1982 November 13

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOS PAPAXENOPHONTOS AND OTHERS,
Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE COUNCIL OF MINISTERS,
THE MINISTER OF FINANCE, AND
THE MINISTER OF EDUCATION,
Respondents.

(*Cases Nos.* 454/81, 456/81 and 134/82).

Legislation—Delegated legislation—Must be intra vires the enabling statute—Pensions (Amendment) Regulations, 1981*—Made by the legislative Authority—Not the product of delegation or subsidiary legislation—No question of ultra vires arises.*

Constitutional Law—Constitutionality of legislation—Judicial Control—Principles applicable—Regulation 16(8) *and* 31 *of the Pensions Regulations as amended by regulations* 3 *and* 7, *respectively, of the Pensions (Amendment) Regulations,* 1981, *and section* 7(7) *of the Pensions (Secondary School Teachers) Law,* 1967 *(as amended by Law* 40/81), *to the extent that they exclude from their ambit civil servants and schoolmasters of secondary education who retired under section* 3 *of the Compensation (Entitled Officers) Law,* 1962*—Not contrary to Articles* 9 *and* 25 *of the Constitution—But they create a differentiation between these officers and the rest of the servants of the State for which there is no reasonable justification—Such different treatment involves invidious discrimination and is beyond the permissible margin of reasonable differentiation—Said Regulations and section unconstitutional because they are repugnant to the principle of equality as declared and safeguarded by Article* 28 *of the Constitution.*

The issues to be decided in these recourses were whether

regulations 16(8) and 31 of the Pensions Regulations as amended by regulations 3 and 7, respectively, of the Pensions (Amendment) Regulations 1981 and section 7(7) of the Pensions (Secondary School Teachers) Law, 1967 (Law 56/67), as amended by the Pensions (Secondary School Teachers) (Amendment) Law, 1981 (Law 40/81) to the extent that they exclude from their ambit respectively a civil servant and a schoolmaster of secondary education, who retired from the Government of the Colony of Cyprus under section 3 of the Compensation (Entitled Officers) Law, 1962 (Law 52/62) were (a) Unconstitutional as being repugnant to Articles 9, 25 and 26 of the Constitution; and (b) Unconstitutional as they were repugnant to the notion of equality as enunciated and safeguarded in Art 28.1 of the Constitution, as the applicants, who retired under Law 52/62 were discriminated adversely by the challenged provisions of these Laws; and, also, whether the Pensions (Amendment) Regulations, 1981 were ultra vires the empowering Law.

The above Regulations and s. 7(7) provided that if a civil servant or a teacher of secondary education, as the case may be, retired from the respective service and is reappointed after serving for not less than five years in the new post, on his retirement his previous service prior to his reappointment is taken into consideration in the computation of his pension on his final retirement, and any amount paid to him in the form of gratuity or otherwise should be refunded by him; but they excluded a civil servant and a school-master of secondary education, who retired from the Government of the Colony of Cyprus under s.3 of the Compensation (Entitled Officers) Law.

Held, (1) that the legislature can, without impairing its sovereignty, authorise other bodies to legislate; that delegated legislation must be intra vires the enabling statute; that the Pensions (Amendment) Regulations, 1981, were made by the legislative authority itself; that their power was not delegated; that section 13 provides that notwithstanding and without prejudice to the powers delegated to the Council of Ministers, the House of Representatives itself sanctioned a new set of regulations; that they are in no sense the product of delegation or subsidiary legislation but a Law enacted by the legislature itself; and that, therefore, the question of ultra vires does not enter at all.

(2) (*After stating the principles governing judicial control of constitutionality of statutes*–vide pp. 1048–1049 post). That Article 9 of the Constitution has no bearing on this case; that it delineates a scheme for social action enjoining the State to implement it; that likewise Article 25 is similarly irrelevant; that it safeguards freedom to exercise a profession or to carry on an occupation, trade or business; and that here nobody denied professional freedom to the applicants.

