1985 October 3

[TRIANTAFYLLIDES, P., A. LOIZOU, LORIS, PIKIS, KOURRIS, JJ.]

DIAGORAS DEVELOPMENT LTD.,

Applicant,

v.

NATIONAL BANK OF GREECE S.A.,

Respondent.

(Question of Law Reserved No. 218).

Constitutional Law—Constitution, Parts IV, IX and X— Separation of powers between the Legislative Power and the Judicial Power of the Republic—S. 2 of Law 92/84 is unconstitutional because in enacting it the House of Representatives exceeded the limits of its legislative competence and infringed the constitutionally entrenched separation of powers between the legislative power and judicial power of the Republic.

Constitution—Articles 136, 152 and 24.

Interpretation of Laws (Constitution and Statute Law)—Whether it is by its nature a judicial function.

Retroactive Legislation—Power of the House of Representatives to enact such legislation—Constitutional limits to such power.

The Debtors Relief (Temporary Provisions) (Amendment) Law, 92/84, s.2 and the definition of "stricken debtor" in the Debtors Relief (Temporary Provisions) Law 24/79, s. 2.

The sole question in this case is whether section 2 of the Debtors Relief (Temporary Provisions) (Amendment) Law 92/84 is unconstitutional as offending against the separation of powers between the Legislative Power and the Judicial Power of the Republic.

Section 2 of Law 92/84 reads as follows:

"2. To remove any doubt as regards the interpretation of the term 'stricken debtor', as set out in section 2 of the basic law, it is declared that the material time for evaluating the situation of a stricken debtor is, and always was, the time immediately after the Turkish invasion and not any other time subsequent to it".

The definition of "stricken debtor" in section 2 of the Debtors Relief (Temporary Provisions) Law 24/79 which is the "basic law" referred to in section 2 of Law 92/84 reads as follows:

" 'stricken debtor' means any debtor whose work or business has been affected, by reason of the abnormal situation, to such an extent so as to render him unable to meet his contractual obligations out of which the debt arose, or a debtor who is missing as a result of the Turkish invasion and includes a co-debtor and a guarantor of any such debtor;"

The said definition in the "basic law" was interpreted by the Supreme Court in *Evangelou* v. *Ambizas* (1982) 1 C.L.R. 41. In that case it was decided that the material time for evaluating the situation of a debtor in order to determine the question whether he is able to respond to his contractual obligations is the time of the trial and not any other time anterior to the date of trial.

Held, A. Loizou, J. dissenting:

(A) Per Triantafyllides, P., Loris, J. concurring:

(a) Section 2 of Law 92/84 has been enacted as an interpretative provision in order to reverse the interpretation given by the Court in *Evangelou* v. *Ambizas,* supra.
(b) As it is derived from the respective provisions of Parts IV, IX and X of the Constitution there exists constitutionally entrenched separation of Powers between the legislative Power and the Judicial Power of the Republic. This separation entails, normally, non interference by the Legislature with the way in which the Courts have determined a particular case. The assumption that there existed

a doubt as to the correct meaning of "stricken debtor" in section 2 of Law 24/79 was unwarranted because no such doubt could have properly been found to exist once the said definition has been interpreted by the Supreme Court by means of a final judgment *(Evangelou case,* supra). (c) In the present instance section 2 of Law 92/84 cannot be treated as a provision amending the definition of "stricken debtor" in section 2 of Law 24/79, because it is framed in such a way that it is impossible to speculate with any certainty what the legislative intention would have been had it been in fact an amendment and not an interpretative provision. (d) In the light of the above in enacting section 2 of Law 92/84 the House of Representatives exceeded the limits of its legislative competence and encroached upon the field of competence of the Judicial Power. (e) There can be no doubt that the legislature, instead of enacting the said section 2 as an interpretative provision, could have amended the definition of "stricken debtor" in section 2 of Law 24/79 in a manner reversing the interpretation given to such definition in the *Evangelou* case, supra.

(B) *Per Loris, J.:* The judgment in *Evangelou* v. *Ambizas,* supra was delivered as early as the 8.2.1982, whereas Law 92/84 was enacted on 21.12.84. Thus the legislature which is being presumed to know the state of the law at the time of passing Law 92/84 and must be taken to know the Judicial Interpretation given in the *Evangelou* case two and a half years earlier, has sought to reverse the Judicial interpretation placed upon "the material time for evaluating the situation of a stricken debtor" thus infringing the constitutionally entrenched separation of powers between the Legislative Power and the Judicial Power of the Republic.

