1987 July 31

[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, SAVVIDES, LORIS, STYLIANIDES, KOURRIS, JJ.]

THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC SERVICE COMMISSION,

Appellant (Respondent),

v.

KYRIACOS KYRIACOU,

Respondent (Applicant)

(Revisional Jurisdiction Appeal No. 733)

Constitutional Law — Public Service Commission — The Public Service Law, 33/67, section 4(3) — Whether aforesaid section, vesting the President of the Republic with power to terminate the appointment of the Chairman and Members of the Public Service Commission, set up by the said law, is unconstitutional — Question answered in the negative

Constitutional Law — Law of necessity — The necessary prerequisites for the application of the doctrine — What measures are justified thereunder

Constitutional Law — Questions of constitutional nature — The principles governing the power of the Courts to examine such questions

The question in this appeal is whether section 4(3) of Law 33/67, which provides that the President of the Republic is vested with power to terminate in the public interest the appointment of the Chairman or of any other member of the Public Service Commission, is unconstitutional.

In this respect the trial Judge held* that section 4(3) is unconstitutional, not only because it is inconsistent with Art. 124.5 of the Constitution, but also because it offends the constitutional principle of separation between political and administrative authority. The trial Judge held further that because of section 4(3) the Public Service Commission was unconstitutionally constituted and, as a result, the sub judice decision has to be annulled.

Held, *allowing the appeal, Kourris, J. dissenting*

(A) *Per Triantafyllides, P., Malachtos, J. concurring* (1) The case law established that the Public Service Commission set up by Law 33/67 is not the Public Service Commission provided for by Art. 124 of the Constitution, but a new Commission. Consequently, Art. 124.5 of the Constitution is not directly applicable to the Commission of Law 33/67.

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* *See Kyriacou v. The Republic (1987) 3 C.L.R. 1130.*

(2) The setting up of the aforesaid new Commission was justified by the Law of necessity The new Commission has to exist and function in a manner as closely analogous as possible with the Commission of Art 124, because otherwise the setting up of the new Commission cannot be justified under the law of necessity It follows that the question is whether section 4(3) is compatible with the independence of the new Commission

(3) It has not been established that section 4(3) of Law 33/67 was intended to be, or has been or can be used for the purpose of interfering with such independence Moreover, the existence of judicial control over the exercise of the power under section 4(3) (See *Louca v President of the Republic* (1984) 3 C L R 241) eliminates any risk of interference with the new Commission's independence

(4) In any event, the sub judice decision cannot be annulled, because it has not been shown that the alleged invalidity of section 4(3) was in any way related to the manner in which such decision wa reached

(B) *Per A Loizou, J , Malachtos, J concurring* (1) In *The Republic v Louca and Others* (1984) 3 C L R 241, where, however, the issue was whether a revisional jurisdiction appeal or a recourse under Art 146 can be withdrawn without prior leave of the Court, there were made certain observations to the effect that the whole matter of section 4(3) of Law 33/67 should be reconsidered by the appropriate organs in the light of Art 124 5 of the Constitution

(2) On 28 11 86 a Bill was published proposing an amendment of section 4(3) to the effect tha the Chairman and Members of the Commission cannot be removed from office, except on the like grounds and in the like manner as the Judges of the Supreme Court The Bill has not been enacted so far by the House of Representatives, but the delay was due to the fact that it was left to be introduced as part of a bigger revision of the Public Service Law

(3) Moreover the tenor of subsection 3 is nothing more than the power claimed to be possessed by the Executive branch of Government under the general principles of Administrative Law, namely the administrative measure

(4) Section 4(3) of the Law was presumably a provision that would enable the President of the Republic to terminate in the public interest the services of the members of the Public Service Commission in case for example there were Constitutional and other radical changes in Cyprus that necessitated the bringing to an end the overall structure of the Public Service Commission, as established by the said Law as a temporary measure

(5) To my mind the developments which have taken place since *Louca* case (supra) have in effect and for all intents and purposes rendered inoperative the said sub-section and in no way could be invoked as constituting an interference with the independence of the members of the Public Service Commission

243 cited with approval by Josephides, J. in *The Board for Registration of Architects and Civil Engineers v. Kyriakides* (1966) 3 C.L.R. 640 was cited with approval).

(2) The task of the trial Judge in this case was confined to the issue whether the sub judice appointments were reasonably open to the Public Service Commission.

(3) Determination of the constitutionality of section 4(3) of Law 33/67 was not «absolutely necessary to a decision of this case», in as much as s. 4(3) of Law 33/67 was neither applied nor a question of its application arose.

(E) *Per Stylianides, J.:* (1) The doctrine of necessity is mainly based on the maxim «salus populi est suprema lex». The prerequisites for the application of the doctrine were set out in *Attorney-General v. Ibrahim and Others, supra,* by Josephides, J. at p. 265. The principle that can be deduced from *Ibrahim* case is that the Court may temporarily treat as valid and effective laws which are constitutionally flawed in order to preserve the rule of law. When it is impossible to comply with the Constitution, the Court may allow the Government a temporary reprieve from such compliance in order to preserve society and maintain, as nearly as possible, normal conditions.

(2) The establishment of the present Public Service Commission by Law 33/67 was justified by the Law of necessity.

(3) In the *Republic v. Louca and Others,* supra observations obiter were made by a number of Judges, either expressly declaring that section 4(3) of Law 33/67 is clearly unconstitutional and not justified by the «law of necessity», or that a serious question of its constitutionality arose and that serious doubt was cast on its constitutionality and the whole matter should be considered by the appropriate organs of the Republic in the light of the provisions of the Constitution.

Thereafter a Bill No. 28/86 was laid before the House of Representatives by the Executive, whereby section 4 of Law 33/67 was sought to be repealed and substituted by a new section, providing that the members of the Commission can only be removed from office on the like grounds and in the like manner as Judges of the Supreme Court.

This Bill was not enacted by the House of Representatives, as in the meantime a comprehensive Bill, containing many provisions relating to the Public Service - Bill 16/87, was introduced.