(3) That since the applicants were in the employ of the State before, at and after the establishment of the Republic; that since the severance of links with the service was made theoretical than real for they never interrupted their services to the State; that since the benefits under Law 52/62 were meant to compensate them for this compulsory in effect retirement; that since compensation is a lump sum - gratuity - admittedly more than the amount that each one would have received had he retired at that time under normal circumstances; and that since this is the only difference between applicants and the rest of the servants of the State to whom a right to pension for past services the 1981 legislation came to acknowledge they should have been given a similar option, more so as the applicants found themselves at a disadvantage as a result of the changes in the Government of the country; that there is an element of injustice and unfairness in the new scheme, specifically excluding them by regulation 16(8) and s. 7(7) of Law 40/81; that there was no reasonable justification for this differentiation; that the different treatment of the present applicants involves invidious discrimination and is beyond the permissible margin of reasonable differentiation; that though mathematical niceties cannot be used to declare a classification unreasonable at the same time mathematical niceties cannot labour in favour of unreasonable and arbitrary classification; accordingly regulation 16(8) as amended by regulation 3 of the Pensions (Amendment) Regulations, 1981, and regulation 31 as amended by regulation 4 of the Pensions (Amendment) Regulations, 1981, and s. 7(7) of the Pensions (Secondary School Teachers) (1967-1981) as amended by the Pensions (Secondary School Teachers) (Amendment) Law, 1981 (Law No. 40/81) are unconstitutional as they are repugnant to the principle of equality as declared and safeguarded by Article 28 of the Constitution; that these provisions

are severable from the rest of the Law and can be expunged without impairing the overall legislative scheme.

Sub judice decisions annulled.

Cases referred to:

Suleiman v. Republic, 2 R.S.C.C. 93;

Philokyprou v. Republic (1966) 3 C.L.R. 327;

Papapetrou v. Republic (1968) 3 C.L.R. 502;

Christodoulou v. Republic, 1 R.S.C.C. 1;

Spyrou and Others v. Republic (1973) 3 C.L.R. 627;

Fina (Cyprus) Ltd. v. Republic, 4 R.S.C.C. 26;

Chester v. Bateson [1920] 1 K.B. 829 at p. 838;

Newcastle Breweries Ltd. v. King [1920] 1 K.B. 854;

Utah Construction and Engineering Property Limited and Another v. Pataky [1965] 3 All E.R. 650;

Commissioners of Customs and Excise v. Cure and Deeley Ltd. [1962] 1 Q.B.D. 340;

Police v. Hondrou, 3 R.S.C.C. 82 at p. 86;

Board for Registration of Architects and Civil Engineers v. Kyriakides (1966) 3 C.L.R. 640 at p. 654;

Mikrommatis v. Republic, 2 R.S.C.C. 125;

Republic v. Arakian (1972) 3 C.L.R. 294;

Levy v. Louisiana, 391 U.S. 68, 20 L. Ed. 2d 436;

Lindslay v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79.

Recourses.

Recourses against the decision of the respondents whereby their offer to refund the gratuity received by them in 1963 and thus qualify for a pension for the period commencing in 1943 when they joined the Public Service was turned down.

A. S. Angelides, for the applicants.

M. Photiou, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. These three recourses sprang from the enactment and application of the Pensions (Amendment) (No. 2) Law, 1981 (Law No. 39/81) and the Pensions (Secondary School Teachers) (Amendment) Law, 1981 (Law No. 40/81).

Nicos Papaxenophontos on 10th August, 1981, by letter (exhibit No. 2) purported to exercise the right conferred by Law 39/81 and the Regulations amended thereby, offering to refund the gratuity received in 1963 and thus qualify for a pension for the period commencing in 1943 when he joined the service, serving uninterruptedly until his final retirement. By letter (exhibit No. 3) dated 18.9.1981 he was informed that, according to paragraph 8 of Pensions Regulation 16, as amended by Law No. 39/81, the Law had no application in his case as he had retired from the Government of the Colony of Cyprus under s. 3 of the Compensation (Entitled Officers) Law, 1962.

