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Case note, Supreme Court of Cyprus, Applications 589/06, 590/06, 591/06, 592/06 and 593/2006

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1. INTRODUCTION

The purpose of the present case note is to present and comment a recent judgment of the Supreme Court of Cyprus, which accepted as a defence to alleged human rights violations, the doctrine of “act of government”.

In Section 2, the factual background of the case will be sketched, in broad lines, in order to feature the main legal points relied upon by the litigating parties and by the Supreme Court in delivering its judgment.

The next part will briefly conceptualize the “act of government” in order to provide a common understanding of this doctrine, before proceeding to the legal analysis.

The author will analyze, in Section 4, the judgment in the backdrop of the European Convention of Human Rights (ECHR). Articles 2 (right to life) and 6 (right to a fair trial) are the two normative pillars around which the discussion will revolve. Relevant case law by the European Court of Human Rights (ECtHR) will be used in order to provide a fuller account on the matter.

The last part is devoted to the concluding remarks in relation to the legal soundness of the judgment and for certain reflections on the doctrine “of act of government” in the field of human rights.

As for terminology, the use of “missing persons” has been employed as a translation of the term used by the parties and the Supreme Court. No

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further connection exists in the judgment with the term as it is employed in international humanitarian law. The author will employ the term “disappeared persons” as a more accurate term within the framework of international human rights law.

2. THE CASE

i) Factual background

In 1974, following a coup d’ état backed by the Greek junta against the lawful government of Cyprus, Turkey invaded Cyprus. The invasion was in violation of public international law, including the UN Charter, and resulted in the occupation of 35.83% of the island. The invasion unfolded in two successive stages; the first took place on the 20th of July 1974 and the second on 14th of August 1974.

The members of the Turkish Cypriot community were living at the time in territorial enclaves spread throughout the island. The applicants in the case under consideration are close relatives of the disappeared. The latter were born in the mid-40s in the village of Tohni, where they resided until the 14th of August 1974. The applicants alleged that on that day armed Greek Cypriots apprehended and led them to the village’s school. They further maintained

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2 The recently adopted International Convention for the Protection of All Persons from Enforced Disappearance defines in Article 2 enforced disappearance as the arrest, detention, abduction or any form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

that their relatives were executed along with other Turkish Cypriots. Their fate remains to be ascertained until today. Accordingly, their names have been included in the list of missing persons of the Committee of Missing Persons (CMP).

“From 1974-1977, a number of inter-communal meetings on the problem of the missing persons were held, but made no significant progress. Between 1977 and 1981, negotiations took place in Nicosia, Geneva and New York for the establishment of a Committee on Missing Persons in Cyprus (CMP). [...] The CMP was established in April 1981 by agreement between the Greek Cypriot and Turkish Cypriot communities under the auspices of the United Nations. It is one of the only institutionalized, bi-communal committee in Cyprus.” In 2003, the Government of the Republic of Cyprus through insertions in newspapers called all relatives of Turkish Cypriot missing persons to provide blood samples in order to create a data bank to be used for identification of remains in the event of exhumations took place. The applicants responded to this call, but no further action was taken by the State after giving these samples.

ii) **Submissions by the Applicants**

The applicants sought a judgment of the Supreme Court declaring that the Republic of Cyprus failed (a) to initiate all relevant procedures in order to ascertain the fate of the disappeared, given the fact that 3 years had elapsed from the day they had provided blood samples and (b) to conduct an effective investigation which would have the fate of the disappeared ascertained, the remains of the disappeared returned, the perpetrators identified and duly prosecuted.

