

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

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IN THE MATTER OF APPLICATIONS BY ADVOCATES
B. VASSILIADES AND CHR. VAKIS TO APPEAR IN
CRIMINAL APPEAL No. 3280:

GEORGHIOS
XENOPHONTOS
v.
THE POLICE
IN RE
VASSILIADES
AND ANOTHER

BETWEEN: GEORGHIOS XENOPHONTOS

Appellant,

and

THE POLICE,

Respondents.

(*Criminal Appeal No. 3280*).

Advocates—Former Judges—Section 12 of the Advocates Law, Cap. 2 (as amended by the Advocates (Amendment) Law, 1961, No. 42 of 1961)—Section 12 precluding former Judges from appearing as advocates before the Courts for the period of one year after their leaving or retirement from such service—Nothing repugnant to the Constitution in that section—Particularly, section 12 is consistent with Articles 12.5(c), 25, 28.1, 30.3(d) and 158.3 of the Constitution—Cf. Article 153.7(2)—See further infra, passim.

Constitutionality of laws—Judicial control of the constitutionality of legislative enactments—Approach to the question—General and well established principles applicable to such control, restated.

Equality—Principle of equality and non-discrimination—Article 28 of the Constitution—The principle does not exclude reasonable differentiations—Discrimination can only arise as between persons who are in substantially equal or, at least, equivalent situations—Section 12 of the Advocates Law, Cap. 2 (supra) does not discriminate between former judicial officers, who have resigned (or retired from) their office and returned to the profession of advocacy, and persons who have all along been advocates and continued to work as such—Nor does it discriminate between such judicial officers and advocates who have served in high political offices or in a public capacity.

Discrimination—Principle of non-discrimination—See immediately hereabove.

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Right to practise any profession etc. etc.—Safeguarded under Article 25 of the Constitution—Legitimate restrictions may be imposed on such right—Paragraph 2 of Article 25—Section 12 of the Advocates Law, Cap. 2 (supra) is fully covered by that paragraph 2—It is a restriction necessary, in the sense of the said paragraph 2 of Article 25, for the protection of the rights of those already practising the profession of advocacy—In view of the need to break effectively any nexus between the capacity of the holder of judicial office and his subsequent capacity of an advocate appearing before the Courts—And breaking such nexus accords, too, with the public interest which the restriction concerned may thus be said to serve as well, within the said paragraph 2 of Article 25.

Retaining a lawyer of a person's own choice—Articles 12.5(c) and 30.5(d) of the Constitution—Section 12 of the Advocates Law, Cap. 2, supra, not repugnant to the right of a person to retain a lawyer of his own choice.

Resignation—Right of Judges of the Supreme Court to resign their office—Article 153.7(2) of the Constitution—Right extended to District Judges by section 8 of the Courts of Justice Law, 1960 (Law 14/60)—Said right is a safeguard of judicial independence—Said section 12 of the Advocates Law, Cap. 2 not inconsistent with such right.

The Supreme Court refused in this case to allow two former District Judges to appear as advocates for the Appellant in this appeal, holding that section 12 of Cap. 2 (as amended, *infra*), which prevents the two gentlemen from so appearing, is not unconstitutional. When on October 21, 1971, the hearing of this appeal was about to begin, two formerly District Judges, Mr. B. Vassiliades and Mr. Chr. Vakis, sought to appear as advocates for the Appellant. They have both resigned from the office of District Judge less than a year before the material date (October 21, 1971), with effect from September 23, 1971, and April 1, 1971, respectively. Prior to their appointment as District Judges on February 7, 1961, and September 26, 1966, respectively, they had both been practising advocates.

Thus, the question arose as to whether the Supreme Court could, in view of section 12 of the Advocates Law, Cap. 2, as amended by the Advocates (Amendment) Law, 1961 (Law 42/61), allow Mr. Vassiliades and Mr. Vakis to appear as counsel during the hearing of this appeal. Section 12 provides:

“..... no person holding a judicial office who leaves or retires from the service of the Republic from such office shall be allowed to appear as an advocate before any Court for a period of one year after his leaving or retirement from such service”.

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Messrs. Vassiliades and Vakis mainly argued that the said section 12 of Cap. 2, which prevents them from appearing as advocates in the present appeal, is inoperative as being unconstitutional; particularly, the argument went on, the section offends against:

- (a) Article 25 of the Constitution which safeguards “the right to practise any profession” (*infra*);
- (b) Article 28 safeguarding the principle of equality and of non-discrimination (*infra*);
- (c) Articles 12.5(c) and 30.3(d) which safeguard the right of the subject to retain a lawyer of his own choice;
- (d) Article 153.7(2), safeguarding the right of resignation of Judges of the Supreme Court which was extended on District Judges by section 8 of the Courts of Justice Law 1960 (Law 14/60), and which right is a safeguard of judicial independence;
- (e) Article 158.3, this issue relating only to Mr. B. Vassiliades, (*infra*).