(C) *Per Pikis, J., Kourris, J. concurring:* (a) Subject to reservations expressly made in the Constitution (Art. 152) every aspect of the judicial power vests in the Courts established under the Constitution. (b) State Powers are distributed depending on their intrinsic nature, among the three branches of the State, the Executive, the Legislative and the Judicial. Within its sphere each power is sovereign and autonomous. (c) The Interpretation of Laws

—and that includes the Constitution and Statute Law— is by its nature a judicial function. Consequently any attempt by the Legislature to interprete its own laws is unconstitutional. (d) What in the present instance the legislature purported to achieve by the assumption of competence to declare the meaning of "stricken debtor" in the context of the Debtor Relief Law was to make its provisions read otherwise than originally framed. Plainly they engaged in an exercise of interpretation of the law and in that way usurped the powers of the Judiciary. (d) If s. 2 of Law 92/84 was capable of being construed as a piece of retroactive legislation it might be saved. However, that is not a possible construction of its provisions.

Opinion accordingly.

Cases referred to:

Evangelou v. *Ambizas* (1982) 1 C.L.R. 41;

Malachtou v. *Attorney-General of the Republic* (1981) 1 C.L.R. 543;

Liyanage v. *Reginam* [1966] 1 All E.R. 650;

Chokolingo v. *Attorney-General of Trinidad and Tobago* [1981] 1 All E.R. 244;

In Re Lovell and Collard's Contract [1907] 1 Ch. 249;

Attorney-General v. *Theobald* [1890] 24 Q.B.D. 557;

Harding v. *Queensland Stamp Commissioners* [1898] A.C. 769;

Societe United Docks v. *Mauritius* [1985] 1 All E.R. 864;

Hinds v. *R.* [1976] 1 All E.R. 353;

Liatsos v. *Ponirou and Another* (1985) 1 C.L.R. 165;

Ttofis Kyriacou and Son Ltd. v. *Rologis Ltd.* (1985) 1 C.L.R. 211;

The Republic and Charalambos Zacharia, 2 R.S.C.C. 1;

Decision of the Greek Council of State No. 1894/58.

Question of Law Reserved.

Question of law reserved by the District Court of Nicosia (Michaelides, D.J.) for the opinion of the Supreme Court under section 9(1) of the Debtors Relief (Temporary Provisions) Laws, 1979-1984 relative to a ruling of the said District Court made in the course of the hearing of Appl. No. 25/84 filed by Diagoras Development Ltd. against the National Bank of Greece for a declaration that the applicant is a stricken debtor under section 2 of Law No. 92/84.

A. Markides, for the applicant.

A. Digikoropoullos, for the respondent.

Cur. adv. vult.

The following judgments were read.

TRIANTAFYLLIDES P.: During the proceedings in Application No. 25/84, in the District Court of Nicosia, which was filed under the provisions of the Debtors Relief (Temporary Provisions) Laws, 1979-1984, there was reserved for consideration by this Court, on the joint application of counsel on both sides and by virtue of section 9(1) of the said Laws, the question of law as to whether section 2 of the Debtors Relief (Temporary Provisions) (Amendment) Law, 1984 (Law 92/84) is unconstitutional as offending against the Separation of Powers between the Legislative Power and the Judicial Power of the Republic.

The said section 2 of Law 92/84 reads as follows:

«2. Προς άρσιν οιασδήποτε αμφιβολίας ως προς την ερμηνείαν του όρου 'πληγείς οφειλέτης', ως ούτος διαλαμβάνεται εις το άρθρον 2 του βασικού νόμου, δηλούται ότι ως ουσιώδης χρόνος εκτιμήσεως της καταστάσεως πληγέντος τινός οφειλέτου είναι, και πάντοτε ήτο, ο αμέσως μετά την Τουρκικήν εισβολήν χρόνος και ουχί οιοσδήποτε έτερος μεταγενέστερος τούτου χρόνος.»

("2. To remove any doubt as regards the interpretation of the term 'stricken debtor', as set out in sec-

tion 2 of the basic law, it is declared that the material time for evaluating the situation of a stricken debtor is, and always was, the time immediately after the Turkish invasion and not any other time subsequent to it.")

The definition of "stricken debtor" in section 2 of the Debtors Relief (Temporary Provisions) Law, 1979 (Law 24/79), which is the "basic law" referred to in section 2 of Law 92/84, reads as follows:

« 'πληγείς οφειλέτης' σημαίνει πάντα οφειλέτην τού οποίου η εργασία ή επιχείρησις, λόγω της εκρύθμου καταστάσεως, επηρεάσθη εις τοιούτον βαθμόν ούτως ωστε να μη δύναται ούτος να ανταποκριθή προς τας συμβατικάς αυτού υποχρεώσεις εξ ών προέκυψε η οφειλή ή οφειλέτην του οποίου αγνοείται η τύχη συνεπεία της Τουρκικής εισβολής και περιλαμβάνει συνοφειλέτην και εγγυητήν παντός τοιούτου οφειλέτου'»)

(" 'stricken debtor' means any debtor whose work or business has been affected, by reason of the abnormal situation, to such an extent so as to render him unable to meet his contractual obligations out of which the debt arose, or a debtor who is missing as a result of the Turkish invasion and includes a co-debtor and a guarantor of any such debtor;").

