31η Δεκεμβρίου 1975

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ΑΡΙΣΤΕΙΔΗΣ Μ. ΛΙΑΣΗ ΚΑΙ ΑΛΛΟΙ ν. ΓΕΝΙΚΟΥ ΕΙΣΑΓΓΕΛΕΩΣ ΤΗΣ ΔΗΜΟΚΡΑΤΙΑΣ ΚΑΙ ΑΛΛΟΥ

[Α. Λοϊζου, Δ.]

ΕΠΙ ΤΟΙΣ ΑΦΟΡΩΣΙ ΤΟ ΑΡΘΡΟΝ 146 ΤΟΥ ΣΥΝΤΑΓΜΑΤΟΣ

ΑΡΙΣΤΕΙΔΗΣ Μ. ΛΙΑΣΗ ΚΑΙ ΑΛΛΟΙ,

Αἰτηταί,

κατὰ

ΤΟΥ ΓΕΝΙΚΟΥ ΕΙΣΑΓΓΕΛΕΩΣ ΤΗΣ ΔΗΜΟΚΡΑΤΙΑΣ ΚΑΙ ΑΛΛΟΥ,

Καθ' ὧν ἡ αἴτησις.

(*Ὑπόθεσις ὑπ' ἀρ.* 370/74).

Διοικητικὸν Δίκαιον – Νόσφισις ἐξουσίας – Τερματισμὸς ὑπηρεσιῶν αἰτούντων ὡς εἰδικῶν ἀστυφυλάκων – Ἀστυνομικὸς Διευθυντὴς ὁ διενεργείσας τερματισμὸν τοποθετηθεὶς ὑπὸ ὀργάνου διορισθέντος ὑπὸ Πραξικοπηματικῆς Κυβερνήσεως – Πρᾶξις διορισμοῦ ρηθέντος ὀργάνου ἀνυπόστατος καὶ ἀνύπαρκτος – Τοποθέτησις Ἀστυνομικοῦ Διευθυντοῦ ἔπασχε ἐκ τοιαύτης παρανομίας ὥστε νὰ καθίσταται ἕνεκα ταύτης νομικῶς ἀνύπαρκτος – Πρᾶξις τερματισμοῦ ὑπηρεσιῶν ὑπὸ ρηθέντος ἀστυνομικοῦ διευθυντοῦ νομικῶς ἀνύπαρκτος – Δόγμα τῶν de facto *ὀργάνων δὲν ἔχει ἐφαρμογήν.*

Πραξικόπημα – Βασικὰ κριτήρια διὰ τῶν ὁποίων νομιμοποιεῖται – Πραξικόπημα τῆς 15ης *Ἰουλίου* 1974 *– Ἀπέτυχε νὰ νομιμοποιηθῇ βάσει τῶν τοιούτων κριτηρίων – Περὶ Πραξικοπήματος (Εἰδικαὶ Διατάξεις) Νόμος τοῦ* 1975 (*Ἀρ.* 57)75) *ἄρθρα* 2, 3 *καὶ* 4.

De facto *ὄργανα – Δόγμα τῶν* de facto *ὀργάνων.*

Διοικητικὸν Δίκαιον – Ἀνύπαρκτος ἢ ἄκυρος πρᾶξις.

Ἡ προσφυγὴ αὕτη στρέφεται κατὰ τοῦ τερματισμοῦ τῶν ὑπηρεσιῶν τῶν αἰτητῶν ὡς εἰδικῶν ἀστυφυλάκων, ὑπὸ τοῦ κ. Χρυσάνθου Ἀναστασιάδη ὁ ὁποῖος ἐνεργῶν ἐκ θέσεως Ἀστυνομικοῦ Διευθυντοῦ Λεμεσοῦ δι' ἐγγράφου εἰδοποιήσεως, ἡμερ. 29.7.1974 ἐτερμάτισε ταύτας.

Συνεπείᾳ τοῦ πραξικοπήματος τῆς 15ης Ἰουλίου, 1974, ὁ νομίμως κατέχων τὸ ἀξίωμα τοῦ Ἀρχηγοῦ τῆς Ἀστυνομίας

ἀπεμακρύνθη ἐκ τῆς θέσεώς του ἄνευ νομίμου διαδικασίας, ὑπὸ τοῦ πραξικοπηματικοῦ καθεστῶτος καὶ ἀντεκατεστάθη ὑπὸ τοῦ κ. Μ. Παντελίδη. Ὁ δὲ τελευταῖος ἐτοποθέτησε τὸν κ. Χρύσανθον Ἀναστασιάδην εἰς τὴν θέσιν τοῦ Ἀστυνομικοῦ Διευθυντοῦ Λεμεσοῦ.

Οἱ αἰτηταὶ ἰσχυρίσθησαν ὅτι ἡ προσβαλλομένη πρᾶξις ἦτο νομικῶς ἀνύπαρκτος καὶ ἐστερημένη οἱουδήποτε νομικοῦ ἀποτελέσματος ὡς γενομένη κατὰ νόσφισιν ἐξουσίας.

Ἐκ μέρους τῶν καθ' ὧν ἡ αἴτησις ὁ Βοηθὸς Γενικὸς Εἰσαγγελεὺς τῆς Δημοκρατίας κατέστησε σαφῆ τὴν θέσιν τῆς Πολιτείας, δηλαδή, ὅτι ἡ προσβαλλομένη ἀπόφασις εἶναι ἀνυπόστατος καὶ παράνομος, ὡς προελθοῦσα ἐκ προσώπου τὸ ὁποῖον δὲν ἐκέκτητο ἐξουσίαν νὰ ἐκδώσῃ τὴν ἐν λόγῳ πρᾶξιν, περιβληθέντος τὴν ἰδιότητα τοῦ ἀστυνομικοῦ Διευθυντοῦ Λεμεσοῦ διά διορισμοῦ, ἤτοι διὰ πράξεως δημοσίας ἀρχῆς, ἤτις ἀφ' ἑαυτῆς ἦτο νομικῶς ἀνυπόστατος.

Τὸ Δικαστήριον ἀφοῦ ἐξήτασε τὰ πραγματικὰ γεγονότα καὶ τὰς περιστάσεις τοῦ πραξικοπήματος (ἴδε σελ. 562–563 τῆς ἀποφάσεως) καὶ ἀνεφέρθη εἰς τὰ δύο βασικὰ κριτήρια διὰ τῶν ὁποίων νομιμοποιεῖται ἓν πραξικόπημα ἤτοι (α) τὸ οὐσιαστικὸν, δηλαδὴ ἡ ὑπὸ τοῦ λαοῦ ἀποδοχή, ἔστω καὶ σιωπηρῶς τῆς μεταβολῆς καὶ τῶν ἐπικαλουμένων ἀξιῶν αὐτῆς καὶ (β) τὸ τυπικὸν, δηλαδὴ τῆς νομιμοποιήσεως τῆς πραξικοπηματικῆς Κυβερνήσεως συνεπείᾳ ἀναγνωρίσεως τῶν ἐνεργειῶν αὐτῆς, ὑπὸ τῆς ἐπομένης Κυβερνήσεως, ΕΚΡΙΝΕΝ, ὅτι:

(α) Τὸ Πραξικόπημα ἀπέτυχεν νὰ νομιμοποιηθῇ εἴτε βάσει τοῦ οὐσιαστικοῦ ἢ τοῦ τυπικοῦ κριτηρίου. ("Ἰδε σελ. 564 τῆς ἀποφάσεως καὶ τὸν Περὶ τοῦ Πραξικοπήματος (Εἰδικαὶ Διατάξεις) Νόμον τοῦ 1975 τὸ ἄρ. 3 τοῦ ὁποίου προνοεῖ ὅτι " τὸ Πραξικόπημα καὶ ἡ Πραξικοπηματικὴ Κυβέρνησις οὐδεμίαν νόμιμον ὑπόστασιν ἐκέκτηντο").

