[VASSILIADES, P., TRIANTAFYLLIDES, JOSEPHIDES, LOIZOU AND HADJIANASTASSIOU, J.]

SOFOCLIS DEMETRIADES AND SON AND ANOTHER,

Appellants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF HEALTH,
2. THE PHARMACY AND POISONS BOARD,

Respondents.

(*Revisional Jurisdiction Appeal Nos.* 54 *and* 55).

Pharmacy and Poisons Law, Cap. 254 (*as amended by Law No.* 59 *of* 1962) *section* 4*A—Decision of Minister of Health not to amend the Second Schedule thereto—An exercise of legislative power—And not an "act or decision by an organ, authority or person exercising executive or administrative function" within the ambit of Article* 146.1 *of the Constitution—Such decision of the Minister, therefore, is not amenable to the jurisdiction of this Court on a recourse under that Article—Reasoning behind the case* Police and Hondrou, 3 *R.S.C.C.* 82, followed and applied; *see also the case* Eagle Automatic Games Co. Ltd. and Others and The Republic *decided by the former Supreme Constitutional Court on February* 9, 1962 (*unreported*)*—Test laid down in the case* Papaphilippou and Republic, 1 *R.S.C.C.* 62 *at p.* 64 *for ascertaining the legal nature of an act or decision* followed and applied.

Legislative act—Test for ascertaining the legal nature of an act (*or decision*)*—Test laid down in* Papaphilippou *case* ubi supra *followed and applied—See, also, hereabove.*

Recourse under Article 146 *of the Constitution—"Act or decision by an organ, authority or person exercising executive or administrative function"—Article* 146.1*—Meaning scope and effect—Tests and principles applicable.*

Administrative act or decision—"Act or decision of an organ, authority or person exercising executive or administrative function" within the ambit of Article 146.1 *of the Constitution—Acts or decisions alone as aforesaid can be challenged by recourse under Article*

146—*Legislative act—Acts or decisions done or taken by organ such as the Council of Ministers under powers delegated to them by legislation—How far such acts or decisions may be considered as being outside the ambit of Article* 146.1 *of the Constitution—Cf. Article* 54(*g*) *of the Constitution—See, also, hereabove.*

Delegated Legislation—Doctrine of—Reasoning behind both cases Hondrou and Eagle (supra) *followed and applied—See also hereabove.*

Drugs—Pharmacy and Poisons Law, Cap. 254 (*as amended by Law No.* 59 *of* 1962) *section* 4*A Second Schedule thereto—Powers of the Minister of Health in relation to such Schedule—Legal nature of such powers—They are of a legislative nature—See, also, hereabove.*

In these consolidated appeals the main contention of the Appellants was that the learned trial Judge (a Judge of the Supreme Court) in dismissing their recourses erroneously held that the decision of the Minister of Health (*infra*) not to include certain drugs in the Second Schedule to the Pharmacy and Poisons Law, Cap. 254 (as amended by Law No. 59 of 1962) section 4A were of a legislative nature, and as such, outside the ambit of Article 146.1 of the Constitution i.e. not amenable to the jurisdiction of the Court on a recourse under that Article. (The judgment appealed from is reported in (1968) 3 C.L.R. 727).

The said section 4A so far as material reads:

"4A. (1) Save as hereinafter provided no person other than a pharmacist shall sell any drugs to the public.

(2) Notwithstanding anything in the preceding sub-section contained, any person may sell to the public any of the drugs specified in the Second Schedule, on condition that such drugs are sold in their original containers or in containers in which they have been packed or repacked and sealed by a pharmacist:

Provided that the Minister may, on the advice of the Board and subject to the procedure hereinafter described, from time to time, amend, vary, revoke or replace the said Second Schedule.

(3)(a) The Minister, on the advice of the Board, shall prepare a notice for publication in the Official Gazette of

the Republic showing the intended amendments, variations, revocations or replacements in the Second Schedule.

(b) Before the publication of the aforesaid notice in the Official Gazette of the Republic the Minister shall cause a signed copy thereof to be delivered to the House of Representatives.

(c) If within 15 days from the receipt by the House of Representatives of the aforesaid notice no objection is raised by it, the President of the House of Representatives shall, in writing, inform the Minister of that fact, and the Minister shall proceed to publish the notice in the Official Gazette of the Republic. The notice so published shall constitute the amended; varied, revoked or replaced Second Schedule."

