1984 August 21

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOS VAKIS,

Applicant,

v.

THE PUBLIC SERVICE COMMISSION,

Respondents.

(*Case No.* 199/83).

Public Officers—Schemes of service—Their publication may be dispensed with—Article 57.4 *of the Constitution*—Economides *v.* Republic (1973) 3 C.L.R. 410 *followed.*

Preliminary to inquiring into the merits of the case the following question of law was set down for determination:

Is publication of a scheme of service a necessary condition for its validity?

Held, that there is power in Article 57.4 of the Constitution to dispense with the publication of a scheme of service (decision of the Full Bench of the Supreme Court in *Economides v. Republic* (1973) 3 C.L.R. 410 followed, in view of the doctrine of binding precedent which makes decisions of hierarchically superior Courts binding, notwithstanding the reservations of the Court about its correctness.)

Per Pikis, J.: This is not to suggest that the Council of Ministers should be encouraged in its practice to withhold publication of schemes of service. Soon after the establishment of the Cyprus Republic, the Supreme Constitutional Court indicated that it is desirable that schemes of service should be published for general information. With this approach, I am wholly in agreement for it is to everybody's interest that schemes of service should see light as soon as they are approved. Publication makes for open government - highly conducive to a sound Administration.

Order accordingly.

Cases referred to:

Economides v. Republic (1973) 3 C.L.R. 410;

Police v. Hondrou, 3 R.S.C.C. 82;

Papapetrou v. Republic, 2 R.S.C.C. 61;

PA.SY.D.Y. v. Republic (1978) 3 C.L.R. 27;

Ploussiou v. Central Bank of Cyprus (1983) 3 C.L.R. 398;

Arsalides and Another v. CY.T.A. (1983) 3 C.L.R. 510;

Republic v. Demetriades (1977) 3 C.L.R. 213;

Ogden Industries Pty Ltd. v. Loucas [1969] 1 All E.R. 121;

Miliangos v. George Frank (Textiles) Ltd. [1975] 3 All E.R. 801 at p. 803;

Baker and Another v. The Queen [1975] 3 All E.R. 55;

Ishin v. Republic, 2 R.S.C.C. 17.

Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Senior Agricultural Research Officer in preference and instead of the applicant.

A. Panayiotou, for the applicant.

N. Charalambous, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

PIKIS J. read the following judgment. Preliminary to inquiring into the merits of the case, a question of law of some importance affecting the substratum of the decision was, on the application of counsel, set down for determination:

> Is publication of a scheme of service a necessary condition for its validity?

If the answer is in the affirmative, the decision must be swept aside for, the scheme of service, on the basis of which the sub judice decision was taken, was not published.

The opposing submissions can with benefit be reduced to the following rival propositions: Applicant contends the scheme of service is invalid for lack of promulgation in the Gazette; publication is a condition of the validity of every law and, in the submission of counsel for the applicant, it is expressly required by s.86(1) of the Public Service Law - 33/67, providing for the publication of every Regulation made by the Council of Mi-

nisters in furtherance to the objects of the law. Inasmuch as the decision was founded on a void Regulation, it is likewise void, as well as everything flowing therefrom.

For the Republic it was submitted that notwithstanding the legislative character of a scheme of service, publication in the Gazette may be dispensed with in accordance with the express provisions of para. 4 of Article 57 of the Constitution, as authoritatively interpreted by the Full Bench of the Supreme Court in *Economides v. Republic* (1973) 3 C.L.R. 410. And in view of the decision of the Council of Ministers to withhold publication of the scheme of service under consideration, absence of publication left its validity unaffected. Counsel for the applicant rejoined that the application of the dispensing provisions of para. 4 is limited to decisions of a non legislative character. He drew a distinction in this respect between decisions of the Council of Ministers under Articles 54 and 57 of the Constitution, respectively.