(β) Ἐπομένως ὁ ὑπὸ τῆς Πραξικοπηματικῆς Κυβερνήσεως διορισμὸς τοῦ κ. Μιχαὴλ Παντελίδη ὡς Ἀρχηγοῦ τῆς Ἀστυνομίας εἰς ἀντικατάστασιν τοῦ νομίμως κατέχοντος τὸ ἀξίωμα τοῦτο ἦτο πρᾶξις ἀνυπόστατος καὶ ἀνύπαρκτος, ἡ δὲ τοποθέτησις τοῦ Χρυσάνθου Ἀναστασιάδη εἰς τὴν θέσιν Ἀστυνομικοῦ Διευθυντοῦ Λεμεσοῦ ἔπασχε ἐκ τοιαύτης παρανομίας ὥστε νὰ καθίστατο ἕνεκα ταύτης νομικῶς ἀνύπαρκτος. Ὀνομασθεὶς δὲ διὰ τοιούτου νομικῶς ἀνυπάρκτου διορισμοῦ δὲν δύναται νὰ θεωρηθῇ ὡς de facto ὄργανον ἀλλ'

"ἐξομοιοῦται πρὸς τὸν ἄνευ οὐδεμιᾶς πράξεως διορισμοῦ ἀναλαβόντα τὴν ἄσκησιν τῶν καθηκόντων ἤτοι πρὸς τὸν νοσφιζόμενον ἐξουσίαν (usurpator) αἱ πράξεις τοῦ ὁποίου δέον νὰ θεωρῶνται νομικῶς ἀνύπαρκτοι μὴ παράγουσαι νομικὰς συνεπείας". ("Ιδε Στασινοπούλου Δίκαιον Διοικητικῶν Πράξεων σελ. 196).

(γ) Εἰς τὴν προκειμένην περίπτωσιν δὲν ἠδύνατο νὰ ἰσχύσῃ τὸ δόγμα τῶν de facto ὀργάνων ("Ιδε Στασινοπούλου (ἀνωθι) σελ. 194 καὶ σελ. 566–568 τῆς ἀποφάσεως).

(δ) Ἡ ἐπίδικος ἀπόφασις ἀποτελεῖ πρᾶξιν ἀνύπαρκτον καὶ ὡς τοιαύτη δὲν ἠδύνατο νὰ παράξῃ ἔννομον ἀποτέλεσμα καὶ δὲν ἰσχύει ὑπὲρ αὐτῆς τὸ τεκμήριον τῆς νομιμότητος. Ὡς ἐκ τούτου διαπιστοῦται δικαστικῶς ἡ ἀνυπαρξία τῶν ἐπιδίκων ἀποφάσεων καὶ ἐν πάσῃ περιπτώσει διατάσσεται ἡ ἀκύρωσις τούτων. ("Ιδε Τσάτσου Αἴτησις Ἀκυρώσεως Ἐκδ. 3η σελ. 342 παράγραφος 168).

Ὑποθέσεις παρατεθεῖσαι:

Adams v. *Adams* [1970] 3 All E.R. 572·

R. v. *Bedford Level Corporation* [1805] 6 East 356.

Προσφυγή.

Προσφυγὴ κατὰ τοῦ τερματισμοῦ τῶν ὑπηρεσιῶν τῶν αἰτητῶν ὡς εἰδικῶν ἀστυφυλάκων.

Γλ. Ταλιάνος καὶ Γ. Δ. Γεωργίου, διὰ τοὺς αἰτητάς.

Λ. Λουκαΐδης, Βοηθὸς Γενικὸς Εἰσαγγελεύς, διὰ τοὺς καθ' ὧν ἡ αἴτησις.

ΑΠΟΦΑΣΙΣ*

Α. ΛΟΪΖΟΥ, Δ.:– Διὰ τῆς παρούσης αἰτήσεως οἱ αἰτηταὶ ἐξαιτοῦνται παρὰ τοῦ Δικαστηρίου διάταγμα δι' οὗ νὰ δηλοῦται ὅτι ὁ τερματισμὸς τῶν ὑπηρεσιῶν των ὡς εἰδικῶν ἀστυφυλάκων, δι' ἐπιστολῆς ἡμερομηνίας 29.7.74, εἶναι πρᾶξις νομικῶς ἀνύπαρκτος καὶ ἐστερημένη οἱουδήποτε νομικοῦ ἀποτελέσματος, ὡς γενομένη κατὰ νόσφισιν ἐξουσίας.

Οἱ αἰτηταὶ κατὰ τὸν οὐσιώδη χρόνον ὑπηρέτουν ὡς εἰδικοὶ ἀστυφύλακες διορισθέντες ἐπὶ τούτῳ, δυνάμει τοῦ ἄρθρου 30 τοῦ Περὶ Ἀστυνομίας Νόμου Κεφ. 285.

* An English translation of this judgment appears at pp. 568–577 *post*.

Δυνάμει τῶν προνοιῶν τοῦ Ἄρθρου 35 τοῦ ἰδίου Νόμου, ὁ Ἀστυνομικὸς Διευθυντὴς τῆς ἐπαρχίας, δύναται νὰ τερματίσῃ τὰς ὑπηρεσίας οἱουδήποτε εἰδικοῦ ἀστυφύλακος δι ἐγγράφου εἰδοποιήσεως, καὶ ἐνεργῶν ἐκ θέσεως Ἀστυνομικοῦ Διευθυντοῦ Λεμεσοῦ ὁ κ. Χρύσανθος Ἀναστασιάδης δι' ἐγγράφου εἰδοποιήσεως, ἡμερ. 29.7.74, ἐτερμάτισε τὰς ὑπηρεσίας τῶν αἰτητῶν ὡς εἰδικῶν ἀστυφυλάκων.

Ἡ παροῦσα αἴτησις βασίζεται ἐπὶ τῶν ἀκολούθων νομικῶν σημείων:

1. Ὁ τερματισμὸς τῶν ὑπηρεσιῶν τῶν αἰτούντων ὡς Εἰδικῶν Ἀστυφυλάκων εἶναι πρᾶξις νομικῶς ἀνύπαρκτος καὶ ἄνευ οὐδενὸς νομικοῦ ἀποτελέσματος καθ' ὅτι ἐγένετο ὑπὸ προσώπου ἐνεργήσαντος κατὰ "νόσφισιν" ἐξουσίας.

2. Ἡ ὑπὸ τοῦ κυρίου Χρυσάνθου Ἀναστασιάδη ἄσκησις τῶν ἐξουσιῶν τοῦ Ἀστυνομικοῦ Διευθυντοῦ Λεμεσοῦ ἦτο κατὰ τὸν οὐσιώδη χρόνον παράνομος καθ' ὅτι ὁ διορισμὸς τούτου ὡς Ἀστυνομικοῦ Διευθυντοῦ Λεμεσοῦ ἐγένετο ὑπὸ προσώπων ἐνεργησάντων κατὰ νόσφισιν ἐξουσίας καὶ/ἢ ὑφαρπαγῆς ἐξουσίας καὶ/ἢ ὑπὸ προσώπων ἅτινα ἐστεροῦντο οἱασδήποτε νομικῆς ὑποστάσεως καὶ/ἢ νομίμου ἁρμοδιότητος.

Ἐμφανισθεὶς ἐκ μέρους τῶν καθ' ὧν ἡ αἴτησις ὁ εὐπαίδευτος Βοηθὸς Γενικὸς Εἰσαγγελεὺς τῆς Δημοκρατίας κατέστησε σαφῆ τὴν θέσιν τῆς Πολιτείας ἐπὶ τῶν ἐγειρομένων εἰς τὴν παροῦσαν ὑπόθεσιν νομικῶν θεμάτων, δηλαδή, ὅτι ἡ προσβαλλομένη ἀπόφασις, εἶναι ἀνυπόστατος καὶ παράνομος, ὡς προελθοῦσα ἐκ προσώπου τὸ ὁποῖον δὲν ἐκέκτητο ἐξουσίαν νὰ ἐκδώσῃ τὴν ἐν λόγῳ πρᾶξιν, περιβεβληθέντος τὴν ἰδιότητα τοῦ Ἀστυνομικοῦ Διευθυντοῦ Λεμεσοῦ διὰ διορισμοῦ, ἤτοι διὰ πράξεως δημοσίας ἀρχῆς, ἥτις ἀφ' ἑαυτῆς ἦτο νομικῶς ἀνυπόστατος.

Ὡς προσφυῶς ἀνέφερε ὁ εὐπαίδευτος δικηγόρος τῶν αἰτητῶν, εἰς τὴν προκειμένην περίπτωσιν, ἀμφότεραι αἱ διάδικοι πλευραί, συμφωνοῦν ἐπὶ τῆς νομικῆς θέσεως, παρέμεινε δὲ νὰ πεισθῇ τὸ Δικαστήριον ἐπὶ τῆς ὀρθότητος τῶν ἐκφρασθεισῶν ἀπόψεων καὶ κατ' ἀκολουθίαν νὰ διατάξῃ τὴν ἀκύρωσιν τῆς προσβαλλομένης ἀποφάσεως χάριν τῆς νομιμότητος καὶ τῆς ἀποδόσεως δικαιοσύνης εἰς τοὺς αἰτητάς, θύματα τῆς παρανομίας.