Papaxenophontos was at the material time the Head of the Department of Elementary Education. He, Leonidhas Koullis and Nicos Hji-Nicolas, Heads of the Department of Secondary Education and Technical and Vocational Education, respectively, filed Recourse No. 454/81.

On 9.10.1981 advocate, Mr. Angelides, addressed a letter (exhibit No. 4) to the Minister of Finance whereby he applied on behalf of a number of clients of his to be given the benefit to exercise the right conferred by Laws No. 39/81 and 40/81, *i.e. those who received gratuity to repay it and receive pension for the full period, both before and after the receipt of such gratuity.* Reasons in support of the application are set out in the said letter.

On 15.10.1981 Mr. Angelides made a similar application on behalf of Georghios N. Akathiotis, an educationalist.

Before the receipt of any reply Recourse No. 456/81 was filed by 15 of the persons on whose behalf the aforesaid applications were submitted to the Minister of Finance.

Objection was taken in Recourses No. 454/81 and 456/81 to the effect that, with the exception of applicant Papaxenophontos, the recourses of all the other applicants were premature.

On 4.1.1982 the Ministry of Finance replied to the aforesaid applications of 9.10.1981 and 15.10.1981 by exhibit No. 5 whereby the said applications were turned down as "σύμφωνα μὲ τὴν παράγραφο (8) τοῦ Κανονισμοῦ 16 τῶν περί Συντάξεων Κανονισμῶν, ὁ ὁποῖος ἐκτίθεται στὸν Καν. 3 τῶν περὶ

Συντάξεων (Τροποποιητικῶν) Κανονισμῶν τοῦ 1981 (Νόμος 39/81) καὶ ἐφαρμόζεται στὴν περίπτωση τῶν πελατῶν σας οἱ ὁποῖοι ἀνήκουν στὴ Δημόσια Ὑπηρεσία καὶ ἐπίσης σύμφωνα μὲ τὸ ἑδάφιο (7) τοῦ νέου ἄρθρου 7 τῶν περὶ Συντάξεων Καθηγητῶν Νόμων τοῦ 1967 ἕως 1981, τὸ ὁποῖο ἐκτίθεται στὸ ἄρθρο 5 τοῦ περὶ Συντάξεων Καθηγητῶν (Τροποποιητικοῦ) Νόμου Ἀρ. 40/81, καὶ τὸ ὁποῖο ἐφαρμόζεται στὴν περίπτωση τῶν πελατῶν σας ποὺ ἀνήκουν στὴ Δημόσια Ἐκπαιδευτικὴ Ὑπηρεσία, ὁ Κανονισμὸς 16 καὶ τὸ ἄρθρο 7, ἀντίστοιχα, δὲν ἐφαρμόζονται στὴν περίπτωσή τους γιατὶ ἀφυπηρέτησαν ἀπὸ τὴν ὑπηρεσία τῆς Κυβερνήσεως τῆς Ἀποικίας τῆς Κύπρου δυνάμει τοῦ ἄρθρου 3 τοῦ περὶ Ἀποζημιώσεως Δικαιούχων Ὑπαλλήλων Νόμου καὶ ἔτυχαν δικαίας ἀποζημιώσεως δυνάμει τοῦ ἄρθρου 192.3 τοῦ Συντάγματος".

("in accordance with paragraph 8 of regulation 16 of the Pensions Regulations, as set out in reg. 3 of the Pensions (Amendment) Regulations, 1981 (Law 39/81) and which is applicable in the case of your clients who belong to the Public Service and also in accordance with sub-section (7) of the new section 7 of the Pensions (Secondary School Teachers) (Amendment) Law, No. 40/81 and which is applicable in the case of your clients who belong to the Public Educational Service, regulation 16 and section 7 respectively, do not apply in their case because they retired from the service of the Government of the Colony of Cyprus by virtue of section 3 of the Compensation (Entitled Officers) Law and they had received a just compensation under Article 192.3 of the Constitution").