The said definition was interpreted as follows in *Evangelou* v. *Ambizas*, (1982) 1 C.L.R. 41 (see the judgment of Pikis J., at pp. 54, 55):

"Who is a stricken debtor:

A stricken debtor is defined by s.2 of Law 24/79 as a debtor whose financial position was, as a result of the anomalous situation resulting from the Turkish invasion, prejudiced to an extent that renders him unable to respond to the financial obligations arising from his debt. A debt in this context is one created prior to 14.8.1974.

In *Lorris Tryfonos & Another* v. *Famagusta Shipping Co. (1957) Ltd.*, (1981) 1 C.L.R. 137, it was

held that the inquiry must be solely restricted to the ability of the debtor to respond to his particular obligation and not to his financial obligations, generally. The law postulates as a first prerequisite for relief, adverse financial repercussions emanating from the Turkish invasion. Therefore, the Court must, to start with, weigh the magnitude of the loss sustained as a result of the Turkish invasion. Then, it must evaluate the financial position of the debtor, as shaped by the events of 1974, in juxtaposition to the debt, and decide whether he is in a position to respond to his obligations.

Argument was received as to the date at which this evaluation must be undertaken. On a grammatical construction of the definition of a stricken debtor, particularly the word 'δύναται' (is able), read in combination with the verb that follows 'να ανταποκριθή' (to respond), one is led to the conclusion that the inquiry must be presently made and not by reference to any time anterior to the date of trial. This construction is not only warranted by the wording but also consonant with the wider aims of the law intended to give relief to those debtors who, notwithstanding the effluxion of years from the shattering events of 1974 and such recovery as they have achieved, remain unable to meet their obligations.

Mrs. Timothi argued that it is unreasonable to distinguish, in this respect, between displaced and stricken debtors, and submitted that the right to relief of the two classes of beneficiaries of the law should be tested by reference to 14.8.1974. If this submission is upheld, practically everyone would qualify for relief for at the time of the Turkish invasion and in the climate of uncertainty that ensued and lasted for quite some time, economic values dropped considerably, putting the financial standing of everyone in jeopardy. Further, there are inherent and intrinsic differences between displaced and stricken debtors. The implications of uprootment are diverse and wide-spread and are apt to tax one's resources for many years to come, particularly the effort to build-up a home. Their plight

was different from that of stricken debtors and that is acknowledged by the law.

Before leaving the subject of who qualifies as a stricken debtor, we may note that prejudice may arise from the loss of both or either capital and income. The debtors' financial position must be examined from a broad perspective, the test being whether he is reasonably in a position to meet his obligations. The burden is on the debtor to satisfy the Court that he is entitled to relief."

It is quite clear that section 2 of Law 92/84 was enacted as an interpretative provision in order to reverse the interpretation given by this Court in the *Evangelou* case, supra, to the definition of "stricken debtor" in section 2 of Law 24/79. There can be no doubt that the Legislature, instead of enacting the said section 2 as an interpretative provision, could have amended the definition of "stricken debtor" in section 2 of Law 24/79 in a manner reversing the interpretation given to such definition in the *Evangelou* case, supra, and bringing about the legal situation envisaged by the provisions of section 2 of Law 92/84. But such a course was not adopted by the Legislature.

As it is to be derived from the respective provisions of Parts IV, IX and X of our Constitution there exists constitutionally entrenched Separation of Powers between the Legislative Power and the Judicial Power in our Republic; and the separation of the two Powers in question has been stressed in, inter alia, the judgment of Pikis J. in *Malachtou* v. *Attorney-General of the Republic,* (1981) 1 C.L.R. 543, 549, the contents of which are adopted to the extent to which this is necessary for the purposes of the present judgment.

The need to abide by the separation of the Judicial Power from the Legislative Power has been pointed out, in inter alia, the cases of *Liyanage* v. *Regina,* [1966] 1 All E. R. 650, 659 and *Chokolingo* v. *Attorney-General of Trinidad and Tobago,* [1981] 1 All E. R. 244, 248.

The separation of the Legislative Power from the Judicial Power envisages, normally, non-interference by the

Legislature with the way in which the Courts have determined a particular case.