Article 25, paragraphs 1 and 2, of the Constitution reads as follows:

“ 1. Every person has the right to practise any profession or to carry on any occupation, trade or business.

2. The exercise of this right may be subject to such formalities, conditions or restrictions as are prescribed by law and relate exclusively to the qualifications usually required for the exercise of any profession or are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person or in the public interest:

Provided that no such formalities, conditions or restrictions purporting to be in the public interest shall

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be prescribed by a law if such formality, condition or restriction is contrary to the interests of either Community”.

Article 28, paragraph 1, of the Constitution provides:

“ 1. All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby”.

The Supreme Court, rejecting all the arguments set forth in support of the proposition that section 12 of Cap. 2 (*supra*) is inoperative and refusing to allow Mr. Vassiliades and Mr. Vakis to appear as advocates of the Appellant in the present appeal, —

Held, (1). In approaching the issue of the constitutionality of a legislative provision such as section 12 of Cap. 2 (*supra*), we have borne in mind that, according to well established principles we ought to be satisfied beyond reasonable doubt about its unconstitutionality before we can decide to that effect (see, *inter alia*, *Matsis v. The Republic*, (1969) 3 C.L.R. 245, at p. 258); and that once we find that a restriction, as the one laid down by section 12, is within the ambit of a constitutional provision enabling its imposition, we cannot inquire into the desirability of the policy which has led to such imposition (see, *inter alia*, *The Board for Registration of Architects etc. etc. v. Kyriakides* (1966) 3 C.L.R. 640, at p. 654).

(2) *Regarding the argument based on Article 25 of the Constitution (supra)*:

(A) We do not think that once both of them, by their own free choice, left the ranks of the profession in order to become judicial officers, it can now be held that section 12 interferes in any way with the right to practise the profession of advocacy which vested initially in them when they enrolled, for the first time, as advocates.

(B) What has, however, given us some cause for concern is whether there exists, because of that section 12, an infringement of their right to practise as advocates which they have re-acquired after their resignation from the office of District Judge. It is pertinent in this respect to examine the nature of the restriction—and it is no doubt a restriction—imposed by the said section 12 on their said right.

(C) Such restriction does not amount to a complete prohibition to practise as an advocate; it only excludes the

right of appearance before all Courts in the Republic for the limited period of one year; it is, therefore, not an absolute restriction but only a limited one of a temporary nature.

(D) Bearing this in mind we are of the opinion that it can reasonably be said that section 12 which is part of a law regulating the exercise of the profession of advocacy, is a restriction which is necessary—in the sense of paragraph 2 of Article 25, *supra*—for the protection of the rights of those already practising such profession, in view of the need to break effectively any nexus between the capacity of the holder of judicial office and his subsequent capacity of an advocate appearing before the Courts; and breaking such nexus accords, too, with the public interest which the restriction concerned may thus be said to serve as well.

(3) *Regarding the argument based on the constitutional principles of equality and non-discrimination (Article 28.1 of the Constitution supra:*

Reliance has been placed, too, on Article 28 of the Constitution, in the sense that section 12 discriminates against the two advocates concerned (*viz.* the aforesaid two former District Judges).

(A) It has, however, been repeatedly stressed that discrimination can only arise as between persons who are in substantially equal or, at least equivalent situations; and, therefore, there cannot be said to exist any discrimination, amounting to unconstitutional differentiation, between one who has all along been an advocate and continues to work as such and one who chose to cease to be an advocate in order to become a judicial officer and has later on resigned from his judicial office and returned to the profession of advocacy.

(B) Nor can we hold that there exists any discrimination against former District Judges because advocates who have served in high political offices such as former Ministers or former Law Officers in the office of the Attorney-General, are not prevented from appearing before the Courts as soon as they resume private practice as advocate. In our opinion the aforementioned capacities are essentially different from that of a judicial officer.

(4) It has, also, been contended that section 12 is repugnant to Articles 12.5(c) and 30.3(d) of the Constitution, which safeguard the right to have a lawyer of a person's own choice. In our view that right is obviously limited to a choice from

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amongst advocates who are entitled at the material time to appear before a Court; we find, therefore, no merit in this contention.

