὰ ἀπαντηθῶσιν ἄνευ ταύτης (ὡς π.χ. ποῖον ἦτο τὸ ἕτερον μέλος τοῦ Πλήρους Ἐπαρχιακοῦ Δικαστηρίου Ἀμμοχώστου περὶ τοῦ ὁποίου γίνεται λόγος εἰς τὴν παράγραφον 3(γ) τοῦ ἐγγράφου ἡμερομηνίας 9ης Σεπτεμβρίου 1971).

Οὐδόλως ὑφίσταται ἡ ὑφίστατο πρόθεσις ὅπως μὴ τεθῇ ἐν τέλει τὸ παράπονον τοῦ κ. Κούρρη ἐνώπιον τῶν μελῶν τοῦ Ἀνωτάτου Δικαστικοῦ Συμβουλίου, πρὸς τὰ ὁποῖα ἀπεστάλησαν ἤδη (ἴδετε καὶ ἐπιστολήν μου ἡμερομηνίας 14ης Δεκεμβρίου 1971) ἀντίγραφα ὁλοκλήρου τῆς σχετικῆς ἀλληλογραφίας· καὶ ἕκαστον μέλος τοῦ Συμβουλίου δύναται νὰ ἐκφράση τὰς ἀπόψεις του.

Ἀναφορικῶς πρὸς τὴν τελευταίαν παράγραφον τῆς ἐπιστολῆς σας ἡμερομηνίας 16ης Δεκεμβρίου, 1971 δέον νὰ τονισθῇ ὅτι ἐκ τοῦ γεγονότος τῆς μὴ κοινοποιήσεως ἀποφάσεως τοῦ Ἀνωτάτου Δικαστικοῦ Συμβουλίου πρὸ τῆς ἐκπνοῆς μονομερῶς καθορισθείσης ὑπὸ τοῦ αἰτητοῦ προθεσμίας δὲν δύναται νὰ ἐξαχθῇ συμπέρασμα περὶ ἀρνήσεως τοῦ Συμβουλίου νὰ ἐπιληφθῇ αἰτήσεως πρὸς αὐτό.»

("Unfortunately Mr. Kourris has not yet replied to other questions embodied in my letter of the 9th October 1971. In order to reply to such questions and thus make it clear which decisions he requests

to be taken by the Supreme Council of Judicature, it does not appear that he requires knowledge of the minutes of the meetings and decisions of the Supreme Council of Judicature on this subject as well as of the relevant official records as alleged in your letter of the 23rd October 1971. At least, if you hold a contrary view, specify in connection with which of such questions and why, such knowledge is required and reply to the ones that can be answered without such knowledge (as e.g. who was the other member of the Full District Court of Famagusta about whom reference is made in paragraph 3(c) of the document dated 9th September, 1971).

There does not or did not exist an intention not to place the complaint of Mr. Kourris before the members of the Supreme Council of Judicature, to whom copies of the whole correspondence have already been circulated (see also my letter dated 14th December, 1971); and each member of the Council can express its views.

Referring to the last paragraph of your letter dated 16th December 1971, it should be stressed that from the fact that no decision of the Supreme Council of Judicature was communicated prior to the expiration of a time limit set up by the applicant one sidedly no conclusion can be drawn that the Council has refused to deal with a petition before it".)

From the contents of paragraph (e) of the last letter it was made quite clear that the complaint of Judge Kourris would have been placed before the members of the Supreme Council of Judicature. However, it appears that nothing has been done about it, and on January 10, 1972, (no actual date appears in my own file) the applicant, feeling aggrieved, filed the present recourse by his counsel, Mr. K. Talarides.

In this recourse the applicant claimed (a) that the decision of the Supreme Council of Judicature to appoint Messrs. Demetriades, Stavrinakis, Savvides, Loris and Stylianides as temporary Presidents of the District Courts, was null and void and of no effect whatsoever; and (b) that the refusal or omission of the Supreme Council of Judicature to deal and decide speedily regarding the

written application and/or complaint of the applicant dated September 6, 1971, is null and void and of no effect whatsoever, and in the case of omission, declared that whatever has been omitted ought to have been made.

On January, 11, however, the Chief Registrar of this Court wrote in Greek to counsel of the applicant in these terms :- (blue 29).

«Περιῆλθεν εἰς γνῶσιν μου ὅτι χθὲς κατεχωρίσατε τὴν προσφυγὴν ὑπ' ἀρ. 6/72 ἐνώπιον τοῦ Ἀνωτάτου Δικαστηρίου. Ἐπειδὴ τὴν 21ην Δεκεμβρίου, 1971, ὅτε ἐξεδόθη εἰς ὑμᾶς ἐτησία ἄδεια ἀσκήσεως τοῦ δικηγορικοῦ ἐπαγγέλματος διὰ τὸ ἔτος 1972 δὲν ἐγνώριζον ὅτι ἡ παραίτησίς σας ἐκ τῆς θέσεως τοῦ Ἀνωτέρου Δικηγόρου τῆς Δημοκρατίας θὰ ἰσχύσῃ ἀπὸ τῆς 14ης Φεβρουαρίου, 1972, καὶ ὅτι θὰ εἴσθε ἐν τῷ μεταξὺ ἐπ' ἀδείᾳ, παρακαλῶ ὅπως ἔχω ἐγγράφως τὰς ἀπόψεις σας ἐν προκειμένῳ.»

("It has come to my knowledge that yesterday you filed recourse No. 6/72 before the Supreme Court. Because on the 21st December 1971, when I issued to you the annual advocates licence to practise as an advocate for the year 1972, I did not know that your resignation from the post of Senior Counsel of the Republic would be effective from the 14th February, 1972, and that in the meantime you would be on leave, I would request you to let me have your views in writing in this connection".)

On the same date the Registrar of the Court addressed to the same counsel a new letter (blue 30) which in Greek reads as follows :-

«Χθές, 10ην Ἰανουαρίου, 1972, κατεχωρίσατε τὴν προσφυγὴν Ἀρ. 6/72, μεταξὺ Α. Κούρρη καὶ Ἀνωτάτου Δικαστικοῦ Συμβουλίου. Μετὰ τὴν καταχώρισιν ταύτην, διεπίστωσα ὅτι ἐξακολουθῆτε νὰ κατέχετε (εὑρισκόμενος ἐπ' ἀδείᾳ) τὴν θέσιν τοῦ Ἀνωτέρου Δικηγόρου τῆς Δημοκρατίας ἐκ τῆς ὁποίας θὰ ἀφυπηρετήσετε τὴν 14ην Φεβρουαρίου, 1972. Προκύπτει ὅθεν θέμα ἐάν, ἐφ" ὅσον κέκτησθε τὴν ὡς ἄνω ἰδιότητα, ἠδύνασθε νὰ καταχωρίσετε ἐγκύρως τὴν ἐν λόγῳ προσφυγήν.

Πρὸ τῆς περαιτέρω ἐξετάσεως τοῦ τοιούτου θέ-

ματος, παρακαλῶ ὅπως ἔχω ἐγγράφως καὶ τὸ ταχύτερον δυνατόν, τὰς ἐν προκειμένῳ ἀπόψεις σας.

Σημειώσατε ὅτι ἐν ἀναμονῇ τῆς ἀπαντήσεώς σας δὲν δύναται νὰ ληφθῇ οἱαδήποτε διαδικαστικὴ ἐνέργεια (ὡς π.χ. ἐπίδοσις κτλ.) ἐν σχέσει πρὸς τὴν εἰρημένην προσφυγήν.»

("Yesterday the 10th January, 1972, you filed recourse No. 6/72 between A. Kourris and the Supreme Council of Judicature. After such filing I found out that you continue being the holder (by being on leave) of the post of Senior Counsel of the Republic from which you will be retiring on the 14th February, 1972. Therefore the question arises whether, since you are holding such capacity, you could validly file the said recourse.

Before examining further such matter, I would request you to let me have in writing the soonest possible your views in this connection.

You are to note that awaiting your reply no procedural step can be taken (e.g. service etc.) in connection with the said recourse.")

There was a further correspondence between counsel of the applicant and the Chief Registrar which went on until the 27th January, 1972. On the same date the Chief Registrar, after instructions from the Supreme Court, has written to the Attorney-General of the Republic asking for legal advice and requesting that the Bar Council of Cyprus should express its opinion regarding the filing of the present recourse by Mr. Talarides. On February 1, the Attorney-General in his reply to the Chief Registrar had this to say in Greek :-

«Τὸ διὰ τῆς ἐπιστολῆς σας, ὑπ' ἀρ. 67(III) καὶ ἡμερομηνίαν 27 Ἰανουαρίου 1972 πρὸς ἐμὲ ἐγειρόμενον θέμα ἐτέθη ἐνώπιον τοῦ Συμβουλίου τοῦ Παγκυπρίου Δικηγορικοῦ Συλλόγου κατὰ τὴν χθεσινὴν αὐτοῦ συνεδρίασιν καὶ τοῦτο δυνάμει τοῦ ἄρθρου 24(1)(γ) τοῦ περὶ Δικηγόρων Νόμου (Κεφ. 2 ὡς μεταγενεστέρως ἐτροποποιήθη) ἀπεφάσισε ὅτι δέον νὰ δοθῇ ἡ ἀκόλουθος ἀπάντησις :-

Θὰ ἦτο ἀντίθετος πρὸς τὴν δεοντολογίαν τοῦ δι-

κηγορικοῦ ἐπαγγέλματος ἡ ὑπὸ δικηγόρου, δημοσίου ὑπαλλήλου τελοῦντος ἐπ' ἀδείᾳ πρὸ τῆς ἡμερομηνίας τῆς ἀφυπηρετήσεως αὐτοῦ, ἀνάληψις ὑποθέσεως ἐναντίον τοῦ κράτους τοῦ ὁποίου εἰσέτι ἐξακολουθεῖ νὰ εἶναι ὑπάλληλος'.»