What has happened in the present instance is that section 2 of Law 92/84 was enacted on the unwarranted assumption that there existed a doubt as to the correct interpretation of the definition of "stricken debor" in section 2 of Law 24/79, whereas no such doubt could have properly been found to exist once the said definition had been interpreted in the *Evangelou* case, supra, by our Supreme Court by means of a final judgment. Thus I am driven to the conclusion that the Legislature chose to disregard the effect of the *Evangelou* case, with the consequence that there has taken place what has been described in the *Liyanage* case, supra, as an "erosion" of the Judicial Power incompatible with its separation from the Legislative Power.

I have considered whether there could be saved the constitutionality of the aforementioned section 2 by treating it as a legislative provision amending the definition of "stricken debtor" in section 2 of Law 24/79 (see, in this respect, inter alia, Sgouritsas on Constitutional Law, 1964, vol. B, part A, p. 51, and the Decision of the Greek Council of State in case 1894/1958). But in the end I reached the conclusion that I cannot do so in the present instance because the said section 2 has been framed in such a way that it is impossible to speculate with any certainty what the legislative intention would have been had it been in fact an amendment and not an interpretative provision.

In the light of all the foregoing I have reached the conclusion that by purporting to interpret by means of section 2 of Law 92/84 the definition of "stricken debtor", in section 2 of Law 24/79, in a way different from the interpretation given to such definition by the Supreme Court in the *Evangelou* case, supra, the House of Representatives exceeded the limits of its legislative competence and encroached upon the field of competence of the Judicial Power and, consequently, section 2 of Law 92/84 is unconstitutional.

It is now up to the Legislature to revert to the matter of the aforementioned definition of "stricken debtor" and

to decide whether or not, and how, to amend it.

A. Loizou J.: I regret that I find myself in disagreement with the opinion reached by my brethren on the Question of Law reserved for consideration by this Court as to whether Section 2 of the Debtors Relief (Temporary Provision) (Amendment) Law 1984 (Law No. 92 of 1984) is unconstitutional as offending the Separation of Powers between the Legislative and the Judicial Power of the Republic.

Had I agreed with them I felt that I would have been unduly restricting or even denying the House of Representatives its powers under Article 61 of the Constitution whereby the Legislative Power of the Republic is exercised by the House of Representatives in all matters except those expressly reserved to the Communal Chambers under the Constitution. Furthermore I would have been disregarding the well established principles governing the exercise of judicial control of legislative enactments and in particular the basic principles of constitutional interpretation, that no act of legislation will be declared void except in a very clear case or unless the act is unconstitutional beyond all reasonable doubt and that if at all possible the Courts will construe the Statute so as to bring it within the law of the Constitution. Also I would have been departing from the well established rules of construction of Statutes and in particular the one that if a Statute is in its nature a declaratory act the argument that it is not to be construed so as to take away previously vested rights is inapplicable, and that words are to be construed in accordance with the intention of the legislation. I shall revert, however, to this aspect of the case later.

The definition of a "stricken debtor" to be found in the Debtors Relief (Temporary Provisions) Law, 1979 (Law No. 24 of 1979) was judicially considered and interpreted by this Court in the case of *Evangelou* v. *Ambizas* (1982) 1 C.L.R. 41 where it was held that "the inquiry must be presently made and not by reference to any time anterior to the date of trial."

There followed this interpretation, the enactment of The Debtors Relief (Temporary Provisions) (Amendment) Law

1984, (Law No. 92 of 1984), section 2 of which reads as follows:

"2. To remove any doubt as regards the interpretation of the term 'stricken debtor', as set out in section 2 of the basic law, it is declared that the material time for evaluating the situation of a stricken debtor is, and always was, the time immediately after the Turkish invasion and not any other time subsequent to it.'

This enactment is in substance an amendment of the definition of "stricken debtor" in the basic Law and the fact that this amending enactment speaks about the removal of any doubt as regards the interpretation of the term stricken debtor to be found in the basic Law, does not change its character or render it offensive to the Separation of Powers to be found in our Constitution. It should be noted that it goes on to say that "it is declared that the material time for evaluating the situation of a stricken debtor is and always was the time immediately after the Turkish invasion and not any other time subsequent to it."

In effect, it amends, by using the expression "to remove any doubt" instead of using such other terms as "to amend". The expression therefore used and the choice of words does not take the said Law outside the powers vested in the House of Representatives to amend a pre-existing Law which was found, through the words used, not to convey, as interpreted by the Court, the intention of the legislature and it is not for this Court to criticize the expressions used but to give effect to them.

The intention of the legislature in enacting this section 2, is more than clear if one looks at its text as a whole and my answer to the Question of Law reserved for consideration by this Court whether the said section is unconstitutional as offending the separation of powers is in the negative as this amendment has not been invoked as between the parties to the *Evangelou* case (supra) but in another case as between other parties where different considerations apply. Furthermore there may arise an issue as to whether in addition to its prospective effect which is introduced by

the use of the word "is" before the words "and always was", and for which unquestionably there cannot be any issue raised, retrospectivity can be given in respect of other persons other than the litigants in the *Evangelou* case and in respect of pending actions.