Article 146, paragraph 1 of the Constitution reads:–

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

The Appellants in the first case, who are dealers and importers of drugs applied under the proviso to section 4A(2) (*supra*) to the Minister of Health on October 13, 1964 requesting him to amend the second schedule to the aforesaid section 4A of the statute so that the articles known as "Pastilles Valda" "Renie Tablets" "Optrex Eye Lotion" and "Kruschen Salts" imported by them be included therein. The Respondent Minister in his reply dated November 13, 1965 stated that on the advice of the Pharmacy and Poisons Board he decided that none of the articles (drugs) in question be added to the said Schedule. On November 19, 1965 the Appellants in the first case feeling aggrieved by the aforesaid refusal of the Minister made a recourse under Article 146 of the Constitution challenging the validity of the aforementioned decision contained in the Minister's reply of November 13, 1965 (*supra*).

The learned trial Judge applying the principles laid down in the case *Police and Hondrou,* 3 R.S.C.C. 82 dismissed the recourse, holding that: (1) A notice of the Minister of Health

under section 4A(3) of the Law (*supra*) would be an exercise of legislative power; (2) it follows that a decision not to give such notice is not a decision "of an organ, authority or person exercising executive or administrative function" within the provisions of paragraph 1 of Article 146 of the Constitution (*supra*) and therefore not amenable to the jurisdiction of the Supreme Court under Article 146 of the Constitution.

Against this decision the Appellants now appeal under the relevant provisions of the Administration of Justice (Miscellaneous Provisions) Law, 1964. It was submitted by counsel on behalf of the Appellant that both the *Hondrou* case (*supra*) and the case *Eagle Automatic Games Co. Ltd. and Others and The Republic* decided by the Supreme Constitutional Court on February 9, 1962 (unreported) should be overruled.

Dismissing the appeals the Supreme Court:–

Held, per Hadjianastassiou, J. (all other members of the Court concurring):–

(1) Having considered all the authorities I have come to the conclusion to follow in the cases in hand the test formulated in the case *Papaphilippou and The Republic*, 1 R.S.C.C. 62 at p. 64 for ascertaining the legal nature of the Minister's decision complained of.

(2) Having done so, I have reached the view that in its essential nature that decision was connected with the exercise of legislative power.

(3) I would, therefore, follow and apply the reasoning behind the *Hondrou* case (*supra*), because I am of the opinion that it was rightly decided. I would, therefore, dismiss counsel's for the Appellants submission that both the *Hondrou* and the *Eagle* cases (*supra*) should be overruled.

(4) In the light of my decision, I would affirm the judgment of the learned trial Judge, because the decision of the Minister of Health not to insert in the Official Gazette the notice applied for by the Appellants was taken in accordance with the law and, therefore, I believe that the exercise of such power was an exercise of legislative power under section 4A(3) (a) of the Law (*supra*). It follows that the decision in question of the Minister is not within the ambit of Article 146 of the Constitution and I would dismiss these consolidated appeals.

Held, per Triantafyllides, J.:

(1) I agree, too, that these appeals should be dismissed and that the judgment of the learned Judge of this Court who heard the two recourses concerned in the first instance should be affirmed.

(2) I would like, however, to observe that it should not be invariably taken that an executive or administrative organ is entrusted with a legislative function, and not with its primary function, *viz.* an executive or administrative one whenever such organ—as in these cases the Minister of Health—is entrusted by legislation with the addition to, or deletion from a Schedule to a Law of certain items; a lot would depend on the context in which the organ concerned is so entrusted including the nature of the particular situation.

(3) In the present instance I have reached the view that the relevant powers of the Minister of Health are of a legislative nature in view of the nature of the procedure laid down in section 4A of the Pharmacy and Poisons Law, Cap. 254 (as amended by Law No. 59 of 1962) *supra*.

Appeals dismissed.

Cases referred to:

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

Eagle Automatic Games Co. Ltd. and Others and The Republic, decided on February 9, 1962 by the former Supreme Constitutional Court (*unreported*);

Papaphilippou and The Republic, 1 R.S.C.C. 62 at p. 64.

Appeal.

Appeal against the judgment* of a Judge of the Supreme Court of Cyprus (Stavrinides, J.) given on December 21, 1968 (Revisional Jurisdiction Cases Nos. 219/65 and 253/65) dismissing Appellants' recourses against the decision of the Respondents not to proceed with the amendment of the Second Schedule to the Pharmacy and Poisons (Amendment) Law, 1962.