("The question raised in your letter to me No. 67(III) of the 27th January, 1972 was placed before the Board of the Cyprus Bar Council at its yesterday's meeting by virtue of the provisions of section 24(1)(c) of the Advocates Law (Cap. 2 as subsequently amended) and it was decided that the following reply should be given :-

'It would have been contrary to the etiquette of the legal profession for an advocate who is a public officer on leave prior to retirement to undertake a case against the state of which he still continues to be an employee'.")

On February 15, the Attorney-General addressed a new letter to the Chief Registrar, and in his reply had this to say in Greek :- (blue 42).

«Εἰς περαιτέρω ἀπάντησιν τῆς ὑπ' ἀριθμὸν 67(III) καὶ ἡμερομηνίαν 27 Ἰανουαρίου, 1972 ἐπιστολῆς σας ἐν σχέσει πρὸς τὴν ὑπὸ τοῦ κ. Κ. Ταλαρίδη καταχωρισθεῖσαν προσφυγὴν ὑπ' ἀριθμὸν 6/72 ἐπὶ τῆς ὁποίας ζητεῖτε νομικὴν συμβουλήν, ὡς σᾶς ἐδήλωσα καὶ προφορικῶς, τοῦτο δὲν ἀποτελεῖ θέμα ἐφ' οὗ δύναται νὰ δοθῇ νομικὴ συμβουλὴ ἀλλ' ἐμπίπτει εἰς τὴν ἁρμοδιότητα τοῦ Δικαστηρίου.»

("In further reply to your letter No. 67(III) dated the 27th January, 1972 in connection with recourse No 6/72 filed by Mr. K. Talarides in which you are seeking legal advice, this matter, as I have stated to you verbally, is not one upon which legal advice may be given but it comes within the competence of the Court.")

There was further exchange of correspondence between counsel for the applicant and the Chief Registrar, and finally, by a letter dated March 13, (blue 46) the Chief Registrar wrote to counsel in these terms in Greek :-

«Ἐν σχέσει πρὸς τὴν προσφυγὴν ἀρ. 6/72 τοῦ πε-

λάτου σας Ἐπαρχιακοῦ Δικαστοῦ κ. Α. Κούρρη κατὰ τοῦ Ἀνωτάτου Δικαστικοῦ Συμβουλίου (ἀναφορικῶς πρὸς τοὺς προσωρινοὺς διορισμοὺς εἰς θέσεις Προέδρων Ἐπαρχιακῶν Δικαστηρίων τῶν Δικαστῶν Δ. Δημητριάδη, Γ. Σταυρινάκη, Λ. Σαββίδη, Α. Λώρη καὶ Δ. Στυλιανίδη) δεδομένου ὅτι προέκυψε θέμα κατὰ πόσον ἠδύνατο νὰ καταχωρισθῇ ἐγκύρως ἐκ μέρους σας ἡ τοιαύτη προσφυγὴ τὴν 10ην Ἰανουαρίου, 1972, καθ' ὃν χρόνον ἐτελούσατε ἐπ' ἀδείᾳ ὡς Ἀνώτερος Δικηγόρος τῆς Δημοκρατίας (πρὸ τῆς παραιτήσεως σας ἐκ τῆς ἐν λόγῳ θέσεως τὴν 14ην Φεβρουαρίου, 1972) καὶ ἐν ὄψει, σὺν ἄλλοις, τῆς ἀποφάσεως τοῦ Παγκυπρίου Δικηγορικοῦ Συλλόγου, τὴν 31ην Ἰανουαρίου, 1972, δυνάμει τοῦ ἄρθρου 24(1)(γ) τοῦ περὶ Δικηγόρων Νόμου, Κεφ. 2 ὅτι :-

> Θὰ ἦτο ἀντίθετος πρὸς τὴν δεοντολογίαν τοῦ δικηγορικοῦ ἐπαγγέλματος ἡ ὑπὸ δικηγόρου, δημοσίου ὑπαλλήλου τελοῦντος ἐπ' ἀδείᾳ πρὸ τῆς ἡμερομηνίας τῆς ἀφυπηρετήσεως αὐτοῦ, ἀνάληψις ὑποθέσεως ἐναντίον τοῦ κράτους τοῦ ὁποίου εἰσέτι ἐξακολουθεῖ νὰ εἶναι ὑπάλληλος·

τὸ Ἀνώτατον Δικαστήριον, ὥρισε τὴν 25ην Ἀπριλίου 1972 καὶ ὥραν 10 π.μ., διὰ νὰ ἀκούσῃ ἐπιχειρηματολογίαν ἐν προκειμένῳ ἐκ μέρους ὑμῶν, τοῦ Γενικοῦ Εἰσαγγελέως τῆς Δημοκρατίας, τοῦ Παγκυπρίου Δικηγορικοῦ Συλλόγου καὶ οἱουδήποτε ἑτέρου ἐνδιαφερομένου ὅστις τυχὸν ἐπιθυμεῖ νὰ ἐμφανισθῇ διὰ συνηγόρου ἐνώπιον τοῦ Δικαστηρίου

Δεδομένου ὅτι κατὰ τὴν ἐν λόγῳ διαδικασίαν τὸ Ἀνώτατον Δικαστήριον θὰ ἐξετάσῃ τὴν ἐγκυρότητα τῆς ὑποβολῆς τῆς προσφυγῆς, τὸ Δικαστήριον, ἐὰν τυχὸν κληθῇ ὑφ' οἱουδήποτε ἐνώπιον τοῦ ἐμφανισθησομένου μέρους, ὅπως ἐξετάσῃ, εἰς τὸ παρὸν στάδιον καὶ κατὰ πόσον κέκτηται δικαιοδοσίαν δυνάμει τοῦ ἄρθρου 146 τοῦ Συντάγματος ἐν σχέσει πρὸς προσφυγὴν τοιαύτης φύσεως, δυνατὸν νὰ ἀκούσῃ ὡσαύτως ἐπιχειρηματολογίαν ἐπὶ τοῦ ζητήματος τούτου, δεδομένου ὅτι δὲν ἔχει προηγουμένως, εἰς ἄλλην τινα ὑπόθεσιν, ἀποφανθῇ ἐν προκειμένῳ.»

("Regarding recourse No. 6/72 of your client District Judge A. Kourris against the Supreme

Council of Judicature (concerning the acting appointments to the posts of Presidents District Courts of Judges D. Demetriades, G. Stavrinakis, L. Savvides, A. Loris and D. Stylianides) considering that the question arose whether such recourse could be validly filed by you on the 10th January, 1972 at a time when you were on leave as a Senior Counsel of the Republic (prior to your retirement from the said post on the 14th February 1972) and in view, *inter alia*, of the decision of the Cyprus Bar Council, dated the 31st January, 1972, taken persuant to section 24(1)(c) of the Advocates Law Cap. 2 to the effect that—

> 'It would have been contrary to the etiquette of the legal profession for an advocate who is a public Officer on leave prior to retirement to undertake a case against the state of which he still continues to be an employee'

the Supreme Court fixed the 25th April, 1972 at 10 a.m. to hear argument in this connection from you, the Attorney-General of the Republic, the Cyprus Bar Council and any other interested party who might wish to appear before the Court represented by Counsel.

Considering that in the course of such proceedings the Supreme Court will go into the validity of the filing of the recourse the Court, in the event of being called upon by any of the parties before it to consider also at this stage whether it is vested with jurisdiction under article 146 of the constitution, in a recourse of this nature, might possibly hear argument on this matter as well, given that it had not resolved this issue in another case."

It is to be observed that a copy of this letter was sent to the Supreme Council of Judicature, the Honourable Attorney-General of the Republic, the Bar Council of Cyprus, as well as to the five temporary Presidents.

On April 25, 1972, as it appears from a document before me, Mr. L. Clerides, Chairman of the Bar Council, has been appointed to represent the Council in this recourse. The five temporary Presidents, decided, for

reasons appearing on this record, not to be represented by counsel because, as they put it in Greek :-

> «.. καθ' ὅτι τοιαύτη ἀντιπροσώπευσις θὰ ἐδημιούργει προβλήματα πιθανῶς καθαπτόμενα τοῦ ἀμερολήπτου τῆς ἀπονομῆς τῆς Δικαιοσύνης καὶ θὰ κατέτεινε πρὸς ἐμφανῆ εὔνοιαν μέλους ἢ μελῶν τινων τοῦ Δικηγορικοῦ Σώματος τὰ ὁποῖα τυχὸν ἤθελον διορισθῇ ὑφ' ἡμῶν, εἰς ὑπόθεσιν φύσεως ὡς ἡ παροῦσα. Θὰ ἠθέλαμεν δὲ νὰ τονίσωμεν ὅτι ἅπαντες πιστεύομεν εἰς τὴν ἰσότιμον μεταχείρισιν ἁπάντων τῶν μελῶν τοῦ εὐγενοῦς τούτου ἐπαγγέλματος».
>
> ("..... because such representation might create problems possibly offending against the impartial administration of justice and would have shown obvious favouratism to a member or members of the legal profession who would have been retained by us in a case of this nature. We would like to stress that we all believe in the equal treatment of all the members of this honourable profession.")