On receipt of this letter Recourse No. 134/82 was filed by 17 applicants, i.e. applicants No. 2 and 3 in Case No. 454/81 and all the applicants in Case No. 456/81. At no stage of the proceedings, however, the two aforesaid cases were withdrawn after the filing of Case No. 134/82. All three recourses were heard together. Though separate oppositions were filed in each case, all three were heard together.

Reference will be made to the applicants in their numerical order in Recourse No. 134/82. Papaxenophontos is the only remaining applicant for all intents and purposes in the first recourse.

This country was under the British administration occupied

as a Crown Colony until 15.8.1960. On 11.2.1959, after a long struggle by the people of this country, the Zurich Agreement was reached between the Prime Ministers of Greece and Turkey, subsequently accepted, on 19.2.1959, by the Colonial Government—the Government of the United Kingdom —and by the two leaders of the two main communities of the island—Archbishop Makarios for the Greek community and Dr. Fadil Kutchuk for the Turkish community. These agreements are known as the Zurich and London Agreements. They were published in Cmnd 679. The Colonial Government (U.K.) made a statement dated 17.2.1959 which refers also to the civil service in the following terms:-

> "That provision shall be made for the protection of the interests of the members of the public services in Cyprus".

In the Transitional Provisions of the Constitution, which came into force on the establishment of the new State—the Republic of Cyprus—Art. 192 purported to implement the aforesaid statement and undertaking.

The unitary Government of the Colonial Rule was in the structure of the new State transformed into a sui generis constitutional order: the Government of the Republic and two Communal Chambers—the Greek and Turkish Communal Chambers. Strictly separate functions were assigned to the two Communal Chambers. The Communal Chambers had, in relation to their respective community, competence to exercise power with regard, inter alia, to all educational, cultural and teaching matters—(Art. 87.1(b)).

On the day prior to the date of the coming into operation of the Constitution and the establishment of the Republic (16.8.1960), Papaxenophontos, Panayiotis Vassiliades, Alexandros Ioannou, Antonis Michaelides, Christakis Philokyprou and Leonidhas Koullis were civil servants and the other applicants were teachers. With the new constitutional structure all the applicants found themselves in the service of the Greek Communal Chamber. They did not elect to do so but by operation of the Constitution the functions they were performing came within the competence of the Greek Communal Chamber. Their position is set out in Art. 192, paragraphs 1, 3 and 4 of the Constitution.

The provisions of Article 192.1 applied to, and were designed to safeguard the rights of, officers who, having held an office in the public service of Cyprus prior to the 16th August, 1960, continued in such office in the public service of the Republic on or after that date.

The provisions of Article 192.3, with regard to the rights for "just compensation or pension on abolition of office terms", read in conjunction with Art. 192.4, applied to, and were vested in, all officers mentioned in paras. 1 and 2 of Article 192, who, not having continued in the public service of the Republic, were not appointed in it, and included officers whose offices, by operation of the Constitution, came within the competence of a Communal Chamber. Where an officer whose office by operation of the Constitution came within the competence of the Communal Chambers, was appointed in the public service of the Republic as contemplated by Art. 192.3, his appointment should be such as would entitle him to the same terms and conditions of service as were applicable to him immediately prior to the 16th August, 1960, and to which he would have been entitled under Art. 192.1, had he continued in the public service of the Republic, and involving also the performance of duties of the same general nature. (*Ali Suleiman of Limassol* v. *The Republic of Cyprus*, 2 R.S.C.C. 93; *Philokyprou* v. *The Republic of Cyprus*, (1966) 3 C.L.R. 327).

For the purpose of implementing Article 192.3 a Law was enacted in 1962, the Compensation (Entitled Officers) Law, 1962 (Law No. 52/62), regulating the discharge of the obligations of the Republic in the area under consideration. An entitled pensionable officer is one who held a permanent pensionable position in the public service on 15.8.1960, and covers those who were entitled either to a pension or a gratuity. Entitled pensionable officers were given an option to choose between two species of compensation, a pension and a gratuity, both calculable in accordance with the provisions of the Pensions Law, Cap. 311. Subsections 2, 3 and 4 made detailed provision for the computation of the compensation and the payment of interest for the period following 15.8.1960.