(4) Having regard to the above, the provisions of section 4(3) have become inoperative and no President of the Republic may exercise power under it. Its existence in the statute book, as aforesaid, cannot be validly said that it interferes in any way with the independence of the members of the Public Service Commission.

(5) In any event it has not been shown that the provisions of section 4(3) had any connection or relation whatsoever with the process in the taking of the sub judice decision

Appeal allowed

Cases referred to

Bagdassarian v The Electricity Authority of Cyprus (1968) 3 C L R 736,

Messaritou v The Cyprus Broadcasting Corporation (1972) 3 C L R 100,

Theodorides v Ploussiou (1976) 3 C L R 319,

The Cyprus Tourism Organization v HadjiDemetriou (1987) 3 C L R 780,

Hadjianastassiou v The Republic (1982) 3 C L R 1173,

Louca v The President of the Republic (1983) 3 C L R 783,

The Attorney-General of the Republic v Ibrahim 1964 C L R 195,

The Reference Re Language Rights under the Manitoba Act 1870 (1985) 19 D L R (4th) 1,

The President of the Republic v Louca (1984) 3 C L R 241,

Josephin v The Republic (1986) 3 C L R 111,

Charalambous v The Republic (1986) 3 C L R 557,

Kazamias v The Republic (1982) 3 C L R 239,

Andreou and Others v The Republic (1975) 3 C L R 108,

The Board for Registration of Architects and Civil Engineers v Kyriakides (1966) 3 C L R 640,

Pastellopoulos v Republic (1985) 2 C L R 165

Appeal.

Appeal against the judgment of a Judge of the Supreme Court (Pikis, J) given on the 16th July, 1987 (Revisional Jurisdiction Case No 725/85)* whereby the decision of the Public Service Commission to appoint the interested parties to the post of Conservator of Forests was declared null and void.

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

K. Talandes, for the respondent

Cur adv. vult

* *Reported in (1987) 3 C L R 1130*

The following judgments were read:

TRIANTAFYLLIDES P.: At this stage of the proceedings in the present appeal this Court has to pronounce on the constitutional validity of the constitution of the appellant Public Service Commission.

The crusial issue in this respect is the constitutionality of subsection (3) of section 4 of the Public Service Law, 1967 (Law 33/67), which empowers the President of the Republic to terminate in the public interest the appointment of the Chairman or of any other member of the Public Service Commission.

The learned trial Judge found that section 4(3) of Law 33/67 is unconstitutional because it conflicts with Article 124.5 of the Constitution, which provides that a member of the Public Service Commission shall not be removed from office except on the like grounds and in the like manner as a Judge of the High Court (now of the Supreme Court). The trial Judge went on to find, further, that section 4(3) of Law 33/67 interferes with the independence of the Public Service Commission and he held, consequently, that, because of the said section 4(3), the Public Service Commission was uncostitutionally constituted. As a result he annulled the sub judice in the proceedings before him decision of the Public Service Commission.

Our case-law (see, inter alia, *Bagdassarian v. The Electricity Authority of Cyprus*, (1968) 3 C.L.R. 736, *Messaritou v. The Cyprus Broadcasting Corporation*, (1972) 3 C.L.R. 100, *Theodorides v. Ploussiou*, (1976) 3 C.L.R. 319, and *The Cyprus Tourism Organization v. HadjiDemetriou*, Revisional Jurisdiction Appeal No. 665, determined on 6 November 1986 and not yet reported)* has established that the Public Service Commission which was set up under Law 33/67 is not the Public Service Commission provided for by Article 124 of the Constitution, but a new Public Service Commission set up for the purpose of functioning as a substitute for the Public Service Commission provided for by the said Article 124 of the Constitution, because that Commission has ceased to exist and function ever since 1964.

Consequently, paragraph (5) of Article 124 of the Constitution is not directly applicable to the Public Service Commission which was set up under Law 33/67 and, therefore, section 4(3) of Law 33/67 is not in conflict with such paragraph (5).

* *Reported in (1987) 3 C.L.R. 780.*

The setting up of a new Public Service Commission under Law 33/67 was justified by the law of necessity (see, inter alia, in this respect, *Hadjianastassiou v. The Republic*, (1982) 3 C.L.R. 1173, 1179, *Louca v. The President of the Republic*, (1983) 3 C.L.R. 783, 788, and, also, *The Attorney-General of the Republic v. Ibrahim*, 1964 C.L.R. 195, which was referred to with approval by the Supreme Court of Canada in *The Reference Re Language Rights under the Manitoba Act 1870*, (1985) 19 D.L.R. (4th) 1).

The new Public Service Commission, which was set up under Law 33/67, has to exist and to function in a manner as closely analogous as possible to the Public Service Commission provided for by Article 124 of the Constitution, because otherwise the setting up of the new Public Service Commission cannot be justified by the «law of necessity»; and an indispensable attribute both of the Public Service Commission provided for by the Constitution and of the new Public Service Commission which was set up under Law 33/67 is its independence, for which the security of tenure of its members is an essential prerequisite.

It has to be examined, therefore, whether section 4(3) of Law 33/67 is compatible with the independence of the Public Service Commission which was set up under Law 33/67; and concern in this connection has been expressed in *The President of the Republic v. Louca* (1984) 3 C.L.R. 241 and in subsequent cases such as *Josephin v. The Republic* (1986) 3 C.L.R. 111.

After having carefully weighed all relevant considerations I have reached the conclusion that it has not been established to my satisfaction that section 4(3) of Law 33/67 was either intended to be, or since its enactment has been, or can be, used for the purpose of interfering with the independence of the Public Service Commission which was set up under Law 33/67; and it is to be noted that even when the said section 4(3) was resorted to by the President of the Republic in order to terminate the appointments, in the public interest according to his view, of two members of the Public Service Commission in a manner not in any way affecting the independence of the Public Service Commission, it was held (see *Louca v. The President of the Republic*, supra) that action taken by the President of the Republic under such section 4(3) is subject to judicial control by the Supreme Court.

In my view the existence of judicial control eliminates any risk that the powers of the President of the Republic, under section 4(3) of Law 33/67, may be used to undermine the independence

of the Public Service Commission and it should, also, dispel any anxiety of any member of the Commission that his independence is threatened because of the existence of the said section 4(3).