Ἐπιπροσθέτως πρὸς τὰς ἀξιολόγους ἀγορεύσεις ἐτέθη, ἐκ συμφώνου, ἐνώπιόν μου ἐκτενὴς μελέτη τοῦ Βοηθοῦ Γενικοῦ Εἰσαγγελέως ὡς πρὸς τὰς Νομικὰς Ἐπιπτώσεις τοῦ Πραξικοπήματος τῆς 15ης Ἰουλίου 1974 περιέχουσα ἔγγραφα καὶ στοιχεῖα ἅτινα ἠδύ-

ναντο νὰ ἀποτελέσουν τὸ πραγματικὸν ὑπόβαθρον τῆς παρούσης ὑποθέσεως. Τοῦτο συνάδει πρὸς τοὺς ἰσχύοντας Δικαστικοὺς Κανονισμοὺς καὶ τὴν ἀκολουθουμένην τακτικὴν εἰς θέματα Διοικητικῆς Δικαιοσύνης, εἰς δὲ τὴν ὑπόθεσιν Adams ν. Adams [1970] 3 All E.R. 572 εἰς τὴν σελ. 578, εἰς τὴν ὁποίαν θὰ γίνῃ ἀναφορὰ καὶ ἀργότερον, ἀριθμὸς γεγονότων δημοσίας φύσεως ἐδηλώθησαν ὡς συμφωνηθέντα ὑπὸ τῶν δικηγόρων ἢ ἀπεδείχθησαν δι ἐγγράφων παρουσιασθέντων ἐκ συμφώνου.

Ἔδει ὅμως ὅπως γίνῃ, ἐν συνόψει, ἀναφορὰ εἰς ὡρισμένα γεγονότα, πρὸς καλυτέραν κατανόησιν τῶν ὅσων θὰ λεχθοῦν.

Ὁ Χρύσανθος Ἀναστασιάδης κατεῖχε τὸν βαθμὸν Βοηθοῦ Ἀστυνόμου ὅταν τὴν 15.3.73 δι' ἀποφάσεως τοῦ Ὑπουργικοῦ Συμβουλίου Ἀρ. 12.192 ἐτερματίσθησαν αἱ ὑπηρεσίαι του, ὡς καὶ ἄλλων μελῶν τῆς Ἀστυνομικῆς Δυνάμεως, πρὸς τὸ δημόσιον συμφέρον. Ἡ ἐν λόγῳ ἀπόφασις προσεβλήθη διὰ προσφυγῆς ἐνώπιον τοῦ Ἀνωτάτου Δικαστηρίου, ἀλλὰ δὲν εἶχε ἀκυρωθῆ ἢ ἀνακληθῆ κατὰ πάντα πρὸς τὴν παροῦσαν ὑπόθεσιν οὐσιώδη χρόνον.

Τὴν πρωΐαν τῆς 15.7.74, ἐξεδηλώθη πραξικόπημα ὀργανωθὲν καὶ καθοδηγούμενον ὑπὸ ἐξ Ἑλλάδος ἀξιωματικῶν οἵτινες εὑρίσκοντο ἐν Κύπρῳ δι' ὑπηρεσίαν εἰς τὴν Ἐθνικὴν Φρουράν, ἡ ἵδρυσις τῆς ὁποίας ὡς ἀναφέρεται εἰς τὸ προοίμιον τοῦ Ἱδρυτικοῦ αὐτῆς Νόμου (Ἀρ. 20/64) κατέστη ἀναγκαία λόγῳ προσφάτων τότε γεγονότων " ὅπως ὑποβοηθῇ τὰς τακτικὰς δυνάμεις τῆς Δημοκρατίας ἤτοι τὸν Στρατὸν αὐτῆς καὶ τὰς Δυνάμεις Ἀσφαλείας τῆς Δημοκρατίας εἰς ὅλα τὰ ἀναγκαῖα μέτρα διὰ τὴν ἄμυναν αὐτῆς". Ἀποτελεῖ δὲ τραγικὴν ἀντίφασιν ὅτι μονάδες τῆς Δυνάμεως αὐτῆς προητοιμάσθησαν καὶ ἔπαιξαν ὑπὸ τὴν καθοδήγησιν τῶν ἀξιωματικῶν των πρωτεύοντα ρόλον, ἐν συνεργασίᾳ μετὰ τῆς παρανόμου ὀργανώσεως ΕΟΚΑ Β καὶ τῶν αὐτῆς ἐνόπλων μονάδων, διὰ τὴν βιαίαν ἀνατροπὴν τῆς Συνταγματικῆς τάξεως καὶ τὴν ὑπόσκαψιν τῆς ὑποστάσεως αὐτῆς ταύτης τῆς Πολιτείας. Διὰ τῆς χρησιμοποιήσεως ἀνηκούστου βίας, ἐπίκεντρον τῆς ὁποίας ἦτο τὸ Προεδρικὸν Μέγαρον καὶ ὁ εἰς αὐτὸ εὑρισκόμενος κατὰ τὸν χρόνον ἐκεῖνον νομίμως ἐκλεγεὶς Πρόεδρος τῆς Κυπριακῆς Δημοκρατίας Ἀρχιεπίσκοπος Μακάριος, ἀνετράπη προσωρινῶς ἡ συνταγματικὴ τάξις. Ὁ δὲ Πρόεδρος διασωθεὶς κατέφυγε εἰς Πάφον καὶ ἐκεῖθεν εἰς τὸ ἐξωτερικὸν ἀγωνιζόμενος διὰ τὴν ἀποκατάστασιν τῆς νομιμότητος ἐν Κύπρῳ.

Δὲν εἶναι ἐντὸς τῶν σκοπῶν τῆς παρούσης ἀποφάσεως ἡ ἀναφορὰ εἰς τὰς τραγικὰς συνεπείας διὰ τὸν τόπον τοῦ ἐγχειρήματος ἐκείνου, ἀρκεῖ ὅμως νὰ λεχθῇ ὅτι ἀπετέλεσε τὸ πρόσχημα ἔξωθεν εἰσβολῆς, ἥτις ἤρξατο τὰς πρωϊνὰς ὥρας τῆς 20.7.74.

Τὴν 23ην Ἰουλίου 1974 καὶ καθ' ὃν χρόνον τὰ ἐκ τῆς Τουρκικῆς εἰσβολῆς ἐπακόλουθα προηώνιζον ζοφερὸν τὸ μέλλον τῆς μέχρι τότε εὐτυχούσης Νήσου, ὁ Νικόλαος Σαμψών, ὅστις ἀνέλαβε τὴν προεδρίαν τῆς Δημοκρατίας ἣτις ἀνετέθη, ὡς ἐλέχθη, εἰς αὐτὸν ὑπὸ τῶν Ἐνόπλων Δυνάμεων, αἵτινες ἐπεχείρησαν τὸ πραξικόπημα, παρητήθη τῆς προεδρίας καὶ ἀνέλαβε καθήκοντα ὁ Πρόεδρος τῆς Βουλῆς τῶν Ἀντιπροσώπων κ. Γλαῦκος Κληρίδης. Ἤδη εἶχε ἐπιτευχθῆ συμφωνία καταπαύσεως τοῦ πυρὸς ἣτις διελάμβανε πρόνοιαν περὶ τῆς συγκλήσεως διασκέψεως ἐν Γενεύῃ. Καθ' ὃν χρόνον πρωταρχικὸν μέλημα τῶν πάντων ἦτο νὰ περισωθῇ ὅτι ἠδύνατο, ἀπελύοντο οἱ αἰτηταὶ ἐνῶ ἄλλοι εἶχον ἤδη διορισθῆ εἰς θέσεις Εἰδικῶν Ἀστυφυλάκων.

Διὰ νὰ καταλήξῃ τὶς εἰς συμπέρασμα ὡς πρὸς τὴν νομιμότητα ἢ μὴ τῆς ἐπιδίκου ἀποφάσεως, πρέπει, ἐν πρώτοις, νὰ διαπιστωθοῦν αἱ νομικαὶ ἐπιπτώσεις τοῦ πραξικοπήματος καὶ ἐὰν ἐδημιούργησε δίκαιον ἢ ὄχι.

