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

D. THEODORIDES AND OTHERS,

Appellants,

v.

S. PLOUSSIOU,

Respondent.

(*Revisional Jurisdiction Appeals Nos.* 126, 127, 128).

Administrative Law—Practice—Recourse for annulment—"Interested parties"—Who have not taken part in the first instance proceedings—Entitlement to file independent appeals of their own.

Central Bank—Appointments of employees or officers of—Made after the promulgation of the Public Service Law, 1967 (*Law* 33 *of* 1967)*—And when there was not in existence a Public Service Commission empowered under Article* 125 *of the Constitution to make such appointments—But only a Commission set up under the said Law* 33 *of* 1967 *and not so empowered—Validly made by its Governor under s.* 15(2) *of the Central Bank of Cyprus Law,* 1963 (*Law* 48 *of* 1963)*—Such course fully justified by the law of necessity—And once such appointments were made they could be made on a permanent basis*—Iosif *v.* The Cyprus Telecommunications Authority (1970) 3 *C.L.R.* 225, Georghiades *v.* The Republic (1966) 3 *C.L.R.* 317, HadjiGeorghiou *v.* The Republic (1966) 3 *C.L.R.* 504 *and* PapaPantelis *v.* The Republic (1966) 3 *C.L.R.* 515 *distinguished—Sections* 2, 3 *and* 5 *of the Public Service Law* (supra).

Law of necessity—Central Bank of Cyprus Law, 1963 (*Law* 48 *of* 1963) *section* 15(2)*—Provisions thereof validly applied on the strength of the law of necessity for the purpose of making* sub judice *appointments—See, also, under "Central Bank".*

Central Bank of Cyprus Law, 1963 (*Law* 48 *of* 1963)*—"Appoint"* ("διορίζει") *in the context of section* 15(2) *of the law is wide enough to include the notion of promotion.*

Constitutional Law—Constitutionality of Legislation—Constitutiona-

lity of s. 15(2) *of the Central Bank of Cyprus Law,* 1963 (*Law* 48 *of* 1963).

Statutes—Legislature must be presumed to know the state of the Law when enacting a new statute.

Central Bank of Cyprus Law, 1963 (*Law* 48 *of* 1963)—*Constitutionality of s.* 15(2) *of the law.*

Words and Phrases—"Subject to" ("τηρουμένου") *in Article* 125. 1 *of the Constitution—"Appoint" in s.* 15(2) *of the Central Bank of Cyprus Law,* 1963 (*Law* 48 *of* 1963).

Constitutional Law—Constitutionality of legislation—Objection of unconstitutionality—Is considered only in relation to the issue of the validity of the subject-matter of the recourse and is decided solely for the purpose of the particular case—Unconstitutional statute—Not ipso facto void—When does it become void.

The respondent in this appeal, by means of a recourse under Article 146 of the Constitution, challenged the decision of the Central Bank of Cyprus (appellant 3) to appoint the interested parties (appellants 1 and 2) to the post of Manager, Central Bank on a permanent basis.

The said appointments were made by the Governor of the Central Bank under the provisions of section 15(2)* of the Central Bank of Cyprus Law, 1963 (Law 48/63).

The trial Judge found that the above provision of Law 48/63 was unconstitutional, as being contrary to Articles 122-125 of the Constitution, which provide about the setting up and functioning of the Public Service Commission; and that, consequently, the appointments of appellants 1 and 2, as made on the basis of such provision, were made contrary to the Constitution. The trial Judge further found that as the appointments were made on a permanent, and not only on a temporary, basis, and as it was not shown that it was really necessary to make them on a permanent basis, their validity could not be saved by applying the "law of necessity".

* Section 15(2) reads as follows:

"Without prejudice to the generality of subsection (1) the Governor shall, subject to any Law in force for the time being and in accordance with regulations relating to the officers and employees of the Bank made under this Law, appoint, suspend or dismiss any officer or employee of the Bank other than officers or employees in respect of whom other provision is made in this Law".

The trial Judge's decision was attacked by means of appeals which were filed both by the interested parties and the Bank.

Counsel for the appellants contended:

That section 15(2) of Law 48/63 was not unconstitutional, because it was possible, by means of a statutory provision, to take certain matters away from the competence of the Public Service Commission under Article 125. 1* of the Constitution.

It has been argued in this connection that the position in the present case is distinguishable from that in *Markoullides and The Republic*, 3 R.S.C.C. 30 because the relevant powers of the Governor of the Central Bank, under section 15(2) of Law 48/63, are powers which were validly taken out of the competence of the Public Service Commission, and vested in him, by Law 48/63, which is a Law enacted after 1960.

Counsel for the respondent contended:

That the appointments in question could not have been made under section 15(2) of Law 48/63 because such section provides about the power of the Governor of the Central Bank to "appoint" only; and that as the appointments in question were, in effect, promotions they were outside the ambit of the powers of the Governor under section 15(2).

The appointments in question were made in March, 1970, and long before then the Public Service Commission, set up under Article 124 of the Constitution, had ceased to exist and to function as envisaged by Articles 122 to 125 of the Constitution. What was functioning in 1970 was another organ, which though described as a "Public Service Commission", was really different from that set up under the Constitution in 1960. This new Commission was set up under the Public Service Law, 1967 (Law 33/67).

In the course of the hearing of the appeals there has been raised a procedural issue namely, whether or not appellants 1 and 2 could appeal on their own against the decision of the trial Judge.

It has been argued, in this connection, by counsel for the

* Quoted at p. 332 *post*.

respondent in these appeals, that such a course was not open to them, especially as they had been notified, in the usual manner, to take part in the proceedings before the trial Judge—(if they so wished)—as "interested parties", but they failed to do so.

Held, (I) on the procedural issue (Per Triantafyllides, P., L. Loizou, A. Loizou and Malachtos, JJ. concurring):

That since appellants 1 and 2 chose not to take part in the proceedings at the first instance stage they were not entitled, in the present case, to file independent appeals of their own; that, as, however, the Decision given by the trial Judge has been challenged on appeal by appellant 3 (as the respondent in the recourse) there is no difficulty in permitting appellants 1 and 2 to take part in the proceedings before this Court, for the protection of their own interests (pp. 330–331 *post*).

Held, (II) on the merits of the appeals (Per Triantafyllides P., L. Loizou, A. Loizou and Malachtos, JJ. concurring):

(1) That on a proper construction of Article 125. 1 of the Constitution it cannot be held that a Law enacted after 1960 can take anything away from the competence of the Public Service Commission, as set out in Article 125. 1, but can only regulate the exercise, by the Commission, of the said competence; that this conclusion is very much reinforced when Article 125. 1 is looked at in the context of the constitutional structure of which it forms part, and when it is borne in mind that the expression "subject to" in Article 125. 1 corresponds to the word "τηρουμένων" in the Greek original text of Article 125. 1; and that, even after Law 48/63 was enacted, it was still not possible for the Governor of the Central Bank to exercise validly any powers of appointment under section 15(2) thereof, as such powers were, under Article 125. 1, within the competence of the Public Service Commission.

(2) That, therefore, had the *sub judice* appointments of appellants 1 and 2 been effected by the Governor at a time when the Public Service Commission, which was set up under the Constitution, was in existence and was exercising its relevant competence they would have to be annulled as having been made in the exercise of powers, by the Governor of the Central Bank, in a matter inconsistent with the Constitution.

(3) *On the question whether or not it must be held, by reading together sections* 15(2) *of Law* 48/63 *and sections* 2, 3 *and* 5 *of*

Law 33/67, *that at the material time, in* 1970, *the Commission which was set up under Law* 33/67 *was not empowered to make the* sub judice *appointments of appellants* 1 *and* 2, *but that they ought to be made by the Governor of the appellant Central Bank under section* 15(2) *of Law* 48/63:

(a) That the Legislature is presumed to know the state of the law at the time when it enacts a new statute; and that, accordingly, it must be assumed that, when Law 33/67 was enacted by the House of Representatives, the House had Law 48/63 in mind as being on the statute book.

(b) That as Law 48/63, not being an enactment which existed before the coming into operation of the Constitution in 1960, could not possibly have been treated as invalidated by operation of Article 188 of the Constitution, due to any conflict with Article 125.1 of the Constitution; that as a statute which contravenes a provision of the Constitution does not ipso facto become void but it is only when it is declared to be void by a competent Court, in a regular proceeding, that the effects of the statute being unconstitutional are to take place; that as until the enactment of Law 33/67 (or even until to day) there did not intervene any judicial decision impugning the constitutionality, or otherwise the validity of Law 48/63, it is right to conclude that Law 48/63 is one of the special Laws envisaged by the definition of "public service" in section 2, as well as by the provisions of sections 3 and 5, of Law 33/67; and that, accordingly, it was not intended to vest, by means of Law 33/67, in the Public Service Commission set up under it, the power, under section 15(2) of Law 48/63, of making appointments of officers in the service of appellant 3, such as those which are involved in the present proceedings (pp. 338–339 *post*).

(c) That, therefore, this Court is faced with the position that when the two *sub judice* appointments—of appellants 1 and 2—were made by the Governor of appellant 3, under section 15(2) of Law 48/63, they could not have been made either by the Public Service Commission envisaged under Article 125.1 of the Constitution, because it had already ceased to exist and function, or by the Public Service Commission set up under Law 33/67, because it was not empowered to make them.

(4) *On the question whether or not the appointments of appellants* 1 *and* 2 *were, when made, validly made, under section* 15(2) *of Law* 48/63 *in view of the fact that had they been made under*

such section at a time when the Public Service Commission envisaged under Article 125.1 *of the Constitution was functioning they would have amounted to an unconstitutional course of administrative action:*

(a) That an objection of unconstitutionality is considered only in relation to the issue of the validity of the subject matter of the recourse and is decided solely for the purposes of the particular case; and that, accordingly, in the present case this Court does not have to decide about the possibility of validly applying section 15(2) of Law 48/63 *at all times*, but only *at the time material* for the purposes of these proceedings, namely when the *sub judice* appointments were made, because the validity of such appointments has to be examined in relation to the state of the law as at the time when they were made.

(b) That in the present instance the position, though not exactly the same, is closely analogous to the one in *Messaritou* v. *The Cyprus Broadcasting Corporation* (1972) 3 C.L.R. 100 where it was held that the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law 61/70) could be validly applied on the strength of the "law of necessity".