In the light of all the foregoing I cannot hold that section 4(3) of Law 33/67 is invalid either because it conflicts with Article 124 of the Constitution or because it is incompatible with the essential prerequisite of the independence of the Public Service Commission, and, therefore, the constitution of the Commission is not vitiated by the existence of the said section 4(3).

In any event, I have noted with satisfaction that a Bill has been sent by the Executive to the House of Representatives for the purpose of repealing section 4(3) of Law 33/67 and substituting it with a provision modelled on paragraph (5) of Article 124 of the Constitution, in order to avert any doubt regarding independence of the Public Service Commission which was set up under Law 33/67; and, actually, a similar provision has already been enacted, as an amendment to the Public Educational Service Law, 1969 (Law 10/69).in respect of the Educational Service Commission.

In concluding I should, in addition to my finding that the constitution of the Public Service Commission is not vitiated by the existence of section 4(3) of Law 33/67, stress that I would not, in any event, be prepared to hold that there can be annulled the sub judice decision of the Public Service Commission since it has not been shown that the alleged invalidity of the said section 4(3) is in any way directly related to the the manner in which such decision was reached (see, inter alia, *Charalambous v. The Republic*, (1986) 3 C.L.R. 557).

In the result this appeal should be allowed, without any order as to its costs, and the cross-appeal will be fixed for hearing in due course.

A. LOIZOU J.: The question of the Constitutionality of section 4(3) of the Public Service Law 1967 (Law No. 33 of 1967 - heareinafter to be referred to as the Law) was raised for the first time in the case of *Louca v. The Republic* (1983) 3 C.L.R. 783 where Triantafyllides P., hearing the case in the first instance held the view that although the said provision was contrary to Article 124(5) of the Constitution it was justified by the Law of necessity. In this respect Triantafyllides, P., at p. 789 had this to say:-

«As already stated the vesting, by the said section 4(3), in the President of the Republic of the right to terminate in the public interest the services of a member of the Public Service Commission is a legislative extension of the powers of the President of the Republic under the Constitution which can only be justified by the 'law of necessity' in the same context in which the setting up by means of Law 33/67 of a new Public Service Commission is found to be justified by the 'law of necessity'».

The *Louca case* was one challenging the validity of the termination by the President of the Republic under section 4(3) of the Law of the services of members of the Public Service Commission. The sub-judice termination, having been annulled, an appeal was filed against the annulling judgment but after a statement made by the parties, the two respondents in the appeal asked for leave to withdraw their recourses It may be said here that the question that was raised by this course of events was whether an appeal could be withdrawn or abandoned without the leave of the Court or only with such a leave as a matter of discretion possessed by it under the relevant Rules of Court, and whether a recourse filed under Article 146 of the Constitution could likewise be withdrawn, discontinued or abandoned as of right by a litigant or only with the leave of the Court. The judgment in that appeal is reported as *The Republic v. Louca and Others* (1984) 3 C.L.R. 241

In order to complete the picture as regards the circumstances under which these recourses were withdrawn, it may be mentioned here that as it appears from the factual background of the case in my judgment at p. 247, «this position was reached as a result of an overall settlement of the relevant recourses and that the applicants were expected to withdraw them having been apparently duly compensated.»

In delivering my judgment on that issue in that appeal I made the following observations at pp. 251-252.

«Before concluding and in view of the importance of the issue of the constitutionality of subsection 3 of section 4 of the Public Service Law 1967, and of the fact that same refers to the powers of the President of the Republic to terminate in the public interest the services of the Chairman or any Member of

the Public Service Commission, the whole matter should be reconsidered by the appropriate Organs of the Republic in the light of the provisions of Article 124, para. 5, of the Constitution which provides 'a Member of the Commission shall not be removed from office, except on the like grounds and in the like manner as a judge of the High Cout', and in the light of Article 47, para (f) and Article 153, paras. 7 and 8 of the Constitution.»

Observations to the same effect were made by Savvides J., in the same case and in the case of *Kazamias v. The Republic* (1982) 3 C.L.R. 239 at p. 301 which he also reiterated in the case of *Charalambous v. The Republic* (1986) 3 C.L.R. 557. Similar observations appear in other judgments delivered in that case.

After the delivery of the judgments in that appeal allowing the withdrawal of the recourses, the appeal and cross-apppeals were also withdrawn and dismissed with the leave of the Court.

The Executive soon thereafter, introduced legislation by which there was effected an amendment to the corresponding section of the Public Educational Service law 1969. Moreover a Bill was published in the official Gazette of the Republic of the 28th November 1986, aiming at effecting changes to section 4 of the Law, in order to provide, inter alia, that the members of the Public Service Commission cannot be removed from office except on the like grounds and in the like manner as the Judges of the Supreme Court, which, however, has not yet been enacted by the House and which was obviously the outcome of the observations made by this Court in connection also with the settlement that was effected regarding the termination of the services of those members of the Public Service Commission. It appears, however, that the delay must have been due to the fact that this amendment was left to be introduced as part of a bigger revision of the Law which was negotiated in the Joint Personnel Consultative Committee between the Government and the Civil Service Trade Union following the prescribed procedure for negotiations and reaching at solutions in matters relating to the industrial relations of Government and its employees. Moreover the tenor of subsection 3 is nothing more than the power claimed to be possessed by the Executive branch of Government under the general principles of Administrative Law, namely the administrative measure. I do not intend to elaborate on this point, which in fact came before the Full

Bench of this Court in the cases of *Telemachos Andreou and other v. The Republic*, (1975) 3 C.L.R. 108, but no judgment was ever delivered because in view of the supervening events of 1974, they were struck out as abated.

Section 4(3) of the Law was presumably a provision that would enable the President of the Republic to terminate in the public interest the services of the members of the Public Service Commission in case for example there were Constitutional and other radical changes in Cyprus that necessitated the bringing to an end of the overall structure of the Public Service Commission, as established by the said Law as a temporary measure.