Κατὰ τὴν νομολογίαν καὶ τὰς θεωρίας περὶ τὸ Δίκαιον, δύο εἶναι τὰ βασικὰ κριτήρια διὰ τῶν ὁποίων νομιμοποιεῖται ἓν πραξικόπημα. Τὸ πρῶτον, τὸ οὐσιαστικόν, εἶναι ἡ ὑπὸ τοῦ λαοῦ ἀποδοχή, ἔστω καὶ σιωπηρῶς, τῆς μεταβολῆς καὶ τῶν ἐπικαλουμένων νομικῶν ἀξιῶν αὐτῆς, καὶ τὸ δεύτερον, τὸ τυπικόν, τῆς νομιμοποιήσεως πραξικοπηματικῆς Κυβερνήσεως συνεπείᾳ ἀναγνωρίσεως τῶν ἐνεργειῶν αὐτῆς, ὑπὸ τῆς ἐπομένης νομίμου Κυβερνήσεως. Δέον ὅθεν ὅπως ἐξετασθοῦν τὰ πραγματικὰ γεγονότα καὶ αἱ περιστάσεις τοῦ πραξικοπήματος διὰ νὰ ἀπαντηθῇ τὸ τιθέμενον ἐρώτημα, κατὰ πόσον ἡ πραξικοπηματικὴ ἐπιβολὴ ἐπεκράτησε νομικῶς ὡς γενομένη ἀποδεκτὴ ἢ ὡς τυχοῦσα τῆς σιωπηρᾶς ἐγκρίσεως τοῦ λαοῦ.

Ἐγένετο ἤδη ἀναφορὰ εἰς τὸν βίαιον τρόπον ἐκδηλώσεως τοῦ πραξικοπήματος τὴν πρωΐαν τῆς 15ης Ἰουλίου. Ἐπεβλήθη καὶ ἐφηρμόσθη κατ' οἶκον περιορισμὸς τοῦ πληθυσμοῦ τῆς Νήσου, ἐξαιρέσει διώρου διαστήματος δι' ἀγορὰν τροφίμων ἐπ' ἀπειλῇ ἐκτελέσεως, ἄνευ προειδοποιήσεως οἱουδήποτε παραβάτου τῆς ἐν λόγῳ ἀπαγορεύσεως μέχρι καὶ τῆς 17ης Ἰουλίου. Ἐσυνεχίσθη δὲ ἀπὸ τὰς ἀπογευματινὰς μέχρι τὰς πρώτας πρωϊνὰς ὥρας, μέχρι καὶ μετὰ τὴν Τουρκικὴν εἰσβολήν. Ὑπῆρξε ἔντονος ἀντίστασις τόσον ὑπὸ κρατικῶν ὅσον καὶ λαϊκῶν δυνάμεων. Ὑπῆρξαν πολυάριθμα θύματα, νεκροὶ καὶ τραυματίαι συνεπείᾳ τοῦ πραξικοπήματος καὶ τῆς ἐκδηλωθείσης ἀντιστάσεως.

Τὸ πραξικοπηματικὸν καθεστὼς προέβη εἰς πολυαρίθμους συλλήψεις προσώπων διὰ πολιτικοὺς λόγους οἵτινες ὅμως ἀφέ-

31η Δεκεμβρίου 1975
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ΑΡΙΣΤΕΙΔΗΣ Μ. ΛΙΑΣΗ ΚΑΙ ΑΛΛΟΙ
ν
ΓΕΝΙΚΟΥ ΕΙΣΑΓΓΕΛΕΩΣ ΤΗΣ ΔΗΜΟΚΡΑΤΙΑΣ ΚΑΙ ΑΛΛΟΥ

θησαν ἐλεύθεροι ἅμα τῇ Τουρκικῇ εἰσβολῇ καὶ λόγῳ αὐτῆς. Δημόσιοι ὑπάλληλοι κατέχοντες ὑψηλὰς θέσεις εἰς τὴν Κυβερνητικὴν ὑπηρεσίαν, ὡς καὶ ὁ νομίμως κατέχων τὸ ἀξίωμα τοῦ Ἀρχηγοῦ τῆς Ἀστυνομίας, ἀπεμακρύνθησαν ἐκ τῆς θέσεώς των ἄνευ νομίμου διαδικασίας καὶ ἀντεκατεστάθησαν ὑπὸ ἄλλων ἀναγγελλομένων διὰ τοῦ ραδιοφώνου. Ὁ τύπος ἐτέθη ὑπὸ λογοκρισίαν μέχρι δὲ τῆς 23ης Ἰουλίου ἐκυκλοφόρησαν διὰ μίαν ἡμέραν μόνον, ἤτοι τὴν 19ην Ἰουλίου, τέσσαρες ἐκ τῶν δέκα ἡμερησίων ἐφημερίδων.

Ὡς ἦτο φυσικόν, ἀπὸ τῆς στιγμῆς τῆς εἰσβολῆς, ἡ προσοχὴ καὶ αἱ δυνάμεις τοῦ λαοῦ ἐστράφησαν πρὸς τὸν ἔξωθεν κίνδυνον. Δὲν δύναται λοιπὸν νὰ λεχθῇ ὅτι κατὰ τὴν διάρκειαν τοῦ βραχέος βίου της ἡ ἐκ τοῦ πραξικοπήματος προελθοῦσα ἐξουσία κατώρθωσε, βάσει τῶν ἀρχῶν ἃς διεκήρυττε καὶ τῶν ἐνεργειῶν της, νὰ νομιμοποιηθῇ ὡς ἔχουσα λαϊκὸν ἔρεισμα ἢ ὡς γενομένη ὑπὸ τοῦ λαοῦ ἀποδεκτή, ἔστω καὶ σιωπηρῶς, παρέμεινε δὲ μέχρι τέλους ξένη πρὸς αὐτόν.

Κατὰ τὰς γενικῶς παραδεκτὰς ἀρχὰς τοῦ Δικαίου ἦτο ἀπαραίτητον, πέραν τῆς ὑποταγῆς, ἡ ἐνεργὸς ἀποδοχή, ἢ ἡ ἐπίμονος μακροχρόνιος καὶ ἐνσυνείδητος σιωπὴ ὑπὸ καταλλήλους συνθήκας, καὶ δὲν ὑπῆρξαν αἱ κατάλληλοι συνθῆκαι διὰ νὰ δοθῇ ἡ εὐκαιρία νὰ ἐκδηλωθῇ ἐὰν θὰ ἐκδηλοῦτο ποτέ, ἐνσυνείδητος ἀναγνώρισις ἢ σιωπηρῶς ἐκδηλούμενος σεβασμός τοῦ πραξικοπήματος. Δὲν κατώρθωσε ἡ βιαίως ἐπιβληθεῖσα θέλησις νὰ ἐμπνεύσῃ τὸν σεβασμὸν καὶ τὴν ὑπακοὴν πρὸς τὰς ἀξίας ἅτινας ἐπεκαλεῖτο αὕτη νὰ τῆς ἀναγνωρισθοῦν ὑπὸ τοῦ κοινωνικοῦ συνόλου.

Ἀπέτυχεν ἐπομένως νὰ νομιμοποιηθῇ τὸ πραξικόπημα, ἐπὶ τῇ βάσει τοῦ οὐσιαστικοῦ κριτηρίου, ἤτοι τῆς ἐπικυρώσεως αὐτοῦ ὑπὸ τῆς λαϊκῆς συνειδήσεως.

Ὡς πρὸς τὴν ἐξέτασιν τοῦ ἐγειρομένου θέματος ὑπὸ τὸ πρῖσμα τοῦ τυπικοῦ κριτηρίου, εἶναι ἀρκετὸν διὰ τοὺς σκοποὺς τῆς παρούσης ὑποθέσεως νὰ ἀναφερθῇ ὅτι ὁ Ἀρχηγὸς τῆς Ἀστυνομίας ὡς καὶ ἄλλοι ἀξιωματοῦχοι τῆς Δημοκρατίας καὶ ἄλλων ἡμικρατικῶν ὀργανισμῶν, ἐκλήθησαν εὐθὺς ὡς αἱ ἐπικρατοῦσαι συνθῆκαι ἐπέτρεψαν τοῦτο νὰ συνεχίσουν τὰς ὑπηρεσίας των ἀναγνωριζομένου οὕτω τοῦ ἀνυποστάτου τῆς ἀπομακρύνσεώς των. Δὲν δύναται συνεπῶς νὰ λεχθῇ ὅτι ἡ πραξικοπηματικὴ Κυβέρνησις ἐνομιμοποιήθη συνεπείᾳ ἀναγνωρίσεως τῶν ἐνεργειῶν αὐτῆς ὑπὸ τῆς ἐπομένης νομίμου Κυβερνήσεως, καὶ τοῦτο, βέβαια, ἐπιπροσθέτως πρὸς τὴν γενομένην ἤδη διαπίστωσιν τῆς ἀντιδράσεως τῆς λαϊκῆς συνειδήσεως.