(c) That the Legislature, instead of enacting a new Law (such as Law 61/70) incorporating the provisions contained in section 15(2) of Law 48/63, has, in effect, rendered, by means of the combined effect of sections 2, 3 and 5 of Law 33/67, inevitably applicable the already existing section 15(2) of Law 48/63, as a provision which had to be resorted to in the context of the prevailing juridical situation and which was entirely different from that which was prevailing at the time when Law 48/63 was originally enacted; that, thus, the only possible course which was open to the Governor of the appellant Central Bank (appellant 3), was to exercise the powers under section 15(2) of Law 48/63 in order to make the *sub judice* appointments, which could not be made, at that time, either under Article 125.1 of the Constitution or under Law 33/67; and that such course was fully justifiable by the "law of necessity".

(d) That once that was so it cannot be said that, in the light of the "law of necessity", the said two appointments could have been made only on a temporary, and not on a permanent basis, because it was not the appointments as such which were made by virtue of the "law of necessity", but it was section 15(2) of Law 48/63 which became legislation validly applicable, on

the basis of such "law of necessity", in respect of all appointments authorized by its provisions (see the *Messaritou* case, *supra*, 145, 146, which is referred to, in this respect, in the Annual Survey of Commonwealth Law, 1972, p. 67). (*Iosif* v. *The Cyprus Telecommunications Authority* (1970) 3 C.L.R. 225, *Georghiades* v. *The Republic* (1966) 3 C.L.R. 317, *HadjiGeorghiou* v. *The Republic* (1966) 3 C.L.R. 504 and *Papapantelis* v. *The Republic* (1966) 3 C.L.R. 515 distinguishable from the present case).

(5) *On the question whether the appointments in question were promotions and as such they were outside the ambit of the powers of the Governor under section* 15(2) *of Law* 48/63:

That as the vacancies in the posts concerned were advertised in the Official Gazette it is clear that the said posts were not treated merely as promotion posts, but as first entry and promotion posts, because, by means of the advertisement, applications for appointment thereto were invited from persons outside the service of the Central Bank; and that, in any event, the term "appoint" in the context of section 15(2) is wide enough to include the notion of "promotion" (see, also, section 10 of the Cyprus Broadcasting Corporation Law, Cap. 300A, Maxwell On Interpretation of Statutes, 12th ed., p. 76 and Δεληκωστοπούλου, "Διοικητικὸν Δίκαιον" Part A, pp. 130, 131).

(6) That the *sub judice* appointments of appellants 1 and 2 should not have been annulled, on the ground on which they were annulled by the learned trial Judge, and that the recourse of the respondent in the appeal has to be heard further so as to deal with the other issues, raised thereby, concerning the validity of such appointments.

Per Hadjianastassiou, J. in his concurring judgment:

(1) That the true construction of Article 125.1, in view of its subject matter and of the surrounding circumstances with reference to which it was made, cannot take anything away from the competence of the Commission which was expressly referred to in Article 125.1 of the Constitution, but in my view it can only regulate the exercise of its competence. On this point, I find myself in agreement with the President of this Court when he said that it was not possible to vest validly in the Governor of the Central Bank the powers set out in s. 15(2) of Law 48/63 at that time. I would, therefore, dismiss that con-

tention because in a conflict of this kind between the existing law and the Constitution, the latter must prevail.

(2) That in spite of the fact that section 15(2) was unconstitutional, due to the fact that the House of Representatives in legislating had to exercise its powers within the narrow limits laid down by the supreme law of the land, nevertheless, it is an arguable point that a statute which contravenes a provision of the Constitution does not ipso facto (that is to say without a judicial pronouncement to that effect) become void.

(3) That the learned Judge in following *Iosif's* case (*supra*), misconceived or failed to discern the real principle enunciated in that case, *viz.*, that there was no legislation at all in force in November 1967 enabling the respondents (CYTA) to make the *sub judice* appointments, and that on the contrary, in the case in hand, Law 48/63—a post-Constitution law—was still remaining on the statute book.

(4) That having also read in advance the judgment of the President of this Court, I regret I find myself unable to agree that the present case is closely analogous to the case of *Messaritou* and that it was possible by means of the combined effect of ss. 2, 3 and 5 of Law 33/67, to introduce or to revive the operation of s. 15(2) of Law 48/63.

(5) That the following prerequisites must be satisfied before the doctrine of necessity may take place *viz.*, (a) an imperative and inevitable necessity or exceptional circumstances; (b) no other remedy to apply; and (c) the measure taken must be proportionate to the necessity; that the Bank authorities had in mind in concrete cases before me, that this very same point was raised in those recourses, that is to say, that section 15(2) of Law 48/63 was unconstitutional. In spite of my observations that the bank authorities had to introduce legislation—once the said law was born unconstitutional—no steps were taken to re-enact that section, as in fact was the case with the enactment of the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law 61/70)), which was enacted because the Public Service Commission set up under the Constitution had ceased to exist and function; and because the Commission set up under Law 33/67 had no competence over the personnel of public corporations.

(6) That once the Commission had no competence over the

employees of the Central Bank, the authorities had the duty to take exceptional measures and not wait for such a long time to remedy that position. I have no hesitation, therefore, in reiterating that in those exceptional circumstances it was the duty of the bank authorities, through the legislative organ, to take all measures which were absolutely necessary and indispensable for the normal and unobstructed administration of the bank for the duration of the necessity. In these circumstances, I have grave doubts whether those prerequisites to which I had referred earlier were or could be really satisfied before the doctrine of necessity could become applicable.

(7) With this reservation in mind, and because of the long delay in completing these cases which inevitably have interfered with the smooth running of the bank, I have decided—in spite of the difficulties and reservations I have made—not to dissent with the majority judgment. I would, therefore, declare that the *sub judice* appointments of the appellants 1 and 2 should not have been annulled by the trial Judge in the circumstances of this case.

Per A. Loizou, J. in his concurring judgment:

This legislative measure which the Government in the exercise of its discretion, in the circumstances, adopted for the purpose of meeting the situation created by the fact that the Public Service Commission, empowered, to act under Article 125 of the Constitution, ceased to exist, does not include the Central Bank of Cyprus among the Public Authorities whose smooth function with regard to matters relating to their personnel was to regulate. As Government must, however, be deemed aware of the existence of section 15(2) above, which was analogous to the way by which the situation was to be met by the new Law, it must be taken that it was considered, in the circumstances, superfluous for the Government to cover by Law 61/70 also the Central Bank.

Appeals allowed.

Cases referred to:

Lyssiotou v. *Papasavva and Another* (1968) 3 C.L.R. 173;

Christodoulou and Another v. *Kouali and The Republic* (1971) 3 C.L.R. 207;

Case No. 317/1955 *of the Greek Council of State;*

Case of *Harenne*, on January 9, 1959 (French Council of State);

Markoullides and The Republic, 3 R.S.C.C. 30 at pp. 33, 34;

Smith v. *London Transport Executive* [1951] A.C. 555;
C. & J. Clark Ltd., v. *Inland Revenue Commissioners* [1973] 2 All E.R. 513 (affirmed on appeal [1975] 1 All E.R. 801);
B. Surinder Singh Kanda v. *Government of the Federation of Malaya* [1962] A.C. 322; at pp. 332–335;
Bagdassarian v. *The Electricity Authority of Cyprus and Another* (1968) 3 C.L.R. 736 at pp. 742–744;
Lordou and Others v. *The Republic* (1968) 3 C.L.R. 427 at p. 433;
Philippou v. *The Municipal Corporation of Nicosia* (1972) 3 C.L.R. 50 at p. 54;
Messaritou v. *The Cyprus Broadcasting Corporation* (1972) 3 C.L.R. 100;
The Attorney-General of the Republic v. *Ibrahim and Others*, 1964 C.L.R. 195;
Iosif v. *The Cyprus Telecommunications Authority* (1970) 3 C.L.R. 225;
Georghiades v. *The Republic* (1966) 3 C.L.R. 317;
HadjiGeorghiou v. *The Republic* (1966) 3 C.L.R. 504;
Papapantelis v. *The Republic* (1966) 3 C.L.R. 515;
Sofroniou and Others v. *The Municipality of Nicosia and Others* (reported in this Part at p. 124 *ante*);
HjiSavvas v. *The Republic* (1972) 3 C.L.R. 174 at pp. 195–197;
Chicot Co. Drainage Dist. v. *Baxter State Bank*, 84 Law. Ed. U.S. 329 at pp. 332–333;
Norton v. *Shelby County*, 30 Law. Ed. U.S. 178;
Cargill Co. v. *Minnesco*, 45 Law. Ed. U.S. 179–182, 619;
South Australia v. *The Commonwealth* (1942) 65 C.L.R. 373 at p. 408.

Appeals.

Appeals against the judgment of a Judge of the Supreme Court of Cyprus (Stavrinides, J.) given on the 6th October, 1973 (Case No. 108/70) whereby the appointments of the interested parties to the post of Manager, Central Bank were annulled.

K. Talarides, for appellant 1 (in Appeal No. 126).

A. Triantafyllides with *A. Moushiouttas*, for appellant 2 (in Appeal No. 127).

N. Charalambous, Counsel of the Republic, for appellant 3 (in Appeal No. 128).

L. Clerides with *T. Eliades* and *G. Chlorakiotis*, for the respondent.

Cur. adv. vult.

The following judgments were read:-

TRIANTAFYLLIDES, P.: These three appeals were lodged against the Decision* of a Judge of this Court in recourse No. 108/70, which was made, under Article 146 of the Constitution, by the respondent in these appeals; by means of such Decision the appointments of appellants 1 and 2 to the post of Manager in the service of the Central Bank of Cyprus (appellant 3) were annulled.

The said appointments were made by the Governor of appellant 3 under the provisions of section 15(2) of the Central Bank of Cyprus Law, 1963 (Law 48/63), which reads as follows:-

" 15.-(2) Ἄνευ ἐπηρεασμοῦ τῆς γενικότητος τοῦ ἐδαφίου (1), ὁ Διοικητὴς διορίζει, θέτει εἰς διαθεσιμότητα ἢ ἀπολύει ἅπαντας τοὺς ἀξιωματούχους ἢ ὑπαλλήλους τῆς Τραπέζης πλὴν ἐκείνων δι' οὓς γίνεται εἰδικὴ πρόνοια ἐν τῷ παρόντι Νόμῳ, τηρουμένων τῶν ἐκάστοτε ἐν ἰσχύϊ νόμων καὶ συμφώνως πρὸς Κανονισμοὺς γενομένους δυνάμει τοῦ παρόντος Νόμου ἀναφορικῶς πρὸς τοὺς ἀξιωματούχους καὶ ὑπαλλήλους τῆς Τραπέζης."