(5) (a) We have anxiously examined the effect of a provision such as section 12 on the free exercise of the right of resignation (without loss of pension or other like benefits), which has been conferred on Supreme Court Judges by Article 153.7(2) of the Constitution and on District Judges by section 8 of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960) and which is a safeguard of judicial independence; such independence being an essential part of our Constitutional structure which is based on the principle of the separation of powers in the State.

(b) Bearing in mind that section 12 does not entirely restrict the exercise of the profession of advocacy, but only prohibits, for a year's period, appearance in Court, we do not think that it is a provision the existence of which could materially influence a judicial officer who might find himself forced to consider whether or not to resign from his office on an issue of principle related to his independence as a Judge.

(6) *Regarding an issue which relates only to Mr. B. Vassiliades and is based on Article 158.3 of the Constitution:*

(A) When Mr. B. Vassiliades was appointed as a District Judge (February, 1961) section 12 was not yet part of the Advocates Law, Cap. 2; it was enacted subsequently on October 30, 1961. That being so, it was argued that section 12 in so far as he is concerned is excluded by Article 158.3 of the Constitution which provides that the "remuneration and other conditions of service" of any District Judge "shall not be altered to his disadvantage after his appointment".

(B) We are of the view that a restriction such as the one introduced by section 12 is not contrary to Article 158.3 (*supra*), because the right to appear before the Courts as an advocate after leaving judicial office, cannot be taken as being included in the notions of "remuneration and other conditions of service", which obviously apply when one is holding judicial office or concern rights, such as pension rights, emanating from his having held such office.

(7) For the foregoing reasons we regret that we are unable

to allow the appearance today before us of the two advocates concerned.

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Order accordingly.

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Cases referred to:

Matsis v. The Republic (1969) 3 C.L.R. 245, at p. 258;

The Board for Registration of Architects etc. v. Kyriakides (1966)
3 C.L.R. 640, at p. 654.

Application.

Application by two former District Judges, made within a period of less than one year after they have resigned from their offices, for leave to appear as advocates for the Appellant in Criminal Appeal No. 3280, in view of the provisions of section 12 of the Advocates Law, Cap. 2 (as amended by Law No. 42 of 1961).

D. Liveras, for the Appellant.

A. Frangos, Senior Counsel of the Republic, for the Respondents.

Advocates B. Vassiliades and Chr. Vakis sought to appear, also, for the Appellant and they were heard regarding their being entitled to do so.

The judgment of the Court was delivered by:-

TRIANAFYLLIDES, P.: When the hearing of this appeal was about to begin Mr. Chr. Vakis, an advocate who together with advocate Mr. Liveras has already signed the notice of appeal, sought to appear, also, on behalf of the Appellant; and advocate Mr. B. Vassiliades, who has not signed the notice of appeal, sought to appear, too, with the said two advocates, for the Appellant.

Thus, the question arose as to whether this Court could, in view of section 12 of the Advocates Law (Cap. 2), as amended by the Advocates (Amendment) Law, 1961 (Law 42/61), allow Mr. Vassiliades and Mr. Vakis to appear as counsel during the hearing of this appeal. Section 12 provides that "..... no person holding a judicial office who leaves or retires from the service of the Republic from such office shall be allowed to appear as an advocate before any Court

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for a period of one year after his leaving or retirement from such service”.

Mr. Vassiliades and Mr. Vakis have both resigned from the office of District Judge less than a year ago, with effect from the 23rd September, 1971, and the 1st April, 1971, respectively. Prior to their being appointed as District Judges on the 7th February, 1961, and the 26th September, 1966, respectively, they had both been practising advocates; and they have resumed being such after their resignations from judicial office.

We have afforded today to them an opportunity of being heard regarding the matter of their being allowed to appear for the Appellant; and they have argued that section 12 of Cap. 2, which prevents them from doing so, is unconstitutional.

In approaching the issue of the constitutionality of a legislative provision, such as section 12, we have borne in mind that, according to well-established principles, we ought to be satisfied beyond reasonable doubt about its unconstitutionality before we can decide to that effect (see, *inter alia*, *Matsis and The Republic* (1969) 3 C.L.R. 245, at p. 258); and that once we find that a restriction, as the one laid down by section 12, is within the ambit of a constitutional provision enabling its imposition we cannot inquire into the desirability of the policy which has led to such imposition (see, *inter alia*, *The Board for Registration of Architects and Civil Engineers v. Kyriakides* (1966) 3 C.L.R. 640, at p. 654).