I took time to consider the issue raised, considering its importance and far reaching implications. Having surveyed the juridical nature of a scheme of service and caselaw on the subject, I have come to the following conclusions:

A scheme of service is, because of its character and content, a piece of legislation, both in principle and on authority. "Legislative" is every act that prescribes rules of law. The hallmark of these rules lies in the universality of their application and impersonal character and exposition. They are contrasted with acts of application or implementation of the law, detailing the rights of individuals under the law, either personally, collectively or locally. Rules of law, on the other hand, refer to a genus or category of things objectively discernible. They are impersonal in that their application is dependent on the existence of a state of things at the time of their application.[1]

Despite the doctrine of separation of powers that underlines the allocation and exercise of State power under the Constitution, the House of Representatives is not the sole law-making body, although it is the power that retains ultimate control over

1. See, *Dagtoglou—General Administrative Law A*, 1977, pp. 54–59 and 72–73; *Sgouritsas—Constitutional Law*, Part B, 1964, p. 85.

legislation - See, *Police v. Hondrou,* 3 R.S.C.C. 82. The exercise of legislative power may be delegated by the House of Representatives to another body or it may be vested, as in the case of schemes of service, by the Constitution to the executive branch of Government (Article 54(a) and (d)). It is evident from *Papapetrou v. Republic,* 2 R.S.C.C. 61, that legislative power can be exercised by the Council of Ministers for the promotion or implementation of executive policy. The criterion for the classification of an act as legislative, is not a formal one, that is, its source of origin, but a substantive one, its content. In *Pankyprios Syntechnia Dimosion Ypallilon v. Republic* (1978) 3 C.L.R. 27, the Court pronounced that a scheme of service, is, for reasons similar to those propounded by Greek Courts, an act of legislation. Thus, the consensus of counsel on the matter is well founded. A scheme of service, it must be said, aims to establish legal norms at public law previously inexistent. The genesis of these rules does not derive from the application of the provisions of any other law, but stems from the exercise of the rule-making power that vests under the Constitution, in the Council of Ministers. The rules are general in content, articulated by reference to the needs of the Public Service.

Both under the Constitution and general principles of law, publication of legislation is a condition of its validity. Article 82 of the Constitution categorically provides that every law shall be published. Not only publication is mandatory under the Constitution, but the accrual of rights and imposition of duties is dependent on the date of the promulgation of the law in the Gazette, unless another day is set froth in the law itself. Publication is the final indispensable requisite for the genesis of a law. Our Statute Law as well, embodying in this regard fundamental principles of English law, envisages the publication of every law as a condition precedent to its validity. As s.7 of the Interpretation Law - Cap. 1 makes clear, publication is necessary for every piece of legislation, whether primary or secondary. In *Ploussiou v. The Central Bank of Cyprus* (1983) 3 C.L.R. 398, I noticed at some length the effect of Article 82 of the Constitution and s.7 of the Interpretation Law, and debated the implications of the wider principle involved*. The enactment of laws without publication would corrode the principle that

* Note, *Arsalides and Another* v. *CY.T.A.* (1983) 3 C.L.R. 510.

everybody is deemed to know the law and, more important still, it would undermine the right of the public to control legislation enacted in its name. Speaking of schemes of service the public has a vital interest to be acquainted with the conditions prescribed for manning the Public Service and, thus, voice an opinion on the quality of the Administration. The interest of the public in proper government cannot be overstated.

If it was not for the dispensing provisions of para. 4 of Article 57, no question would arise of amenity on the part of the Council of Ministers to dispense with the publication of a legislative act. Counsel for the applicant argued, as stated, that power to do away with the publication of a legislative act, is limited to purely administrative acts on a juxtaposition of the provisions of Articles 54 and 57 of the Constitution. His thesis is that the two Articles deal with separate matters and cover different spheres of activity. With this I cannot agree.

Article 54 defines the powers of the Council of Ministers in a broad perspective, whereas Article 57 regulates the manner of their exercise. The application of Article 57 is not, in terms or impliedly, limited to any particular aspect of the exercise of the powers of the Council of Ministers. Its application extends to every decision of the Council of Ministers and that includes decisions of a legislative content. Consequently, the submission must be dismissed, as indicated, on analysis of the relevant provisions of the Constitution. Nevertheless the problem does not end there. There is another aspect of Article 57 that merits scrutiny.