("15. (2) Without prejudice to the generality of subsection (1) the Governor shall, subject to any Law in force for the time being and in accordance with regulations relating to the officers and employees of the Bank made under this Law, appoint, suspend or dismiss any officer or employee of the Bank other than officers or employees in respect of whom other provision is made in this Law").

The learned trial Judge found, in deciding on *Preliminary legal issues, that the above provision of Law* 48/63 was unconstitutional, as being contrary to Articles 122-125 of the Constitution, which provide about the setting up and functioning of the Public Service Commission; and that, consequently, the appointments of appellants 1 and 2, as made on the basis of such provision, were made contrary to the Constitution.

Also, as the appointments were made on a permanent, and not only on a temporary, basis, and as it was not shown that it was really necessary to make them on a permanent basis, the trial Judge held that their validity could not be saved by applying the "law of necessity".

* Reported in (1973) 3 C.L.R. 539.

Appellant 1 has attacked the trial Judge's decision first, by means of Appeal No. 126; then appellant 2 filed Appeal No. 127; and, lastly, appellant 3 (being the respondent in the recourse) filed Appeal No. 128.

A procedural issue, which has been raised before us, and which has to be dealt with first, is whether or not appellants 1 and 2 could appeal on their own against the Decision of the trial Judge: It has been argued, in this connection, by counsel for the respondent in these appeals, that such a course was not open to them, especially as they had been notified, in the usual manner, to take part in the proceedings before the trial Judge—(if they so wished)—as "interested parties", but they had failed to do so.

The practice of allowing a person, to whom an administrative act or decision relates, to take part in the proceedings in a recourse made by somebody else against such administrative act or decision is not governed directly, in Cyprus, by any specific enactment; it was first initiated by the Supreme Constitutional Court, and was, subsequently, continued by the present Supreme Court in the course of exercising the competence of the no longer functioning Supreme Constitutional Court. As a result of standing directions made under rule 19 of the Supreme Constitutional Court Rules a person so affected—(who has come to be described as an "interested party")—is notified that he is entitled to appear and apply for leave to take part in the proceedings in the recourse, for the protection of his own interests, and, if he so appears, he is, as a rule, allowed to do so, either through counsel or in person, as he may wish. On many occasions interested parties appear in order to state merely that they do not wish to take part in the proceedings on their own, being content to leave the matter in the hands of counsel appearing on behalf of the organ (the respondent in the recourse) which has made the *sub judice* administrative act or decision; or an interested party may, even after service on him of the appropriate notice, choose not to appear at all, and this is taken to signify that he does not wish to take part in the proceedings; and this is what was, actually, done on the present occasion by appellants 1 and 2.

As regards appeals by interested parties against a judgment given in a recourse there are two reported cases to which we have been referred, namely *Lyssiotou* v. *Papasavva and The Republic*, (1968) 3 C.L.R. 173, and *Christodoulou and Another*

v. *Kouali and The Republic*, (1971) 3 C.L.R. 207; in both such cases interested parties did appeal, but no objection was raised concerning their right to do so; so the procedural issue now before us was not decided then. It is to be observed that in the *Lyssiotou* case "the appellant-interested party" had been allowed to, and did, take part in the proceedings at the trial (see the relevant report in (1967) 3 C.L.R. 111, 121), whereas in the *Christodoulou* case "the appellants-interested parties" had chosen not to take part in the first instance proceedings (see the relevant report in (1970) 3 C.L.R. 441, 442).

In Greece the Council of State decided (see, for example, case 317/1955) that the notion of a "party", in the sense of the relevant legislative provision governing appeals from decisions in first instance administrative Court proceedings (see section 42 of Law 3713 as reenacted by section 1 of Law 4210), did not include an "intervener"—(such as would be described an interested party taking part here in the trial of a recourse)—and that, consequently, an intervener could not appeal directly, and separately, on his own, though he could intervene in the proceedings on appeal.

In France the position seems to be, by analogy, that a person, who in Cyprus would be described as an "interested party" in a recourse, is entitled to appeal against the outcome of an administrative recourse if he has taken part in the litigation at the first instance level (see Odent's Contentieux Administratif, 1970-1971, vol. 2, pp. 627 et seq., as well as the decision by the Council of State in the case of *Harenne* on January 9, 1959).

In the light of all the foregoing I am of the view that since appellants 1 and 2 chose not to take part in the proceedings at the first instance stage they were not entitled, in the present case, to file independent appeals of their own; as, however, the Decision given by the trial Judge has been challenged on appeal by appellant 3 (as the respondent in the recourse) I can see no difficulty in permitting appellants 1 and 2 to take part in the proceedings before us, for the protection of their own interests.

I shall deal, next, with the merits of the case:-

It has been argued by counsel for the appellants that section 15(2) of Law 48/63 is not unconstitutional, because it was possible, by means of a statutory provision, to take certain matters away from the competence of the Public Service Commission,

which was set up under the Constitution; and that this is what has in fact happened in the present instance.

The relevant constitutional provision is Article 125.1 which reads as follows:-

" 1. Ἐπιφυλασσομένης πάσης ἑτέρας ἐν τῷ Συντάγματι ρητῆς διατάξεως περὶ οἱουδήποτε τῶν ἐν τῇ παρούσῃ παραγράφῳ θεμάτων καὶ τηρουμένων τῶν διατάξεων οἱουδήποτε νόμου, ἡ ἐπιτροπὴ δημοσίας ὑπηρεσίας ὀφείλει νὰ κατανέμῃ τὰς δημοσίας θέσεις μεταξὺ τῶν δύο κοινοτήτων καὶ νὰ διορίζῃ, μονιμοποιῇ, ἐντάσσῃ εἰς τὴν δύναμιν τῶν μονίμων ἢ τῶν δικαιουμένων συντάξεως ὑπαλλήλων, προάγῃ, μεταθέτῃ, καθιστᾷ συνταξιούχους δημοσίους ὑπαλλήλους καὶ νὰ ἀσκῇ πειθαρχικὴν ἐξουσίαν ἐπ' αὐτῶν, περιλαμβανομένων τῆς ἀπολύσεως ἢ τῆς ἀπαλλαγῆς ἀπὸ τῶν καθηκόντων αὐτῶν."

In the Draft Constitution, which was signed at Nicosia on April 6, 1960, in the Joint Constitutional Commission (see Article 149 of the Constitution), the above provision appears in English as follows:-

" 1. Save where other express provision is made in this Constitution with respect to any matter set out in this paragraph and subject to the provisions of any law, it shall be the duty of the Public Service Commission to make the allocation of public offices between the two Communities and to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer, retire and exercise disciplinary control over, including dismissal or removal from office of, public officers".

It is not in dispute that the post of Manager in the Central Bank is a "public office" in the sense of Article 125. 1; and it is useful to bear in mind that in *Markoullides* and *The Republic*, 3 R.S.C.C. 30, it was stated (at pp. 33, 34) that –

" The combined effect of the definitions of 'public officer' and 'public service' in Article 122 of the Constitution and of the provisions of paragraph 1 of Article 125 of the Constitution lead to the conclusion that the Commission has exclusive competence, *inter alia*, to transfer employees of the Authority such as the Applicant or to dismiss them.

The contrary view, however, has been propounded, in this connection, in view of the expression 'subject to the

provisions of any law' in paragraph 1 of Article 125, in which the competence of the Commission is set out. It has been argued that because of an apparent conflict between the said paragraph and the provisions of section 10 of the Electricity Development Law, Cap. 171, it is the Authority and not the Commission which is the competent organ to transfer employees of the Authority such as the Applicant or to dismiss them.

In the opinion of the Court no conflict, in effect, arises between paragraph 1 of Article 125 and section 10 of Cap. 171. Clearly Cap. 171 is a Law which has continued in force under, and subject to, the provisions of Article 188 of the Constitution. Under such Article 188, and in particular paragraph 3 thereof, the corresponding body of the Republic which has to be substituted in Cap. 171 for the Authority, in all matters falling within the competence of the Commission under paragraph 1 of Article 125, is the Commission .....".

So, the appellants' above submission would be, in my view, bound to fail had this been a case where it was being alleged that a matter within the Public Service Commission's competence, under Article 125.1, remained vested in some other organ by virtue of a Law existing *before* the coming into operation, in 1960, of the Constitution.

But, it is being contended that the position in the present case is distinguishable from that in the *Markoullides* case, *supra*, because the relevant powers of the Governor of the Central Bank, under section 15(2) of Law 48/63, are powers which were validly taken out of the competence of the Public Service Commission, and vested in him, by Law 48/63, which is a Law enacted *after* 1960; and, in this respect, reliance is being placed on the words "subject to the provisions of any law" in Article 125.1.

For the meaning of the expression "subject to" reference has been made, *inter alia*, to *Smith* v. *London Transport Executive*, [1951] A.C. 555, and to *C. & J. Clark Ltd* v. *Inland Revenue Comrs*, [1973] 2 All E.R. 513 (affirmed on appeal, [1975] 1 All E.R. 801). In my view not much help can be derived from the above cases, because they relate to the effect of the expression "subject to" when it is being used in a statute in connection with

other provisions of the *same* enactment; in this respect Megarry J. stated in the *Clark* case, *supra* (at p. 520):-

> " In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail".

A much more relevant case is that of *B. Surinder Singh Kanda* v. *Government of the Federation of Malaya*, [1962] A.C. 322, where it was held (at pp. 332–335) that the words "subject to the provisions of any existing law" in Article 144(1) of the Constitution of Malaya (which relates to the functions of the Police Service Commission which was set up under such Constitution) do not have the effect of taking out of the competence of the Police Service Commission any powers which, under existing legislation, were previously vested in another organ.