Pausing here for a moment, I would like to share the observations made by the President of the Court in the course of the hearing regarding the statements of the five temporary Presidents. Their stand, to say the least, is not a realistic one, and it might give cause for misgivings, in a case where the right of every citizen to have a lawyer of his own choice, (which has been an accepted right for a long time), now seems to be challenged. I have felt that those observations were not only necessary, but justified in the circumstances, for a far more substantive reason, *i.e.* that those temporary appointments were made and will continue to be made by the new Supreme Council of Judicature (hereinafter referred to as the Council) which includes in its composition an advocate elected every 6 months amongst the advocates. It is therefore clear that an advocate will continue to play an important role for the appointment, promotion.... termination of appointment, dismissal and disciplinary matters of judicial officers, and no one so far thought fit to make any similar insinuation against any judge when the said advocate votes either for or against a judicial officer. I think, therefore, the less said the better it would have been for everyone who possibly might think

that such statements were directed or in any way affected or intended to criticise his own right to choose his advocate to defend his case in a Court of law.

I think I ought to reiterate from the very beginning that although two issues were originally raised in this recourse, firstly the validity of the decision of the Supreme Council of Judicature, and secondly an omission to review by the same organ its own decision, nevertheless, two more were added *ex proprio motu*, *viz.* the question whether counsel of the applicant was legally entitled to file this recourse; and whether this Court has jurisdiction to deal with this application.

The Court, after hearing full argument on a number of sittings on the two preliminary issues, reserved its decision on June 21, 1972. Regarding the third issue, it is well-known that the profession of an advocate is regulated by law, and an advocate is required to have his name enrolled and to hold a practising certificate. It is already in evidence that although counsel for the applicant was on leave prior to his resignation, nevertheless, he had been enrolled as an advocate and I take it that he was holding a practising certificate. As I said earlier, having heard counsel on this issue at length, I have agreed with the interim decision delivered on July 6, that the filing of this recourse was properly made by counsel on behalf of the applicant, for the reasons given in the judgment of the President.

I find it constructive before I shall proceed to deal with the question of competence, to quote Article 146 of the Constitution. Paragraph 1 reads as follows :-

> "The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person."

Pausing here for a moment, it should be observed, that though the said Article 146 can be invoked to

review a decision, an act or omission in the domain only of public and not of private law, nevertheless, legislative and judicial acts are not within the province of this Article of the Constitution. I think I should have added that in Greece, the relevant provisions similar to those of our Article 146, are to be found in s. 47 of Law 3713/1928.

Since the enactment of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33 of 1964), the powers and jurisdiction of both the Supreme Constitutional Court and the High Court of Justice have been conferred upon the Supreme Court, and as a result of such merger, no conflict of jurisdiction can arise in the future.

I now turn to s. 10 of Law 33/64, which deals with the composition of the Supreme Council of Judicature, and subsections 1(a), (b), (c) and (d), read as follows :-

> "The Supreme Council of Judicature for the exercise of the competence and the powers in respect of appointments, promotions, transfers, termination of appointments, dismissals and disciplinary matters of judicial officers shall be composed of :-
>
> (a) the Attorney-General of the Republic;
>
> (b) the President and the two senior Judges of the Court;
>
> (c) the senior President of a District Court and the senior District Judge; and
>
> (d) a practising advocate of at least twelve years' practice elected at a general meeting, convened for the purpose, of the Cyprus Bar Association for a period of six months and not being eligible for re-election for the next five years."

Then follow two provisos which are in these terms :-

> "Provided that in case of absence or temporary incapacity of the President or a Judge of the Court or of a President of the District Court, or the senior District Judge, the Judge or President of a District Court, or District Judge, as the case may be, next in seniority shall act as a member of the Council :
>
> Provided further that in case of absence or

temporary incapacity of the practising advocate provided by paragraph (d) of this subsection the practising advocate elected as an alternate member of the Council at the same meeting of the Bar Association shall act."

Then subsection 2 provides as follows :-

"The Supreme Council of Judicature shall be deemed to be duly constituted during and notwithstanding any vacancy in the office of any member thereof."

Finally, subsection 4 provides :-

"The Supreme Council of Judicature may make rules regulating its own procedure."

In some jurisdictions in other countries the Courts, in order to ascertain the intention of the instrument calling for interpretation, can look at the legislative history or the preparatory works. Both Mr. Talarides and Mr. Loucaides have invited the Court that in interpreting the relevant constitutional and legal provisions, it ought to be guided by the French and Greek decisions supported or criticized by eminent authors in both countries. Mr. Talarides, after pointing out the difference in the wording between the Greek legal relevant provision, *i.e.* of Law 3713, dealing with the competence and jurisdiction of the Greek Council of State, (*i.e.* administrative authority) and our own wording, both in Article 146 and s. 11 of Law 33/64, has forcibly and at length argued that the Supreme Court has jurisdiction to deal with this matter because in accordance with our own Article 146—contrary to what is in force both in France and in Greece regarding the competence of similar courts—the criterion as regards the nature of the act under attack by annulment is "ousiastikon" and not "typikon."

Mr. Loucaides, on the contrary, after resisting the argument of Mr. Talarides, posed this question :- "If the formulation of Article 146 was specific and explicit regarding the adopted criterion by the constitutional drafter as to the nature of the acts complained of under annulment and not as to whether such criterion is 'typikon' or 'ousiastikon', then the acts of the Council would be amenable within the control of this Court and

there would be no need at all to examine or refer to what was in force in France or in Greece". He went on to argue, however, that because Article 146 does not solve the problem specifically or explicitly, then in order to solve the question under consideration, (since the notion of the judicial control of the administrative acts is a creation of the European Jurisprudence and mainly of France) one should seek guidance from the French or Greek principles.

I am indeed indebted to both counsel for such exhaustive and lengthy argument, though I feel that in the present case such argument prolonged the trial by extending the material of judicial scrutiny. For the moment, I have decided to approach the question of jurisdiction, being a question of construction, unaided by any such knowledge (*i.e.* knowledge of the constitutional provisions of both Greece and France) and to proceed to scrutinize the actual words of the legislation to be interpreted in the light of the established canons of interpretation.

I believe it is the duty of this Court so to interpret a law of the House of Representatives as to give effect to its intention. The Court sometimes asks itself what the draftsman must have intended, and I admit that this is reasonable enough: the draftsman knows what is the intention of the legislative initiator. He knows what canons of construction the Courts will apply and will express himself in such a way as accordingly to give effect to the legislative intention. The House of Representatives, of course, in enacting legislation, assumes responsibility for the language of the draftsman. Accordingly, such canons of construction as that words in a non-technical statute will primarily be interpreted according to their ordinary meaning, or that a statute establishing a criminal offence will be expected to use plain and unequivocal language to delimit the ambit of the offence (*i.e.* that such a statute will be construed restrictively) are not only useful as part of that common code of juristic communication by which the draftsman signals legislative intention, but are also constitutionally salutary in helping to ensure that legislators are not left in doubt at to what they are taking responsibility for.

In order to ascertain, therefore, the legislative intention,

I have to examine most of the provisions of Law 33/64 in order to see what was the evil or defect which the legislator intended to remedy by enacting ss. 10 and 11 and also examine the other provisions of the law in question for the light which those provisions throw on the particular words which are the subject of interpretation. In this difficult task, I am indeed fortunate, because I can seek guidance from the three separate judicial pronouncements by this Court at to the intention of the legislature in enacting the law in question. It appears that because of the recent events in Cyprus, the legislature in enacting the said law, must have had in mind the principles of law of necessity as applied in other countries. I think the position is made very clear in the judgment of Triantafyllides, J. (as he then was) in the *Attorney-General* v. *Mustafa Ibrahim and Others,* 1964 C.L.R. 195 at pp. 236 and 237 :-

> "Law 33/64 is a legislative measure which without purporting to repeal any of the relevant provisions of the constitution, which have been rendered inoperative by supervening events, sets up the necessary judicial machinery for the continued administration of justice in cases where the machinery provided for under the constitution has either broken down indefinitely or is liable to break down from time to time; and it provides for the operation of such machinery through the same persons who had already been entrusted with the administration of justice by means of the machinery provided for in the constitution. Thus, the same Judges who were vested with the exercise of the jurisdictions of the two highest courts—and under Articles 153.9 and 133.9 the Judges of the Supreme Constitutional Court and of the High Court of Justice could act for each other in certain eventualities—were entrusted, as Judges of the Supreme Court, with the exercise of the jurisdictions of both such courts; the absence of neutral Presidents and the need for maximum efficiency in the difficult times in which they had to exercise their said jurisdictions made it all the more reasonable and necessary for them to be brought together in one Supreme Court. Likewise, by making it possible for District Judges, subject to

any direction of the Supreme Court, to try any case irrespective of the community of litigants, the administration of justice has been enabled to go on even if Turkish Judges from time to time are to absent themselves from the courts as in the past.

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

Later on Triantafyllides, J. continued his judgment as follows at pp. 238 and 239 :-

"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) at p. 38)."