The power vested in the Council of Ministers under Article 57.4 to dispense with publication of a decision, is by the opening words of the paragraph in question limited to decisions enforceable in themselves. Automatic enforceability of the decision is a prerequisite to the exercise by the Council of Ministers of the power to do away with publication. And as no decision of a legislative content is enforceable in the absence of publication, a fair construction of para. 4 of Article 57 suggests that its application is limited to decisions of a non legislative nature. Article 82 of the Constitution makes publication of a law a condition of its validity. "Law", in the context of Article 82, is not limited to any particular type of legislation. It is all embracive; it applies to every species of legislation, irrespective of wherefrom

it emanates. On a literal interpretation, "law" encompasses every code containing binding legal norms. That the constitutional makers intended to ascribe to the word "law" its ordinary connotation, is supported by the definition of law in para. 5(a) of Article 188. In view of the above, it appears to me that as a matter of construction and interpretation of the provisions of para. 4 of Article 57, the power of the Council of Ministers to sanction the non publication of its decision, does not extend to decisions of a legislative character. However, this interpretation is not judicially open to this Court, in view of the decision of the Full Bench of the Supreme Court in *Economides v. The Republic* (1973) 3 C.L.R. 410, and the doctrine of judicial precedent.

The doctrine of stare decisees makes decisions of hierarchically superior Courts binding. The precedent set thereby must be followed by every Court whose decisions are subject to appeal to the superior Court that issued the judgment. The doctrine of binding precedent and its application in Cyprus were discussed at length in *The Republic* (*Minister of Finance and Another*) *v. Demetrios Demetriades* (1977) 3 C .L.R. 213. The Full Bench of the Supreme Court reaffirmed that the doctrine of binding precedent lies at the root of our legal system in much the same way as it does in England. It is unnecessary to examine in detail the views expressed by individual judges for they all agreed that Courts are bound to follow legal precedents set by hierarchically superior Courts. And the Full Bench of the Supreme Court, exercising revisional jurisdiction or appeal, is, vis-a-vis a single judge exercising revisional jurisdiction at first instance, a hierarchically superior Court.

Binding, it must be noted, is only that part of a judgment that constitutes the ratio decidendi of a case. The ratio of a case is the principle of law upon which the result of the case is founded. And if found on more than one principles, both are equally *binding*[1].

I shall not concern myself further in this judgment with the application in practice of the doctrine of binding precedent, a subject I had occasion to analyse in some detail in my book on the English common law and doctrines of equity and their

1. *Ogden Industries Pty Ltd.* v. *Lucas* [1969] 1 All E.R. 121 (P.C.); *Miliangos* v. *George Frank (Textiles) Ltd.* [1975] 3 All E.R. 801, 803 (H.L.).

application in Cyprus.[1] This is not to overlook the criticisms of the doctrine by Lord Denning and his repeated attempts to have it modified, not very successful, as he, himself, admits in his book[2]. Lord Denning adheres to the view that application of the doctrine of binding precedent conflicts with the all important duty of the Court to do justice in the particular circumstances of a case. On the other hand, one should not underestimate the importance of certainty in the law and the certainty it infuses in the exercise of rights conferred by law, as well as the guarantee it provides against arbitrariness. I shall not debate the subject further, unnecessary for the purposes of this judgment. I am glad, however, to note that greater freedom is nowadays acknowledged to Courts of final instance, in England as well as in Cyprus, to depart from previous decisions of their own[3].

Speaking of myself, I regard myself bound by the ratio of the decision of the Full Bench in *Economides*, supra, and I feel constrained to follow it notwithstanding my reservations about its correctness. The result of the case was expressly founded on the interpretation of para. 4 of Article 57, favoured by the Full Bench to the effect that there is power to dispense with the publication of schemes of service. That binds me to hold likewise. That the issue was not cast in the perspective set forth in this judgment, is no reason for departing from the decision of the Full Bench[4]. This is not to suggest that the Council of Ministers should be encouraged in its practice to withhold publication of schemes of service. Soon after the establishment of the Cyprus Republic, the Supreme Constitutional Court indicated that it is desirable that schemes of service should be published for general information[5]. With this approach, I am wholly in agreement for it is to everybody's interest that schemes of service should see light as soon as they are approved. Publication makes for open government - highly conducive to a sound Administration.

1. 1981 Proodos Press, written in Greek—See, in particular, Cap. 7 and p. 79 et seq.
2. *The Discipline of Law*—Part 7.
3. See, *Demetriades*, supra, and *The Statement of the Judicial Committee of the House of Lords*, appearing in [1966] 3 All E.R. 77.
4. See, *Baker And Another* v. *The Queen* [1975] 3 All E.R. 55 (P.C.)
5. *Ilter Ishin* v. *The Republic*, 2 R.S.C.C. 17.

For the reasons given above, the sub judice decision stands the preliminary test to which it has been exposed. A day will be be given for inquiring into the merits of the case. Let there be no order as to costs.

Order as above.