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In their written address, the applicants relied on several articles of the Cypriot constitution and the European Convention on Human Rights. In particular for the latter, they invoked Article 2 (right to life), both its substantive and procedural aspect, corroborating their submissions with case law of the European Court of Human Rights.

iii) **Submission by the Respondent Government**

The Government raised a preliminary objection; the argument advanced was that the ascertainment of the fate of missing persons constitutes one of the many aspects of the “Cyprus problem”, an issue of political nature, falling within the exclusive competence of the President of the Republic and the Government. Law 17(I)/93, entitled “Law on the direct supervision by the President of the Republic of matters relating to missing, displaced and affected persons” provides that the President shall have direct supervision on every affair relating to, *inter alia*, missing persons. Two institutions of the executive, namely the “Missing Persons Service” and the “Humanitarian Affairs Service” are assigned the task of assisting the President in carrying out this task. Therefore, it is a matter falling full of the definitions of “act of government” and “political act", which are not susceptible to any review by the judiciary.

In the alternative, the Government submitted that it had always been ready to proceed with exhumations and identifications. However, its willingness was impaired by several pretexts advanced by the Turkish Cypriot side. Additionally, the Secretary General of the United Nations preferred a common program of exhumations under the auspices of CMP.

iv) **The Supreme Court’s judgment**

The Court stated that the preliminary objection raised by the Government is not related to State Responsibility, but to the Court’s jurisdiction to adjudicate upon the responsibility of the State in the particular case.
It accepted that by its very nature the matter of missing persons is included in the overall search for a solution of the Cyprus problem, and therefore, came under the exclusive political competence of the President. As such it was deemed that it fell in the sphere of the notion of “act of government”, a category of acts not reviewable by the Court. The application was, therefore, dismissed.

3. Act of Government – Introductory remarks

The doctrine of “act of government” is widely known in civil law countries. French theory has conceptualized it in the following words: “Rarement nommé en tant que tel par la jurisprudence, l’acte de gouvernement compte parmi les constructions prétoiriennes les plus complexes du droit administratif. Il est le fruit d’une théorie élaborée par le Conseil d’Etat depuis la fin du XIXe siècle dans le but de lui conférer une immunité juridictionnelle. Il s’agit d’actes présentant apparemment le caractère de décisions administratives mais qui, du fait de leur objet dans le domaine intérieur ou dans celui des relations internationales de la France, ne peuvent donner lieu à un recours juridictionnel, que ce recours concerne la légalité ou la responsabilité.”

The central question in relation to its position in the normative pyramid of rules is whether it is a theory compatible with the existence of the rule of law, since it a priori carves out a space which rests outside the judicial scrutiny of domestic and international courts.

The jurisprudence of the Conseil d’Etat has employed the notion of “l’acte détachable” to circumvent the blanket immunity which the act of government theory ensues. This theory suggests that certain legal consequences of governmental acts can be severed from those enjoying

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immunity and be subjected to judicial examination, notably in the case of a flagrant illegality.  

In brief, the “act of government” theory has received considerable criticism in academic scholarship, but its endorsement by national and international courts has not ceased.

4. ASSESSMENT IN THE LIGHT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Turning to the ECHR and its interpretation through the jurisprudence of the European Court of Human Rights, the doctrine of ‘act of government’ has been invoked several times by respondent States. The following sections purport to provide an alternative reading to the judgment of the Supreme Court, in the light of Articles 2 and 6 of the ECHR.

i) Article 2

Article 2(1) of the ECHR stipulates:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

The ECtHR has read into these lines that the right to life has a two-fold nature; a procedural and a substantive one. The first one “imposes the obligation on States to carry out effective official investigation when individuals had been killed as a result of the use of force, and particularly when there had been allegations of complicity of police or security forces in

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the killings"\(^9\). The judgment of the Court in *McCann v. UK* is the foundational authority on this.\(^10\) The substantive aspect rests with the obligation of the State to refrain from intentional and unlawful taking of life and to take appropriate steps to safeguard the lives of those within their jurisdiction. This was enunciated in *LCB v. UK*.\(^11\)

In the case before the Supreme Court, it must be noted that no proof was adduced that the disappeared persons had been unlawfully killed or that agents of the State were in any way involved. However, it must not escape attention that these persons disappeared in a context which can be considered life-threatening. It should also be borne in mind that many similar incidents were recorded in the areas under the control of the government of Cyprus at the same period, as a form of retaliation. This was also the factual framework in *Cyprus v. Turkey*\(^12\), where the Commission, “when referring the case to the Court, observed that those missing had disappeared in circumstances which were life threatening, having regard, *inter alia*, to the fact that their disappearance had occurred at a time when there was clear evidence of large-scale killings as a result of acts of criminal behavior outside the fighting zones.”\(^13\) Given this background, it is evident that what is of essence here is the procedural aspect of Article 2.