The retrospective operation of statutes, subject to any Constitutional restrictions and limitations as those to be found in Article 24, which have no bearing to the case in hand, and any possible effect that the provisions of section 10(2) of the Interpretation Law may have, is governed by well defined canons of construction in respect of which I need not elaborate. It is sufficient to quote from *Maxwell on Interpretation of Statutes* 12th Edition p. 220 where it is stated that "In general when the substantive Law is altered during the pendency of an action the rights of the parties are decided according to the Law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights". But this question is not in issue before us to-day.

Another aspect of the case related to the nature of declaratory statutes. The matter is adequately dealt with again in *Maxwell* (supra) at p. 224 where it is stated that "if a statute is in its nature a declaratory act, the argument that it is not to be construed so as to take away previously vested rights is inapplicable". And by way of example reference is made therein to section 6 of the Finance Act 1898 which provided for the removal of doubt, that the definition of "conveyance on sale" in the Stamp Act 1891 included an order for foreclosure. It was held that section 6 was declaratory and therefore retrospective so that an order of 1896 foreclosing a legal mortgage required stamping as a conveyance on sale. This was so held *In Re Lovell and Collard's Contract* [1907] 1 Ch. 249 in which the *Attorney-General* v. *Theobald* [1890] 24 Q.B.D. 557 was followed. In the *Lovell,* case (supra) Swinfen Eady J., at p. 254 pointed out by reference to the case of *Harding* v. *Queensland Stamp Commissioners* [1898] A.C. 769 that:

> "The Supreme Court held that the section was declaratory because of the opening expression, 'It is hereby declared,' but Lord Hobhouse said: ' Their Lord-

ships cannot take such a view of the Act.' The use of the expression, 'It is decided,' to introduce new rules of law is not incorrect, and is far from uncommon. The nature of the Act must be determined from its provisions."

In the course of the argument before us reference was made by counsel to the case of *Chokolingo* v. *Attorney-General of Trinidad and Tobago* [1981] 1 All E.R. 244. If anything this case bears out my approach that the question of the separation of power as regards the exercise of legislative power to make written laws and the exercise of judicial power as a function of the judiciary alone was raised in it only as regards the parties to the same proceedings.

In that case a newspaper in Trinidad and Tobago published a short story written by the appellant who was prosecuted for contempt of court. On advice from counsel he pleaded guilty to the offence and he was sentenced to twenty-one days imprisonment. He did not appeal and served the sentence. Three years later he applied for a declaration under a particular provision of the Constitution of Trinidad and Tobago that his committal was unconstitutional and void because it contravened his right under section 1(a) not to be deprived of his liberty except by "due process of Law".

Lord Diplock whose statement of the law was invoked in our case had this to say at pp. 247-248:

"In dismissing the appellant's application under s. 6(1) the Court of Appeal relied on the statement by this Board in *Maharaj* v. *Attorney-General of Trinidad and Tobago (No. 2)* [1978] 2 All E.R. 670 at 679, [1979] AC 385 at 399:

'... no human right or fundamental freedom recognised by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court

to appeal to then none can say that there was error.'

It may be that technically this statement was obiter, but, as the context indicates, it was the subject of careful deliberation by the Board in the light of the judgments of Hyatali CJ and Corbin JA in the Court of Appeal and the minority judgment in the Judicial Committee itself.

The arguments addressed to their Lordships in the instant appeal, however, call for some expansion of that statement. Under a constitution on the Westminster model, like that of Trinidad and Tobago, which is based on the separation of powers, while it is an exercise of the legislative power of the state to make the written law, it is an exercise of the judicial power of the state, and consequently a function of the judiciary alone, to interpret the written law when made and to declare the law where it still remains unwritten, i. e. the English common law and doctrines of equity as incorporated in the law of Trinidad and Tobago by s. 12 of the Supreme Court of Judicature Act 1962. So when in Chapter 1 the Constitution of Trinidad and Tobago speaks of 'law' it is speaking of the law of Trinidad and Tobago as interpreted or declared by the judges in the exercise of the judicial power of the state.