I feel that one would be inclined to pose this question : Doesn't this statement of law so lucidly presented

presuppose that the Supreme Court has jurisdiction at all times to determine whether the necessity in question actually exists in each case before it, and also whether the measures taken were warranted under the circumstances. I think that the answer should be in the affirmative, because "the system of justice that has been set up under Law 33/64 apart from being necessary in the circumstances, is also more consonant with the notion of justice and its requirements than the one which has been provided for under the Constitution." Per Triantafyllides, J. in *Ibrahim* case *(supra)*.

Regarding the doctrine of necessity in exceptional circumstances, Josephides, J. had this to say at p. 265 :-

> "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."

Later on at p. 268 he continued his judgment in these terms :-

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

measures taken are warranted by the exceptional circumstances.

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

Thus it appears that once the decision was taken by s. 10 of Law 33/64, this Court, I repeat, has jurisdiction to consider whether the enactment of s. 10 providing for a new composition of the Council was necessitated by the recent events even today, eight years afterwards, and whether the measure taken is still proportionate to the necessity, having regard to the provisions of Article 157 of the Constitution, which provides for the composition and competence of the Council, and particularly after the establishment of the present Supreme Court. But apart from these reasons, having gone carefully into all the provisions of Law 33/64, I have found neither clear words excluding or ousting the jurisdiction of this Court, nor the answer that a judicial officer has lost under the said law his inalienable rights to seek redress in the Supreme Court of the Republic, where the present Judges are entrusted with the competence and jurisdiction of the Supreme Constitutional Court and High Court. I further believe that it was the intention of the legislature, in enacting s. 10 (providing for a new composition of the Council) not to grant exclusive remedy to such collective organ when such organ was exercising administrative function within the meaning of s. 11 of the said law, and it does not bar a recourse. I think, therefore, that I can do no better than quote the words of Viscount Simonds

which I would adopt and apply in this case. Viscount Simonds said in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260 at p. 286 :-

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words. That is, as MCNAIR J., called it in *Francis* v. *Yiewsley & West Drayton U.D.C.* [1957] 1 All E.R. 825, a 'fundamental rule' from which I would not for my part sanction any departure. It must be asked then what is there in the Act of 1947 which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it then an alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away."

Having shown clearly at the outset in this judgment that though the High Court shall be the Council, when the latter is exercising its exclusive competence (acting in a dual capacity) for the appointment etc., nevertheless, in the case of retirement or dismissal of a judicial officer, its function is of a judicial nature, *(i.e.* the Council is entrusted with judicial power)—as contrasted to the earlier function which remains administrative. Thus, in my view, the constitutional drafter in a clear and unequivocal language, expressed its intention that the act or decision of the Council in the case of dismissal or retirement of a judicial officer is clearly excluded from the jurisdiction of Article 146, because, I repeat, such decision would have been the result of the exercise of a judicial power. I think, I ought to add that, put in another way, judicial power is power limited by the obligation to act judicially.

Administrative or executive power is not limited in that way. Judicial action or function requires as a minimum the observance of some rules of natural justice, and this is exactly why the constitutional drafter has distinguished

between promotions etc. and dismissal or retirement of a judicial officer.

This point is made even clearer, because regarding the appointment etc. of a judicial officer, as at present advised, (being as I said of an administrative nature) the Council in reaching its decision affords no opportunity to a judicial officer to present his views.

The next question which is posed is whether the decision of the Council if it was made under Article 157, in effecting promotions etc. was amenable within the provisions of Article 146. Once I have found that its functions in effecting such promotions are of an administrative nature, I think the answer should definitely be in the affirmative. But for the following reasons, should be answered in the affirmative :-

(a) Because the Council was given under Article 157 exclusive competence for appointment etc. and by implication, therefore, any other remedy is excluded before another high judicial organ; and

(b) Because the Supreme Constitutional Court is not given competence to determine matters relating to the appointments promotions etc. of the judicial officer. Cp. Article 133.8(1)(2)(a) and (b).

I find it convenient at this stage to state what is the position regarding the Supreme Council of Judicature in Greece and the philosophy behind the enactment of both the constitutional provision and a law giving competence to such organ. In Greece (and I see no reason why not also in Cyprus) an indispensable completion of the substantive independence of a judicial officer is his personal independence which (apart from the Constitutional guarantees) is also guaranteed by the creation of an institution which is known as the Supreme Council of Judicature. In accordance with Article 90 of the Greek Constitution, the appointments, promotions, transfers, etc. are made after an agreed and especially comprehensive reasoned opinion of the Supreme Council of Judicature which is composed of members of Arios Pagos (the counter part of our High Court) in such a way as a law provides. The significance of such a provision is obvious, because all changes in the personal status of the judicial

officers are made after an agreed especially comprehensive reasoned opinion of the same collective organ *i.e.* of the Council, of which, because of its composition of Supreme Court Judges, provides sufficient guarantee of objective and unbiased opinion.

I should have added that in accordance with a decision of the Greek Council of State in case No. 184/1947, it was held that though under the provisions of Article 90 of the Constitution regarding the composition of the Supreme Council of Judicature, a law should provide for such composition, nevertheless, such law cannot determine its composition in such a way as to alter the guarantees of independence of the Supreme Judicial Council. In fact, this was the position under the provisions of s. 23 of a compulsory Law 1055/1946, under which law a right was given to the Minister of Justice to appoint two out of the five members of the said Council. See also the well-known text-book of Prof. Sgouritsa under the title Constitutional Law, (1965) 3rd edn. Vol. A, under the heading "Judicial Independence," at p. 436, et seq.

In order to complete the picture in Greece, I must add that under the provisions of Article 90 paragraph 3 of the Constitution, the decisions of the Supreme Council of Judicature and of the full members of Arios Pagos, as well as the administrative acts of execution issued by them, cannot be challenged before the Council of State. This provision, according to Prof. Sgouritsas at p. 442 of the same textbook, came to guarantee mainly the dignity of Arios Pagos.

Because of the distinction between the position of a state attorney in Greece and an attorney in Cyprus, I should have added that in Greece, both an attorney and an assistant attorney are considered to be Judges. On the contrary, however, in this country, though an advocate is considered to be an officer of the Court, he cannot be considered as a Judge.

Having shown what is the position in Greece and the differences existing there, I think I must show now what is the position in Cyprus with the new composition of the Council. One would therefore observe immediately (a) that the High Court is no longer the Council, and in accordance with the provisions of s. 10(1)(b) the President and the

two senior judges of the Court are members of the said Council; (b) in accordance with paragraph (c) the Senior President of a District Court and the Senior District Judge, are two more members; (c) one advocate, who though an officer of the Court cannot be considered as a judge; and (d) that when this collective organ meets for the purpose of affecting appointments, promotions, etc. not only it does not afford a chance to a judicial officer to present his case, but on the contrary, as I am at present advised, their decision is not taken after a comprehensive reasoned opinion as provided in Greece.

I leave aside, of course, for the moment the further reason, *i.e.* whether the substantive point prevailing in Greece whether the new composition of the Council, (not consisting only of Supreme Court Judges) provides sufficient guarantee of objective and unbiased opinion, particularly, since the provisions of s. 10 of Law 33/64 were intended to be of a temporary duration only.

Regarding the further question as to which acts are considered in Greece to be administrative acts, in order to be challenged by the process of annulment before the Council of State, the position, with due respect, is admirably explained in the well-known textbook of Stassinopoulos on the Law of Administrative Differences (1964), 4th edn. at. p. 152 et. seq. It seems that such acts must come from an administrative organ. The learned author explains further that in Greece one does not look for an internal criterion or criterion of substance, but to the external criterion or of a formal criterion or criterion of an organ. In Greek it reads as follows :- «Δέν άποβλέπομεν δηλαδή είς κριτήριον έσωτερικόν ή κριτήριον περιεχομένου, άλλ' είς κριτήριον έξωτερικόν ή κριτήριον τύπου ή όργάνου». He goes on to add that if an act, which was made by an administrative organ, is in substance of a legislative nature, this does not alter the position. On the basis of the said external criterion in Greece, both the decisions of the legislative organs and of the judicial organs cannot be challenged before the Council of State. In Cyprus, of course, because of the qualification, as it would appear in a moment, both regarding the express constitutional provision and of our law, the criterion adopted is "ousiastikon" and not "typikon", *i.e.* we search

whether the contents of the act constitute an exercise of administrative function.

I now turn to s. 11 of Law 33/64 which deals with the manner of exercise of jurisdiction etc. by the Court, and so far as material, is in these terms :-

> "Any jurisdiction, competence or powers vested in the Court under section 9 shall, subject to sub-sections (2) and (3) and to any Rules of Court, be exercised by the full Court.
>
> (2) Any original jurisdiction vested in the Court under any law in force and any revisional jurisdiction, including jurisdiction on the adjudication of a recourse made against an act or omission of any organ, authority or person exercising executive or administrative authority as being contrary to the law in force or in excess or abuse of power, may be exercised subject to any Rules of Court, by such Judge or Judges as the Court shall determine."

In comparing the wording of the Greek text of this section with the English translation, one would observe that the Greek wording is «οἱουδήποτε ὀργάνου ..... ἀσκοῦντος ἐκτελεστικὴν ἢ διοικητικὴν λειτουργίαν» (and not exercising administrative authority) at the time of taking the specific act or decision etc.