To my mind the developments which have taken place since *Louca case (supra)* have in effect and for all intents and purposes rendered inoperative the said sub-section and in no way could be invoked as constituting an interference with the independence of the members of the Public Service Commission. In fact it could not be said and it has not been shown that it has interfered or raised a reasonable probability that it could interfere with the independence of its members.

No doubt legislation introduced in derogation of the Constitution has to be justified under the well established doctrine of necessity which can be invoked under certain prerequisites as expounded by Josephides J., in the case of the *Attorney-General of the Republic v. Mustafa Ibrahim* 1964 C.L.R. 195, namely that (a) an imperative and inevitable necessity or exceptional circumstances, (b) no other remedy to apply, (c) the measures taken must be proportionate to the necessity and (d) it must be of a temporary character limited to the duration of the exceptional circumstances. Moreover a Law so enacted is subject to the control of the Court which has to decide whether the aforesaid prerequisites are satisfied, whether there exists such necessity and whether the measures taken were necessary to meet it.

I had myself the occasion to expound my views on this doctrine in the case of *Rita Messaritou v. Cyprus Broadcasting Corporation* (1972) 3 C.L.R 100 where I held that the prerequisites must be satisfied before the Law or doctrine of necessity becomes applicable. After that it is a question to be determined in the circumstances of each case whether the legislative measure taken was justified in the circumstances and also whether it was not a wider measure than what it ought to have been in the circumstances.

I abide by these views and I hold that the legislative measures taken to meet a necessity can be chosen from a number of alternative solutions but they have to be absolutely necessary to meet such a situation Therefore though the Public Service Commission set up by the Law is a substitute organ to that provided by the Constitution, yet any deviation from the provisions of the Constitution should be limited to the extent that it is absolutely necessary to meet the necessity created and that the rest of the provisions of the Constitution apply, particularly those that safeguard its independence, and give it the character envisaged by the drafters of the Constitution.

It is in this context that the case of *Theodondes and Others v Ploussiou* (1976) 3 C.L R. 319 should be viewed.

For all the above reasons the appeal is allowed but in the circumstances there will be no order as to costs

MALACHTOS J.: I would also allow the appeal as I hold the view that subsection (3) of section 4 of the Public Service Law, 1967 (Law 33/67), which empowers the President of the Republic to terminate in the public interest the appointment of the Chairman or of any other Members of the Public Service Commission, is not unconstitutional for the reasons given by the judgments just delivered by the President of the Court and my brother Judge A Loizou

SAVVIDES J.:- This is an appeal by the Republic of Cyprus, respondent in Recourse No 725/85, against the judgment of a Judge of this Court in the exercise of the original jurisdiction of the Court whereby he allowed the recourse of the applicant and annulled the promotion of the interested parties, T Tsintides and Chr Alexandrou to the post of Conservator of Forests which was decided by the Public Service Commission.

The applicant, respondent in this appeal, challenged the promotion of the interested parties on the grounds of wrongful exercise by the Public Service Commission of its discretionary powers, for illegal composition of the Departmental Committee and for reasons of constitutionality of the provisions of section 4(3) of the Public Service Law, 1967, Law 33/67. The learned trial Judge dismissed the recourse on all other grounds relied upon but accepted it and annulled the sub judice decision on the ground

that the provisions in section 4(3) of Law 33/67 under which the members of the Commission serve, are contrary to the Constitution. The learned trial Judge reached the conclusion that the terms of office laid down by section 4(3) of the Public Service Law (33/67) under which the members of the Commission serve, are contrary to the Constitution and deprive the body of the attributes of independence laid down by the Constitution.

Section 4(3) of Law 33/67 empowers the President of the Republic to terminate at any time the services of the chairman or any member of the Public Service Commission on grounds of public interest.

The appeal in the present case is directed against that part of the judgment of the trial Judge whereby he found that the terms of office laid down by section 4(3) are violating the Constitution.

The sole question which poses for consideration is whether the trial Judge was correct in finding that the sub judice decision should be annulled on this ground.

The submission of counsel for the respondent in this appeal was that such provision was violating Article 124.5 of the Constitution which provides that «a member of the Commission shall not be removed from office except on the like grounds and the like manner as a judge of the High Court.»

I agree with the result reached by the majority of this Court that the appeal should be allowed and the decision of the trial Court should be reversed but for different reasons than those already mentioned by my brethren.

My approach in this appeal is the same as that in the case of *Charalambous v. The Republic* (1986) 3 C.L.R. 557, in which I rejected a similar submission made by counsel for applicant on the ground that such matter can only be considered if the termination of the term of office of a member of the Public Service Commission before its expiration comes for consideration before this Court on the application of such member.

The question of constitutionality of section 4(3) of Law 33/67 was raised for the first time in the case of *Louca v. The President of the Republic* (1983) 3 C.L.R. 783, where Triantafyllides, P. held the view that although the provisions of section 4(3) of the Public Service Law were contrary to Article 124.5 of the Constitution,

they were justified by the law of necessity. The relevant passage at p. 789, reads as follows:

> «As already stated the vesting, by the said section 4(3), in the President of the Republic of the right to terminate in the public interest the services of a member of the Public Service Commission is a legislative extension of the powers of the President of the Republic under the Constitution which can only be justified by the law of necessity in the same context in which the setting.up by means of Law 33/67 of a new Public Service Commission is found to be justified by the 'Law of necessity'.»

Appeals were filed against the above judgment (See *Republic v. Louca and Others* (1984) 3 C.L.R. 241) and in the course of the hearing of the appeals and cross-appeals counsel for the parties made a statement to the effect that the appellants abandoned or discontinued their appeals and the cross-appeals and the two respondents in person asked to withdraw their recourses. Such course was followed as a result of an overall settlement of the relevant recourses by means of which the respondents were expected to withdraw them having been apparently duly compensated.

The question, however, arose for consideration by the Full Bench, whether an appeal, or a recourse under Article 146 of the Constitution, could be withdrawn or abandoned without the leave of the Court or only with such leave. The majority of the Court (Pikis J. dissenting) found that the appeals and cross-appeals should be dismissed and the recourses struck out. Some members expressed the opinion that the recourses had been deprived of their object. Pikis, J. in his dissenting judgment refused leave for the withdrawal of the appeals and dealt with the constitutionality of section 4(3), concluding that the law of necessity was not applicable and that sub-section (3) of section 4 of the Public Service Law is unconstitutional.

