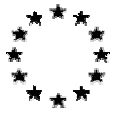

EUROPEAN COURT OF HUMAN RIGHTS

In the case of Modinos v. Cyprus*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Matscher,
Mr R. Bernhardt,
Mr A. Spielmann,
Mr I. Foighel,
Mr F. Bigi,
Sir John Freeland,
Mr A.B. Baka,
Mr G. Pikis, ad hoc judge,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 31 October 1992 and 25 March 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

* The case is numbered 7/1992/352/426. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

PROCEDURE

1. The case was referred to the Court on 21 February 1992 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15070/89) against Cyprus lodged with the Commission under Article 25 (art. 25) on 25 May 1989 by Mr Alecos Modinos, a Cypriot citizen.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Cyprus recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr A.N. Loizou, the elected judge of Cypriot nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the

President of the Court (Rule 21 para. 3 (b)). In a letter to the President of 10 March 1992, Mr Loizou stated that he wished to withdraw pursuant to Rule 24 para. 3 as he had been a member of the Supreme Court of Cyprus in a case where comparable issues had been examined (see paragraph 11 below). On 10 April 1992 the Agent of the Government of Cyprus ("the Government") informed the Registrar that Mr Justice Georghios Pikis had been appointed as ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

On 25 March 1992 the President had drawn by lot, in the presence of the Registrar, the names of the seven other members of the Chamber, namely Mr F. Matscher, Mr R. Bernhardt, Mr A. Spielmann, Mr I. Foighel, Mr F. Bigi, Sir John Freeland and Mr A.B. Baka (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. On 10 April 1992 the International Lesbian and Gay Association sought leave under Rule 37 para. 2 to submit written comments. On 12 May 1992 the President decided not to grant leave.

5. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's representative on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received, on 17 June 1992, the applicant's and the Government's memorials. On 30 June the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 October 1992. The Court had held a preparatory meeting beforehand. Prior to the hearing the applicant had filed a supplementary claim for costs.

There appeared before the Court:

(a) for the Government

Mr R. Gavrielides, Senior Counsel, Deputy Agent,
Mrs L. Koursoumba, Senior Counsel, Counsel;

(b) for the Commission

Mr L. Loucaides, Delegate;

(c) for the applicant

Mr A. Demetriades, Barrister-at-law, Counsel.

The Court heard addresses by Mr Gavrielides for the Government, by Mr Loucaides for the Commission and by Mr Demetriades for the applicant. During the hearing various documents were filed by the applicant.

AS TO THE FACTS

7. The applicant is a homosexual who is currently involved in a sexual relationship with another male adult. He is the President of the "Liberation Movement of Homosexuals in Cyprus". He states that he suffers great strain, apprehension and fear of prosecution by reason of the legal provisions which criminalise certain homosexual acts.

A. Criminal Code

8. Sections 171, 172 and 173 of the Criminal Code of Cyprus, which predates the Constitution, provide as follows:

"171. Any person who -

(a) has carnal knowledge of any person against the order of nature; or

(b) permits a male person to have carnal knowledge of him against the order of nature, is guilty of a felony and is liable to imprisonment for five years.

172. Any person who with violence commits either of the offences specified in the last preceding Section is guilty of a felony and liable to imprisonment for fourteen years.

173. Any person who attempts to commit either of the offences specified in Section 171 is guilty of a felony and is liable to imprisonment for three years, and if the attempt is accompanied with violence he is liable to imprisonment for seven years."

9. Various Ministers of Justice had indicated in statements to newspapers dated 11 May 1986, 16 June 1988 and 29 July 1990, that they were not in favour of introducing legislation to amend the law relating to homosexuality. In a statement to a newspaper on 25 October 1992 the Minister of the Interior stated, inter alia, that although the law was not being enforced he did not support its abolition.

B. Constitutional provisions

10. The relevant provisions of the Constitution of the Republic of Cyprus, which came into force on 16 August 1960, read as follows:

Article 15

"1. Every person has the right to respect for his private and family life.

2. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person."

Article 169

"1. ...

2. ...

3. Treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the Official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto."

Article 179

"1. This Constitution shall be the supreme law of the Republic.

2. No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this

Constitution."

Article 188

"1. Subject to the provisions of this Constitution and to the following provisions of this Article, all laws in force on the date of the coming into operation of this Constitution shall, until amended, whether by way of variation, addition or repeal, by any law or communal law, as the case may be, made under this Constitution, continue in force on or after that date, and shall, as from that date be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution.

2. ...

3. ...

4. Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of the Constitution including the Transitional Provisions thereof.

5. In this Article -

'law' includes any public instrument made before the date of the coming into operation of this Constitution by virtue of such law;

'modification' includes amendment, adaptation and repeal."

C. Case-law

11. In the case of Costa v. The Republic (2 Cyprus Law Reports, pp. 120-133 [1982]) the accused - a 19 year-old soldier - was convicted of the offence of permitting another male person to have carnal knowledge of him contrary to section 171(b) of the Criminal Code. The offence was committed in a tent within the sight of another soldier using the same tent. The accused had contended that section 171(b) was contrary to Article 15 of the Constitution and/or Article 8 (art. 8) of the European Convention on Human Rights. In its judgment of 8 June 1982 the Supreme Court noted that, since the offence was not committed in private and since the accused was a soldier who was 19 years of age at the time, the constitutional and legal issues raised by the case fell outside the ambit of the construction given to Article 8 (art. 8) by the European Court of Human Rights in its Dudgeon v. the United Kingdom judgment of 22 October 1981 (Series A no. 45). The Supreme Court, nevertheless, added that it could not follow the majority view of the Court in the Dudgeon case and adopted the dissenting opinion of Judge Zekia. The court stated as follows:

> "By adopting the dissenting opinion of Judge Zekia this Court should not be taken as departing from its declared attitude that, for the interpretation of provisions of the Convention, domestic tribunals should turn to the interpretation given by the international organs entrusted with the supervision of its application, namely, the European Court and the European Commission of Human Rights ...
>
> In ascertaining the nature and scope of morals and the degree of the necessity commensurate to their protection, the jurisprudence of the European Court and the European Commission of Human Rights has already held that the conception of morals changes from time to time and from place to place, and that there is no uniform European

conception of morals; that, furthermore, it has been held that state authorities of each country are in a better position than an international judge to give an opinion as to the prevailing standards of morals in their country; in view of these principles this Court has decided not to follow the majority view in the Dudgeon case, but to adopt the dissenting opinion of Judge Zekia, because it is convinced that it is entitled to apply the Convention and interpret the corresponding provisions of the Constitution in the light of its assessment of the present social and moral standards in this country; therefore, in the light of the aforesaid principles and viewing the Cypriot realities, this Court is not prepared to come to the conclusion that Section 171(b) of our Criminal Code, as it stands, violates either the Convention or the Constitution, and that it is unnecessary for the protection of morals in our country."

D. The prosecution policy of the Attorney-General

12. There had been prosecutions and convictions in Cyprus for homosexual conduct in private between consenting adults up until the 1981 judgment of the European Court in the Dudgeon case (loc. cit.). When this case was pending before the European Court the Attorney-General requested the police not to continue with a prosecution under section 171 because of apparent conflict between that provision and Article 8 (art. 8) of the Convention. Since that date the Attorney-General's office has not allowed or instituted any prosecution which conflicts with either Article 8 (art. 8) of the Convention or Article 15 of the Constitution, in so far as they relate to homosexual behaviour in private between consenting adults.

Under Article 113 of the Constitution of Cyprus the Attorney-General is vested with competence to institute and discontinue criminal proceedings in the public interest. Although he could not prevent a private prosecution from being

brought he can intervene to discontinue it.

PROCEEDINGS BEFORE THE COMMISSION

13. In his application before the Commission (no. 15070/89) lodged on 22 May 1989, the applicant complained that the prohibition on male homosexual activity constituted a continuing interference with his right to respect for private life in breach of Article 8 (art. 8) of the Convention.