I would like to lay stress on those Greek words, because, as I said, there is a difference from the English text. This difference regarding the word "function" or not "authority" appears also in the Greek text when compared to the English in Article 146 of the Constitution. One would also observe that the wording of s. 11 is more or less identical with the said Article. Following, therefore, the canons of construction to which I have referred to earlier in this judgment, I am bound to construe the words οἱουδήποτε ὀργάνου according to their ordinary meaning, that it means what it says in Greek, *i.e.* that the decision of every organ..... exercising executive or administrative function, and not authority. In the light of this construction, I am of the view that here the legislature intended to depart from the Greek position, and, therefore, once the decision of the Council comes within the provisions of s. 11—being of an administrative

function, without any qualification, such decision can be challenged by the applicant regarding its validity, and, is, therefore, amenable to the jurisdiction of this Court in its present composition. In my view, therefore, any other construction to the contrary, would clearly be contrary to the provisions of Article 157 and to the clear and unambiguous wording of s. 11 of the said law.

I shall now proceed to deal with three cases, one from the Supreme Court of England and the other two from our own Supreme Court.

In *re S. (a barrister)* [1969] 1 All E.R. 949, (a case dealing with the disciplinary powers exercised over barristers and with the visitorial jurisdiction of the Supreme Court Judges in England) it was decided that Judges of the Supreme Court have an inalienable over-riding inherent jurisdiction to discipline members of the Bar; and that they possess the power to regulate the right of audience of barristers.

In my view, this decision stresses the all important factor of inherent jurisdiction of the Supreme Court Judges in the administration of justice under the common law system; and as it would appear, this very point, *i.e.* the inherent jurisdiction of our own Supreme Court, has been laid down in the two cases I shall now cite.

In *re C.D. (an advocate)* (1969) 1 C.L.R. 376, a case dealing with the disciplining of advocates, Vassiliades, P., said at p. 381 :-

> "With a profession where the roll runs only to scores (and not to hundreds or thousands as elsewhere) discipline in both branches of the profession—judges and advocates—was entrusted by law, for many years, to the Supreme Court. Not only because the ultimate responsibility for the functioning of the courts rested with its judges, but also because the judges of the Supreme Court were detached by their office from the judges of the lower courts and from the practising lawyers.
>
> Since 1955, it has been considered desirable that the discipline of advocates should be placed in the first instance, in the Disciplinary Board of the profession. But the ultimate responsibility was, wisely

and properly, left where it must necessarily rest. Every advocate is expressly deemed by the statute (The advocates Law—as now amended—section 15) 'to be an officer of the Supreme Court'; and in fact he is a most important officer, on whom the Court must be able to rely absolutely; and whom the general public must be able to trust and respect. An officer on whose integrity, ability and work, the administration of justice partly depends. Who else is better qualified to have the ultimate responsibility for the good discipline of its own officers, than the Supreme Court itself? The Court entrusted with the exercise and control of the judicial power in the State; and with the responsibility of maintaining at all times and in all circumstances, the independence of its justice."

In delivering a separate judgment in the same case, I had this to say at pp. 386-387 :-

"The powers of the Supreme Court, in reviewing the whole case of the Disciplinary Board are to be found in s. 17(5) of the Advocates Law Cap. 2 (as amended), which is in these terms :-

'The Supreme Court may, of its own motion or on the application of the complainant or of the advocate whose conduct is the subject of the enquiry, review the whole case and either confirm the decision of the Disciplinary Board or set it aside or make such other order as it may deem fit'.

In my view, the most important question in this case, is to determine the powers of this Court, which is sitting as a Court of Review.

Having given the matter my best consideration, I have reached the conclusion that s. 17(5) confers on this Court, a wider power in reviewing the whole case, than any other case before the Court of Appeal. It is further to be observed that the Supreme Court has power to review both the conviction and the sentence, because such jurisdiction of the Court is for the purpose of establishing the status of and disciplining a member of a profession in the qualification for which, and the integrity of which,

the public have a vital interest, and the Judges have an overriding supervisory jurisdiction by law over the decision of the Disciplinary Board."

In *re C.H. (an advocate)* (1969) 1 C.L.R. 561, Vassiliades, P. in delivering the ruling of the majority of the Court, had this to say at p. 567 :-

"Mr. Clerides raised two preliminary points on behalf of his client. The first was whether this proceeding under section 17(4) should be proceeded with or it was a matter which should proceed under section 17(5). The second point was that the proceedings before the disciplinary board were of a nature which should be challenged under Article 146 of the Constitution.

After discussion and particular reference to proceedings of a similar nature in other jurisdictions, Mr. Clerides very rightly, in our opinion, abandoned the point taken under Article 146.

Called upon to decide whether this proceeding under section 17(4) can be proceeded with on the material on record, the majority of the court took the view that there having been no decision in the proper sense of the word by the Disciplinary Board, the matter should proceed under section 17(4)."

Triantafyllides, J. (as he then was) after giving the reasons for his dissent, *i.e.* that he was not able to agree that there was a matter of complaint before the Court on which we might make an order in pursuance of our powers under subsection 4 of section 17 of the Advocates Law, Cap. 2 (as amended), proceeded to touch on the question of Article 146 of the Constitution. Though this point has been abandoned by counsel appearing for the applicant, Triantafyllides, J. had this to say in the same ruling at p. 568 :-

"On the other point, *viz.* whether there is competence under Article 146, I fully agree with the majority that there is none.

It seems to be well settled that matters related to the administration of justice are outside the ambit of a jurisdiction such as that under Article

146; advocates are officers of the Court and disciplinary matters concerning them are considered as being related to the administration of justice (see the decisions of the Greek Council of State in cases 1042(51), 1633(51) as reported in Zacharopoulos Digest of the Decisions of the Council of State, 1935—1952, p. 300 paras. 46—47)."

When finally the judgment of the Court was delivered, Josephides, J. after finding himself in full agreement with the judgment of the President of the Court, proceeded at p. 573 to touch on the question of Article 146, and had this to say:-

> "One of the preliminary points taken by respondent's counsel, and later abandoned, was that the proceedings before the Disciplinary Board were of a nature which should be challenged under Article 146 of the Constitution and not as provided in section 17 of the Advocates Law, Cap. 2 (as amended). In addition to the authority quoted in the ruling of my brother Triantafyllides J. earlier, it should, I think, also, be stated that in France, which has the oldest system of droit administratif, although the disciplinary organs of the various public professions (such as medical practitioners, architects, dentists, pharmaceuticals chemists and all levels of the teaching profession) are controlled by the administrative tribunals, significantly, the bodies controlling the legal profession are subordinated to the civil courts and not to the Conseil d' Etat or any of the other inferior administrative tribunals (cf. Brown and Garner's French Administrative Law (1967), page 26)."

Later on, Josephides J., after quoting a passage by Vassiliades, P., in *re C.H. (an advocate) (supra),* had this to say at p. 576:-

> "The nature of the duty of the Disciplinary Board is akin to a judicial one, and it is exercised by a highly responsible and specially qualified body. It is for the purpose of disciplining a member of a profession in the integrity of which the public have a vital interest, and the Supreme Court has an

overriding supervisory jurisdiction. The exercise of the duty may mean professional life or death for the individual (cf. In *re Shier* (1969) 'The Times', February 14).

I am of the view that once a person aggrieved by the conduct of an advocate sets the disciplinary machinery into motion, under the provisions of section 17(2)(d) of the Law, as in the present case, then it is in the public interest and in accordance with the express provision of section 17 that the matter should be dealt with or reviewed by the Supreme Court in the final resort either under section 17(4) or section 17(5) of the Law. The position is analogous to a complaint for a criminal offence. As is well settled, whenever a criminal offence is committed then irrespective of whether it also involves a civil injury (say, as in the case of an assault), the offender becomes liable to punishment by the State, not for the purpose of affording compensation or restitution to anyone who may have been injured, but as a penalty for the offence and in order to deter the commission of similar offences. Here the matter is one of *public law*. The mere fact that compensation has been paid to a person injured by the offence does not exempt the offender from punishment."

With the greatest respect to the observations made in the last case, in my view, the importance of this decision is not only that it lays down that the nature of the duty of the Disciplinary Board is akin to a judicial one in the context in which it was decided, *i.e.* the disciplining for unprofessional conduct of an advocate, but also because it establishes that in the public interest, the withdrawal of a complaint, does not bar the inherent overriding supervisory jurisdiction of the Supreme Court to be dealt with or reviewed by the Supreme Court "entrusted with the exercise and control of the judicial power in the State; and with the responsibility of maintaining at all times and in all circumstances, the independence of its justice" (per Vassiliades, P.).

In the light of this weighty judicial pronouncement, the question which is posed is: How is it possible for

the Supreme Court of this land to carry on its responsibility of maintaining at all times and in all circumstances, the independence of the judicial officers, when a judicial officer's recourse for the determination of his rights is excluded because of lack of jurisdiction, but in the majority view, the answer is, as I understood it, twofold: (a) that the jurisdiction of this Court under Article 146 of the Constitution is excluded because the decision of the Council in making the temporary appointments of Presidents in the District Courts, is of a nature so closely related to the judicial power or to put it in another way, is akin to a judicial one; and (b) that the said Council, because it is composed completely of persons related to the administration of justice, is a collective organ acting in the domain of judicial power and not in the domain of executive power. With the greatest respect to the majority, I adhere to the view that the Court has jurisdiction to review the complaint of the applicant, for the reasons I have endeavoured to explain at length in this judgment, because I found myself in the minority.