The normal way in which this interpretative and declaratory function is exercised is by judges sitting in courts of justice for the purpose of deciding disputes between parties to litigation (whether civil or criminal), which involves the application to the particular facts of the case of the law of Trinidad and Tobago that is relevant to the determination of their rights and obligations. It is fundamental to the administration of justice under a constitution which claims to enshrine the rule of law (preamble, paras (d) and (e) that if between the parties to the litigation the decision of that court is final (either because there is no right of appeal to a higher court or because neither party has availed himself of an existing right of

appeal) the relevant law as interpreted by the Judge in reaching the court's decision is the 'law' so far as the entitlement of the parties to 'due process of law' under s. 1(a) and the 'protection of the law' under s. 1(b) are concerned. Their Lordships repeat what was said in *Maharaj* v. *Attorney-General for Trinidad and Tobago (No. 2)*. The fundamental human right guaranteed by s. 1(a) and (b), and s. 2, of the Constitution is not to a legal system which is infallible but to one which is fair."

I have quoted at some length in order to show that the *Chokolingo case* turned on other issues and not on the powers of the legislature to amend laws or clarify situations or remove doubts by declaratory acts, even after an enactment was judicially construed and such a construction revealed that the original wording of the law did not convey what was intended by the legislature to convey.

A similar approach again as regards the rights of the parties to the same proceeding is to be found in the *Societe United Docks* v. *Mauritius* [1985] 1 All E.R. 864 where at p. 877 Lord Templeman had this to say as regards retrospective legislation:

"The attention of the Supreme Court was not directed to the provisions of ss. 2 and 17 of the Constitution but to the question whether the retrospective provisions of the amending Act, aimed specifically at the award, constituted an unconstitutional infringement by the legislature of the judicial powers. In *Liyanage* v. *R.* [1966] 1 All E.R. 650, (1967) 1 AC 259 the Parliament of Ceylon passed Acts pursuant to a legislative plan ex post facto to secure the conviction and enhance the punishment of particular individuals, legalising their imprisonment while they were awaiting trial, making admissible statements which had been inadmissibly obtained, altering the fundamental rules of evidence so as to facilitate their conviction and altering ex post facto the punishment to be imposed on them. The Board held that the Acts involved the usurpation and infringement by the legislature of judicial powers inconsistent with the written constitution

of Cyelon which though not in express terms, manifested an intention to secure to the judiciary freedom from political, legislative and executive control. Similarly, in *Hinds* v. *R.* [1976] 1 All E.R. 353 at 360, [1977] AC 195 at 213 the Board affirmed the principle that -

> 'implicit in the very structure of a constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, even though this is not expressly stated in the constitution...'

In the present case the Board have not heard full argument and do not pronounce on the submission by the appellants that the amending Act was an unconstitutional interference with the rights of the Supreme Court."

In *Liyanage and others* v. *Reginam* [1966] 1 All E.R. 650, again the issues have no direct bearing in the case before us. In effect with regard to offences arising out of an abortive Coup d' Etat in Ceylon, legislation was passed with retrospective effect and was limited in operation to those who were accused of offences against the State. It modified a section of the Penal Code so as to enact ex post facto a new offence to meet the circumstances of the abortive coup, it altered ex post facto the law of evidence regarding statements made by an accused while in custody, and it enacted a minimum punishment, accompanied by forfeiture of property, for the offences for which the appellants were in fact to be tried.

There was a further act passed regarding the nomination of Judges by a Minister. It was held "(i) the first and second Acts were invalid for the following reasons - (a) under the Constitution of Ceylon there was a separation of powers, and the power of the judicature, while the Constitution stood, could not be usurped or infringed by the executive or the legislature, (b) the first and second Acts were aimed at the individuals concerned in the abortive

coup and were not legislation effecting criminal law of general application, and although not every enactment ad hominem and ex post facto necessarily infringed the judicial power, yet there was such infringement in the present case by these two Acts."

This case is obviously distinguishable from the one in hand.

In Malachtos v. *The Attorney-General* (1981) 1 C.L.R. 543, Pikis J., at p. 549 had this to say:

> "The expedient of furnishing an interpretation to the provisions of a law already enacted, must be sparingly used, and then only in circumstances where the legislature failed in the first place to give a clear expression to its manifest intent. It is not the province of the legislature to interpret its laws but that of the judiciary. Certainty in the law would be undermined if the legislature resorted to an ex post facto interpretation of its enactments whereas serious inroads would be created to the system of separation of powers, so essential for sustaining the rule of law. Therefore, unless the wording of the interpretative enactment is reconcilable with the provisions of the law it purports to interprete, such subsequent legislation will be treated by the Courts as a piece of retroactive legislation, leaving intact rights that may have vested in the meantime. No such conflict is discernible in this case for it was, in the first place, the manifest intention of the legislature to leave to the Council of Ministers the power of terminating the period of suspension as it might deem necessary in the light of the prevailing circumstances."

There is one more case to which I would like to refer that is a judgment of a German Court, copy of which in a Greek translation prepared by Mr. Pantelides was produced. It is headed "The Legislator cannot amend retrospectively a Law, suitably applied by the Case Law of the Supreme Court, for the purpose of annulling the Case Law for the past and correct it."