In the light of the foregoing I am of the opinion that, on a proper construction of Article 125.1 of our Constitution, it cannot be held that a Law enacted after 1960 can take anything away from the competence of the Public Service Commission, as set out in Article 125.1, but can only regulate the exercise, by the Commission, of the said competence; this conclusion is very much reinforced when Article 125. 1 is looked at in the context of the constitutional structure of which it forms part, and when it is borne in mind that the expression "subject to" in Article 125.1 corresponds to the word "τηρουμένων" in the Greek original text of Article 125. 1; therefore, even after Law 48/63 was enacted it was still not possible for the Governor of the Central Bank to exercise validly any powers of appointment under section 15(2) thereof, as such powers were, under Article 125. 1, within the competence of the Public Service Commission.

So, had the *sub judice* appointments of appellants 1 and 2 been effected by the Governor at a time when the Public Service Commission, which was set up under the Constitution, was in existence and was exercising its relevant competence they would have to be annulled as having been made in the exercise of powers, by the Governor of the Central Bank, in a manner inconsistent with the Constitution.

As a matter of fact, however, such appointments were made in March 1970, and long before then the said Commission had

ceased to exist and to function as envisaged by Articles 122 to 125 of the Constitution. What was functioning in 1970 was *another organ*, which though also described as a "Public Service Commission", it is really different from that set up under the Constitution in 1960.

This new Commission was set up under the Public Service Law, 1967 (Law 33/67).

In section 2 of Law 33/67 the definition of "public service" is different from that in Article 122 of the Constitution; this new definition is as follows:-

" 'δημοσία ὑπηρεσία' σημαίνει πᾶσαν ὑπαγομένην εἰς τὴν Δημοκρατίαν ὑπηρεσίαν ἄλλην ἢ τὴν δικαστικὴν ὑπηρεσίαν τῆς Δημοκρατίας ἢ ὑπηρεσίαν εἰς τὰς 'Ενόπλους Δυνάμεις τῆς Δημοκρατίας ἢ τὰς Δυνάμεις 'Ασφαλείας τῆς Δημοκρατίας ἢ ὑπηρεσίαν εἰς τὴν θέσιν τοῦ Γενικοῦ Εἰσαγγελέως τῆς Δημοκρατίας ἢ τοῦ Γενικοῦ 'Ελεγκτοῦ ἢ τοῦ Γενικοῦ Λογιστοῦ ἢ τῶν Βοηθῶν αὐτῶν ἢ ὑπηρεσίαν ἐν οἱαδήποτε θέσει ὡς πρὸς τὴν ὁποίαν γίνεται διάφορος πρόνοια διὰ νόμου ἢ ὑπηρεσίαν ὑπὸ προσώπων τῶν ὁποίων ἡ ἀμοιβὴ ὑπολογίζεται ἐπὶ ἡμερησίας βάσεως·".

(" 'public service' means any service under the Republic other than the judicial service of the Republic or service in the Armed or Security Forces of the Republic or service in the office of Attorney-General of the Republic, or Auditor-General or Accountant-General or their Deputies or service in any office in respect of which other provision is made by law or service by persons whose remuneration is calculated on a daily basis;").

Section 3 of Law 33/67 reads as follows:-

" 3. Τηρουμένων τῶν διατάξεων τοῦ παρόντος Νόμου, ὁ παρὼν Νόμος ἐφαρμόζεται ἐπὶ ἁπάντων τῶν μελῶν τῆς δημοσίας ὑπηρεσίας πλὴν ἐκείνων τὰ ὁποῖα δὲν ἐμπίπτουσιν εἰς τὴν δικαιοδοσίαν τῆς 'Επιτροπῆς Δημοσίας 'Υπηρεσίας ἢ περὶ τῶν ὁποίων γίνεται διάφορος πρόνοια δυνάμει οἱουδήποτε ἑτέρου ἑκάστοτε ἐν ἰσχύϊ νόμου."

("3. Subject to the provisions of this Law, this Law shall apply to all members of the public service except those who do not come within the province of the Public Service Commission or for whom other provision is made under any other law in force for the time being.").

Also, section 5 of Law 33/67 reads as follows:-

" 5. Πλὴν τῶν περιπτώσεων περὶ τῶν ὁποίων γίνεται εἰδικὴ πρόνοια ἐν τῷ παρόντι ἢ ἐν οἱῳδήποτε ἑτέρῳ νόμῳ ὡς πρὸς οἱονδήποτε θέμα ἐκτιθέμενον ἐν τῷ παρόντι ἄρθρῳ καὶ τηρουμένων τῶν διατάξεων τοῦ παρόντος ἢ οἱουδήποτε ἑτέρου ἐκάστοτε ἐν ἰσχύϊ νόμου, ἀποτελεῖ καθῆκον τῆς Ἐπιτροπῆς ὁ διορισμός, ἡ ἐπικύρωσις διορισμοῦ, ἡ ἔνταξις εἰς τὸ μόνιμον προσωπικόν, ἡ προαγωγή, ἡ μετάθεσις, ἡ ἀπόσπασις καὶ ἡ ἀφυπηρέτησις δημοσίων ὑπαλλήλων καὶ ἡ ἐπ' αὐτῶν ἄσκησις πειθαρχικοῦ ἐλέγχου περιλαμβανομένων τῆς ἀπολύσεως ἢ τῆς ἀπαλλαγῆς ἀπὸ τῶν καθηκόντων αὐτῶν."

("5. Save where other express provision is made in this or any other law with respect to any matter set out in this section and subject to the provisions of this or any other law in force for the time being, it shall be the duty of the Commission to appoint, confirm, emplace on the permanent establishment, promote, transfer, second, retire and exercise disciplinary control over, including dismissal or removal from office of, public officers.").

Law 33/67 had to be enacted, so as to set up under it a new Public Service Commission, because the Public Service Commission set up under the Constitution had ceased to exist as a result of the anomalous situation which resulted due to the intercommunal rift which commenced in December, 1963, and which is, unfortunately, still continuing. The evolution which culminated in the enactment of Law 33/67 is described in *Bagdassarian* v. *The Electricity Authority of Cyprus and The Republic*, (1968) 3 C.L.R. 736, 742-744, as follows:-

" From all the material before me it appears that there were appointed, on the 16th August, 1960, ten members of the Public Service Commission, as envisaged by Article 124 of the Constitution; by virtue of paragraph 3 of such Article they were to hold office for six years, expiring on the 15th August, 1966.

In the meantime, due to the situation in the Island having developed in such a way as to interfere with the composition and functioning of the said Commission, The Public Service Commission (Temporary Provisions) Law, 1965 (Law 72/65) was enacted on the 16th December, 1965. There can be no doubt, in view of its context, that Law 72/65 was intended

to legislate in relation to the Public Service Commission provided for under the Constitution; but, it was apparently thought fit, in the circumstances, to restrict the membership of the Commission to five members, including its Chairman.

On the 16th August, 1966, immediately after the expiration of the term of office of the members of the Commission appointed on the 16th August, 1960, there were reappointed five members of the Commission; their new appointments were made under section 3 of Law 72/65.

Neither in the said section 3, nor in the instruments of appointment, any mention was made of the duration of the new appointments, but taking into account the nature of Law 72/65 (in view particularly of its preamble) it may be assumed that the appointments made on the 16th August, 1966, were made pro tempore.

Viewing the said appointments against their proper background one might be inclined, with good reason, to say that they were intended to ensure somehow the continuance of the functioning of a Public Service Commission necessary for the exercise of the powers set out in Article 125.

Then, on the 30th June, 1967, Law 33/67 was promulgated, repealing expressly Law 72/65; and on the very next day, on the 1st July, 1967, the same five members of the Public Service Commission, who were appointed on the 16th August, 1966, were given new appointments under section 4 of Law 33/67—the number of the members of the 'Commission', including its Chairman, being five, under such section 4; by virtue of the same section the term of office of the members of the 'Commission', appointed thereunder, is six years.

In view of the repeal of Law 72/65 by Law 33/67, and in view of the appointments made, as aforesaid, under section 4 of the latter Law, I take the view that the earlier appointments of the same persons, which were made on the 16th August, 1966, under section 3 of the former Law, must be taken as having been terminated (see, also, section 11 of The Interpretation Law, Cap. 1).

In this case the Court is not concerned with the consti-

tutionality, in whole or in part, of Law 33/67, or of anything done under its provisions, this is a matter which I leave entirely open; and nothing which I say further on in this Decision should be taken as prejudging such issue of constitutionality one way or the other.

Law 33/67 has no preamble explaining its purpose, like in the case of Law 72/65. In the long title of Law 33/67 reference is made to the functioning of the 'Public Service Commission', but not also to the creation of such a 'Commission'; yet section 4 of the Law does clearly provide for the setting up of a 'Public Service Commission'; and in a manner which differs in some respects from the provisions of Article 124 of the Constitution.

Moreover, in section 5 of Law 33/67, which lays down the powers of the 'Commission' appointed under such Law, no reference at all is made to Article 125 of the Constitution; and though the provisions of such section 5 are in many respects similar to the corresponding provisions in Article 125, nevertheless there arises the following most material, for the purposes of the present case, difference: By reading section 5 of Law 33/67 together with the relevant definitions in section 2 of the Law, and by comparing the position thus resulting with that which results when Article 125 is read together with the relevant definitions in Article 122, one is led inevitably to the conclusion that the 'Public Service Commission' set up, as from the 1st July, 1967, under Law 33/67, possesses competence over members of the 'public service', which is defined in such Law in a manner not including the personnel of the Authority, whereas under Article 125 the Public Service Commission is entrusted with competence over the personnel of the Authority, in view of the definition of 'public service' in Article 122.

It follows, therefore, that when the *sub judice* appointment was made, after the promulgation of Law 33/67, there was not in existence a Public Service Commission empowered under Article 125 to make such an appointment, but only a 'Public Service Commission' set up under Law 33/67 and not so empowered".

The question that has to be answered, next, in the present case, is whether or not it must be held, by reading together sections 15(2) of Law 48/63 and sections 2, 3 and 5 of Law 33/67, that at

the material time, in 1970, the Commission which was set up under Law 33/67 was not empowered to make the *sub judice* appointments of appellants 1 and 2, but that they ought to be made by the Governor of the appellant Central Bank (appellant 3) under section 15(2) of Law 48/63:

The Legislature is presumed to know the state of the law at the time when it enacts a new statute; so, it must, accordingly, be assumed that, when Law 33/67 was enacted by the House of Representatives, the House had Law 48/63 in mind as being on the statute book.