Ἐπιπροσθέτως πρὸς τὰ ὡς ἄνω, ἐψηφίσθη ὑπὸ τῆς Βουλῆς τῶν Ἀντιπροσώπων Νόμος, ὁ περὶ τοῦ Πραξικοπήματος (Εἰδικαὶ Διατάξεις) Νόμος τοῦ 1975), (Ἀρ. 57 τοῦ 1975), διὰ τοῦ ὁποίου προνοεῖται ὅτι (ἄρθρ. 3) "τὸ πραξικόπημα καὶ ἡ πραξικοπηματικὴ Κυβέρνησις οὐδεμίαν νόμιμον ὑπόστασιν ἐκέκτητο". Ὡς ἀναφέρεται εἰς τὴν συνοδεύουσαν τὴν κατάθεσιν τοῦ Νομοσχεδίου εἰς τὴν Βουλήν, αἰτιολογικὴν ἔκθεσιν, "σκοπὸς τοῦ νομοσχεδίου ἦτο ἡ ἀποκατάστασις τῆς διὰ τοῦ Πραξικοπήματος διαταραχθείσης ἐννόμου τάξεως, διὰ τῆς ἐφαρμογῆς συμφώνως πρὸς τὸ δόγμα Τοπὰρ τῆς ἀρχῆς τῆς συνταγματικῆς νομιμότητος καὶ τῆς μὴ ἀναγνωρίσεως, συμφώνως πρὸς τὸ δόγμα Στίμσον, ἐκνόμων καταστάσεων δημιουργηθεισῶν διὰ παρανόμου βίας κατὰ τὴν διάρκειαν τοῦ Πραξικοπήματος". Ἠκολουθήθησαν δέ, παρόμοια προηγούμενα ὡς " ἐν Γαλλίᾳ διὰ τῆς Ordinnance τῆς 9ης Αὐγούστου, 1944, ἐν σχέσει πρὸς τὰς πράξεις τῆς κυβερνήσεως τοῦ Vichy καὶ ἐν Ἑλλάδι διὰ τῆς συντακτικῆς πράξεως 58/1945 ἐν σχέσει πρὸς τὰ κατὰ τὴν ἐποχὴν τῆς ἐχθρικῆς κατοχῆς νομοθετήματα καὶ διὰ τῶν συντακτικῶν πράξεων ἀπὸ 1.8.1974 ἕως 7.8.1974 καὶ τοῦ Δ' ψηφίσματος τῆς Ε' Ἀναθεωρητικῆς Βουλῆς ὅσον ἀφορᾷ τὰ νομοθετήματα καὶ πράξεις κατὰ τὴν διάρκειαν τῆς δικτατορίας ἀπὸ 21.4.1967 ἕως 23.7.1974".

Περαιτέρω " Πραξικοπηματικὴ Κυβέρνησις" κατὰ τὸ ἄρθρον 2 τοῦ ὡς ἄνω νόμου σημαίνει " τὸν κατὰ τὸ πραξικόπημα ἀναλαβόντα ἀντισυνταγματικῶς καὶ παρανόμως τὸ λειτούργημα τοῦ Προέδρου τῆς Δημοκρατίας ὡς καὶ τοὺς ὑπ' αὐτοῦ ἀντισυνταγματικῶς καὶ παρανόμως διορισθέντας Ὑπουργοὺς καὶ τὸν Ὑφυπουργὸν καὶ περιλαμβάνει πᾶν μέλος αὐτῆς". Ἐπίσης δὲ κατὰ τὸ ἄρθρον 4 " Πρᾶξις τῆς πραξικοπηματικῆς κυβερνήσεως γενομένη ὑπ' αὐτῆς κατ' ἐπίκλησιν ἐξουσιῶν ἢ καθηκόντων αὐτῆς εἶναι ἀνυπόστατος καὶ ἀνύπαρκτος".

Ἑπομένως ὁ ὑπὸ τῆς Πραξικοπηματικῆς Κυβερνήσεως διορισμὸς τοῦ Μιχαὴλ Παντελίδη ὡς Ἀρχηγοῦ τῆς Ἀστυνομίας εἰς ἀντικατάστασιν τοῦ νομίμως κατέχοντος τὸ ἀξίωμα τοῦτο ἦτο πρᾶξις ἀνυπόστατος καὶ ἀνύπαρκτος, ἡ δὲ τοποθέτησις τοῦ Χρύσανθου Ἀναστασιάδη εἰς τὴν θέσιν Ἀστυνομικοῦ Διευθυντοῦ Λεμεσοῦ ἔπασχε ἐκ τοιαύτης παρανομίας ὥστε νὰ καθίστατο ἕνεκα ταύτης νομικῶς ἀνύπαρκτος. Ὀνομασθεὶς δὲ διὰ τοιούτου νομικῶς ἀνυπάρκτου διορισμοῦ, δὲν δύναται νὰ θεωρηθῇ ὡς de facto ὄργανον, ἀλλ' ὡς παρατηρεῖ καὶ ὁ Στασινόπουλος εἰς τὸ Δίκαιον Διοικητικῶν Πράξεων, σελ. 196 ἐξομοιοῦται πρὸς τὸν ἄνευ οὐδεμιᾶς πράξεως διορισμοῦ ἀναλαβόντα τὴν ἄσκησιν τῶν καθηκόντων ἤτοι πρὸς τὸν νοσφιζόμενον ἐξουσίαν (usurpator) αἱ πράξεις τοῦ ὁποίου

δέον νὰ θεωρῶνται νομικῶς ἀνύπαρκτοι μὴ παράγουσαι νομικὰς συνεπείας".

Ἦτο φανερὸν ὅτι ὁ ἐν λόγῳ διορισμὸς ἀπετέλει ἄμεσον προέκτασιν τῆς ἀποπείρας βιαίας ἀσκήσεως ἐξουσίας ἀποτυχούσης ἐν τέλει. Ὡς ἔχει δὲ λεχθῆ (ἴδε Κυριακόπουλος Ἑλληνικὸν Διοικητικὸν Δίκαιον, Τόμος 2ος, σελ. 370) "ἀλλ' ἐξ ἀποτυχούσης Ἐπαναστάσεως τὰ ἐξ αὐτῆς προελθόντα 'ὄργανα' θεωροῦνται γενικῶς ὡς σφετερισταὶ τῆς ἐξουσίας διὸ καὶ αἱ 'πράξεις' αὐτῶν εἶναι νομικῶς ἀνίσχυροι δηλαδὴ ἀνύπαρκτοι".

Ἀναμφιβόλως δὲ ἡ ὡς ἄνω ἀρχὴ ἰσχύει a fortiori καὶ εἰς τὰς περιπτώσεις ἀποτυχόντος πραξικοπήματος καὶ μὴ ἐπικρατήσαντος νομικῶς.

Ἀλλὰ δέον ὅπως ἐξετασθῇ ἐὰν ἠδύνατο νὰ ἰσχύσῃ εἰς τὴν προκειμένην περίπτωσιν τὸ δόγμα τῶν de facto ὀργάνων.

Ὡς ἀναφέρεται εἰς τὸ ὑπὸ τοῦ Στασινοπούλου (ἄνωθι) σελὶς 194 – " Ἀλλὰ λόγοι κοινωνικῆς τάξεως καὶ εὐσταθείας ἐδημιούργησαν ἤδη παλαιόθεν τὴν θεωρίαν τῶν de facto ὀργάνων, τὴν ὁποίαν εἰσήγαγεν ὁ γνωστὸς lex Barbarius Philippus, ὁ ρυθμίσας τὴν τύχην τῶν ἀποφάσεων, τὰς ὁποίας ἐξέδωκεν ὁ ὑπὸ τὸ ὄνομα τοῦτο ρωμαῖος δοῦλος, ὁ ὁποῖος κατώρθωσε νὰ ὀνομασθῇ πραίτωρ καὶ ἐπιστεύετο παρὰ πάντων, ὅτι νομίμως εἶχε διορισθῇ. Οὗτος ἐθεωρήθη διὰ τοῦ ὡς ἄνω νόμου ὡς de facto ὄργανον καὶ αἱ πράξεις αὐτοῦ ἐτηρήθησαν ἔγκυροι. Τὴν θεωρίαν ταύτην, ἡ ὁποία συνδυάζεται πρὸς τὴν νομικὴν ἀρχήν, ὅτι 'ἡ κοινὴ πλάνη δημιουργεῖ δίκαιον' (error communis facit jus), παρέλαβε καὶ τὸ διοικητικὸν δίκαιον, διὰ τὴν κατοχύρωσιν τῆς σταθερότητος καὶ τῆς ἀσφαλείας τῶν ἐκ πράξεων τῶν διοικητικῶν ὀργάνων δημιουργηθεισῶν καταστάσεων, χάριν προστασίας τῶν ἐπὶ τῇ βάσει τῶν καταστάσεων τούτων συναλλαγέντων πολιτῶν, τοὺς ὁποίους δὲν εἶναι ὀρθὸν νὰ βλάψῃ ἡ περὶ τὸν διορισμὸν τοῦ δημοσίου ὀργάνου ὑπάρξασα ἀνωμαλία".