The question of the constitutionality of section 4(3) was not considered by the other members of the Full Bench as the issue before them was not argued and they had only to decide whether the appellants were entitled to withdraw their appeals and the respondent their cross-appeals and the question was left open. Certain obiter views, however, were expressed by some members of the Court, that in view of the important constitutional issues

raised the position should be reconsidered by the appropriate organs of the Republic so that the independence and impartiality of the Public Service Commission be safeguarded. In fact I made the following observations at p 253:-

«Due to the importance of the functions of the Public Service Commission and to secure their impartiality and independence from governmental influence, the holding of office by its members was safeguarded for the duration of their term of office by paragraph 5 of Article 124 of the Constitution which provides that:

'A member of the Commission shall not be removed from office except on the like grounds and in the like manner as a Judge of the High Court'.

In *Kazamias v. The Republic* (1982) 3 C.L.R. 239, at p. 301, in dealing with the object of Article 125.1 of the Constitution, I said:

'The object of the introduction in our Constitution of Article 125.1, as already explained, was to entrust the safeguarding of the efficiency and proper functioning of the public service of the Republic, expressly including the exercise of disciplinary control over public officers, to the Public Service Commission, an independent and impartial organ outside the governmental machinery, and, at the same time safeguarding the protection of the legitimate interests of public officers.'

The power to appoint a member of the Public Service Commission was vested in the President and Vice-President of the Republic by Article 47(f) of the Constitution. As a result of the intercommunal troubles and the non participation of the Turkish members of the Public Service Commission in such Commission, and the fact that its functioning in the composition provided by Article 124 of the Constitution could not be carried out, the power to appoint the members of the Public Service Commission became vested in the President of the Republic under section 4(1) of Law 33/67. By the same Law, the number of its members was reduced to 5 (one Chairman and 4 members) and their term of office, subject to renewal, was fixed at 6 years (which was in line with the period provided by Article 124 of the Constitution). Under section 4(3) of Law 33/67 the President of the Republic may at any time terminate the appointment of the Chairman or of any

other member of the Commission if he considers it to be in the public interest.»

The same question was raised once again before this Court in the case of *Josephin v. The Republic* (1986) 3 C.L.R. 111, in which, Triantafyllides, P., annulled the promotions in question on another ground, but making reference to the views expressed in *The President of the Republic v. Louca* (supra) stressed once again the need for urgent consideration of the matter by the appropriate organs of the State.

Finally, the same issue was raised in *Charalambous v. The Republic* (supra) to the result of which reference has already been made. In dealing with this issue, in *Charalambous v. The Republic* I said the following at pp. 569, 570:-

«What was in issue in the case of Louca v. The Republic (supra) was the dismissal of a member of the Public Service Commission on grounds of public interest and should be differentiated from the present case. The opinions expressed in that case by both the President of the Court who heard the case in the first instance and all members of the Full Bench on appeal, referred only to the power of the President of the Republic under section 4(3) of Law 33/67 to dismiss a member of the Public Service Commission. In my obiter opinion in that judgment I observed that the functioning of the P.S.C. in the composition provided by Article 124 could not be carried out as a result of the intercommunal troubles and the non participation of the Turkish members of the P.S.C. in such Commission and as a result the power to appoint the members which under Article 47(f) of the Constitution was vested in the President and Vice-President of the Republic, became vested to the President of the Republic under section 4(1) of Law 33/67; also that the term of office provided by Law 33/67 was in line with the period provided by Article 124 of the Constitution. Assuming that sub-section (3) of section 4 is unconstitutional, a question which I am not proposing to decide in this case for the reasons I shall shortly explain, and which I leave open to be decided in a proper case in which the power of the President to dismiss a member prior to the expiration of his term of office will be at stake, the unconstitutionality of a provision in a law which can be

severable from the rest, without the object of such law being defeated, cannot render the whole law unconstitutional

In the present case I am not invited to decide the validity of an act or decision taken under the provisions of section 4(3), namely the termination of the term of office of a member of the P S C before its expiration This Court does not examine in abstracto the constitutionality of a particular provision in a law (in the present case section 4(3)) but a definite issue arising in the case As very rightly observed by the President of this Court in *Josephin v. The Republic* (supra), questions of constitutional nature are not to be decided unless it is really necessary

Counsel for applicant has contended that in view of the provisions of sub-section (3) of section 4, there is a possibility of a decision of the P S C to be taken under pressure and lack of impartiality Bias and lack of impartiality are matters which have to be established and the burden of proof lies upon the *person alleging same* »

I fully endorse what I said in *Charalambous* case in this respect, and I adopt the above as applicable mutatis mutandis in the present case

Bearing in mind the above I find that the respondent had no legitimate interest to challenge the constitutionality of section 4(3) namely, the right of the President of the Republic to terminate the term of office of a member of the Public Service Commission before its expiration, as contemplated therein Such matter could be challenged by a member of the Commission if and when his term of office was terminated, as a legitimate interest of his would have been affected entitling him to seek protection under the Constitution, as in *Louca* case (supra)

Before concluding, I wish to observe that the remarks made by the Court in *The Republic v Louca and Others* and other cases referred hereinabove as to the need for reconsideration of the matter by the appropriate organs of the State has found response and in fact a law has already been enacted concerning the terms of office of the members of the Educational Service Commission, in full compliance with the observations made by the Court in *Louca* case, and that two Bills were laid before the House of Representatives the one in November, 1986, and the other in

May, 1987 with the object of bringing the terms of office of members of the Public Service Commission in line with the relevant provisions of the Constitution.

In the light of the above this appeal should be allowed and the cross-appeal will have to be heard separately as it has not been argued at this stage.

LORIS J.: The main issue raised by the present appeal is set out in ground one thereof, whereby the appellant Commission complains «that there was no reason to decide a constitutional issue 'in abstracto' in as much as in this particular case section 4(3) of Law 33/67 has not been applied and no question for its application arose.»