I think, in summing up, I must reiterate once again that, the Council in its present temporary composition, in making the temporary appointments of the Presidents, acting under the provisions of s. 10 of the Courts of Justice Law, 1960, as contrasted to its judicial functions regarding the termination of appointment, dismissal and disciplinary proceedings of a judicial officer, is functioning as a collective organ exercising administrative functions relating to the organization of the Courts. In my view, therefore, the decision of the Council not to appoint the applicant as a temporary President (having served earlier for a period of 3 months) is a matter which affects no doubt his judicial career, and it cannot be said that such decision is so closely related to the judicial functions or, indeed, the nature of such function can be considered as being akin to a judicial one. See the distinction I have made when I was dealing with Article 157, paragraph 3 at p. 441 *ante*, of this judgment.

As I have said earlier, if the intention of the legislature was to follow in a clear and unambiguous language the wording of s. 47 of Law 3713/1928, there was no reason at all to use the words «οἱουδήποτε ὀργάνου»

(every organ) exercising at the time of taking the specific decision, executive or administrative function. Cf. *The Minister of Finance* v. *The Public Service Commission* (1968) 3 C.L.R. 691.

For all these reasons, I am of the opinion that both the decision and the omission of the Council falls within the construction I have placed on s. 11 of Law 33/64, and such decision or omission can be challenged in this Court under Article 146 of the Constitution. Because, had it been otherwise, the legislator who assumed the responsibility for the language of the aforesaid section, would have clearly said that the inalienable remedy of a judicial officer to seek redress in the Supreme Court was taken away. I am positive that after the merger of the jurisdiction of both Courts, the Supreme Court retains jurisdiction and will continue to maintain its judicial control from the decisions or acts or omissions of any organ exercising executive or administrative function, in order to maintain at all times and in all circumstances the rights of the members of the public service, and the personal independence of its judicial officers regarding their career.

A. Loizou, J.: For the purposes of this judgment I need not go extensively into the facts of the present case, since they have already been dealt with in the judgments that have just been read. Nor do I propose to deal with the question whether this recourse was validly filed by counsel, who, at the time of such filing, was on leave prior to resigning from the post of Senior Counsel of the Republic, as the reasons for our unanimous decision on this point announced earlier, are contained in the judgment of the learned President of this Court. However, I have not been able to agree on the second issue, namely, that there is no competence in this Court under Article 146 of the Constitution to hear and determine the present recourse on the ground that the act and omission complained of, are not "acts or omissions of any organ, authority or person exercising any executive or administrative authority".

The applicant is a judicial officer holding the substantive post of a District Judge. The Supreme Council of Judicature promoted the interested parties to the post

of Acting Presidents, District Courts, instead of the applicant. It is not in dispute that these promotions, though acting, were made after consideration of the merits of the parties and not as a mere temporary arrangement for the safeguard of the continuation of the function of the service and for a short period. The prayers for relief are —

(a) that the said decision be declared as null and void and of no effect, and

(b) that the omission and/or refusal of the Supreme Council of Judicature to consider a written application and/or complaint of the applicant regarding these appointments is null and void and that in case of an omission declare that what was omitted should have been performed.

The acts and omissions complained of were those of the Supreme Council of Judicature set up under section 10 of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (33/64). Until the enactment of this Law to which I shall shortly revert, Article 157 of the Constitution, governed matters relating to the appointment, promotion, etc., of judicial officers and it reads as follows :-

"1. Save as otherwise provided in this Constitution with regard to the Supreme Constitutional Court, the High Court shall be the Supreme Council of Judicature, and its President shall have two votes.

2. 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.

3. No judicial officer shall be retired or dismissed except on the like grounds and in the same manner as a judge of the High Court."

It should be observed here that the matters referred to in paragraph 2 hereof, are described as being exclusively within the competence of the Supreme Council of Judicature. As far as the manner of retirement and dismissal is concerned, the provisions of Article 153.8

(3) of the Constitution apply mutatis mutandis and the proceedings of the Council for such matters are described as being "of a judicial nature and the judge concerned shall be entitled to be heard and present his case before the Council". For the remaining matters within the exclusive competence of the Supreme Council of Judicature under the said Article, no description is given and, to my mind, this left the matter open for judicial interpretation in the light of the general principles of the Constitutional and Administrative Law pertaining to such matters. In the light of the aforesaid provisions of the Constitution and the structure of the State in general, the judicial power other than that exercised by the Supreme Constitutional and the Communal Courts was vested in the High Court which had, as a Supreme Council of Judicature, exclusive competence with regard to appointments, promotions, etc. of Judges.

In July, 1964 on account of "recent events" rendering impossible the functioning of the Supreme Constitutional Court and of the High Court of Justice and the administration of justice in some other respects, as stated in its preamble, the Administration of Justice (Miscellaneous Provisions) Law, 1964, was enacted by the House of Representatives. Its preamble is indicative of the mind of the legislator and the circumstances which it was intended to remedy. This Law provided for the establishment and constitution of a Supreme Court consisting of five or more, but not exceeding seven Judges, one of whom would be the President (section 3). This Court was vested with the jurisdiction and powers which, until then, were vested in and exercised by the Supreme Constitutional Court and the High Court of Justice (section 9).

Sections 3, 9, 11, 12 and 15 of the said Law were considered by the Supreme Court in the case of *The Attorney-General of the Republic* v. *Ibrahim & Others,* 1964 C.L.R. 195 and their enactment was found justified on the doctrine of necessity for the reasons given therein. Section 10 of the said Law provides for a new composition of the Supreme Council of Judicature. In so far as the said section is relevant for the purposes of these proceedings, it reads as follows :-

"(1) The Supreme Council of Judicature for the exercise of the competence and the powers in respect of appointments, promotions, transfers, termination of appointments, dismissals and disciplinary matters of judicial officers shall be composed of :-

(a) the Attorney-General of the Republic;

(b) the President and the two senior Judges of the Court;

(c) the senior President of a District Court and the senior District Judge; and

(d) a practising advocate of at least twelve years' practice elected at a general meeting etc..."

The words "exclusively within the competence" appearing in Article 157.2, of the Constitution earlier referred to in this judgment, do not appear in section 10. It may be said, however, that the new Supreme Council of Judicature was intended to perform the functions that the Supreme Council of Judicature established under Article 157 of the Constitution was previously performing. In due course, however, it will have to be examined whether this Council has been given exclusive competence in these matters, since the new composition of the Council, is, to my mind, most relevant in determining the issue of competence of this Court to entertain this recourse.

Counsel for the applicant and counsel appearing on behalf of the Attorney-General in presenting the case of their respective sides, have gone into considerable pains and have done extensive research on the analogous position in Greece and France. I am grateful to both of them for the assistance they have rendered with their labours. If I do not deal extensively with their arguments and the authorities to which they have referred to, it is not out of disrespect, but because there is an evident distinction to be made between the issue before us and the one that the Courts in Greece and France had been asked to resolve. In Greece and France the Courts had to pronounce on the nature of normal legislative provisions, whereas to-day, we are faced with considering acts performed under a law, which, as described by

Triantafyllides, J. as he then was, in the *Ibrahim's* case (*supra*) p. 227, was "an urgent measure and a temporary one" and not simply with considering the nature and character of acts performed under Article 157.2, of the Constitution and by the organ composed as provided by paragraph 1 thereof.

It was the contention of counsel appearing on behalf of the Attorney-General from whichever angle the question of competence was examined, that is to say either by considering the nature of the organ or the nature of the act, the conclusion that could be reached was that this Court has no competence inasmuch as this organ or authority was a judicial one. In this respect, he referred to a number of decisions of the Greek Council of State quoted in Sympliroma Nomologhias by Zacharopoulos (1935—1952) p. 50 where it is stated that the Greek Council of State held that "the decisions of the Supreme Judicial Council constitute acts of a judicial authority, as emanating from an authority not being part of the administrative hierarchy".

This argument was based on the fact that the Supreme Council of Judicature has such a judicial character on account of the provisions of Article 157.2 of the Constitution and section 10(1) of Law 33/64 and by the further fact that it is composed of Judges and other officials of the Courts, that is to say the Attorney-General and an advocate, all its members being persons independent from the executive. He further argued that examined from the point of view of the nature of the act, the acts or omissions complained of relate, as of their nature, to the exercise of judicial authority, and this, because they are so interwoven with such authority, that they acquire a judicial character or nature, and, therefore, they cannot be the subject of a recourse under Article 146 of the Constitution. He relied on a passage by Jellinek, Introduction to Administrative Law, 1939, volume AB, pp. 38 and 39, who said that "they so closely connected with the main work of the ordinary Courts, the administration of justice that they cannot be considered as functions foreign to the judicial authority". He also referred to Fleiner, Administrative Law, 1932, pp. 14, 15, as well as to Stasinopoulos, The Law of Administrative Acts, 1951, p. 64, footnote (1)

and the Decisions of the Greek Council of State 483/30, 578/30.

On the other hand, counsel for the applicant invited the Court to follow the French jurisprudence on the matter as it was before it was changed by Law, that is to say, that acts or omissions relating to the promotion and transfer of Judges and as such affecting their career, were administrative acts, as concerning the organization of the judicial service and distinguished from the acts relating to the functioning of the judicial service and which are not administrative acts and do not fall within the administrative jurisdiction as falling within the competence of the ordinary Court: A distinction followed by the Counseil d' Etat, as appearing from the authorities referred to. *(Préfet de Guyane 1952* and *Falco et Vidaillac* 1953, Walline Droit Administratif 1963 p. 80).