It ought to be stressed, at this stage, that Law 48/63, not being an enactment which existed before the coming into operation of the Constitution in 1960, could not possibly have been treated as invalidated by operation of Article 188 of the Constitution, due to any conflict with Article 125.1 of the Constitution; and until the enactment of Law 33/67—(or even until today)—there did not intervene any judicial decision impugning the constitutionality, or otherwise the validity, of Law 48/63; and it is useful to point out, in this connection, that "a statute which contravenes a provision of the Constitution does not ipso facto (i.e., without a judicial pronouncement to that effect) become void. It is only when it is declared to be void by a competent Court, in a regular proceeding, that the effects of the statute being unconstitutional are to take place". (See Basu's Commentary on the Constitution of India, 5th ed., vol. 1, p. 245).

It is, therefore, right to conclude that Law 48/63 is one of the special Laws envisaged by the definition of "public service" in section 2, as well as by the provisions of sections 3 and 5, of Law 33/67; and it follows that it was not intended to vest, by means of Law 33/67, in the Public Service Commission set up under it, the power, under section 15(2) of Law 48/63, of making appointments of officers in the service of appellant 3, such as those which are involved in the present proceedings.

This Court is faced, thus, with the position that when the two *sub judice* appointments—of appellants 1 and 2—were made by the Governor of appellant 3, under section 15(2) of Law 48/63, they could not have been made either by the Public Service Commission envisaged under Article 125.1 of the Constitution, because it had already ceased to exist and function, or by the Public Service Commission set up under Law 33/67, because it was not empowered to make them.

The next issue to be examined is whether or not the appointments of appellants 1 and 2 were, *when made*, validly made, under section 15(2) of Law 48/63, in view of the fact that had they been made under such section at a time when the Public Service Commission envisaged under Article 125.1 of the Constitution was functioning they would have amounted—for the reasons explained earlier on in this judgment—to an unconstitutional course of administrative action:

In examining the above issue in the present proceedings we are not concerned in abstracto with the constitutionality, as such, of section 15(2) of Law 48/63; our only concern is the determination of the outcome of the recourse of the respondent, made under Article 146.1 of the Constitution; and in proceedings in a recourse of this nature this Court, as an administrative Court, is not called upon to pronounce on the constitutionality of a statute in order to declare it to be constitutional or unconstitutional generally for all purposes, but it only has to examine the constitutionality of a statute, on which the subject matter administrative act or decision was based, in order to decide about the validity of such act or decision; thus, an "objection of unconstitutionality" is considered only in relation to the issue of the validity of the subject matter of the recourse and is decided solely for the purposes of the particular case (see, in this connection, Βλάχου "Ἡ Ἔρευνα τῆς Συνταγματικότητος τῶν Νόμων", 1954, p. 106, Σγουρίτσα "Συνταγματικὸν Δίκαιον", 3rd ed., 1965, vol. A, p. 66, Burdeau "Traité De Science Politique", 2nd ed., vol. 4, p. 469).

So, in the present case, we do not have to decide about the possibility of validly applying section 15(2) of Law 48/63 *at all times*, but only *at the time material* for the purposes of these proceedings, namely when the *sub judice* appointments were made; because, the validity of such appointments has to be examined in relation to the state of the law as at the time when they were made (see *Lordou and Others* v. *The Republic*, (1968) 3 C.L.R. 427, 433, *Philippou* v. *The Municipal Corporation of Nicosia*, (1972) 3 C.L.R. 50, 54).

In *Messaritou* v. *The Cyprus Broadcasting Corporation*, (1972) 3 C.L.R. 100, which was decided in relation to the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law 61/70)—(which was enacted because the Public Service Commission set up under the Constitution had ceased to exist and fun-

ction, and because the Public Service Commission set up under Law 33/67 has no competence over the personnel of public corporations, such as the Cyprus Broadcasting Corporation)— it was held that Law 61/70 could be validly applied on the strength of the "law of necessity" (as expounded in *The Attorney-General of the Republic* v. *Ibrahim and others*, 1964 C.L.R. 195) for the purpose of making promotions.

In the present instance, the position though not exactly the same, is, in my opinion, closely analogous. The Legislature, instead of enacting a new Law (such as Law 61/70) incorporating the provisions contained in section 15(2) of Law 48/63, has, in effect, rendered, by means of the combined effect of sections 2, 3 and 5 of Law 33/67, inevitably applicable the already existing section 15(2) of Law 48/63, as a provision which had to be resorted to in the context of the then prevailing juridical situation and which was entirely different from that which was prevailing at the time when Law 48/63 was originally enacted. Thus, the only possible course which was open to the Governor of the appellant Central Bank (appellant 3), was to exercise the powers under section 15(2) of Law 48/63 in order to make the *sub judice* appointments, which could not be made, at that time, either under Article 125.1 of the Constitution or under Law 33/67; and such course was, in my opinion, fully justifiable by the "law of necessity".

Once that was so it cannot be said that, in the light of the "law of necessity", the said two appointments could have been made only on a temporary, and not on a permanent basis; because it was not the appointments as such which were made by virtue of the "law of necessity", but it was section 15(2) of Law 48/63 which became legislation validly applicable, on the basis of such "law of necessity", in respect of all appointments authorized by its provisions (see the *Messaritou* case, *supra*, 145, 146, which is referred to, in this respect, in the Annual Survey of Commonwealth Law, 1972, p. 67).

In holding that permanent, and not merely temporary, appointments of appellants 1 and 2 could not be justified on the strength of the "law of necessity", because there was nothing before him to show that it was necessary to make them on a permanent basis, the trial Judge referred to *Iosif* v. *The Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 225, where it was, indeed, held that the making of two promotions on a per-

manent basis, and not only on a temporary basis, was not justifiable by virtue of the "law of necessity".

In my view the said case is obviously distinguishable from the present one, because, as it appears from the judgment in that case (see pp. 230, 231), there existed no legislation, enacted after 1960, on the strength of which the respondent Authority in that case could have acted when making the permanent promotions challenged therein; the position was that the said promotions were made after the enactment of Law 33/67, but before the enactment of Law 61/70, and as the Public Service Commission set up under Law 33/67 was not empowered to make such promotions, the Board of the respondent Authority made them without legislative authorization and sought to justify its relevant ad hoc administrative action by relying on the "law of necessity"; it was held that in such a situation it had to be established by the respondent Authority that in the particular circumstances there was warranted, in the light of the criteria governing the application of the "law of necessity", the making of the promotions on a permanent, and not only on a temporary, basis, and, as this was not established, the promotions were annulled.

Reference is made in the judgment in the *Iosif* case, *supra*, to three earlier cases, *Georghiades* v. *The Republic*, (1966) 3 C.L.R. 317, *HadjiGeorghiou* v. *The Republic*, (1966) 3 C.L.R. 504 and *Papapantelis* v. *The Republic*, (1966) 3 C.L.R. 515, in which the particular administrative action taken concerning public officers, was held not to be justifiable, in the specific circumstances of each case, on the strength of the "law of necessity". But, again, all these three cases are distinguishable from the present one for exactly the same reasons as the *Iosif* case, namely that in all those instances there was no legislation—as there was in the present case (Law 48/63)—which became properly applicable by virtue of the "law of necessity" and under which the required administrative action could be taken.

Another argument advanced against the validity of the *sub judice* appointments was that, in any case, they could not have been made under section 15(2) of Law 48/63 because such section provides about the power of the Governor of the Central Bank to "appoint" ("διορίζει") only; and that the appointments in question were, in effect, promotions and, so, according to the contention of counsel for the respondent, they were outside the ambit of the powers of the Governor under section 15(2).

The vacancies in the posts concerned were advertised in the Official Gazette (Not. 24) on January 9, 1970; it is clear that the said posts were not treated merely as promotion posts, but as first entry and promotion posts, because, by means of the advertisement, applications for appointment thereto were invited from persons outside the service of the Central Bank.

But, in any event, I am of the view, that the term "appoint" in the context of section 15(2) is wide enough to include the notion of "promotion"; such term appears with the same wide sense, in, for example, section 10 of the Cyprus Broadcasting Corporation Law, Cap. 300 A. In this connection it is useful to point out that in Maxwell on Interpretation of Statutes, 12th ed., p. 76, it is stated that:-

> " The words of a statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject, or in the occasion on which they are used, and the object to be attained".

Also, in Δεληκωστοπούλου "Διοικητικὸν Δίκαιον" Part A, pp. 130, 131, it is stated that a statute has to be interpreted in a manner which is in accord with its object.

For all the foregoing reasons I have reached the conclusion that the *sub judice* appointments of appellants 1 and 2 should not have been annulled, on the ground on which they were annulled by the learned trial Judge, and that the recourse of the respondent in the appeal has to be heard further so as to deal with the other issues, raised thereby, concerning the validity of such appointments.

L. LOIZOU, J.: I am in full agreement with the judgment delivered by the President, which I had the advantage of reading in advance, and there is nothing that I can usefully add.

HADJIANASTASSIOU, J.: In these three appeals, which have been heard together by the Full Bench of the Supreme Court, under the proviso to s. 11 of Law 33/64, the real question is two-fold: (a) whether the relevant provision of s. 15(2) of Law 48/63 is unconstitutional, as being repugnant to Articles 122-125 of the Constitution; and (b) whether inevitably the act or decision of the Governor of the Central Bank in appointing

D. Theodorides and H. Achniotis to the post of Manager under the provisions of the aforesaid section of the law is unconstitutional because under the constitutional provisions, the appointing authority was the Public Service Commission.

There is no doubt that the Governor of the Central Bank in making the appointments in the year 1970, challenged in Recourse No. 108/70 before one of the Judges of this Court, acted under the provisions of s. 15(2) which says that:-

> " Without prejudice to the generality of subsection (1) the Governor shall, subject to any Law in force for the time being and in accordance with regulations relating to the officers and employees of the Bank made under this Law, appoint, suspend or dismiss any officer or employee of the Bank other than officers or employees in respect of whom other provision is made in this Law."