Law 52/62 cannot, and should not, be treated as being exhaustive of the scope of the application of Article 192, which does

not envisage a Law being necessary for its application. (*Papapetrou* v. *The Republic*, (1968) 3 C.L.R. 502).

A number of persons, who were affected by the operation of the new Constitution, the new governmental structure and Law 52/62, and who were entitled officers within the meaning of Law 52/62—including applicants No. 2, 3, 4, 6, 7, 9 and 11 in Case No. 134/82—filed Recourses No. 21/63, 26/63, 54/63, 102/63, 125/63, 135/63, 138/63, 139/63, 140/63, 149/63 and 207/62, claiming, inter alia, that the amounts prescribed by the provisions of Law 52/62 do not constitute "just compensation or pension" within the meaning of Art. 192.3 of the Constitution, and that the assessment of the amount of just compensation and pension and/or the conditions attached to the payment thereof were unconstitutional, contrary to Articles 6, 25, 28 and 192 of the Constitution.

The events of December, 1963, and the following abstention of the Turkish civil servants from their duty created a new situation. The Greek Communal Chamber in a short period ceased to function, it dissolved and its functions were transferred and taken up by various organs of the Government of the Republic—(see Law No. 12/65). A Ministry of Education was established that succeeded the Greek Communal Chamber on educational and teaching matters.

The aforenumbered recourses were settled in 1966. By the settlement the Government admitted that the posts held by the said officers, which included Inspectors and Assistant Inspectors of Elementary Schools and Advisers, Teaching staff, i.e. Lecturers and Assistant Lecturers, Teacher's Training College, Teachers, Technical Education, Masters and Assistant Masters, Handicraft Teachers and Instructors, "are pensionable and will take steps so to declare them under the provisions of the Pensions Law, Cap. 311, so that officers established in them may qualify for pension on retirement".

The Pensions (Secondary School Teachers) Law, 1967 (Law No. 56/67) was enacted thereafter. The Pensions Regulations (Cap. 311) were amended by the addition of regulation 31. In 1981 the Pensions (Amendment) Law (No. 2), 1981 (Law No. 39/81) and the Pensions (Secondary School Teachers) (Amendment) Law, 1981 (Law No. 40/81) were enacted. The

Pensions Regulations of the Pensions Law, Cap. 311, were amended by the legislature in virtue of the provisions of s.13 of Law 39/81.

The new reg. 16 and the new s.7 of the Pensions (Secondary Education Teachers) Law, as amended by s.5 of Law 40/81, are identical. They provide that if a civil servant or a teacher of secondary education, as the case may be, retired from the respective service and is reappointed after serving for not less than five years in the new post, on his retirement his previous service prior to his reappointment is taken into consideration in the computation of his pension on his final retirement, and any amount paid to him in the form of gratuity or otherwise should be refunded by him. He has, however, immediately after his reappointment or within three months from the coming into operation of the Pensions (Amendment) Regulations, 1981, and Law No. 40/81 to notify the Accountant-General in writing of his such option. Regulation 16(8) and s.7(7) exclude a civil servant and a school-master of secondary education, who retired from the Government of the Colony of Cyprus under s.3 of the Compensation (Entitled Officers) Law.

The new regulation 31 and s.3 of the Pensions (Secondary Education School Teachers) Law, as amended by Law 40/81, which are identical in their wording, provide that a civil servant or a teacher who retired in virtue of s.3 of Law 52/62 who, without interruption was appointed in the service of the Greek Communal Chamber and the Government of the Republic, finally retires from a pensionable post, from his service in the Greek Communal Chamber and the Government of the Republic, is deducted any period taken into consideration for the computation of any benefit of retirement or compensation granted on his retirement from the service of the Government of the Colony of Cyprus. This last provision is given retrospective effect from 1.9.1961.