Διὰ νὰ ἰσχύσῃ ὅμως ἡ ὡς ἄνω θεωρία, " δέον, ἀφ' ἑνὸς μὲν νὰ συνιστᾷ 'διορισμὸν εὐλογοφανῆ' (investiture plausible), ἀφ' ἑτέρου δὲ νὰ μὴν πάσχῃ παρανομίαν τοιαύτην ὥστε νὰ καθίσταται ἕνεκα ταύτης νομικῶς ἀνύπαρκτος". Καὶ ὡς περαιτέρω ἀναφέρει ὁ Στασινόπουλος εἰς σελίδα 196, " ἡ ἔννοια τοῦ εὐλογοφανοῦς διορισμοῦ δέον νὰ λαμβάνηται ὑπὸ ἀντικειμενικὴν ἔποψιν ——

> —— ὅθεν, πρὸς μόρφωσιν γνώμης, περὶ τοῦ ἂν ὁ παρανόμως διορισθεὶς ἔχῃ ὑπὲρ ἑαυτοῦ διορισμὸν εὐλογοφανῆ καὶ ἂν δύναται νὰ χαρακτηρισθῇ ὡς de facto ὄργανον, δέον νὰ

ἐξετάζηται, ἂν, κατὰ τὴν κρίσιν ἀγαθοῦ καὶ σώφρονος ἀνδρός, ὑπὸ τὰς συνθήκας, ὑφ' ἃς ἐν τῇ συγκεκριμένῃ περιπτώσει ἤσκει τὰ καθήκοντά του ὁ διορισθείς, ἦτο δυνατὸν καὶ εὔλογον νὰ ἐκληφθῇ οὗτος ὡς νομίμως κατέχων τὴν ἰδιότητα τοῦ ὀργάνου. Ἐὰν τὸ στοιχεῖον τοῦτο ὑφίσταται, δέον οὗτος νὰ χαρακτηρισθῇ ὡς de facto ὄργανον, χωρὶς νὰ ἐπιδρᾷ τὸ γεγονὸς ὅτι ἐνδεχομένως οὗτος δὲν εὑρίσκετο ἐν καλῇ πίστει".

Εἰς τὴν προκειμένην περίπτωσιν δὲν δύναται νὰ ὑποστηριχθῇ ὅτι κατὰ τὴν κρίσιν ἀγαθοῦ καὶ σώφρονος ἀνδρός, ὑπὸ τὰς συνθήκας ὑπὸ τὰς ὁποίας ὁ Χρύσανθος Ἀναστασιάδης ἀνέλαβε τὰ ἐν λόγῳ καθήκοντα, ἦτο δυνατὸν καὶ εὔλογον νὰ ἐκληφθῇ ὡς νομίμως κατέχων τὴν ἰδιότητα τοῦ ὀργάνου. Ἀπετέλει, ὡς ἤδη ἐλέχθη, τοπικὴν προέκτασιν τοῦ σφετερισμοῦ ἐξουσίας καὶ ἀνατροπῆς τῆς συνταγματικῆς τάξεως καὶ δὲν περιεῖχε οἱονδήποτε στοιχεῖον εὐλογοφανείας.

Τὸ δόγμα τῶν de facto ὀργάνων δὲν εἶναι ἄγνωστον εἰς τὸ Ἀγγλικὸν Κοινὸν Δίκαιον, ὡς φαίνεται καὶ εἰς τὴν ὑπόθεσιν Adams ν. Adams (ἄνωθι, σελ. 589, ἐν ἀναφορᾷ πρὸς τὴν ὑπόθεσιν R. v. Bedford Level Corporation [1805] 6 East 356, ὅπου ἐλέχθη ὅτι, " De facto λειτουργὸς εἶναι ὅστις εἶναι γνωστὸς ὡς ὁ κάτοχος τοῦ ἀξιώματος τὸ ὁποῖον φέρεται ὅτι κατέχει, καίτοι δὲν κατέχει νομίμως τὸ ἀξίωμα".

Τὸ δόγμα, ὡς ἐλέχθη εἰς τὴν ἐν λόγῳ ὑπόθεσιν, δὲν ἔχει ἐφαρμογὴν ὅπου αἱ περιστάσεις αἱ ὑπαίτιοι διὰ τὸ νομικὸν ἐλάττωμα, εἶναι τοῖς πᾶσι γνωσταί. Καὶ εἰς τὴν προκειμένην περίπτωσιν αἱ περιστάσεις ὑπὸ τὰς ὁποίας ἐτοποθετήθη εἰς τὴν θέσιν Ἀστυνομικοῦ Διευθυντοῦ ὁ Χρύσανθος Ἀναστασιάδης καὶ αἱ ὁποῖαι ἦσαν ὑπαίτιοι διὰ τὸ παράνομον τοῦ διορισμοῦ του, ἦσαν τοῖς πᾶσι γνωσταί. Ὅθεν τὸ δόγμα τῶν de facto ὀργάνων οὐδεμίαν ἐφαρμογὴν ἔχει ἐν προκειμένῳ.

Ὡς ἀνεφέρθη ἤδη, κατὰ τὴν κρίσιν μου, ἡ ἐπίδικος ἀπόφασις ἀποτελεῖ πρᾶξιν ἀνύπαρκτον καὶ ὡς τοιαύτη δὲν ἠδύνατο νὰ παράξῃ ἔννομον ἀποτέλεσμα καὶ δὲν ἰσχύει ὑπὲρ αὐτῆς τὸ τεκμήριον τῆς νομιμότητος. Ὡς ἀναφέρεται δὲ εἰς τὸ σύγγραμμα τοῦ Τσάτσου Αἴτησις Ἀκυρώσεως Ἐκδ. 3η σελ. 342 παράγραφος 168, " θὰ ἠδύνατο νὰ ὑποθέσῃ τις, ὅτι βάσει τῶν ἀνωτέρω δὲν συντρέχει λόγος ἀκυρώσεως τῶν ἀνυπάρκτων πράξεων καὶ ὅτι δέον αἱ κατ' αὐτῶν προσφυγαὶ ν' ἀπορρίπτωνται ὡς ἐστερημέναι ἀντικειμένου. Ἀλλὰ τὸ συμπέρασμα τοῦτο δὲν εἶναι ὀρθόν. Πράγματι ἀνάγκη ἀκυρώσεως ἀνυπάρκτου πράξεως δὲν συντρέχει, ἀλλὰ συντρέχει λόγος διαπιστώσεως τῆς ἀνυπαρξίας αὐτῆς ———

..... Ἀλλὰ καὶ προκειμένου περὶ ἀκύρου πράξεως ἡ ἐκδιδομένη κατ' αὐτῆς ἀκυρωτικὴ ἀπόφασις δὲν εἶναι ἄλλο τι εἰμὴ διαπίστωσις ὑπάρξεως τῶν λόγων τῆς ἀρχῆθεν ὑφισταμένης ἀκυρότητος αὐτῆς, ἧς ἡ ἀπαγγελία ὅμως εἶναι ὡς ἐκ τούτου ἀναγκαία, ἵνα ἡ ἄκυρος πρᾶξις ἀπολέσῃ σὺν τῷ τεκμηρίῳ τῆς νομιμότητος καὶ τὴν ἐκτελεστότητα, ἣν ὁ νόμος τῇ ἀπονέμει".

Ὡς ἐκ τούτου διαπιστοῦται διὰ τῆς παρούσης ἀποφάσεως δικαστικῶς ἡ ἀνυπαρξία τῶν ἐπιδίκων ἀποφάσεων τερματισμοῦ τῶν ὑπηρεσιῶν τῶν αἰτητῶν ὡς εἰδικῶν ἀστυφυλάκων καὶ ἐν πάσῃ περιπτώσει διατάσσεται ἡ ἀκύρωσις τούτων. Δίδονται δὲ £40.– ἔναντι τῶν ἐξόδων τῶν αἰτητῶν, ἥτις διαταγὴ περιλαμβάνει πᾶν προηγουμένως ἐπιφυλαχθὲν θέμα ἐξόδων.