As I said earlier, the power of the Governor to make those appointments was challenged by the applicant Mr. Ploussiou, who was alleging that in accordance with the provisions of Articles 122 and 125 of the Constitution, the proper authority for making appointments and/or promotions in the Central Bank of Cyprus is the Public Service Commission and that it followed that section 15 of Law 48/63 which conferred similar powers upon the respondent was contrary to the said Articles of the Constitution.

The learned trial Judge, having considered the contentions of counsel on a preliminary issue of law—agreed by both counsel, delivered his reserved judgment annulling the said appointments. In doing so, he relied on *Iosif* v. *CYTA* (1970) 3 C.L.R. 225 and came to the conclusion that the two promotions made on a permanent basis and not on a temporary basis were not justified by the law of necessity and concluded his short judgment in these words:-

> " It seems to me that, having regard to the very basis of the doctrine of necessity, the act sought to be justified by reference to it must be necessary not only in respect of its nature but also in respect of its scope and extent. As there is nothing before me to show that the reason why the subject appointments or promotions were made on a permanent basis was that it was necessary so to make them, I hold that the subject decision must be annulled without

prejudice to the filling of the posts on a temporary basis or even, if necessary, on a permanent basis."

The main complaint of counsel on behalf of the appellants was that the learned trial Judge wrongly reached the conclusion that s. 15(2) of Law 48/63 was unconstitutional, because in enacting that law it was possible for the legislature to take certain matters outside the competence of the Commission—set up under Article 124 of the Constitution, and that is what has actually happened in the case in hand; and (b) that such powers could have been and were validly taken out of the competence of the Commission because Law 48/63 was enacted after 1960 when the Constitution came into force. In support of this contention, counsel relied on the express words "subject to the provisions of any law" appearing in Article 125.1 of the Constitution. Reference was also made to *Smith* v. *London Transport Executive* [1951] A.C. 555 at pp. 569–576; and to *C. & J. Clark Limited* v. *Inland Revenue Commissioners* [1973] 2 All E.R. 513 at p. 520.

It has not been disputed that service in the Central Bank is "public service" under Article 122, and I think that in the light of this contention, I should turn to Article 125. 1 which says that:–

> " Save where other express provision is made in this Constitution with respect to any matter set out in this paragraph and subject to the provisions of any law, it shall be the duty of the Public Service Commission to make the allocation of public offices between the two Communities and to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer, retire and exercise disciplinary control over, including dismissal or removal from office of, public officers."

It appears to me that the manifest intention of those constitutional provisions is that all those who hold any salaried office in the "public service" shall be appointed by the Commission. I think that I should state at the outset of what I have said in *Sofroniou and Others* v. *The Municipality of Nicosia and Others* (reported in this Part at p. 124 *ante* at p. 143 that "a written Constitution like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made." In seeking to apply to the interpretation of the Constitution of Cyprus what has been said in particular

cases about other constitutions, care must be taken to distinguish between judicial reasoning which depended on the express words used in the particular Constitution under consideration and reasoning which depended on what, though not expressed, is non-the-less a necessary implication from the subject matter and structure of the Constitution and the circumstances in which it has been made.

With this in mind, I turn to consider the first case of *Markoullides and The Republic*, (*P.S.C.*) 3 R.S.C.C. 30 on the question of whether the Commission was the appropriate authority or the Electricity Authority of Cyprus. In brief, the applicant was at all material times employed by the Electricity Authority of Cyprus as a clerk, 1st grade, and was informed by the Secretary of the Authority by a letter dated 2nd February 1961, that the authority had decided to transfer him to Kakopetria w. e. f. 1st March, 1961. Upon the refusal of the applicant to obey the order of his transfer, the matter was referred by the authority to the Public Service Commission, which, having considered the matter, confirmed the transfer to Kakopetria. The applicant filed a recourse claiming that the decision was null and void and the Supreme Constitutional Court had this to say at p. 33:-

> " The combined effect of the definitions of 'public officer' and 'public service' in Article 122 of the Constitution and of the provisions of paragraph 1 of Article 125 of the Constitution lead to the conclusion that the Commission has exclusive competence, *inter alia*, to transfer employees of the Authority such as the Applicant or to dismiss them.
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> The contrary view, however, has been propounded, in this connection, in view of the expression 'subject to the provisions of any law' in paragraph 1 of Article 125, in which the competence of the Commission is set out. It has been argued that because of an apparent conflict between the said paragraph and the provisions of section 10 of the Electricity Development Law, Cap. 171, it is the Authority and not the Commission which is the competent organ to transfer employees of the Authority such as the Applicant or to dismiss them.
>
> In the opinion of the Court no conflict, in effect, arises between paragraph 1 of Article 125 and section 10 of Cap. 171. Clearly Cap. 171 is a Law which has continued in force under, and subject to, the provisions of Article 188

of the Constitution. Under such Article 188, and in particular paragraph 3 thereof, the corresponding body of the Republic which has to be substituted in Cap. 171 for the Authority, in all matters falling within the competence of the Commission under paragraph 1 of Article 125, is the Commission and likewise, the Council of Ministers is, in this connection, to be substituted in Cap. 171 for the Governor or the Governor-in-Council."

In *B. Surinder Singh Kanda* v. *Government of the Federation of Malaya*, [1962] A.C. 322 (H.L.), the question was whether the words "subject to the provisions of any existing law" in Article 144(1) of the Constitution of Malaya, which related to the functions of the Police Service Commission set up under the Constitution, did have the effect of the taking out of the powers of the Police Service Commission, powers which under the existing law were previously vested in another organ.

Lord Denning, delivering the judgment of their Lordships said at p. 334:-

> " It appears to their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under article 162(4)), have made modifications in the existing law within the first two years after Merdeka Day. (The attention of their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service.) But the yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it is necessary for the Court to do so under article 162(6). It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail."

This case was adopted and followed in *HjiSavvas* v. *The Republic* (*Council of Ministers*), (1972) 3 C.L.R. 174 at pp. 195-197.

Having had the occasion to go through the cases relied upon by Counsel, on the meaning of the expression subject to", I find myself unable to derive any help because the said judicial reasoning was based on the express wording used in the two different statutory provisions. Be that as it may, in the latter case, *Clark* (*supra*), Megarry, J., in considering some of the subsections of s. 78 of the Finance Act, 1965, dealt with the contention of counsel, and said at p. 520:–

> " When counsel's attention was drawn to the first words in s. 78(1), 'Subject to the provisions of this section', he understandably did not contend that this meant that there was conflict between sub–s(1) and every other part of every other susbection of s. 78. Yet his explanation seemed to me to increase the frailty of his main contention. It was that whereas the initial 'Subject to' in s. 78(1) was general and forward–looking, referring to the subsequent subsections, the 'Subject to' in sub–s(4) was specific and backward–looking, referring back to two identified subsections. Therefore, he said, the former 'Subject to' was free from the warranty of conflict that the latter gave. I cannot see why the simple phrase 'subject to' should be subject to such delicate adjustments; and if it were, I can foresee trouble, if, say, sub–s (6) of a section with ten subsections began 'Subject to sub–s (1) above and to the following provisions of this section'.
>
> In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision the phrase shows what is to prevail. The phrase provides no warranty of universal collision. Where it appears in the opening words of s. 78(4), it does nothing, in my judgment, to demonstrate that sub–s (2) allows an apportionment to be made even if there has been no shortfall."

In a more recent case, *C. & J. Clark Ltd.* v. *Inland Revenue Commissioners*, [1975] 1 All E.R. 801, the decision of Megarry, J. was confirmed.

In the light of the judicial authorities, and having in mind the argument of counsel that the appointing powers were validly taken out of the competence of the Commission because Law 48/63 was enacted after 1960, I have reached the conclusion that

the true construction of Article 125.1 in view of its subject matter and of the surrounding circumstances with reference to which it was made, cannot take anything away from the competence of the Commission which was expressly referred to in Article 125.1 of the Constitution, but in my view it can only regulate the exercise of its competence. On this point, I find myself in agreement with the President of this Court when he said that it was not possible to vest validly in the Governor of the Central Bank the powers set out in s. 15(2) of Law 48/63 at that time. I would, therefore, dismiss that contention because in a conflict of this kind between the existing law and the Constitution, the latter must prevail.

But the fact remains that the sub judice appointments of appellants 1 & 2 have been effected by the Governor at a time when the Commission set up originally under the Constitution was not functioning and had ceased to exist as provided by Articles 122–125 of the Constitution. In trying to solve this problem, I find myself in this difficulty, that section 15(2) of Law 48/63 when enacted, it was, to use a metaphor, born unconstitutional, and in 1970, one should carefully examine the possiblility as to whether because of the law of necessity, and once a new Commission was created under Law 33/67, the said appointments were in effect valid, and that the said section 15(2) on which the administrative act was based was no longer unconstitutional. It is true that Law 33/67 repealed expressly Law 72/65 which was enacted for the very same reasons based on the doctrine of necessity connected with the crisis of Cyprus. No doubt in section 2 of Law 33/67 "Public Service" is defined in a different way than in Article 122 of the Constitution, and perhaps it was made with the intention to fit the present circumstances prevailing in Cyprus. See particularly ss. 2, 3 and 5. Once therefore, the Commission, which was set up under the Constitution, ceased to exist and did not function since 1965, for reasons of necessity, I turn for guidance first to the case of *Mustafa Ibrahim and Others*, 1964 C.L.R. 195. In that case Josephides, J., in expounding the principle of necessity said at pp. 257–258:–

> " Judicial decisions in various countries have acknowledged that in abnormal conditions exceptional circumstances impose on those exercising the power of the State the duty to take exceptional measures for the salvation of the country on the strength of the above maxim." (Salus populi est suprema lex).

Then, having dealt with the position in France, Italy, Germany and England, he turned to the position in Greece and said at p. 261:-

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

Furthermore, he says at p. 264:-

" In the light of the principles of the law of necessity as applied in other countries and having regard to the provisions of the constitution of the Republic of Cyprus (including the provisions of Articles 179, 182, and 183), I interpret our constitution to include the doctrine of necessity in exceptional circumstances, which is an implied exception to particular provisions of the constitution; and this in order to ensure the very existence of the State. The following prerequisites must be satisfied before this doctrine may become applicable:

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

(b) no other remedy to apply;

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

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

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

Finally, he concluded as follows at p. 268:-

" I have no hesitation in arriving at the conclusion that in these exceptional circumstances it was the duty of the Government, through its legislative organ, to take all measures which were absolutely necessary and indispensable for the normal and unobstructed administration of justice. I agree with the submission of respondent's counsel that the measures taken should be for the duration of the necessity and no more. This is also conceded by the learned Attorney-General of the Republic.