A. Triantafyllides, for the Appellants in Appeal No. 54.

J. Mavronicolas, for the Appellants in Appeal No. 55.

*Reported in (1968) 3 C.L.R. 727.

K. Talarides, Senior Counsel of the Republic, for the Respondents.

Cur. adv. vult.

VASSILIADES, P.: Mr. Justice Hadjianastassiou will deliver the first judgment.

HADJIANASTASSIOU, J.: In these consolidated appeals, the main contention of counsel for the Appellants was that the learned trial Judge, in dismissing the two recourses appealed from, erroneously held that the decision of the Minister of Health was of a legislative nature and, as such, was outside the ambit of Article 146 of the Constitution.

The Appellants are dealers and importers of drugs, and on March 1, 1963, they applied to the Minister of Health, pursuant to the proviso to s. 4A (e) of Law 59/62, for the amendment of the Second Schedule to the said Law, so that the articles known as "Pastilles Valda", "Rennie Tablets", "Optrex Eye Lotion" and "Kruschen Salts" imported by them, be included therein.

On March 9, 1963, the Director-General of the Ministry of Health, in reply, said that as the provisions of the relevant section of the Pharmacy and Poisons (Amendment) Law, 1962, came into force very recently—on March 1, 1963—any suggestion for amending the said Schedule before some experience was gained from its application, was considered as premature.

On October 13, 1964, counsel on behalf of their clients, the Appellants, wrote again to the Minister of Health for the amendment of the Second Schedule of the law, but the Director-General, in his reply of November 13, 1965, *exhibit* 5, said that the Minister, on the advice of the Pharmacy and Poisons Board, decided that none of the drugs in question be added to the said Schedule.

On November 19, 1965, the Appellants in the first case, feeling aggrieved because of the decision of the Minister, made a recourse seeking the following relief: (a) Declaration that the decision of the Respondents contained in *exhibit* 5, not to proceed with the amendment of the Second Schedule to Law 59/62 or not to cause the said amendment to be effected by adding therein the goods mentioned in *exhibit* 4 hereof i.e.

"Pastilles Valda", "Rennie Tablets", "Optrex Eye Lotion", "Kruschen Salts", is *null* and *void* and of no effect whatsoever; and (b) declaration that the omission of the Respondents to proceed with the aforesaid amendment or cause same to be effected by adding in the said Second Schedule the aforesaid goods, ought not to have been made, and whatever has been omitted should have been performed.

The case was heard by a single Judge of this Court, under the provisions of the Administration of Justice (Miscellaneous Provisions) Law, 1964. Mr. Justice Stavrinides had this, *inter alia*, to say in his judgment reported in (1968) 3 C.L.R. 727 at pp. 734-735:–

> " The question then is (a) whether the decisions complained of are decisions 'of an organ, authority or person exercising executive or administrative function' and if so (b) whether they may be interfered with by this Court although they were taken in the exercise of the Minister's discretion. With regard to (a), I think the case of *Police* v. *Hondrou*, 3 R.S.C.C. 82, is relevant. There it was held that an order made by the Council of Ministers under s. 6(2) of the Betting Houses, Gaming Houses and Gambling Prevention Law, Cap. 151, declaring, in effect, 'the handling or the putting into operation of any gaming machine to be a game for the purposes of s. 6(1) of that Law in addition to the games specified therein' was an exercise of legislative power, notwithstanding the fact that the power, conferred on the Council of Ministers by Art. 54(g) of the Constitution, of 'making orders or regulations for the carrying into effect of any Law as provided by such Law' is described in that article as 'executive'."

Later on he says:–

> " In my judgment a notice of the Minister of Health under s. 4A(3) of the 1962 Law would equally be an exercise of legislative power. It follows that a decision not to give such notice is not a decision 'of an organ, authority or person exercising executive or administrative function' and therefore is not amenable to the jurisdiction of this Court under Art. 146 of the Constitution."

I propose dealing with the Pharmacy and Poisons (Amendment) Law 1962, (Law 59/62) which amends the main Law

Cap. 254, particularly section 4 sub-section 3. This repealed section reads as follows:-

"Nothing in this section shall be deemed to make it unlawful for any person to sell any non-poisonous drug when such drug is sold in its original container and condition as received by the seller or to require any such person to be registered as a pharmacist."