The perpetrators of the disappearances and potential killings have not been identified nor has their capacity been ascertained. It is not known whether they were members of the armed forces of Cyprus, agents of the State or paramilitary groups acting with the connivance, approval or knowledge of state authorities. However, this is immaterial with respect to the responsibility of the State under Article 2. In *Ergi v. Turkey*\(^14\), the perpetrators of the killing of the applicant’s sister were alleged to be state agents. This was

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forcefully disputed by the respondent government. The ECtHR, when assessing its responsibility stated the following:

“1. […] the Court has attached particular weight to the procedural requirement implicit in Article 2 of the Convention. It recalls that, according to its case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State’s general duty under Article 1 to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State […]. Thus, contrary to what is asserted by the Government […], this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased’s family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death.”

It is evident, to the author’s view, that the above stated principles are equally incumbent upon Cyprus in the instant case. The mere knowledge of the abduction and possible killing of the applicants gives rise to its obligation to carry out an effective investigation. Cyprus had been aware of their disappearance and was in possession of information not only of their possible killing but also of the possible locations of burial. The names of the missing persons were included in a list posted in the website of the Ministry of Foreign Affairs and the government had invited their relatives to provide blood samples. Not only this proves the State’s positive knowledge, it also does not exonerate it from the obligation to conduct an effective investigation.

The ECtHR has declared Article 2 as continuously violated “on account of the failure by the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek Cypriot
people who had disappeared in life threatening circumstances. The court thus confirmed that a distinction can be made between two aspects of Article 2: it may be violated in a substantive way (in this sense evidence “beyond reasonable doubt” is usually required and sometimes arithmetical criteria are applied) or in a procedural way (lack of investigation). This distinction characterizes all the subsequent judgments on cases of enforced disappearances.”\(^\text{15}\)

In furtherance, it may be recalled that the ECtHR while discussing Article 2 had observed in *McCann*\(^\text{16}\) that “as a provision which not only safeguards the right to life but set outs the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention’. No justification appears in the judgment why and under which criteria an “act of government” can take precedence over the fundamental nature of Article 2.

ii) **Article 6 (right to a fair trial)**

The text of Article 6(1) reads:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]”

The ECtHR has attached great importance to the application of the aforementioned article. Its guiding interpretative principle was set out in *Delcourt*:

“In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a

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restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision.”

The right to a fair trial does not contain *expressis verbis* a right of access to a court. “This latter *lacuna* caused an important dispute. What have the Contracting States agreed to?”\(^\text{18}\) Since the early stages of the ECtHR’s jurisprudence, the Court has provided a progressive reading to the article starting with *Golder*\(^\text{19}\). “The Court finally arrived at a wide interpretation of Article 6, holding the right of access inherent in the rights stated by Article 6§1 […] which includes on the one hand the right to access to a court, and on the other hand the guarantees laid down expressly by Article 6 with respect to the organization and composition of the court, and the conduct of the proceedings.”\(^\text{20}\) The scope of this right has extended gradually to all areas of law (civil, criminal and administrative).

This right is not afforded without limitations, thus providing a margin of appreciation to States. To this end, a long list of limitations has been recognized by the ECtHR including time limits, not excessiveness of court fees, prior authorization to proceed with a claim and many others. These limitations must not, however, impair the essence of access.