All the applicants are entitled officers under Law 52/62. They received the pension—compensation—provided by that Law but not for loss of career. Within the time prescribed by the relevant legislation they applied as aforesaid and their applications were turned down as their cases are specifically excluded by this new legislation.

By these recourses they challenge the validity of the administrative decisions mainly on the following grounds:-

(a) That the Pensions (Amendment) Regulations, 1981, are ultra vires the empowering Law;

(b) That they are unconstitutional as being repugnant to Articles 9, 25 and 26 of the Constitution; and,

(c) That they are unconstitutional as they are repugnant to the notion of equality as enunciated and safeguarded in Art. 28.1 of the Constitution, as the applicants were discriminated adversely by the challenged provisions of these Laws.

(a) *Ultra Vires:*

A sub judice decision has to be annulled and be declared to be null and void and of no effect whatsoever if it was based on an invalid enactment. (*Christodoulou* v. *The Republic*, 1 R.S.C.C. 1; *Spyrou & Others* v. *The Republic* (1973) 3 C.L.R. 627).

The legislature can, without impairing its sovereignty, authorise other bodies to legislate. Delegated legislation must be intra vires the enabling statute. When subsidiary legislation is examined with a view to determining whether it is intra or ultra vires, the answer to the question depends, in every case, on the true construction of the relevant enabling enactment. If delegated legislation interferes with a fundamental right, such as the right to property, any doubt arising as to the ambit and effect of the relevant enactment must be resolved in favour of the liberties of the citizen. (*Fina (Cyprus) Ltd.* v. *The Republic*, 4 R.S.C.C. 26; *Chester* v. *Bateson*, [1920] 1 K.B. 829, at p. 838; *Newcastle Breweries, Ltd.* v. *The King*, [1920] 1 K.B. 854).

In examining whether or not delegated legislation is ultra vires the enabling enactment, the state of the law at the time when such enactment was passed and the changes which it was passed to effect as well as the structure of such enactment as a whole, have particularly to be borne in mind. (*Utah Construction and Engineering Property Limited and Another* v. *Pataky*, [1965] 3 All E.R. 650). Delegated legislation may be challenged for substantive ultra vires, that is, on the ground that it goes

beyond the powers granted by the legislature. (*Commissioners of Customs and Excise* v. *Cure and Deeley Ltd.*, [1962] 1 Q.B.D. 340).

It was submitted by counsel for the applicants that the Pensions Regulations (Amendment), 1981, made by the legislative authority in virtue of s.13 of Law 39/81 are ultra vires as they are beyond the scope of s.3 of the Law which empowers the Council of Ministers to make regulations.

Section 3 empowers the Council of Ministers from time to time to amend, add to or revoke by regulations the Pensions Regulations. Subsection (2) thereof provides that "all Regulations made thereunder shall have the same force and effect as if they were contained in the Schedule to that Law and the expression 'this Law' shall be construed as including a reference to the Schedule". "Law" includes a public instrument. "Law" means any enactment by a competent legislative authority and when the term "the Law" is used in a public instrument, it means the Law under the authority of which such public instrument has been made.

The Pensions (Amendment) Regulations, 1981, were made by the legislative authority itself. Their power was not delegated. Section 13 provides that notwithstanding and without prejudice to the powers delegated to the Council of Ministers, the House of Representatives itself sanctioned a new set of regulations. They are in no sense the product of delegation or subsidiary legislation but a Law enacted by the legislature itself; therefore, the question of ultra vires does not enter at all.

(b) The Courts established in our country, like Courts in every country with a written Constitution, in examining the constitutionality of a Law have to abide by certain well settled principles. It is not upon the Court to consider the object or the wisdom of the legislature. The task of the Court is only to find out if any provision runs contrary to the rights enunciated and ensured by the Constitution.

"It is only the people of a country themselves, through their elected legislators, who can decide to what extent its fundamental rights and liberties, as safeguarded by the Constitution, should

be restricted or limited and this principle is inherently contained in all constitutions, such as ours, which expressly safeguard the fundamental rights and liberties and adopt the doctrine of the separation of powers.