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

I think that I should turn now to consider the authorities which deal with the powers of the Commission under the legislation in 1965 and under the new Law 33/67.

In *Yervant Bagdassarian* v. *The Electricity Authority of Cyprus and Another*, (1968) 3 C.L.R. 736, Triantafyllides, J., (as he then was) dealt with the question of the competence of the Commission to appoint after the promulgation of the said law, and having left open the question of constitutionality of appointments, said at pp. 743-744:-

" Moreover, in section 5 of Law 33/67, which lays down the powers of the 'Commission' appointed under such Law, no reference at all is made to Article 125 of the Constitution; and though the provisions of such section 5 are in many respects similar to the corresponding provisions in Article

125, nevertheless there arises the following most material, for the purposes of the present case, difference: By reading section 5 of Law 33/67 together with the relevant definitions in section 2 of the Law, and by comparing the position thus resulting with that which results when Article 125 is read together with the relevant definitions in Article 122, one is led inevitably to the conclusion that the 'Public Service Commission' set up, as from the 1st July, 1967, under Law 33/67, possesses competence over members of the 'public service', which is defined in such Law in a manner not including the personnel of the Authority, whereas under Article 125 the Public Service Commission is entrusted with competence over the personnel of the Authority, in view of the definition of 'public service' in Article 122.

It follows, therefore, that when the *sub judice* appointment was made, after the promulgation of Law 33/67, there was not in existence a Public Service Commission empowered under Article 125 to make such an appointment, but only a 'Public Service Commission' set up under Law 33/67 and not so empowered.

The next question to be answered is: was the Authority competent to make the said appointment?

In this respect the argument has been advanced that, in the circumstances, it was so competent, in view of the doctrine of necessity and because of relevant provisions to be found in the specific legislation providing for the existence of the Authority—such provisions having not, admittedly, been operative, for the purpose, previously, before the enactment of Law 33/67 and while there was functioning a Public Service Commission exercising the powers under Article 125 in respect of the personnel of the Authority (see also *Markoullides and The Republic*, 3 R.S.C.C. 30, *Stamatiou and The Electricity Authority of Cyprus*, 3 R.S.C.C. 44).

As the application of the doctrine of necessity involves an examination of the special circumstances in relation to which it is being invoked, I find myself unable, on the basis of the material before me, as yet, in these proceedings, to decide whether or not the Authority had competence to make the appointment in question."

Then he concluded in these terms at p. 745:-

" On the other hand, it is clear that once the 'Public Service Commission', which was set up under Law 33/67, was not competent to act in the matter concerned, and once—in the light of what has already been stated in this Decision—at the material time no other Public Service Commission was in existence, this recourse cannot succeed as against Respondent 2, in respect of the decision to appoint the Interested Party, or even in respect of an omission (as alleged by claim (2) of the motion for relief) to appoint the Applicant as Section Head in the Service of the Authority.

This recourse, therefore, fails and is dismissed as regards Respondent 2."

In the case of *Papapantelis* v. *The Republic*, (1966) 3 C.L.R. 515 which was decided before the enactment of Law 33/67, the Court, in dealing with the question that the promotions were justified under the law of necessity, said at p. 519:-

" I do fail to see how the 'law of necessity' could have warranted the making of permanent promotions to the existing, at the time, vacancies in the post of Assistant Labour Officer; any urgent needs of the service could have been met by temporary acting appointments and that is all that, in my view, could have been justified in the circumstances under the 'law of necessity', provided all the other prerequisites for its operation had also been satisfied, too.

In the result, the decision to promote the Interested Parties to the post of Assistant Labour Officer is declared to be null and void and of no effect whatsoever."

As I said earlier, the trial Judge, in the case in hand, in reaching the conclusion that the law of necessity did not permit the Governor of the Bank to appoint or promote on a permanent basis the two interested parties, relied on *Iosif* v. *CYTA* (*supra*). It appears that in that case the Board of CYTA made two permanent appointments to the post of Clerk-Supervisor, exercising their powers under s. 10(1) of CYTA Cap. 302 (as amended), after the enactment of the Public Service Law, 1967. The trial Judge, in annulling the said *sub judice* appointments in that case as being made in an invalid manner, had before him these two questions:-

" Firstly, that the Respondent was entitled to take action,

regarding the appointments in question, by virtue of the doctrine of necessity; and secondly, that the Respondent made the said appointments in the exercise of statutory powers to be found in the legislation providing for the existence and functioning of the Respondent."

Triantafyllides, J., in answering first the second question, said at p. 230:-

" The relevant legislation is the Telecommunications Service Law (Cap. 302), and particularly section 10(1) thereof.

The said provision originally read as follows:

'The Authority shall appoint a General Manager, a Secretary, and such other officers and servants as may be necessary for the purposes of this Law.'

By means of section 4 of the Telecommunications Service (Amendment) Law, 1963 (Law 25/63), for this provision the following one was substituted as section 10(1) of Cap. 302:-

'There shall be appointed a General Manager, a Secretary and such other officers and servants of the Authority as may be necessary for the purposes of this Law.'

It is clear that, as at the time of the promulgation of Law 25/63, on the 16th May, 1963, there was in existence and functioning a Public Service Commission exercising, under Article 125, exclusively, powers regarding, *inter alia*, the appointments of the officers and servants of the Respondent, it was envisaged that the relevant appointments would be made by the Commission, and not by the Respondent.

So, in fact, there was not in existence any legislation at all, in November, 1967, enabling the Respondent to make the *sub judice* appointments, as it has done."

Then, turning to the first question, that is to say the question of the doctrine of necessity, the learned Judge goes on:-

" A necessity which would go so far as to give legal validity to the relevant action taken by the Respondent in the present instance ought to have amounted to a situation caused by exceptional circumstances which could not be otherwise dealt with (see The *Attorney-General* v. *Ibrahim*, 1964

C.L.R. 195); and on the present occasion, even if one were to regard as a situation caused by exceptional circumstances the non-existence, after the promulgation of Law 33/67, of a Public Service Commission empowered to act under Article 125 as the appointing authority in relation to the staff of the Respondent, the obvious remedy, which ought first to have been urgently resorted to, was to draw the attention of the appropriate authorities of the Republic to the need to remedy the situation in such manner as they would deem best and in the meantime to take no steps other than measures of a temporary character, limited to the duration of the situation brought about by the exceptional circumstances and proportionate thereto (see the *Ibrahim* case, *supra*)."

Finally, having quoted a number of authorities, and having particularly drawn attention to the *Papapantelis* case (*supra*) regarding the point of making permanent promotions, he concludes in these words at p. 231:-

> " Likewise in the circumstances of the present case I am not satisfied that the doctrime (or law) of necessity could have warranted the decision to promote the two Interested Parties to Clerks-Supervisors on a permanent basis, and not only on a temporary basis—if at all."

Before leaving this case, I should have added that the learned Judge proceeded to deal also with ss. 4 & 5 of the Public Service Commission (Temporary Provisions) Law, 1965, and having left the question entirely open as to whether the appointments already made prior to the coming into effect of s. 4 of the said law should be deemed as having been made on the basis of its provisions, nevertheless, he says at p. 234:-

> " I have no difficulty in concluding that section 4 of Law 61/70 cannot apply in the present case so as to render valid the *sub judice* promotions.
>
> In the result, the recourse succeeds and the said promotions are annulled."

In *Messaritou* v. *The Cyprus Broadcasting Corporation*, (1972) 3 C.L.R. 100 (referred to by the trial Judge in the case in hand) which was decided under the provisions of Law 61/70, the question before the learned trial Judge was the unconstitutionality of sections 2, 3 and 4 of the said law as being contrary to Arti-

cles 122 and 125. This case has been heard—all counsel having agreed—on the issue of unconstitutionality only. In this case the applicant was seeking the annulment of the promotion of the interested party.

It was agreed by all counsel at the outset that this law could be defended as being constitutional if its enactment was justified only by the law of necessity. The main complaint of counsel for the applicant was that it was not enough for the legislator to invoke the law of necessity. It was the duty of the Court to satisfy itself as to the necessity, and application of the doctrine of necessity had to be examined in relation to the circumstances of the particular case in issue and on the material before it. He further argued that even if it was necessary to have a caretaking body, the *sub judice* promotion was not necessary to be made for the functioning of the respondent organization and, therefore, even if there was necessity for other functions, there was no necessity for this particular case. In fact, counsel in effect was raising the question that the measures taken by the *sub judice* provisions were wider than required to meet any necessity which may have existed.

A. Loizou, J., in answering the question and having reviewed and distinguished *Bagdassarian* and *Iosif* cases (*supra*), as well as quoting certain passages from the three judgments delivered in the *Ibrahim* case (*supra*) on the question of law of necessity, said at p. 114:–

> " I am satisfied that in enacting the law under consideration the Government obviously acted within the narrow limit of the discretion it possesses, regarding the appropriate measure to be adopted for the purpose of meeting such necessity. Instead of improvising new methods it was, to my mind, reasonable to revert to the pre-existing state of affairs with the existence of a Joint Consultative Selection Committee in which both the Staff Trade Union and the Managerial side of the Respondent Corporation (see *exhibit* D attached to opposition) are represented. It cannot be said that the measure taken is wider than what it should have been, or that it was, in the circumstances, unreasonable to entrust personnel matters to the Governing bodies of the three public authorities in such a temporary way as shown by the preamble of the law. In the light of all the above the argument that sections 2, 3 and 4 of the Public Corpo-

rations (Regulation of Personnel Matters) Law of 1970 are unconstitutional fails."

Then, having posed the question as to whether each particular act done under the said law should be separately justified on the ground of necessity, he concludes his judgment as follows:-

" I cannot agree with such a proposition as in examining the circumstances which I have found satisfied the requirements of the doctrine of necessity, all the provisions of the law under consideration were considered and the pros and cons duly weighed in arriving at the conclusion that the scale has tipped on the side of accepting the justification of the enactment in view of the doctrine of necessity. It would have been too far fetched to say that the law is justified on that doctrine but every appointment, promotion or disciplinary procceding taken thereunder has to be justified as coming, or not, within the doctrine of necessity. There cannot be such a distinction and what has been said in the case of *Bagdassarian* (*supra*) and *Iosif* (*supra*) about the temporary or permanent character of the *sub judice* decisions in those two cases, cannot apply to the present case, as, in those cases, there was no enabling law, whereas, in the present case the *sub judice* promotion has been effected under the provisions of the said law. In my view, therefore, this second argument of learned counsel for the applicant must also fail."