Immunities are also a form of limitation, which are susceptible to three preconditions of examination;

a) the persons and organs who enjoy immunity must be narrowly defined;

b) the acts in respect of which immunity is claimed must directly relate to the function for which immunity is granted and;

c) a fair balance must be struck between the public interests which the grant of immunity serves and the interest of unrestricted access to


\(^{19}\) ECtHR, 21 February 1975, *Golder v United Kingdom*, (Application no. 4451/70)

court (in other words, legitimate aim and proportionality\textsuperscript{21}). “Thus, in the\textit{Osman}\textsuperscript{22} case the court reached the conclusion that the automatic immunity to the police, without having regard to competing public-interest considerations, amounted to an unjustifiable restriction.”\textsuperscript{23}

The notion of “act of government” fits squarely in this broad category of immunities. The Supreme Court of Cyprus declined jurisdiction accepting that the matter of missing persons is an act of this kind since it is related to the administration of political power of the President of the Republic and therefore not lending itself to judicial review by it.

A parallel may be drawn here with the judgment in\textit{Markovic}\textsuperscript{24}. In that case the applicants complained of a violation of Article 6 of the Convention, taken together with Article 1, as a result of a ruling by the Italian Court of Cassation that the domestic courts had no jurisdiction to examine their claim for compensation for damage sustained as a result of an air strike by NATO forces. Although it made a finding that Article 6 was applicable in the applicants’ action against the State, it did not find a violation since it considered:

“that the Court of Cassation's ruling in the present case does not amount to recognition of an immunity but is merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war. It comes to the conclusion that the applicants’ inability to sue the State was the result not of an immunity but of the principles governing the substantive right of action in domestic law. At the relevant time, the position under the domestic case-law was such as to exclude in this type of case any possibility of the State being held

\textsuperscript{21}ECtHR, 28 May 1985,\textit{Ashingdene v. United Kingdom}, (App. 8225/78), para. 57 of the judgment.

\textsuperscript{22}ECtHR, 28 October 1998,\textit{Osman v United Kingdom}, (App. 87/1997/871/1083), paras 151-153 of the judgment.


\textsuperscript{24}ECtHR, 14 December 2006,\textit{Markovic and others v. Italy}, (App. 1398/00) [GC]
liable. There was, therefore, no limitation on access to a court of the kind in issue in the *Ashingdane* case.  

The dissenting opinion voiced to this outcome was considerable. It rejected, as incompatible to the Convention, the underlying idea that:

“political functions and individual rights cannot, therefore, coexist, as no rights can be asserted in relation to political acts.”

It further observed that:

“Although the applicants were given access to the Italian courts, it was only to be told that neither the civil courts, nor any other Italian court, had jurisdiction to hear their case. The Court of Cassation thereby restricted for all practical purposes the scope of the general law of reparation [...]. Furthermore, [...], it did not balance the competing interests at stake and made no attempt to explain why in the specific circumstances of the applicants' case the fact that the impugned act was of a political nature should defeat their civil action.”

Back to the Supreme Court of Cyprus and the examination of its judgment in the light of Article 6 and the ECtHR's jurisprudence. The Supreme Court of Cyprus stated in its judgment: “The issue raised by the preliminary objection is not relevant to the responsibility of the State. It concerns the jurisdiction of the Supreme Court to pronounce itself on the issue of State's responsibility in an instance as the present one.”

It is evident that it has not subjected the “act of government” defence within the limits prescribed by Article 6 of the ECHR. More precisely, the

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25 *Ibidem*, para. 114 of the judgment.

26 *Ibidem*, Dissenting opinion of Judge Zzagrebelsky joined by Judges Zupančič, Jungwiert, Tsatsa-Nikolovska, Ugrekhelidze, Kovler and David Thór Björgvinsson.

27 *Ibidem*. 
defence should have been scrutinised under the three preconditions analyzed above.

Are the persons and organs that enjoy immunity narrowly defined? The aforementioned domestic law has afforded and the judgment has recognized this immunity to the President of the Republic, which seems to satisfy the first requirement.