This is an English translation of the judgment in Greek appearing at pp. 558–68 *ante*.

Administrative Law—Unsurpation of power—Termination of applicants' services as special constables—Divisional Commander who has effected termination emplaced to his post by an organ appointed by the "coup d'etat Government"—Appointment of such organ an act legally non-existent—Said emplacement of Divisional Commander so illegal as to be legally non-existent—Act of termination of services by said Divisional Commander legally non-existent—Doctrine of de facto organs not applicable.

Coup d'etat—Tests for legalisation—Coup d'etat of the 15th July, 1974—Failed to be legalised on the basis of such tests—Coup d'etat (Special Provisions) Law, 1975 (Law 57 of 1975) sections 2, 3 and 4.

De facto organs—Doctrine of de facto organs.

Administrative Law—Non-existent or void act—Whether it should be annulled.

This recourse was directed against the termination of the services of the applicants as special constables.

The termination was effected by means of a written notice dated 29th July, 1974 from Mr. Chrysanthos Anastassiades who was then acting as Divisional Police Commander Limassol.

As a result of the Coup d'etat of the 15th July, 1974 the legal holder of the office of Chief of Police was dismissed from his post without a lawful process by the Coup d'etat Government

and was replaced by Mr. M. Pantelides. The latter then posted the aforesaid Mr. Chrysanthos Anastassiades to the post of Divisional Police Commander Limassol.

Applicants submitted that the *sub judice* decision was legally non-existent and without any legal effect whatsoever as made in usurpation of power.

Appearing on behalf of the respondents the Deputy Attorney-General of the Republic, made clear the position of the state in relation to the legal issues involved in this case as follows: That the *sub judice* decision is legally non-existent and illegal as emanating from a person possessing no power to issue the said action, who assumed the capacity of Divisional Police Commander Limassol by appointment, that is by the act of a public authority, which in itself was legally non-existent.

The Court having considered the actual facts and circumstances of the Coup d'etat (see pages 572-573 of the judgment *post*) referred to the two basic tests of legalization of a Coup d'etat namely:

(a) The substantial test, that is popular acceptance, even if a tacit one, of the change and the legal values thereby invoked and

(b) the formal test, that is the legalization of the Coup d'etat Government through recognition of its actions by the next lawful Government, and

Held, (1) The Coup d'etat failed to be legalized on the basis of either of the two tests (see pp. 573-575 of the judgment post and the Coup d'etat (Special Provisions) Law, 1975 (Law 57/1975) section 3 of which provides that the Coup d'etat and the Coup d'etat Government had no legal foundation whatsoever).

(2) Therefore the appointment by the "Coup d'etat Government" of Michael Pantelides as Chief of Police, in substitution of the person legally holding this office was an act which was legally non-existent, and the posting by him of Chrysanthos Anastassiades to the post of Divisional Police Commander Limassol was so illegal so as to be rendered legally non-existent by reason of such illegality. Having thus been nominated by such a legally non-existent appointment, he cannot be considered as a de facto organ but he is assimilated to the one undertaking

the exercise of duties without any act of appointment that is to say the usurpator of power, the acts of whom should be considered as legally non-existent and as creating no legal consequences (See Stasinopoulos Law of Administrative Acts p. 196).

(3) In the instant case the doctrine of de facto organs could not have been applied (see Stasinopoulos (*supra*) at p. 194 and pp. 576-577 of the judgment *post*).

(4) The *sub judice* decision is a non-existent act and as such it could not produce legal results and the presumption of legality is not applicable. By this judgment the non-existence of the sub judice decisions is hereby ascertained judicially and in any event their annulment is ordered. (See Tsatsos in his text book Recourse for Annulment 3rd ed. p. 342 para. 168).

Sub judice decisions annulled.

Cases referred to:

Adams v. *Adams* [1970] 3 All E.R. 572;

R. v. *Bedford Level Corporation* [1805] 6 East 356.

Recourse.

Recourse against the termination of applicants' services as special constables.

Gl. Talianos and *G. D. Georghiou*, for the applicants.

L. Loucaides, Deputy Attorney-General of the Republic, for the respondents.

The following judgment was delivered by:-

A. LOIZOU, J.: By this recourse applicants seek a declaration that the termination of their services as special constables, by letter dated 29.7.74, is an act which is non-existent in law and of no legal effect whatsoever as made in usurpation of power.

The applicants at the material time were serving as special constables having been appointed as such by virtue of s. 30 of the Police Law, Cap. 285.

According to the provisions of s. 35 of the same law, the Divisional Commander may terminate the services of any special constable, by written notice, and Mr. Chrysanthos Anastassiades by acting as Divisional Commander Limassol, by written

notice, dated 29.7.74, terminated the services of the applicants as special constables.

The present recourse is based on the following grounds of law:

1. The termination of the services of the applicants as special constables is an act non-existent in law and without any legal effect whatsoever as made by a person acting in usurpation of power.

2. The exercise of the powers of the Divisional Commander Limassol by Mr. Chrysanthos Anastassiades was at the material time illegal as his appointment as Divisional Commander Limassol was effected by persons who have acted in usurpation of power and/or in unlawful seizure of power and/or by persons deprived of any legal status and/or legal competence.

Appearing on behalf of the respondents the learned Deputy Attorney-General of the Republic made clear the position of the state in relation to the legal issues raised in the present case, that is, that the *sub judice* decision is legally non-existent and illegal as emanating from a person, possessing no power to issue the said act, who assumed the capacity of the Divisional Commander Limassol by appointment, that is by the act of a public authority, which in itself was legally non-existent.

As learned counsel of the applicants aptly stated, in the present case, both parties agree as to the legal position, and it remained to convince the Court about the correctness of the views expressed, which would, consequently, order the annulment of the *sub judice* decision for the sake of legality and the doing of justice to the applicants, who are the victims of the illegality.

In addition to the able addresses, there was put before me, by consent, an extensive study by the Deputy Attorney-General on the Legal Consequences of the coup d'etat of the 15th July 1974, containing documents and material which could constitute the real basis of the present case. This is in conformity with the existing Rules of Court and the practice followed in matters of Administrative Justice, and in the case of *Adams* v. *Adams* [1970] 3 All E.R. 572 at page 578, to which reference will be also made later, a number of facts of public nature were declared as agreed upon by counsel or were proved by documents put in by consent.

Reference though must be made, in brief, to certain events for the better understanding of what will be stated.

Chrysanthos Anastassiades was holding the rank of Assistant Superintendent of Police when on the 15.3.73 by decision of the Council of Ministers No. 12.192 his services, as well as those of other members of the Police Force, were terminated in the public interest. The said decision was attacked by recourse to the Supreme Court, but it has not been annulled or revoked at all times material to this case.

In the morning of the 15.7.74 there took place a coup d'etat, organized and led by Greek officers, who were in Cyprus for service in the National Guard, the establishment of which, as stated in the preamble to the Law establishing it (No. 20/64), became imperative because of events, recent at that time, "with the object of aiding the army of the Republic and the Security Forces of the Republic in all necessary measures for its defence". It is a tragic contradiction that units of this Force have been prepared and played the major part under the guidance of their officers, in collaboration with the illegal organization "EOKA B" and its armed units, for the violent overthrow of the Constitutional order and the undermining of the existence of the State itself. By the use of unheard of violence, the centre of which was the Presidential Palace, and the legally elected President of the Republic of Cyprus who was at that time therein, the constitutional order was temporarily overthrown. And the President having survived took refuge at Paphos and from there he went abroad fighting for the re-establishment of legality in Cyprus.

Reference to the tragic consequences for Cyprus of that operation is not within the scope of this decision, suffice it to say that it constituted the pretext for a foreign invasion, which commenced in the early hours of the 20.7.74.

On the 23rd July 1974 and at a time when the consequences of the Turkish invasion were foretelling a glooming future for the until then prosperous Island, Nicolaos Sampson, who had undertaken the presidency of the Republic, which was entrusted to him as it was stated, by the Armed Forces which executed the coup d'etat, resigned as President and the President of the House of Representatives Mr. Glafkos Clerides assumed duties. An agreement for cease fire had already been achieved which included a provision for convening a meeting at Geneva. At a

time when everybody's major concern was to save anything that could be saved, the applicants were being dismissed, whilst others had already been appointed to the posts of special constable.

For the purpose of coming to a conclusion regarding the legality or not of the sub judice decision, the legal consequences of the Coup d'etat and whether or not it has produced legal results should first be ascertained.