I do not intend to dwell at length with this case as in

its concluding summing up there is left room for retrospective legislation and any effort to go deeper into the matter would have turned this dissenting opinion into a study in comparative law. Retrospectivity in legislation is a branch of the law extensively dealt with by this Court in numerous cases. The latest being *Liatsos* v. *Ponirou and another* (1985) 1 C.L.R. p. 165 and *Ttofis Kyriacou and Son Ltd.*, v. *Rologis Ltd.*, (1985) 1 C.L.R. 211 in which cases reference is made to previous cases of this Court and the English Courts on the subject.

In the case under consideration the amending law does not change the Case Law of this Court, it merely changes the law retrospectively, which subject to certain constitutional and other limitations with which we are not concerned here, it could legitimately do.

It may be helpful to refer to the position in Greece and in that respect reference may be made to certain passages from Sgouritsas, Constitutional Law (1964) Volume B Part A, at p. 49 where it is stated:-

> "Doubts arise whether a law with retrospective force covers also pending trials. And it is recognized on the one hand by virtue of the principle of the separation of powers that the 'legislative power cannot compete with the competence of the judicial power' or 'to take upon itself the work of the Courts', but independently of this it has been accepted that the legislator may in its supremacy order, on account of a new regulation of relations, the abolition of such relations in pending cases before the Court, or abolish or restrict recognized, even by judicial decisions rights, and when it does this it does not declare as null the judicial pronouncements on them nor does it interfere with the judgment of the Court but had simply exercised competence belonging to it."

As regards this point reference can also be made to the Conclusions from the Case Law of the Greek Council of State 1929-1959 at pp. 50-51 and the decisions therein cited.

As I have already said section 2 of Law No. 92 of 1984

is and should be considered as an ordinary amending Law, laying down rules of law with retrospective effect which do not affect any provision of the Constitution. It does not interfere with the rights of the parties in the *Evangelou* (supra) but defined the rights of the public in general other than those dealt with in the said case.

LORIS J.: I had the privilage of reading in advance the opinion of the learned President of this Court and inspite of my full agreement with him, I beg to be permitted to add this much:

The interpretation section of the Debtors Relief (Temporary Provisions) Law 1979 (Law No. 24/79) in respect of "stricken debtor" received judicial interpretation in the decision of the Court of Appeal in the case of *Evangelou* v. *Ambizas* (1982) 1 C.L.R. 41, where Pikis J. in delivering the judgment of the Court clearly stated that "the inquiry must be presently made and not by reference to any time anterior to the date of trial." The judgment in the aforesaid appeal was delivered as early as the 8th of February, 1982.

The House of Representatives having enacted on 21.12.1984 Law 92/84, *purporting by virtue of s. 2 thereof*, "to remove any doubt as regards the interpretation of the term 'stricken debtor', as set out in section 2 of the basic law", declared that "the material time for evaluating the situation of a stricken debtor is, and always was, the time immediately after the Turkish invasion and not any other time subsequent to it."

Thus the Legislature who is being presumed to know the state of the existing law at the time of passing Law No. 92/84 and must be taken to know the judicial interpretation, which has been placed more than two and a half years earlier, on the definition of "stricken debtor" in the basic law, has sought to reverse the judicial interpretation placed upon "the material time for evaluating the situation of a stricken debtor", thus infringing the constitutionally entrenched Separation of Powers between the Legislative Power and the Judicial Power in our Republic.

Of course, as rightly stated by the learned President of

this Court, it was open to the Legislature to amend the definition of "stricken debtor" in the basic law, but it was quite unconstitutional for them to enter into the province of the Judiciary by inserting an interpretation section (s. 2 of Law 92/84) purporting to interpret the definition of "stricken debtor" in the basic law with retroactive effect, whilst such definition had already received final Judicial interpretation some two and a half years earlier.

As stated by Pikis J., in delivering the judgment of the Court of Appeal, over which I had the privilege to preside, in *Malachtou* v. *A. G.* (1981) 1 C.L.R. 543 at p. 549, "Certainty in the law would be undermined if the legislature resorted to an ex post facto interpretation of its enactments, whereas serious inroads would be created to the system of separation of powers, so essential for sustaining the rule of law."