14. On 6 December 1990 the Commission declared the application admissible. In its report of 3 December 1991, drawn up under Article 31 (art. 31) of the Convention, it concluded unanimously that there had been a breach of Article 8 (art. 8).

The full text of the Commission's opinion is reproduced as an annex to this judgment*.

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 259 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

FINAL SUBMISSIONS MADE BY THE GOVERNMENT

15. At the hearing on 27 October 1992 the Government requested the Court to find that there had been no breach of Article 8 (art. 8).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

16. The applicant complained that the maintenance in force of provisions of the Cypriot Criminal Code (see paragraph 8 above)

which criminalise private homosexual relations constitutes an unjustified interference with his right to respect for private life under Article 8 (art. 8) of the Convention which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The existence of an interference

17. The Government submitted that neither the applicant nor any other person in his situation could be lawfully prosecuted under sections 171, 172 and 173 of the Cypriot Criminal Code, since, to the extent that these provisions concerned homosexual relations in private between consenting male adults, they are in conflict with Article 15 of the Cypriot Constitution (see paragraph 10 above) and Article 8 (art. 8) of the Convention. To that extent the prohibition of such relations is in fact no longer in force. Moreover, since 1981 the Attorney-General, who has exclusive competence to institute and discontinue criminal proceedings, has not brought or permitted a prosecution in respect of such homosexual conduct (see paragraph 12 above). Accordingly, there being no risk of prosecution, there is no interference with the applicant's rights under Article 8 (art. 8).

18. The applicant disagreed. In his view, the impugned provisions are still in force. He pointed to the statements of various Government ministers who, by objecting to the amendment

of the law, had implicitly acknowledged its validity (see paragraph 9 above). Moreover, the policy of the Attorney-General not to prosecute could change at any time and a member of the public could bring a private prosecution against the applicant. There is thus no guarantee that he will not be prosecuted.

19. For the Commission, the applicant's fear of prosecution could not be regarded as unfounded.

20. The Court first observes that the prohibition of male homosexual conduct in private between adults still remains on the statute book (see paragraph 8 above). Moreover, the Supreme Court of Cyprus in the case of Costa v. The Republic considered that the relevant provisions of the Criminal Code violated neither the Convention nor the Constitution notwithstanding the European Court's Dudgeon v. the United Kingdom judgment of 22 October 1981 (Series A no. 45) (see paragraph 11 above).

21. The Government, however, have maintained that this case was decided by the Supreme Court in June 1982, prior to the Norris v. Ireland judgment of 26 October 1988 (Series A no. 142) and before the implications of the Dudgeon decision were properly understood; and further that since the Costa case did not concern private homosexual relations between adults the Supreme Court's remarks concerning the Dudgeon judgment were obiter dicta.

22. In the Court's view, whatever the status in domestic law of these remarks, it cannot fail to take into account such a statement from the highest court of the land on matters so pertinent to the issue before it (see, mutatis mutandis, the Pine Valley Developments Ltd and Others v. Ireland judgment of 29 November 1991, Series A no. 222, pp. 23-24, para. 52).

23. It is true that since the Dudgeon judgment the Attorney-General, who is vested with the power to institute or discontinue prosecutions in the public interest, has followed a consistent policy of not bringing criminal proceedings in respect

of private homosexual conduct on the basis that the relevant law is a dead letter.

Nevertheless, it is apparent that this policy provides no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force (see paragraph 9 above). Moreover, it cannot be excluded, as matters stand, that the applicant's private behaviour may be the subject of investigation by the police or that an attempt may be made to bring a private prosecution against him.

24. Against this background, the Court considers that the existence of the prohibition continuously and directly affects the applicant's private life. There is therefore an interference (see the above-mentioned Dudgeon and Norris judgments, Series A nos. 45 and 142, pp. 18-19, paras. 40-41, and pp. 17-18, paras. 35-38).