Before proceeding to decide this issue, I consider it pertinent to refer briefly to the legal aspect of this issue:

The Full-Bench of this Court in the case of *The Board for Registration of Architects and Civil Engineers v. Christodoulos Kyriakides* (1966) 3 C.L.R. 640 has laid for the first time the principles governing the exercise of judicial control of legislative enactments in considering the question of the constitutionality of a statute. Josephides J., delivering the unanimous judgment of the Court in the aforesaid appeal stated inter alia the following: (at p. 655).

> «The judicial power does not extend to the determination of abstract questions: Ashwander v. Tennessee Valley Authority 297 U.S. 288 (1935); 80 Law. Ed. 688. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case': Burton v. United States, 196, U.S. 283, 295; 49 Law. ed. 482, 485, 25 S. Ct. 243. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied': Liverpool, N.Y. & P.S.S. Co. v. Emigration Comrs. 113 U.S. 33; 28 Law. ed. 899, 5 S. Ct. 382.»

Some ten years later the Full Bench of this Court reiterated the above principle in the case of *Theodorides & Others v. Ploussiou (1976) 3 C.L.R. 319;* the learned President of this Court in delivering the judgment in the appeal aforesaid stated (at p. 340) the following:

«In examining the above issue in the present proceedings we are not concerned in abstracto with the constitutionality, as such, of section 15(2) of Law 48/63; our only concern is the determination of the outcome of the recourse of the respondent, made under Article 146.1 of the Constitution; and in proceedings in a recourse of this nature this Court, as an administrative Court, is not called upon to pronounce on the constitutionality of a statute in order to declare it to be constitutional or unconstitutional generally for all purposes, but it only has to examine the constitutionality of a statute, on which the subject matter administrative act or decision was based, in order to decide about the validity of such act or decision; thus, an 'objection of unconstitutionality' is considered only in relation to the issue of the validity of the subject matter of the recourse and is decided solely for the purposes of the particular case (see, in this connection, Βλάχου 'Η Έρευνα της Συνταγματικότητος των Νόμων', 1954, σελ. 106, Σγουρίτσα 'Συνταγματικόν Δίκαιον', 3rd ed., 1965, vol. A, p. 66, Burdeau 'Traité De Science Politique', 2nd ed., vol. 4, p. 469).»

In this particular instance the task of the learned trial Judge was confined in deciding whether it was reasonably open to the appellant Public Service Commission to appoint the interested parties to the post of Conservator of Forests in preference to and instead of the applicant. This is abundantly clear from the prayer of the recourse as well as from the legal points on which same is based.

Determination of the constitutionality of section 4(3) of Law 33/67 was not «absolutely necessary to a decision of this case», in as much as s. 4(3) of Law 33/67 was neither applied nor a question of its application arose; and I am inclined to agree with the submission of learned counsel appearing for the appellant that there was not even an allegation to the effect that the section aforesaid might have influenced or did in fact influence the independence of the members of the P.S.C. in the case under consideration.

In the circumstances I hold the view that the constitutional issue was decided «in abstracto» contrary to the principles set out above, and the present appeal must therefore, be allowed.

STYLIANIDES J.: The respondent by means of the recourse challenged the validity of the appointment of Takis Tsintides and Christos Alexandrou (the interested parties) to the post of Conservator of Forest.

This appeal is directed against a decision of a Judge of this Court, whereby he annulled the promotion to the permanent post of Conservator of Forest of the two interested parties by the Public Service Commission on the sole ground that the appellant Commission has no competence and power, due to the fact that the terms of service laid down in section 4(3) of the Public Service Law, 1967 (Law No. 33/67), under which the members of the Commission serve, are contrary to the Constitution and deprive the body of the attributes of independence safeguarded by the Constitution, as a prerequisite for the exercise of the competence conferred on the Public Service Commission.

Part VII, Chapter I, Article 124 of the Constitution provided for the establishment of a Public Service Commission, consisting of a Chairman and nine other members appointed jointly by the President and the Vice-President of the Republic. Seven members of the Commission shall be Greeks and three members shall be Turks.

This Commission was set up and was functioning in the first years after Independence. Its powers are set out in Article 125. Its independence was safeguarded by a number of provisions. Reference may be made to two of them: Article 166 charged their remuneration on the Consolidated Fund. Article 124.5 secured their tenure of office. It reads:-

> «5. A member of the Commission shall not be removed from office except on the like grounds and in the like manner as a judge of the High Court.»

Due to the well known events of 1963-1964 and the withdrawal of the Turkish members of the Commission, the present Public Service Commission was set up by the Public Service Law, 1967 (Law No. 33/67) as substitute to the Public Service Commission envisaged by the Constitution, which became defunct. Its functions, as set out in section 5 of Law 33/67, are almost identical with those entrusted to the Public Service Commission under Article 125 of the Constitution, with the major difference that the definition of «Public Service» in section 2 of the Law, encompasses only service under the Republic. The establishment of this Commission was justified by the «law of necessity», as expounded in the case of *The Attorney-General of the Republic v. Mustafa Ibrahim and Others*, 1964 C.L.R. 195. (*Yervant Bagdassarian v. The Electricity Authority of Cyprus and Another* (1968) 3 C.L.R. 736; *Rita*

Messaritou v. The Cyprus Broadcasting Corporation (1972) 3 C.L.R. 100; *D. Theodorides and Others v. S. Ploussiou* (1976) 3 C.L.R. 319.)

The question in *Ibrahim* was whether a temporary unconstitutional law, enacted in order to meet the exigencies of a state of emergency, could be valid. The principle that can be deduced from *Ibrahim* case is that the Court may temporarily treat as valid and effective laws which are constitutionally flawed in order to preserve the rule of law. When it is impossible to comply with the Constitution, the Court may allow the Government a temporary reprieve from such compliance in order to preserve society and maintain, as nearly as possible, normal conditions. The doctrine of «necessity» is mainly based on the maxim «salus populi est suprema lex».