PIKIS J.: The constitutionality of s. 2 of Law 92/84 is the subject of questions reserved for the opinion of the Supreme Court by way of case stated pursuant to the provisions of the Debtors Relief (Temporary Provisions) (Amendment) Law, 1979 (Law 24/79). In agreement with the learned President, I rule that s. 2 is unconstitutional. Specifically, because its provisions are repugnant to Art. 152.1 that entrusts judicial power to the judicial authorities of the State and the doctrine of separation of powers, a central feature of the Constitution of Cyprus that prohibits the assumption by one power of the State of a competence assigned to another; and so far as relevant to this case, the Legislature from acting in a judicial capacity. The learned President declared and I wholly agree with him, the attempt made by the Legislature in this case to interpret its own law constitutes an impermissible exercise of a judicial competence and as such is unconstitutional. Not only the Legislature encroached upon the powers of the Judiciary but usurped them as well. Below I explain why.

The Constitution vested the judicial power of the State in the two superior courts, the Supreme Constitutional Court and the High Court and courts subordinate thereto established by law (Article 136 and 152 respectively). With

the fusion of the Courts effected by the Administration of Justice (Miscellaneous Provisions) Law (1) the judicial power devolved on the Supreme Court and inferior Courts established by law. Subject to reservations expressly made in the Constitution(2) every aspect of the judicial power vests in the Courts established under the Constitution. No authority other than the judiciary can legitimately assume the exercise of any facet of the judicial power. State powers are, under the Cyprus Constitution, distributed, depending on their intrinsic nature, among the three branches of the State, the Executive, the Legislative and the Judicial. Within its sphere each power is sovereign and autonomous.

The interpretation of laws—and that includes the Constitution and statute law—is by its nature a judicial function. It was recognized as such by the Supreme Constitutional Court in *The Republic and Charalambos Zacharia*(3) and more recently by the Supreme Court in *Malachtou* v. *The Attorney-General*(4). Consequently, any attempt by the legislature to interpret its own laws is unconstitutional for lack of authority to do so. It is not in their power to interpret the law.

The appreciation of Cyprus Courts of the juristic nature of the interpretative function in a system of separation of powers is consonant with the approach of the Privy Council to the same matter in *Chokolingo* v. *A-G of Trinidad*(5). Defining the nature of the interpretative process under a system based on the separation of powers, the case with the Constitution of Trinidad and Tobago, they said: "While it is an exercise of the legislative power of the State to make the written law, it is an exercise of this judicial power of the State, and consequently a function of the judiciary alone. to interpret the written law when made..."(6).

In discerning the meaning of the law the judiciary is confined to the text of the legislation, the only authoritative expression of the will of the legislature. What the

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(1) 33/64.
(2) See Art. 152.
(3) 2 R.S.C.C. 1, 5.
(4) (1981) 1 C.L.R. 543, 547.
(5) [1981] 1 All E.R., 244, 247, 248.
(6) Page 247 end to p. 248(a).

legislature purported to achieve by the assumption of competence to declare the meaning of "stricken debtor" in the context of the Debtors Relief Law was to make its provisions read otherwise than originally framed. Seemingly they disagreed with the interpretation given by the Supreme Court to the relevant provisions of the law in *Evangelou* v. *Ambizas* (1) and sought to reverse its effect under the guise of clarifying its provisions. Plainly they engaged in an exercise of interpretation of the law, a function that falls within the exclusive jurisdiction of the judiciary and in that way usurped the powers of the judiciary. If s.2 of law 92/84 was capable of being construed as a piece of retroactive legislation it might be saved, as explained by Triantafyllides, P. However, that is not a possible construction of its provisions. If that were the case questions of vested rights would have to be pondered.

The avowed aim of the House of Representatives was to declare the content of the law, after its enactment, to be other than what was expressed to be in the statute, namely, law 24/79. This was outside the sphere of their competence. Now that the House of Representatives will be alerted, by this decision, to the limitations of their power they may, if they so choose, alter the law retrospectively or amend its provisions prospectively or legislate in any manner they may deem necessary. It is in their power, subject to the limitations set out in Art. 24, to enact legislation with retroactive effect.

The assignment of the competence to interpret the laws to the judiciary makes for certainty and consistency in the law, as well as ensures the supremacy of the law, so essential for the sustenance of the rule of law.

KOURRIS J.: I agree with Pikis, J. We are faced with an attempt by the House of Representatives to change the law by assuming powers to interpret it.

As explained in the judgment of Pikis, J. the interpretation of law is the sole responsibility of the Judiciary, a responsibility they discharged in respect of the meaning of

(1) (1982) 1 C.L.R. 41.

"stricken debtor" in the case of *Evangelou* v. *Ambizas* (1982) 1 C.L.R. 41.

Thereafter the attempt of the House of Representatives to interpret the law in any different manner, was a usurpation of the Judicial Power and for that reason unconstitutional.

TRIANTAFYLLIDES P.: In the result the Opinion of this Court is, by majority, that section 2 of Law 92/84 is unconstitutional.

Opinion that s.2 of Law 92/84 is unconstitutional.