Before embarking on the examination of the issue before me, I cannot refrain from commenting on the fact that the approach of the matter in Greece and France had its critics and opponents. In France there were those who criticized adversely the approach of the Conseil d' Etat and in Greece there were also those that criticized the opposite approach followed by the Greek Council of State.

To my mind, had it been an ordinary case of acts performed by the organ envisaged by Article 157, and in view in particular of the whole set up under the Constitution and the functions of the Supreme Constitutional Court and the High Court established thereunder, I might be inclined to the view that these acts emanate from a judicial authority, but that is not the issue before us to-day. The crux of the matter is that the acts and omissions complained of emanate from a council established by a temporary Law of an urgent nature and by which the legislator has thought fit to strip the Court entrusted with the exercise and control of the judicial power in the State of its authority by including in the Council only three out of its possible seven members and by substituting the remaining with judges of inferior Courts subordinate to the Supreme Court and by including also the Attorney-General and a practising advocate as herein-above set out.

The question, therefore, is whether this Council is a judicial authority. To my mind, viewing the composition of the Supreme Council of Judicature established under section 10 of Law 33/64, I cannot but hold that there has been a radical departure from the principle laid down in the Constitution, that matters affecting the career of judges were within the exclusive competence of the High Court acting in its capacity as the Supreme Council of Judicature. It cannot be said that the change in the composition has not brought any change in its character, merely because, apart from the three Supreme Court Judges, its remaining members are either judges or advocates, as already indicated. The present Council, though purporting to have the competence of the Council set up under Article 157 of the Constitution, no longer represents the highest hierarchy of the Judiciary of the Republic. It is this departure that gives to the new Supreme Council of Judicature its administrative character and prevents it from being considered as part and parcel of the Judiciary. I have only commented on its composition, as this is most relevant to consider its character. I should not be taken as questioning its constitutionality which is not raised by the present recourse, nor doubting its independence and impartiality. Viewing, therefore, the matter from the point of view of the character of the organ, I have come to the conclusion that there has been such a departure from its original composition, that it cannot be said to be a judicial one. But the matter does not end here, as it will be seen ultimately.

Greek Case Law is useful, because it considered the Supreme Judicial Council of Greece as not being part of the administration within the meaning of Article 83(c) of the Constitution of Greece, for the reason that it was composed of judges of the highest hierarchy. For example, in the Conclusions of Jurisprudence of the Greek Council of State (1929-1959) at page 230, it is stated :-

«Ἐπίσης δὲν ὑπόκεινται εἰς προσβολὴν αἱ πράξεις τῶν δικαστικῶν ἀρχῶν, αἱ σχετιζόμεναι πρὸς τὴν διοίκησιν τῆς δικαιοσύνης καὶ οὖσαι καθαρῶς διοικητικοῦ περιεχομένου, ὡς ἀπόφασις τῆς ὁλομελείας τοῦ Ἀρείου Πάγου σχετικὴ πρὸς τὸν κανονισμὸν τῆς ἀρχαιότητος πρωτοδικῶν 578(30) ἡ ἀπόφασις τοῦ Ἀνωτάτου Δικαστικοῦ Συμβουλίου σχετικὴ πρὸς

ζητήματα προαγωγῶν δικαστικῶν λειτουργῶν. (905/46, 812, 2360/47).

Τῆς ἁρμοδιότητος τοῦ Συμβουλίου Ἐπικρατείας ἐξαιροῦνται οὐ μόνον αἱ πράξεις αἱ προερχόμεναι ἐξ ὀργάνου ἐντεταγμένου εἰς τὴν δικαστικὴν ἐξουσίαν, ἀλλὰ καὶ αἱ πράξεις, αἵτινες, ἀπορρέουσαι ἐξ ὀργάνων διοικητικῶν, ἀφορῶσιν εἰς τὴν εὔρυθμον λειτουργίαν καὶ ἀπονομὴν τῆς δικαιοσύνης καὶ συνδέονται πρὸς τὴν ἄσκησιν τῆς δικαστικῆς λειτουργίας τῆς Πολιτείας.»

("Also they are not subject to recourse the acts of the judicial authorities relating to the administration of justice and being purely of an administrative nature, such as a decision of the plenary of Arios Paghos relating to the regulation of the seniority of judges of First Instance (decision 578/30) or the decision of the Supreme Judicial Council relating to matters of promotion of judicial officers. (905/46, 812, 2360/47).

Not only the acts emanating from an organ forming part of the judicial authority are exempted from the competence of the Council of State, but also the acts which emanate from administrative organs which relate to the orderly functioning and the administration of justice and are connected with the exercise of the judicial authority of the State").

I do not think that it is necessary for me to go extensively into the very elaborate provisions governing the composition of the Supreme Judicial Council of Greece, as well as its procedure. Suffice it to say that its decisions are taken after proper consideration of every relevant material and with open vote and they have to be "specifically and carefully" reasoned, recording in the minutes, in case of disagreement, the opinion of each member. Furthermore, there is a right of recourse in the case of anyone who has received at least two votes in his favour, when the Council consists of seven members and three votes when it consists of nine members, to the plenary of Arios Paghos or to the joint meeting of the two sections of Arios Paghos, depending on the status of the judicial officer concerned, etc.

This approach of Greek jurisprudence was given constitutional validity, as by Article 90.3, of the Constitution of 1952, the decisions of the Supreme Judicial Council and the plenary of Arios Paghos and the administrative acts issued in execution thereof, cannot be the subject of recourse before the Council of State. As Professor Sgouritsas observes in his textbook on Constitutional Law, 1959 Edition, Vol. 1, page 446, "this provision safeguards mainly the prestige of Arios Paghos —and only for this reason probably its enactment was required—but it does not add anything to the judicial independence as such, given that the decisions of the Supreme Judicial Council and the plenary were not subject, in accordance with its jurisprudence to the control of the Council of State". This provision was included in the Constitution on a suggestion from the plenary of Arios Paghos.

Professor Sgouritsas commenting also on the establishment of the Supreme Judicial Council of Greece under Article 90 of the Constitution, at pages 445-446 of Vol. 1 of his textbook, says :-

> "The significance of the aforesaid provision is obvious. By this, it is required that the changes in the personal position of judges be effected in accordance with the agreed specifically and meticulously reasoned opinion of a collective organ, the Supreme Judicial Council whose composition by highest judicial officers affords sufficient safeguards of objective and impartial judgment."

The notion of a Supreme Judicial Council in Greece first appeared by Law in 1909 and was given constitutional force by Article 90 of the Constitution of 1911. It appeared in some form or another, in subsequent constitutions but always consisting of members of, or of the plenary of Arios Paghos, the highest judicial body of the State. To my mind, it was with this background and the elaborate provisions affording to the judges the right of review by the highest judicial hierarchy in the land, as well as the provisions of the Constitution governing the jurisdiction of the Greek Council of State that the Greek Council of State arrived at the conclusion that it had no competence to entertain a recourse from the decision of

the Supreme Judicial Council, as being a judicial authority and not being part of the administrative hierarchy. Since the establishment of the Supreme Judicial Council in Greece, the approach of the problem was always viewed with the background that the judiciary was allowed to run its own affairs at the level of its highest hierarchy.

The notion that the ultimate responsibility for the functioning of the Courts rests with the judges of the Supreme Court, is not foreign to our system which existed both before and after 1964. Vassiliades, P. *In re C.D. an Advocate* (1969) 1 C.L.R. 376 at p. 381 in dealing with the question of discipline in both branches of the profession —judges and advocates—he says:-

> "(discipline) was entrusted by law, for many years, to the Supreme Court. Not only because the ultimate responsibility for the functioning of the Courts rested with its judges, but also because the judges of the Supreme Court were detached by their office from the judges of the lower Courts and from the practising lawyers."

That the composition of an organ is most material in determining its character, it is apparent from the decision of the Greek Council of State 288/45, referred to in Dikaeon Diikitikon Praxeon by Stasinopoulos (1951), p. 70 where it is stated that the acts of administrative Courts and their organs become of a judicial character, even if they are referring to administrative matters. In this respect the Council of State considered as judicial act not capable of being the subject of control by the Council of State on a recourse for annulment the act of the Elengtikon Synedrion deciding on matters of promotion, establishment, etc. of its staff. The operative part of the decision of the Greek Council of State, reads as follows :-

> «Ἐπειδὴ ὡς πρὸς τὰ θέματα ταῦτα, τὸ ὡς εἴρηται συμβούλιον ἀσκεῖ μὲν ἁρμοδιότητα διοικητικοῦ κατὰ τὸ περιεχόμενον χαρακτῆρος, οὐχ' ἧττον ὅμως, λόγῳ τῆς συγκροτήσεώς του ἀποκλειστικῶς ἐκ τοῦ προέδρου, ἀντιπροέδρων καὶ συμβούλων τοῦ Ἐλεγκτικοῦ Συνεδρίου, ἐξ ὧν καὶ ἡ ὁλομέλεια τούτου συντίθεται, δὲν δύναται νὰ λογισθῇ ὡς διοικητικὴ ἀρχή, καθ' ὃ ταὐτιζόμενον κατ' οὐσίαν πρὸς τὴν ὁλο-

μέλειαν.... Κατ' ἀκολουθίαν, μὴ ὑποκειμένης πράξεως διοικητικῆς ἀρχῆς, ἡ ὑπὸ κρίσιν αἴτησις εἶναι ἀπορριπτέα ὡς ἀπαράδεκτος».