Josephides J., at p. 265 set forth four prerequisites which must be satisfied before the doctrine of «necessity» should apply to validate an otherwise unconstitutional law:-

(a) An imperative and inevitable necessity or exceptional circumstances;

(b) no other remedy to apply;

(c) the measure taken must be proportionate to the necessity; and

(d) it must be of a temporary character limited to the duration of the exceptional circumstances.

It is well settled that measures taken in circumstances allegedly justifying resort to the «law of necessity» are subject to judicial scrutiny and control - (*Pastellopoulos v. Republic* (1985) 2 C.L.R. 165, p. 178).

Section 4(3) of the Public Service Law, 1967 provided that the President of the Republic may at any time terminate the appointment of the Chairman or of any other member of the Commission if he considers it to be in the public interest.

The question of constitutionality of this statutory provision was raised in *Louca v. Republic* (1983) 3 C.L.R. 783 - a recourse by two members of the Commission, whose appointments were terminated by the President.

The learned President of the Court, who heard the case in the first instance, held that, though it was contrary and inconsistent with Article 124.5 of the Constitution, it was justified by the «law of

necessity», but annulled the sub judice terminations on other grounds. An appeal was filed by the Republic, which was ultimately withdrawn, as an overall settlement of the recourses had apparently taken place. Observations obiter were made by a number of Judges, either expressly declaring that this statutory provision is clearly unconstitutional and not justified by the «law of necessity», or that serious question of its constitutionality arose and that serious doubt was cast on its constitutionality and the whole matter should be considered by the appropriate organs of the Republic in the light of the provisions of the Constitution - (*Republic v. Louca and Others* (1984) 3 C.L.R. 241 (see pp. 251, 252, 258, 269, 276, 277)). The President of the Court in a subsequent case - *Josephin v. Republic* (1986) 3 C.L.R. 111, - in view of the observation in *Republic v. Louca* left the matter open.

Thereafter a Bill No. 28/86 was laid before the House by the Executive, whereby section 4 of Law 33/67 was sought to be repealed and substituted by a new section. Subsection 6 of the new section 4 provided for the removal from office of the members of the Commission on the like grounds and in the like manner as Judges of the Supreme Court.

From the objects and reasons it is clear that this Bill was introduced for the removal of doubts as to the constitutionality of this subsection 3, and the permissibility of its application by the «law of necessity».

This Bill was not enacted by the House of Representatives, as in the meantime a comprehensive Bill, containing many provisions relating to the Public Service - Bill 16/87 - which was the outcome of deliberations between the Government and PASYDY (Pancyprian Trade Union of Civil Servants), was placed before the House.

Having regard to the above, I am of the opinion that the provisions of subsection 3 of section 4 have become inoperative and no President of the Republic may exercise power under it. Its existence in the statute book, as aforesaid, cannot be validly said that it interferes in any way with the independence of the members of the Public Service Commission.

Provision identical to paragraph 124.5 of the Constitution was enacted by section 3 of the Public Education Service (Amendment) Law, 1987 (Law No. 65/87), which repealed and substituted section 4 of the basic law.

Furthermore, it has not been shown that, when the sub judice decision was taken the independence of the members of the Commission was in any way interfered with by it, or that there was any reasonable probability that it could be interfered. It has not been shown that the provisions of section 4(3) had any connection or relation whatsoever with the process in the taking of the sub judice decision.

The independence of the members of the Commission is a very material attribute, which has to be secured, preserved and maintained. Any derogation of it cannot be validated by the «law of necessity», as it cannot satisfy the prerequisites for the application of this doctrine.

For all the aforesaid reasons, I would allow the appeal with no order as to costs.

KOURRIS J.: This is an appeal against the first instance judgment of a Judge of this Court who allowed the recourse (725/85) of the respondent against the promotions to the post of Conservator of Forests of T. Tsintides and Chr. Alexandrou which was decided by the respondent Public Service Commission and annulled their promotion.

The applicant - respondent in this appeal - sought the annulment of the decision of the respondent Commission for wrongful exercise of its discretionary powers, for illegal composition of the Departmental Committee and for reasons of unconstitutionality of the provisions of s. 4(3) of the Public Service Law of 1967 (33/67).

The learned trial Judge in accordance with the established practice before dealing with the question of unconstitutionality of the said section decided all the grounds on which the recourse relied and dismissed them. (See, *The Board for Registration of Architects and Civil Engineers v. Christodoulos Kyriakides*, (1966) 3 C.L. R 640).

Pikis, J. who decided the recourse appealed from had before him a submission by counsel appearing for the applicant that the terms under which the Chairman and the members of the Public Service Commission serve, deprive the body of the safeguards envisaged by the Constitution as a prerequisite for the exercise of the powers vested in the Commission. The learned trial Judge in his very meticulous judgment, having referred to all the cases decided by the Supreme Court in its original and appellate

jurisdiction and having dealt with the «law of necessity» reached the conclusion that «the terms of service laid down in s. 4(3) of the Public Service Law (33/67) under which the members of the Commission serve are contrary to the Constitution and deprive the body of the attributes of independence laid down in the Constitution, as a prerequisite for the exercise of the competence conferred on the Public Service Commission by the Constitution.»

Counsel for the Republic invited us to allow the appeal in the absence of any indication that departure from the Constitution with regard to the terms of service of the members of the Public Service Commission undermines in point of fact their independence; therefore, we should allow the appeal on the ground that the learned trial Judge viewed the case in an abstract context. Further, remarks and observations made in the case of *Republic v. Louca and Others*, (1984) 3 C.L.R. 241 render inoperative the provisions of s. 4(3) of the Public Service Law, 1967 (33/67). No President of the Republic, we were told, would venture to rely on the provisions of s. 4(3) of the law and dismiss members of the Public Service Commission. Furthermore, he contended that it has not been proved that in taking the sub judice decision the Chairman and the members of the Commission were in point of fact influenced by the powers vested in the President of the Republic by s. 4(3) of the law. Lastly, he argued that s. 4(3) of the law is not unconstitutional.