I now turn to section 4A which has been added by Law 59/62 section 6. This section is in these terms:-

"4A (1) Save as hereinafter provided no person other than a pharmacist shall sell any drugs to the public.

(2) Notwithstanding anything in the preceding sub-section contained, any person may sell to the public any of the drugs specified in the Second Schedule, on condition that such drugs are sold in their original containers or in containers in which they have been packed or repacked and sealed by a pharmacist:

Provided that the Minister may, on the advice of the Board and subject to the procedure hereinafter described, from time to time, amend, vary, revoke or replace the said Second Schedule.

(3)(a) The Minister, on the advice of the Board, shall prepare a notice for publication in the Official Gazette of the Republic showing the intended amendments, variations, revocations or replacements in the Second Schedule.

(b) Before the publication of the aforesaid notice in the Official Gazette of the Republic the Minister shall cause a signed copy thereof to be delivered to the House of Representatives.

(c) If within 15 days from the receipt by the House of Representatives of the aforesaid notice no objection is raised by it, the President of the House of Representatives shall, in writing, inform the Minister of that fact, and the Minister shall proceed to publish the notice in the Official Gazette of the Republic. The notice so published shall constitute the amended, varied, revoked or replaced Second Schedule.

(d) If the House of Representatives objects to the

whole or any part of the notice prepared by the Minister and submitted to the House, the President of the House shall, within 15 days from the receipt of the notice by the House, inform the Minister of that fact and no amendment, variation, revocation or replacement of the Second Schedule shall take place until the House of Representatives decides the matter.

(e) If, after objection has been raised by the House to the notice prepared by the Minister, the House of Representatives finally decides to amend, vary, revoke or replace the Second Schedule, the decision of the House shall, in accordance with Article 52 of the Constitution, require promulgation.

(4) .....

(5) .....

(6) .....".

It would be observed that under the provisions of this law, in effect, the decision of the Minister is under the control of the House of Representatives, because before the publication in the Official Gazette of the notice showing the intended amendments, variations, revocations or replacements in the Second Schedule, the Minister shall cause a signed copy of the said notice to be delivered to the House of Representatives, and the House finally decides whether to proceed to amend, vary, revoke or replace that said Schedule.

Counsel for the Appellants, in the course of his argument before us, has contended that because no fundamental right of a citizen has been contravened, the *Hondrou* case should be distinguished and ought not to have been followed by the learned trial Judge. Later on, however, in view of the decision in the *Eagle* case, decided by the Supreme Constitutional Court of February 9, 1962, (unreported) counsel further submitted that both decisions, the former and the latter, should be reconsidered and overruled, because they are no longer good law.

I would desire to comment on these two cases, which were discussed before us, particularly so, because the correctness of the Supreme Constitutional Court's decision was challenged by the Appellant's counsel. Forsthoff, P., delivering the judgment of the Court, had this, *inter alia*, to say in the *Hondrou* case at p. 85:-

"There is nothing in our Constitution to prevent the House of Representatives from delegating its power to legislate to other organs in the Republic in accordance with the accepted principles of Constitutional Law and the doctrine of 'delegated legislation' and, in fact, express provision is made in paragraph (g) of Article 54 of the Constitution empowering the Council of Ministers to make 'any order or regulation for the carrying into effect of any law as provided by such law'. It should be observed that the inclusion of the making of delegated legislation by the Council of Ministers under the terminology of 'executive power' in the said Article 54 cannot be taken as having intended to change the essential nature of such function because the aforesaid expression in Article 54 has merely been used as a comprehensive description of the powers exercised by the Council of Ministers which is an executive organ.

The Court in this case has had to consider whether, and if so to what extent, the House of Representatives is entitled to delegate its power of legislation in relation to the imposition of restrictions or limitations on the fundamental rights and liberties guaranteed by Part II of the Constitution in view of the special nature of the provision of such Part.

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."

Later on he says:-

"In the opinion of the Court such restrictions are not unconstitutional as being contrary to, or inconsistent with, the said Articles because they can, in accordance with the relevant provisions of the Constitution, properly be considered to be necessary in the interests, *inter alia*, of public morals."

In *Eagle Automatic Games Co. Ltd. and Others and The Republic of Cyprus through the Council of Ministers* (*supra*) the Supreme Constitutional Court had this to say:-

" In the opinion of the Court the exercise of the aforesaid power is not the exercise of 'any executive or administrative authority', in the sense of paragraph 1 of Article 146, because, as laid down in the case of *Georghios S. Papaphilippou and The Republic of Cyprus, through the Council of Ministers* (1 R.S.C.C., p. 62, at p. 64) matters of a legislative nature do not come within the ambit of paragraph 1 of Article 146. The Court, therefore, cannot entertain this recourse under Article 146."