In the opinion of the Court, therefore, the expression 'imposed by law' in paragraph 3 of Article 23, the expression 'prescribed by law' in paragraph 2 of Article 25 and like expressions in other Articles of Part II of the Constitution, mean, in so far as laying down and defining the extent and framework of the particular restriction or limitation is concerned, a law of the House of Representatives. This does not, however, prevent the House of Representatives from delegating its power to legislate in respect of prescribing the form and manner of, and the making of other detailed provisions for, the carrying into effect and applying the particular restriction or limitation within the framework as laid down by such law, e.g. the addition of further items or instances falling within the restriction or limitation in question. Such a course is presumed to be included in the will of the people as expressed through the particular law of its elected representatives." (*Police v. Hondrou*, 3 R.S.C.C. 82, at 86).

In every case in which the Court is dealing with the issue of alleged unconstitutionality, it has to be borne in mind that there is a presumption of constitutionality in favour of the provision concerned, and that such provision can only be declared unconstitutional if the Court is persuaded of its unconstitutionality beyond reasonable doubt. (*Board for Registration of Architects and Civil Engineers v. Kyriakides*, (1966) 3 C.L.R. 640, at p. 654).

Article 9 of the Constitution has no bearing on this case. It delineates a scheme for social action enjoining the State to implement it. Likewise Article 25 is similarly irrelevant. It safeguards freedom to exercise a profession or to carry on an occupation, trade or business. Here nobody denied professional freedom to the applicants.

(c) *Principle of Equality:*

The principle of equality, enunciated and safeguarded by Article 28 of the Constitution, was first judicially considered in

Mikrommatis case, 2 R.S.C C. 125, a case concerning income tax; it was said:-

> "In the opinion of the Court the term 'equal before the law' in paragraph 1 of Article 28 does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things. Likewise, the term 'discrimination' in paragraph 2 of Article 28 does not exclude reasonable distinctions as aforesaid".

The principle of equality was considered in numerous cases including *The Republic (Ministry of Finance) v. Nishan Arakian and Others*, (1972) 3 C.L.R. 294, where the Full Bench adopted the above passage from *Mikrommatis* case and the following extracts from *Levy v. Louisiana*, 391 U.S. 68, 20 L. ed. 2d. 436:-

> "In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications".

The European Court of Human Rights of the Council of Europe in the *Belgian Linguistic case said:-*

> "... The Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification".

Justice Van Devanter in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-9, laid down the following guiding rules by which contentions that statutory distinctions were unconstitutional should be tested:-

> "1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or

because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary".

The principle of equality has at its core justice and fairness. Laws 39/81 and 40/81 are designed as laws of general application to regulate matters relevant to the pension of public officers and those in the educational service. They cover all civil servants and all secondary education teachers. Only a small group of them is left out. Was it open to the State to make this exception or was the exception discriminatory? This is the question we must answer.

The applicants were in the employ of the State before, at and after the establishment of the Republic. The severance of links with the service was made theoretical than real for they never interrupted their services to the State. The benefits under Law 52/62 were meant to compensate them for this compulsory in effect retirement. That compensation is a lump sum - gratuity - admittedly more than the amount that each one would have received had he retired at that time under normal circumstances. This is the only difference between applicants and the rest of the servants of the State to whom a right to pension for past services the 1981 legislation came to acknowledge. Why should the applicants not be given a similar option more so as the applicants found themselves at a disadvantage as a result of the changes in the Government of the country? There is an element of injustice and unfairness in the new scheme specifically excluding them by regulation 16(8) and s.7(7) of Law 40/41. Was there any reasonable justification for this differentiation?

The State in 1966 entered into a contract in the form of settlement with a number of applicants. A fair construction of this agreement ("A", "B" and "C" of exhibit No.7) leads to the conclusion that the State took upon itself to give to the applicants in those recourses - impliedly acknowledging a similar right to all officers similarly placed - the benefits of the

Pensions Law, Cap. 311, from time to time without any reservation as to any such rights. This undertaking was not honoured by the new Laws while pension rights were granted to others with interrupted service.