It has been submitted that the restriction imposed by section 12 is unconstitutional as being contrary to Article 25 of the Constitution which safeguards, *inter alia*, “the right to practise any profession”; and particularly so in relation to the two advocates concerned who were enrolled as advocates before their appointments as District Judges. We do not think that once both of them, by their own free choice, left the ranks of the profession in order to become judicial officers it can now be held that section 12 interferes with the right to practise the profession of advocacy which vested initially in them when they enrolled, for the first time, as advocates. What has, however, given us some cause for concern is whether there exists, because of section 12, an infringement of their right to practise as advocates which they have re-acquired after their resignations from the office of District Judge; in this

connection we had to consider whether the restriction imposed on their said right by section 12—and it is no doubt a restriction—can be found to be permitted for any reason set out in paragraph 2 of Article 25.

It is pertinent in this respect to examine the nature of the restriction in question: It does not completely prohibit practising as an advocate; it only excludes the right of appearance before all Courts in the Republic for the limited period of one year; it is, therefore, not an absolute restriction but only a limited one of a temporary nature. Bearing this in mind we are of the opinion that it can reasonably be said that section 12, which is part of a Law regulating the exercise of the profession of advocacy, is a restriction which is necessary—in the sense of paragraph 2 of Article 25—for the protection of the rights of those already practising such profession, in view of the need to break effectively any nexus between the capacity of the holder of judicial office and his subsequent capacity of an advocate appearing before the Courts; and breaking such nexus accords, too, with the public interest, which the restriction concerned may thus be said to serve as well.

It has, also, been contended that section 12 is inconsistent with Articles 12.5 (c) and 30.3 (d) of the Constitution, which safeguard the right to have a lawyer of a person's own choice. That right is, in our view, obviously limited to a choice from amongst advocates who are entitled at the material time to appear before a Court; therefore, we find no merit in this contention.

Reliance has been placed, too, on Article 28 of the Constitution, in the sense that section 12 discriminates against the two advocates concerned. It has, however, been repeatedly stressed that discrimination can only arise as between persons who are in substantially equal or, at least, equivalent situations; and, therefore, there cannot be said to exist any discrimination, amounting to unconstitutional differentiation, between one who has all along been an advocate and continues to work as such and one who chose to cease to be an advocate in order to become a judicial officer and has later on resigned from his judicial office and returned to the profession of advocacy.

Nor can we hold that there exists any discrimination against former District Judges because advocates who have served in

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high political offices such as former Ministers, or who have served in a public capacity, such as former Law Officers in the office of the Attorney-General of the Republic, are not prevented from appearing before the Courts as soon as they resume private practice as advocates. In our opinion the aforementioned capacities are essentially different from that of a judicial officer.

In an effort to persuade us about the unconstitutionality of section 12 it was argued that it might be so interpreted as to apply to advocates who accepted temporary appointments as judicial officers; but both the advocates concerned resigned from judicial offices which they held on a permanent basis and we do not think that any particular view as to whether or not section 12 applies in the case of a person who held judicial office on a temporary basis, and, if so, whether or not this is constitutional, could affect the issue now before us.

It has, also, been submitted that instead of enacting section 12 there could have been made a to the same effect rule of etiquette of the profession of advocacy. But that is no reason for holding that the matter in question could not be regulated directly by legislation, so long as such legislation is constitutional.

We have anxiously examined the effect of a provision such as section 12 on the free exercise of the right of resignation (without loss of pension or other like benefits), which has been conferred on Supreme Court Judges by Article 153.7 of the Constitution and on District Judges by section 8 of the Courts of Justice Law, 1960 (Law 14/60) and which is a safeguard of judicial independence; such independence being an essential part of our constitutional structure which is based on the principle of the separation of powers in the State.

Bearing in mind that section 12 does not entirely restrict the exercise of the profession of advocacy, but only prohibits, for a year's period, appearance in Court we do not think that it is a provision the existence of which could materially influence a judicial officer who might find himself forced to consider whether or not to resign from his office on an issue of principle related to his independence as a Judge.

There remains to be dealt with an issue which relates only to advocate Mr. Vassiliades: It is correct that when he was

appointed as a District Judge section 12 was not part of Cap. 2; it was enacted subsequently, on the 30th October, 1961; and it has been argued that the application of section 12 in so far as he is concerned is excluded by Article 158.3 of the Constitution which provides, in effect, that the "remuneration and other conditions of service" of any District Judge "shall not be altered to his disadvantage after his appointment". We are of the view that a restriction such as the one introduced by section 12 is not one which is contrary to Article 158.3, because the right to appear before the Courts as an advocate, after leaving judicial office, cannot be taken as being included in the notions of "remuneration and other conditions of service", which obviously apply while one is holding judicial office or concern rights, such as pension rights, emanating from his having held such office.

For the foregoing reasons we regret that we are unable to allow the appearance today before us of the two advocates concerned.

Order accordingly.

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