According to the case law and legal theories, two are the basic tests whereby a coup d'etat is legalized. The first, the substantial test, is popular acceptance, even if a tacit one, of the change and the legal values thereby invoked,and the second, the formal test, is the legalization of the "Coup d'etat Government" through the recognition of its actions by the next lawful Government. The real facts and circumstances of the coup d' etat should therefore be examined for the purpose of answering the question posed, namely whether the "Coup d'etat Government" that was imposed prevailed legally as having being accepted or as having been tacitly approved by the people.

Reference has already been made to the violent way in which the coup d'etat took place in the morning of the 15th July. A curfew was imposed and applied in respect of the population of the Island, with the exception of a two hours' break for buying food, under the threat of execution without any warning of anyone disobeying the said prohibition until the 17th July. It continued from the afternoon hours to morning hours until and after the Turkish invasion.There had been strong resistance by both the state as well as the popular forces. There were numerous victims, dead and wounded as a result of the coup d'etat and the resistance which was offered.

The "Coup d'etat Government" effected numerous arrests of people for political reasons who were let free upon the Turkish invasion and because of it. High Ranking Public officers as well as the legal holder of the post of Chief of Police, were dismissed from their posts without a lawful process and were replaced by others whose names were announced by the radio. The press was under censorship and until the 23rd of July, there were published for one day only, that is on the 19th of July, four out of the ten daily newspapers.

Naturally, as from the moment of the invasion, the attention and the forces of the people were turned against the outside

danger. So it cannot be said that during its short life the government that came into being as a result of the coup d'etat managed, on the basis of the principles it declared and on its acts, to be legalized as having the support of the people or as having been accepted by the people even tacitly but it remained foreign to the people until the very end.

According to the generally accepted principles of Law, it was indispensable, that further to the submission there would have been active acceptance, or a persistently long and conscious silence under the appropriate conditions, and there were not existing appropriate conditions for an opportunity to be given for manifesting, if it would have ever been manifested, a conscious recognition, or a tacitly manifested respect of the coup d'etat.

The violently imposed will did not manage to inspire the respect and the obedience to the values which it invoked and called upon society as a whole to recognize.

Therefore the coup d'etat failed to be legalized on the basis of the substantial test, that is, its sanction by the public conscious.

Regarding the examination of the matter raised from the point of view of the formal test, suffice it to say, for the purposes of the present case, that the Chief of Police, as well as other officials of the Republic and Public Corporations, as soon as the prevailing circumstances permitted so, were called upon to resume their offices, thus recognizing that their dismissal was legally non-existent. Therefore, it cannot be said that the "Coup d'etat Government" was legalized through the recognition of its actions by the next lawful Government, and this of course, in addition to the already made ascertainment of the reaction of the popular conscious.

In addition to the aforesaid there was enacted by the House of Representatives the Coup d'etat (Special Provisions) Law, 1975 (No. 57 of 1975) whereby it is provided that (s. 3) "the coup d'etat and the 'Coup d'etat Government' had no legal basis whatsoever". As it is stated in the reasoning accompanying the relevant Bill "the intention of the Bill was the restoration of the lawful order which was disturbed as a result of the coup d'etat by applying according to the Topar Doctrine of the principle of constitutional order and the non recognition, according to the Stimson Doctrine of illegal situations created as a result

of illegal violence in the course of the coup d'etat". Similar precedents were followed, that is, "in France by the Ordinnance of the 9th August, 1944, in relation to the acts of the government of Vichy and in Greece by the constituent act 58/1945 in relation to the enactments during the time of the enemy occupation and by the constituent acts as from 1.8.1974 to 7.8.1974 and of the Fourth resolution of the Fifth Revisional Assembly in relation to the enactments and acts during the time of the dictatorship from 21.4.1967 until 23.7.1974".

Furthermore "Coup d'etat Government" according to s.2 of the aforesaid law means "the person who during the coup d'etat unconstitutionally and illegally assumed the office of the President of the Republic and the Ministers unconstitutionally and illegally appointed by him and the Under-Secretary and it includes every member thereof". Also according to s.4 "an act made by the 'Coup d'etat Government' by invoking its powers or duties is legally non-existent".

Therefore the appointment by the "Coup d'etat Government" of Michael Pantelides as Chief of the Police, in substitution of the person legally holding this office was an act which was legally non-existent, and the posting of Chrysanthos Anastassiades to the post of Divisional Commander Limassol was so illegal so as to become legally non-existent by reason of such illegality. Having thus been nominated by such a legally non-existent appointment, he cannot be considered as a de facto organ but as observed by Stasinopoulos in the Law of Administrative Acts, page 196 "he is assimilated to the one undertaking the exercise of duties without any act of appointment that is to the unsurpator of power, the acts of whom should be considered as legally non-existent which create no legal consequences".

It was obvious that the said appointment constituted direct extension of the attempt to exercise power violently which failed in the end. As it has been stated (see Kyriacopoulos Greek Administrative Law, Volume 2, page 370) "but from an unsuccessful revolution the 'organs' deriving therefrom are considered generally as usurpers of the power and therefore their 'acts' are of no legal effect that is non-existent".

Undoubtedly the above principle applies *a fortiori* also to the cases of an unsuccessful coup d'etat which has not prevailed in law.

But it should also be examined whether the doctrine of the *de facto* organs could have been applied in the present case.

As stated by Stasinopoullos (*supra*) p. 194—"But reasons of social order and stability had of old already created the theory of the *de facto* organs, which was introduced by the known lex Barbarius Philippus, who regulated the fate of the decisions which were delivered by the roman slave who had this name, and succeeded to be named Praetor and was believed by all, that he has been legally appointed. He was considered by the aforesaid law as a *de facto* organ and his acts were kept valid. This theory, which is combined with the legal principle that 'common misconception creates law', (error communis facit jus) was received by administrative law, for the safeguarding of the stability and the security of the situations created from the acts of the administrative organs, for the sake of protecting the citizens who had been involved in dealings on the basis of these situations, and who, it is not proper to be prejudiced by the anomaly existing through the appointment of the public organ".

For the above theory to be valid "it should on the one hand constitute a plausible appointment (investiture plausible), and on the other hand it should not suffer from such an illegality so as to be rendered as non-existent in law". And as it is further stated by Stasinopoulos at page 196, "the meaning of plausible appointment should be considered from an objective point of view..... therefore for the purpose of forming an opinion whether the illegally appointed person has to his credit a plausible appointment and if he can be regarded as a *de facto* organ, it should be examined, if in the opinion of a reasonable and prudent man, under the circumstances, in which in the particular case the appointee was exercising his duties, it was possible and reasonable to be taken that he was legally possessing the capacity of the organ. If this element exists, he should be regarded as a *de facto* organ, and the fact that he was not there *bona fide* will be of no effect".

In the present case it cannot be argued that in the opinion of a reasonable and prudent man, under the circumstances in which Chrysanthos Anastassiades undertook the said duties it was possible and reasonable to be considered as legally possessing the capacity of the organ. It constituted as it has already been stated a local extension of usurpation of power and overthrow of the constitutional order and it did not include any plausible element.

The doctrine of the *de facto* organs is not unknown to the English Common Law, as it appears in the case of *Adams* v. *Adams* (*supra*, page 589) in relation to the case *R.* v. *Bedford Level Corporation* [1805] 6 East 356, where it was stated that "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law". The doctrine, as stated in the said case, does not apply where the circumstances responsible for the legal defect, are known to everybody. And in the present case the circumstances under which Chrysanthos Anastassiades was placed to the post of Divisional Commander and which (the circumstances) were responsible for the illegality of his appointment, were known to everyone. Therefore the doctrine of the *de facto* organs has no application in the present case.

As it has already been stated, in my opinion, the *sub judice* decision is a non-existent act and as such it could not produce legal results and the presumption of legality is not applicable. As it is stated by Tsatsos in his text book Recourse for Annulment 3rd Edition, page 342 para. 168 "one could presume that according to the abovementioned no reason exists for the annulment of non-existent acts and that the recourses against them should be dismissed as being deprived of subject-matter. But this conclusion is not correct. Indeed there is no need to annul a non-existent act, but it is necessary to ascertain its non-existence ..... But even in the case of a void act, the decision annulling the same is not more than the ascertainment of the existence of the reasons of its originally existing invalidity, the pronouncement of which being nevertheless necessary, so that the act annulled may lose together with the presumption of legality its executory character too, which the law assigns to it".

By this judgment the non-existence of the sub judice decisions for the termination of the services of the applicants as special constables is hereby ascertained judicially and in any event their annulment is ordered. There will be an order for £40 costs towards applicants' costs which covers all questions for costs which had previously been reserved.

Sub judice decisions annulled.
Order for costs as above.