Some time would inevitably elapse between the date of retirement and the date of reappointment. Inflation has similarly affected all officers with interrupted service. The distinction made between the two classes appears to be arbitrary, especially in the context of legislation designed to regulate pension rights of officers with interrupted service. To leave a small group of persons out was tantamount to leaving out of the legislative scheme persons similarly circumstanced with a wider class of beneficiaries for no good reason.

The applicants share common and relevant properties and qualifications with the rest of the officers with interrupted service out of which they were specially selected to be cut off. There was no objective basis for leaving them out. The object of the Law, as it emerges from its wording, is to give the proper pension to a civil servant or a secondary education teacher at the time of his final retirement from service in the sense that the two periods of service are combined together and thus he obtains the benefit of a longer period of service. Furthermore his pension is reckoned by reference to his emoluments on the day of his final retirement; in order to do so, he has to refund with interest any amount which he received at the time of his premature first retirement. This is not only a permissible objective of the State but it accords to the notion of justice by an employer, particularly when that employer is the State. In my judgment the basis upon which the differentiation was made was too slender to qualify as a reasonable one.

Pension is given to secure a decent life when they are in an advanced age of their life, appropriate to the post they hold at the time of their retirement. The granting of a gratuity on early retirement to a civil servant and the computation of his pensionable years of service at the final retirement, if and when he is reappointed to the civil service, lead to an apparent injustice. It is this mischief that the new legislation intended to remedy. The aim of the legislature was to improve the security of civil servants and secondary education teachers. This

Law was passed by the new State - the Republic of Cyprus, the successor of the Colony of Cyprus.

I do not intend to impinge on the power of the legislature to form its own policy. I am only considering whether this Law contravenes fundamental rights and principles safeguarded by the Constitution. The evil in the case of these applicants, which the Law purposely avoided to remedy by its differentiation, is not of different dimensions and proportions to that of other persons to whom the benefits of the Law are extended. I am not referring to the past but also to the future and the general tenor and application of the Law.

The different treatment of the present applicants involves invidious discrimination and is beyond the permissible margin of reasonable differentiation. Mathematical niceties cannot be used to declare a classification unreasonable but at the same time mathematical niceties cannot labour in favour of unreasonable and arbitrary classification.

I have anxiously examined the implication of all issues relevant to constitutionality, never overlooking that it is for the legislature to legislate, being in the first place the best judges of the needs of the people. The role of the Court is to scrutinize the legislation from the view point of its constitutionality. This I have done. The manifest intention of the Law was, inter alia, to create a comprehensive pension scheme for all officers with interrupted service out of deference to the justice of their claim. All officers with interrupted service were entitled to equality treatment. Less than equal treatment was extended to a small class of persons. The differentiation offends both justice and fairness and in the end rests on premises that have no objective foundation.

For the aforesaid reasons I am of the opinion that both, regulation 16(8) as amended by regulation 3 of the Pensions (Amendment) Regulations, 1981, and regulation 31 as amended by regulation 7 of the Pensions (Amendment) Regulations, 1981, and s.7(7) of the Pensions (Secondary School Teachers) (1967-1981) as amended by the Pensions (Secondary School Teachers) (Amendment) Law, 1981 (Law No. 40/81) are unconstitutional as they are repugnant to the principle of equality

as declared and safeguarded by Article 28 of the Constitution. These provisions are severable from the rest of the Law and can be expunged without impairing the overall legislative scheme.

Therefore, the administrative decisions and acts of the respondents complained of, contained in the letters addressed to Papaxenophontos dated 18.9.81 and to advocate Angelides for his clients, the applicants in Recourse No. 134/82, (exhibits No. 3 and 5, respectively), based on the aforesaid unconstitutional legislative provisions are null and void and of no effect.

Sub judice decisions annulled;
No order as to costs.