Having reviewed the authorities at length, it seems to me that the learned Judge in following *Iosif's* case (*supra*), misconceived or failed to discern the real principle enunciated in that case, viz., that there was no legislation at all in force in November 1967 enabling the respondents (CYTA) to make the *sub judice* appointments, and that on the contrary, in the case in hand, Law 48/63—a post-Constitution law—was still remaining on the statute book.

I would turn now to consider Law 48/63. There is no doubt that once Law 48/63 was a post-Constitutional law, one could not have taken the view that it could be treated as being invalidated due to conflict with Article 125.1, by operation of Article 188 of the Constitution—which is applicable only to pre-Constitution laws. But the question remains whether that statute became *ipso facto void*, once when it was enacted it was in conflict with the Constitution. In spite of what I have said

earlier in this judgment that section 15(2) was unconstitutional, dut to the fact that the House of Representatives in legislating had to exercise its powers within the narrow limits laid down by the supreme law of the land, nevertheless, it is an arguable point that a statute which contravenes a provision of the Constitution does not *ipso facto* (that is to say without a judicial pronouncement to that effect) become void. It is only when it is declared to be void by a competent Court in a regular proceeding, that the effects of the Statute being unconstitutional are to take place. This view, I may add, is preferred in the United States of America and in India. But I would add that even in the United States, the law cannot be said to have been fully settled as to the consequences of a decision as to unconstitutionality of a statute as regards past transactions. In fact, Chief Justice Hughes, delivering the opinion of the Court in *Chicot Co. Drainage Dist.* v. *Baxter State Bank*, reported in 84 Law. Ed. U.S. 329 said at pp. 332–333:–

> "The Courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton* v. *Shelby County*, 118 US 425, 442, 30 L ed 178, 186 6 S Ct. 1121; *Chicago, I. & L.R. Co. v. Hacket*, 228 US 559, 566, 57 L ed. 966, 969, 33 S Ct 581. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations, deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of Courts, state and federal, and it is manifest from numerous decisions that an all–inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

It appears that in the earlier cases and authorities, a logical view was taken, namely that a statute which was declared unconstitutional was a nullity ab initio, in other words, the declaration related back and hit the statute from the moment of its enactment.

In *Norton* v. *Shelby County*, 30 Law. Ed. U.S. 178 it was held that "There can be no officer, either de facto or de jure, if there be no office to fill. The apparent existence of an office created by an Act of the Legislature, which has been decided to be unconstitutional, does not render it possible that there should be an officer de facto. An unconstitutional Act is in legal contemplation, as inoperative as though it had never passed."

It is to be added that the same principles apply when only a part of the statute is declared unconstitutional: see *Cargill Co.* v. *Minnesco*, 45 Law. Ed. U.S. 179–182, 619.

In Australia, which has, like Cyprus also a written constitution, in *South Australia* v. *The Commonwealth*, (1942) 65 C.L.R. 373, Latham C.J. said at p. 408:–

> " If either the Commonwealth Parliament or a State Parliament attempts to make a law which is not within its powers, the attempt fails, because the alleged law is unauthorized and is not a law at all. When both the Commonwealth Parliament and a State Parliament have power to make laws then, in case of inconsistency, the Commonwealth law prevails and the State law, to the extent of the inconsistency, is invalid (sec. 109).
>
> Common expressions, such as: 'The Courts have declared a statute invalid', sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a Court in his favour—but such a decision is not an element which produces invalidity in any law. The law is not valid until a Court pronounces against it—and thereafter invalid. If it is beyond power it is invalid ab initio."

See on this subject Basu, Commentary on the Constitution of India, 5th edn., Vol. 1 at p. 245 et seq. Furthermore, the position in Greece on this very issue is expounded by Prof. Sgouritsas in his textbook on Constitutional Law, (1965) 3rd edn. Vol. A

at p. 66 et seq., and expresses the view that if the Court declares that the law is unconstitutional, the said law does not apply and/or that it is not enforceable in that particular case only, but the declared unconstitutional continues to remain on the statute book. He further added that this system prevails not only in the United States of America, but has been adopted in some other countries as well.

I think I have said enough to show how difficult or thorny this point remains, and having not had the benefit of hearing argument on this particular issue—though I find the proposition in Australia as the more realistic one, viz., that once it was unconstitutional from the very beginning no Judgment of the Court was needed—nevertheless, I am not ready or indeed prepared to express a considered opinion on this issue.

It is true that in Cyprus the Supreme Court, under Article 146 of the Constitution, has exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, exercising any executive or administrative authority is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person. In doing so, the Supreme Court has followed the decisions of the Greek Council of State, i. e. it examines the constitutionality of a statute on which the administrative act was based in order to decide about the validity of such decision; and the question of unconstitutionality is considered only in relation to the issues raised in that recourse, and it is decided solely—as Prof. Sgouritsas put it in that particular case—only between the parties concerned.

Having voiced my difficulties and reservations in the surrounding circumstances of this case, I return to the question whether the said appointments were validly made because of the doctrine of necessity. Having taken the view that certain prerequisites must be satisfied before the doctrine of necessity may become applicable, I would add that the bank authorities had in mind in concrete cases before me, that this very same point was raised in those recourses, that is to say, that section 15(2) of Law 48/63 was unconstitutional. In spite of my observations that the bank authorities had to introduce legislation—once the said law was born unconstitutional—no steps were taken to re-enact that section, as in fact was the case with the enactment of the Public Corporations (Regulation of Personnel Matters)

Law, 1970 (Law 61/70)), which was enacted because the Public Service Commission set up under the Constitution had ceased to exist and function; and because the Commission set up under Law 33/67 had no competence over the personnel of public corporations. But the question remains whether these prerequisites are satisfied viz., (a) an imperative and inevitable necessity or exceptional circumstances; (b) no other remedy to apply; and (c) the measure taken must be proportionate to the necessity.

As I have pointed out earlier in the *Messaritou* case, A. Loizou, J., reached a correct conclusion that in enacting Law 71/70 the legislature was acting within the narrow limits of the discretion it possessed for the purpose of meeting such necessity, and I find myself in full agreement with his elaborate judgment in that case.

Having also read in advance the judgment of the President of this Court, I regret I find myself unable to agree that the present case is closely analogous to the case of *Messaritou* and that it was possible by means of the combined effect of ss. 2, 3 and 5 of Law 33/67, to introduce or to revive to operation of s. 15(2) of Law 48/63. This is the passage with which I disagree, where the learned President said:—

> "..... the position though not exactly the same, is, in my opinion, closely analogous. The Legislature, instead of enacting a new Law (such as Law 61/70) incorporating the provisions contained in section 15(2) of Law 48/63, has, in effect, rendered by means of the combined effect of sections 2, 3 and 5 of Law 33/67, inevitably applicable the already existing section 15(2) of Law 48/63, as a provision which had to be resorted to in the context of the then prevailing juridical situation and which was entirely different from that which was prevailing at the time when Law 48/63 was originally enacted. Thus, the only possible course which was open to the Governor of the appellant Central Bank (appellant 3), was to exercise the powers under section 15(2) of Law 48/63 in order to make the *sub judice* appointments, which could not be made, at that time, either under Article 125. 1 of the Constitution or under Law 33/67; and such course was, in my opinion, fully justifiable by the 'law of necessity.'"

I think, once the Commission had no competence over the

employees of the Central Bank, the authorities had the duty to take exceptional measures and not wait for such a long time to remedy that position. I have no hesitation, therefore, in reiterating that in those exceptional circumstances it was the duty of the bank authorities, through the legislative organ, to take all measures which were absolutely necessary and indespensable for the normal and unobstructed administration of the bank for the duration of the necessity. In these circumstances, I have grave doubts whether those prerequisites to which I had referred earlier were or could be really satisfied before the doctrine of necessity could become applicable.

With this reservation in mind, and because of the long delay in completing these cases which inevitably have interfered with the smooth running of the bank, I have decided—in spite of the difficulties and reservations I have made—not to dissent with the majority judgment. I would, therefore, declare that the *sub judice* appointments of the appellants 1 and 2 should not have been annulled by the trial Judge in the circumstances of this case.

For the reasons I have endeavoured to advance, I would allow the appeal.

A. LOIZOU, J.: I also agree with the judgment delivered by the President which I had the opportunity of reading in advance.

When the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law 61/70) was enacted, as a matter of necessity, in order to fill the vacuum created by the circumstances referred to in its preamble, there existed on the Statute Book section 15(2) of the Central Bank of Cyprus Law, 1963, the constitutionality of which was challenged and is under consideration in this case.

The enactment of Law 61/70 followed the decision in the case of *Bagdassarian* v. *The Electricity Authority of Cyprus* (1968) 3 C.L.R. 736 and preceded the decision in *Iosif* v. *The Cyprus Telecommunications Authority* (1970) 3 C.L.R. 225, though promulgated after judgment in that case was reserved.

This legislative measure which the Government in the exercise of its discretion, in the circumstances, adopted for the purpose of meeting the situation created by the fact that the Public Service Commission, empowered, to act under Article 125 of the Constitution, ceased to exist, does not include the Central Bank

of Cyprus among the Public Authorities whose smooth function with regard to matters relating to their personnel was to regulate. As Government must, however, be deemed aware of the existence of section 15(2) above, which was analogous to the way by which the situation was to be met by the new Law, it must be taken that it was considered, in the circumstances, superfluous for the Government to cover by Law 61/70 also the Central Bank.

MALACHTOS, J.: I also agree with the judgment just delivered by the President of the Court, which I had the advantage of reading in advance, and I have nothing to add.

TRIANTAFYLLIDES, P.: In the result the first instance decision appealed from is set aside and the recourse, out of which these proceedings on appeal have arisen, is fixed for further hearing, on the remaining issues, on December 2, 1976, at 3. 45 p.m.

Appeals allowed.