Are the acts in respect of which immunity is claimed directly related to the function for which immunity is granted? This is a questionable point. The missing persons issue is indeed a matter discussed in the negotiations for a solution to the Cyprus problem. However, it is first and foremost a human rights issue and the applicants have made serious allegations on them. Can the inclusion of human rights issues in the political discourse absolve the State from its responsibility? This leads to the final criterion.

Has a fair balance been struck between the public interests which the grant of immunity serves and the interest of unrestricted access to court? What is the legitimate aim that this immunity seeks to provide and has it been implemented in a proportional manner? One may easily define the legitimate aim being the unrestricted conduct of the negotiations for a solution to the Cyprus problem, as a factor implicating the status of foreign affairs of the State, and the swift and effective provision of assistance to relatives of missing persons by the State, as a factor relevant to a public cause or common good aim. However, the disproportional nature of the automatic immunity afforded to the State is striking and leaves no room for further consideration. In the words of Judge Loucaides, in his dissenting opinion in Al-Adzani:

“Any form of blanket immunity, whether based on international law or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is
the subject matter of the relevant proceedings, is a disproportionate limitation on Article 6 § 1 of the Convention and for that reason it amounts to a violation of that Article. The courts should be in a position to weigh the competing interests in favour of upholding immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings.”

Nothing would bar the State from continuing the negotiations, including the issue of missing persons in them, and at the same time holding an effective investigation. The judgment is tantamount to denial of justice since it is not enough that one may institute proceedings before a court. The author finds it difficult to subscribe to the justification and outcome of the case before the Supreme Court, since it fails to take into account and properly balance the competing human rights considerations on the one hand and the conduct of political affairs on the other.

From a different standpoint, the judgment sets a whole category of potential applicants, the relatives of all the disappeared, outside of the protection of the law, by depriving them of recourse to an effective and meaningful remedy. This is on the borderline between Article 6 and Article 13 of the ECHR, the latter providing for a right to an effective remedy. If the applicants will face the same defense before all domestic courts, what remedy can be readily available for them? However, due to the limited scope of this case note, the author will not embark on a discussion and analysis of this aspect.
5. CONCLUDING REMARKS

The author has purported to argue that the judgment by the Supreme Court of Cyprus fails to abide by the standards of the ECHR and that it lies in manifest contradiction with the content of (at least) two provisions of the Convention, namely the right to life and the right to a fair trial.

The role of national or international courts is not to absolve the States of its responsibility in relation to its duty to secure respect to human rights, based on the premises of theoretical constructions such as the “act of government”. On the contrary, “the State must ‘secure’ the rights and freedoms of the Convention in its domestic law, and take ‘reasonable and appropriate measures’ to protect individuals from the violence and intolerance of others.”

The “act of government” doctrine predates the emergence of human rights law and is conceptually in contradiction to the rationale of the latter. Where this doctrine seeks to carve out a legally immune space for the sovereign, human rights law seeks to establish a wide area of legal protection for the individual. Actors, aims and interests are irreconcilable when one discusses simultaneously the two ideas.

The ECtHR in its recent case law and national courts, at least in civil law countries, have espoused this doctrine, which nevertheless is in regression. In Spain in particular, “actos politicos ont perdu leur immunité juridictionnelle par la volonté du législateur, qui a établi que «l’ ordre juridictionnel administratif est compétent pour connaitre des questions relatives à la protection juridictionnelle des droits fondamentaux, aux éléments réglés et à la réparation des conséquences dommageables des actes du gouvernement ou des conseils de gouvernement des Communautés autonomes, et ce quelle que soit la nature de ces actes.»”\(^{29}\)

Academic literature has emphasized the need to abandon this theory because it is not consonant with the supremacy of the values of Law and its rule. The courts have this challenging task for the future. The author has chosen to conclude by citing the following dissenting opinion which encompasses the very essence of the problem: “I can understand why the States seek to protect themselves against the threat of legal actions such as that in the present case. However, I regret that the majority of the court should have accepted a solution which strikes a blow at the very foundation of the Convention.”\(^{30}\)

6. BIBLIOGRAPHICAL REFERENCES


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