With due respect, counsel for the Republic misconceived the effect of the decision here under appeal. The learned trial Judge held that an organ appointed and serving under the terms and the provisions of s. 4(3) of the law is not a competent organ to assume the powers vested in the Public Service Commission envisaged by the Constitution. Consequently, it is not a question of bias of members of the Commission because of the provisions of s. 4(3) of the law but a question of proper composition of the organ trusted with constitutional powers. And the Public Service Commission set up under the provisions of s. 4 of Law 33/67 does not have these attributes.

The other suggestion that the observations by the Supreme Court in the Loucas case (supra) rendered the provisions of s.4(3) inoperative is wholly untenable. The observations were made obiter; s. 4(3) remains in force and continues to define the legal regime under which the chairman and members of the respondent Commission serve.

Equally untenable is the submission that the case was decided in abstracto. Once the Court found, correctly in my judgment, that the respondents as presently constituted could not exercise the powers vested in the Public Service Commission by the Constitution, they were incompetent to assume any of those powers. That is the main issue in the judgment under appeal raised in connection with the validity of the actions of the respondents. Once they had no competence to make the sub judice decisions the appointments made were wholly void.

I now propose to deal with the constitutionality of s. 4(3) of the Public Service Law, 1967 (33/67).

Section 4(3) of the law confers power on the President of the Republic to terminate at any time the services of the Chairman or any member of the Public Service Commission on grounds of public interest whereas Article 124.5 of the Constitution reads as follows:

> «A member of the Commission shall not be removed from office except on the like grounds and in the like manner as a Judge of the High Court.»

A comparison of these two provisions leads to the conclusion that the provisions of s. 4(3) of the law are contrary to the terms and conditions of service of members of the Commission laid down in the Constitution.

The services of a Judge of the Supreme Court cannot be terminated except for the reasons specified in Article 153.7 and in accordance with the procedure laid down in Article 153.8 of the Constitution. Termination of the services of a Judge of the Supreme Court is only permissible on account of mental or physical incapacity or infirmity as would render him incapable of discharging the duties of his office or on account of misconduct so declared by the Council of Judicature in judicial proceedings.

The object of the Constitution is to entrench the independence of the members of the Commission by securing their tenure of office. The conferment of power on the President of the Republic to terminate their appointment violates the express provisions of the Constitution.

It is, therefore, apparent that the provisions of s. 4(3) of the law are incompatible with the Constitution and cannot be reconciled with it. It provides for the entrenchment of the independence of

members of the Commission and the question arises whether the «law of necessity» justifies the adoption of measures not contemplated by the Constitution. A law thus enacted is subject to the control of this Court to decide whether there exists such a necessity and whether the measures taken were necessary to meet it.

The doctine of the «law of necessity» was expounded in the leading case of *The Attorney-General v. Ibrahim and Others*, 1964 C.L.R. 195; it was explained that it is an extraordinary measure and can only be justified to the degree and extent that the necessity mandates for the sustenance of the constitutional order and the institutions envisaged thereby.

The Public Service Commission set up by the Constitution consisted of ten members; seven Greeks and three Turks. Owing to the departure of the Turkish members of the Commission during the well known events of 1963-1964 the legislature enacted the Public Service Law of 1967 (33/67) limiting the members of the Commission to five Greeks in order to fill the gap left by the departure of the Turkish members.

The question now arises: Did the legislature do what was absolutely necessary in the circumstances or did it exceed it? A series of decisions of the Supreme Court recognize that the Commission is not the same body as the Public Service Commission provided for in the Constitution owing to the different number of members in the composition of the two bodies but does not render the Commission an unconstitutional organ. Considering the departure of the Turkish members and the provisions of s. 4(3) of the Public Service Law of 1967 which provides for the terms of service of the members of the Public Service Commission I am of the view that the provisions of the said section are unwarranted by the exceptional circumstances. There is no doubt that the legislature had to resort to the «law of necessity» to make provision for the functioning of the Public Service Commission; and the Public Service Law, 1967 is founded on the «law of necessity» to make provision for the functioning of the Public Service Commission; and the Public Service Law, 1967 is founded on the «law of necessity». Numerical reduction of these members is not unconstitutional. But undoubtedly, the provisions of s. 4(3) of the law cannot be considered as a necessary measure to meet the gap in the Public Service Commission created by the departure of its Turkish

members. The provisions of s. 4(3) of the Law were not essential for the sustenance of the functioning of the Commission that collapsed with the withdrawal of its Turkish members. I think my reasoning in reaching this conclusion is along the lines of the decision of the case *Pastellopoulos v. The Republic*, (1985) 2 C.L.R. 165, decided by the Full Bench, in connection with the extent of the measures taken which are necessary to meet a necessity under the doctrine of the «law of necessity».

In that case it was held that although the events of 1963-1964 offered justification for the establishment of a Military Court, the Court could neither be set up nor function outside the constitutional framework governing the exercise of judicial power. I fully agree and adopt what the learned trial Judge said in his judgment with regard to the *Pastellopoulos* case (supra) on the question raised before him, which is as follows:

> «In much the same way and by the same process of reasoning, it was permissible for the legislature to make provision for the replacement of the Public Service Commission that ceased to function as a result of the events of 1964 in order to ensure the functionability of an important institution of the State. But, neither the competence nor the legal framework out of which the Public Service Commission should function could be other than those specified by the Constitution. Nor has suggestion been made that any necessity arose to depart from the constitutional framework other than provide for the re-establishment of the Commission after the departure of the Turkish members.»

For all the above reasons I am of the view that the Public Service Commission that was set up and functions under the provisions of s. 4(3) of the Public Service Law, 1967 (33/67) are contrary to the relevant constitutional provisions and for that reason they could not exercise the functions vested by the Constitution in the Public Service Commission, as they have been deprived of the safeguards of independence contemplated by Article 124 of the Constitution.

In conclusion, I agree with the learned trial Judge that the sub judice decision was taken by an incompetent body and it was rightly declared null and void pursuant to the provisions of Article

146.4 (b) of the Constitution. I would dismiss the appeal but with no order for costs.

TRIANTAFYLLIDES P.: In the result this appeal in allowed by majority with no order as to its costs. The Cross-appeal will be fixed for hearing later in due course. 5

Appeal allowed by majority. No order as to costs.