("Whereas in relation to these matters the said Council exercises on the one hand competence of administrative in substance character, nevertheless on account of its being composed exclusively by the President, Vice-President and Councillors of the Elengtikon Synedrion which composed its full membership, it cannot be considered as an administrative authority, because it is identified in substance to its plenary ..... consequently, as no act of an administrative authority, exists, the application under consideration is dismissed as unacceptable)."

I turn now to the test of the nature of the act itself. This is a test which has been followed in a number of cases in Cyprus regarding several acts which were found not to be of an executory or administrative character, though emanating from administrative organs. They can be found in a number of decisions of the then Supreme Constitutional Court, such as the case of *Phedias Kyriakides* v. *The Republic*, 1 R.S.C.C., 66 at p. 73, where it was said :-

"In the light of the framework of the Constitution, which gives to this Court jurisdiction in administrative and constitutional matters and to the High Court and inferior Courts, jurisdiction in ordinary civil and criminal cases, the Court has come to the conclusion that acts of the police of the nature referred to above which are so closely interwoven with prospective proceedings before a criminal Court, do not constitute an exercise of 'executive or administrative authority' within the meaning of Article 146. This view is in accordance with the legal principles and practice followed in similar matters by administrative Courts in different Continental countries."

Acts, therefore, closely connected with the exercise of judicial authority were found not to constitute an exercise of executive or administrative authority.

The same principle was also adopted in the case of

Andreas Gavris and *The Republic*, 1 R.S.C.C., p. 88 at p. 93 and *Xenophontos* and *The Republic*, 2 R.S.C.C., p. 89 at p. 92. Useful also in this respect is the case of *Demetriades & Son & Another* v. *The Republic* (1969) 3 C.L.R. 557, where Hadjianastassiou, J. at p. 568 gives the view in dealing with the *sub judice* matter that "In its essential nature that act was connected with the exercise of legislative power" and Triantafyllides, J. observes at pp. 568-569 that "It should not be invariably taken that an executive or administrative organ is entrusted with a legislative function and not with its primary function.... A lot would depend on the context in which the organ concerned is so entrusted, including the nature of the particular situation."

The nature, therefore, of the act, cannot be examined independently of the surrounding circumstances, and the nature of the particular situation. It is not an examination in abstracto, and in the circumstances of the particular case I have no difficulty in saying that matters affecting the career of judges such as appointments, promotions and transfers are substantially administrative acts.

Kyriacopoulos in his textbook Administrative Law, 3rd Ed. Vol. 3 pages 83-84, says, that they cannot be subject of control by the Council of State.

> "... the acts of the judicial authorities, although of administrative character or relating to objects of administrative nature.... Similarly the decisions of the Supreme Judicial Council about transfer, promotion, etc. of judicial officers, on account of its composition by judges, although in substance administrative ....".

So in Greece, independently whether there was a right of recourse, as well as in France, these matters were considered as administrative acts. In Cyprus, these matters are not described either way by Article 157.2, of the Constitution, unlike the case of retirement and dismissal of judges, which are described as of a judicial nature, and as it has already been pointed out, they have to be examined and classified in the light of the general principles of administrative law.

There are, indeed, several acts which, though not

emanating from the Courts, are closely connected to the administration of justice, *i.e.* arrests of persons etc. and have been held not to constitute exercise of executive or administrative authority within the meaning of Article 146. In this respect, reference may be made also to the question of disciplinary proceedings in respect of advocates.

The approach of our Supreme Court *in Re C.H. an advocate* (1969) 1 C.L.R. 561, is relevant and I feel that I should deal more extensively with it. This case referred to the reviewing powers of the Supreme Court under section 17 of the Advocates Law, Cap. 2 and in particular sub-sections (4) and (5) thereof. The Supreme Court pronounced on the nature of such disciplinary proceedings as being related to the administration of justice and so outside the ambit of the jurisdiction under Article 146. Vassiliades, P. at p. 567, says—

> "Mr. Clerides raised two preliminary points on behalf of his client. The first was whether this proceeding under section 17(4) should be proceeded with or it was a matter which should proceed under section 17(5). The second point was that the proceedings before the disciplinary board were of a nature which should be challenged under Article 146 of the Constitution.
>
> After discussion and particular reference to proceedings of a similar nature in other jurisdictions, Mr. Clerides very rightly, in our opinion, abandoned the point taken under Article 146."

Triantafyllides, J. at page 568, had this to say :-

> "On the other point, *viz.* whether there is competence under Article 146, I fully agree with the majority that there is none.
>
> It seems to be well settled that matters related to the administration of justice are outside the ambit of a jurisdiction such as that under Article 146; advocates are officers of the Court and disciplinary matters concerning them are considered as being related to the administration of justice (see the decisions of the Greek Council of State in Cases 1042(51), 1633(51) as reported in Zacharopoulos

Digest of the Decisions of the Council of State, 1935-1952, p. 300 paras. 46-47)."

Josephides, J. at page 573, had this to say :-

"One of the preliminary points taken by respondent's counsel, and later abandoned, was that the procedings before the Disciplinary Board were of a nature which should be challenged under Article 146 of the Constitution and not as provided in section 17 of the Advocates Law, Cap. 2 (as amended). In addition to the authority quoted in the ruling of my brother Triantafyllides, J. earlier, it should, I think, also be stated that in France, which has the oldest system of droit administratif, although the disciplinary organs of the various public professions (such as medical practitioners, architects, dentists, pharmaceutical chemists and all levels of the teaching profession) are controlled by the administrative tribunals, significantly, the bodies controlling the legal profession are subordinated to the civil courts and not to the Conseil d'Etat or any of the other inferior administrative tribunals (cf. Brown and Garner's French Administrative Law (1967), page 26)."

It is obvious from the aforesaid passages that the result was arrived at in the light of the existing legislation and whether there was a right of review under the Advocates Law or alternatively, a right of recourse under Article 146. Needless to say that it was not a matter of a promotion of a judge, but of a disciplinary nature of an advocate. This case, however, has great significance in the sense that it clearly states that the Court entrusted with the exercise and control of the judicial power of the State and with the responsibility of maintaining at all times and in all circumstances the independence of its justice, is the Supreme Court, and this is a pronouncement appearing in the judgment of Vassiliades, P. in *Re C.D. an advocate (supra)* followed and adopted by Josephides, J. who, at pages 575-576 of his judgment in *Re C.H. an advocate (supra)* said the following :-

"In construing the provisions of section 17 of the Advocates Law, may I reiterate what was recently stated by the President of this Court in

re C.D., An Advocate (1969) 1 C.L.R. 376, at page 381 et seq.:

'Since 1955 it has been considered desirable that the discipline of advocates should be placed in the first instance, in the Disciplinary Board of the profession. But the ultimate responsibility was, wisely and properly, left where it must necessarily rest. Every advocate is expressly deemed by the statute (The Advocates Law—as now amended—section 15) 'to be an officer of the Supreme Court'; and in fact he is a most important officer, on whom the Court must be able to rely absolutely; and whom the general public must be able to trust and respect. An officer on whose integrity, ability and work, the administration of justice partly depends. Who else is better qualified to have the ultimate responsibility for the good discipline of its officers, than the Supreme Court itself? The Court entrusted with the exercise and control of the judicial power in the State; and with the responsibility of maintaining at all times and in all circumstances, the independence of its justice'.

The nature of the duty of the Disciplinary Board is akin to a judicial one and it is exercised by a highly responsible and specially qualified body. It is for the purpose of disciplining a member of a profession in the integrity of which the public have a vital interest, and the Supreme Court has an overriding supervisory jurisdiction. The exercise of the duty may mean professional life or death for the individual. (Cf. in *re Shier* (1969) 'The Times', February 14).

I am of the view that once a person aggrieved by the conduct of an advocate sets the disciplinary machinery into motion, under the provisions of section 17(2)(d) of the Law, as in the present case, then it is in the public interest and in accordance with the express provisions of section 17 that the matter should be dealt with or reviewed by the Supreme Court in the final resort either under section 17(4) or section 17(5) of the Law."

Apart therefore from deciding that the nature of the

duty of the Disciplinary Board of Advocates is akin to a judicial one and the Supreme Court has an overriding supervisory jurisdiction under the provisions of the Advocates Law, than under Article 146 of the Constitution, the significance of this case as far as the present proceedings are concerned, lies in what the then President of the Supreme Court said, that the Supreme Court is the Court entrusted with the exercise and control of the judicial power in the State.

The legislator in enacting section 10 has thought fit to make no provision for review by the organ entrusted with the exercise and control of the judicial power of the State. He has thus departed from the principle recognized by the Constitution from having the full membership of this Court participating in the functions of the Supreme Council of Judicature. Therefore, it should be taken as not intending to exclude the competence of this Court under Article 146 to entertain a recourse on matters affecting the career of judges which are by their nature administrative ones.

To my mind since there was such a marked deviation in the composition of the Supreme Council of Judicature from the one provided for by Article 157 of the Constitution and since by their very nature the acts of promotion are of administrative character, I have no difficulty in arriving at the conclusion that this Court has competence under Article 146 of the Constitution to entertain the present recourse as the acts complained of constitute an exercise of administrative authority.

TRIANTAFYLLIDES, P. : In the result, this recourse, which was made under Article 146 of the Constitution, is dismissed, by majority, on the ground that this Court has no jurisdiction to entertain it under such Article.

We do not propose to make any order as to the costs of these proceedings.

Application dismissed.
No order as to costs.