In *Georghios S. Papaphilippou of Nicosia and The Republic of Cyprus through the Council of Ministers*, 1 R.S.C.C., 62 relied upon by counsel for the Republic, a case for alleged failure of the Council of Ministers, under Article 54(f) of the Constitution, to consider legislation for the implementation of Article 9, the Respondent contested the jurisdiction of this Court, and applied for the dismissal of the application under Article 134.2.

The Court in dismissing the application had this, *inter alia*, to say at p. 64:-

" The omission, as alleged by the Applicant, is not an omission in the sense of paragraph 1 of Article 146 of the Constitution. The function of the Council of Ministers under Article 54(f), though described in the opening part of that Article as 'executive power', is, nevertheless, a function preparatory to, and connected with, the enactment of legislation. The exercise of the legislative power consists not only of the deliberation and enactment of laws by the legislative organs but, in a wider sense, it also includes the preparatory and ancillary activities in the course of the legislative process. This is recognized in all countries with constitutions drawn up on the basis of the doctrine of the separation of powers. Therefore the consideration by the Council of Ministers of bills to be introduced to the House of Representatives is an act preparatory to legislation and for this reason it does not amount to the exercise of 'executive or administrative authority' in the sense in which such words are used in paragraph 1 of Article 146.

The aforesaid words in paragraph 1 of Article 146 must be understood in a strict sense. Thus, the Constitution conforms, as far as possible, in all its parts with the doctrine of the separation of powers, as manifested from

several significant and cardinal Articles thereof, such as 46, et seq., 61, 136 and 152.

The decisive test for ascertaining the legal nature of any act or omission is not necessarily the terminology employed in describing it but its essential nature. Further, it is an accepted principle of Constitutional Law that it cannot be assumed that the same term (e.g. as in this case the word 'executive'), when used in different parts and contexts of a constitution always has exactly the same meaning."

Having considered all the authorities, I have reached the conclusion to follow, in the cases in hand, the test formulated in the *Papaphilippou* case (*supra*), for ascertaining the legal nature of the act of the Minister complained of. Having done so, I have reached the view that in its essential nature, that act was connected with the exercise of legislative power. I would, therefore, follow and apply the reasoning behind the decision in the *Hondrou* case, because I am of the opinion that it was rightly decided. I, therefore, find myself unable to accept the submission of counsel for the Appellants that both the *Hondrou* and the *Eagle* cases should be overruled, and I would dismiss this contention of counsel.

In the light of my decision, I would affirm the judgment of the learned trial Judge, because the decision of the Minister not to insert the notice in the Official Gazette was taken in accordance with the provisions of the law and, therefore, I believe that the exercise of such power was an exercise of legislative power, under section 4A sub-section 3(a) of Law 59/62.

It follows, therefore, that the decision of the Minister of Health is not within the ambit of Article 146 of our Constitution and, I would dismiss these consolidated appeals.

VASSILIADES, P.: I agree; and I have nothing to add.

TRIANTAFYLLIDES, J.: I agree, too, that this appeal should be dismissed and that the judgment of the learned Judge of this Court, who heard the two recourses concerned in the first instance, should be affirmed.

I would like, however, to observe that it should not be invariably taken that an executive or administrative organ is

entrusted with a legislative function, and not with its primary function, viz. an executive or administrative one, whenever such an organ—as in this case the Minister of Health—is entrusted, by legislation, with the addition to, or deletion from, a Schedule to a Law of certain items; a lot would depend on the context in which the organ concerned is so entrusted, including the nature of the particular situation.

In the present instance I have reached the view that the relevant powers of the Minister of Health are of a legislative nature in view of the nature of the procedure laid down in section 4A of the Pharmacy and Poisons Law (Cap. 254), as amended by the Pharmacy and Poisons (Amendment) Law, 1962 (Law 59/62).

JOSEPHIDES, J.: I concur both with the judgment of my brother HadjiAnastassiou, J. and the observations of my brother Triantafyllides, J.

LOIZOU, J.: I also concur and have nothing to add.

VASSILIADES, P.: In the result the appeals fail, and the judgment of the trial Judge is affirmed. Appeals dismissed.

Appeals dismissed.