B. The existence of a justification under Article 8 para. 2 (art. 8-2)

25. The Government have limited their submissions to maintaining that there is no interference with the applicant's rights and have not sought to argue that there exists a justification under paragraph 2 of Article 8 (art. 8-2) for the impugned legal provisions. In the light of this concession and having regard to the Court's case-law (see the above-mentioned Dudgeon and Norris judgments, pp. 19-25, paras. 42-62, and pp. 18-21, paras. 39-47), a re-examination of this question is not called for.

C. Conclusion

26. Accordingly, there is a breach of Article 8 (art. 8) in the present case.

II. APPLICATION OF ARTICLE 50 (art. 50)

27. Under Article 50 (art. 50) of the Convention:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

28. The applicant first submitted that he should be awarded a sum to compensate him for the amount of time he has lost from his work as a self-employed architect by participating in the Strasbourg proceedings as well as an amount for mental stress and suffering.

29. Both the Government and the Delegate of the Commission considered that no award should be made.

30. The Court considers that, in the circumstances of the case, the finding of a breach of Article 8 (art. 8) constitutes sufficient just satisfaction under this head for the purposes of Article 50 (art. 50).

B. Costs and expenses

31. The applicant also claimed 7,730 Cyprus pounds in respect of legal fees and 2,836 Cyprus pounds by way of travelling, subsistence and other out-of-pocket expenses connected with the Strasbourg proceedings.

32. The Government considered that it would be fair and reasonable to limit the award of costs to 1,000 Cyprus pounds but had no objection to awarding the full amount claimed for expenses.

33. Taking its decision on an equitable basis, as required by Article 50 (art. 50), and applying the criteria laid down in its case-law, the Court holds that the applicant should be awarded 4,000 Cyprus pounds in respect of fees together with the full amount claimed by way of expenses.

FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that there is a breach of Article 8 (art. 8) of the Convention;

2. Holds unanimously that Cyprus is to pay the applicant, within three months, the sum of 6,836 (six thousand, eight hundred and thirty-six) Cyprus pounds in respect of costs and expenses;

3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 April 1993.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the

following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Matscher;

(b) dissenting opinion of Mr Pikis.

Initialled: R.R.

Initialled: M.-A.E.

CONCURRING OPINION OF JUDGE MATSCHER

(Translation)

In this case I voted with the majority for a violation because - in contrast to the position in the cases of Dudgeon v. the United Kingdom (Series A no. 45, dissenting opinion, p. 33) and Norris v. Ireland (Series A no. 142, dissenting opinion, p. 24) - the applicant can claim to be a victim within the meaning of Article 25 (art. 25).

However, in order to dispel any misunderstanding which might arise from the reference in the present judgment to the case of Costa v. The Republic (at paragraph 20 in the "As to the law" part), which dealt with a different situation (correctly described at paragraph 11 in the "As to the facts" part), I wish to make clear how I interpret the Court's case-law in this area (see the two cases cited above). In my view, Article 8 (art. 8) will be infringed only where the law makes it a criminal offence for consenting adults to commit homosexual acts in private - and I would exclude from that rule a number of specific situations, for instance the abuse of a relationship in which one party is dependent on the other or carrying out such acts within a closed community, such as a boarding-school or a barracks, etc.

DISSENTING OPINION OF JUDGE PIKIS

The foremost issue in these proceedings, made clear in the judgment of the majority, is the state of Cyprus law respecting the criminalisation of homosexual acts between consenting male adults in private. That we had conflicting statements from the parties concerning the effect of Cyprus law on the subject is in itself indicative of the complexity of the issue and a reflection of the difficulties inherent in the identification and definition of the domestic law of Cyprus following the introduction of the Constitution, coincidentally upon the proclamation of its independence.

The Constitution of Cyprus ("the Constitution") came into force simultaneously with the declaration of the country as an independent State in 1960. Article 179 established the Constitution to be the supreme law of the Republic and prohibited the enactment of any law or decision repugnant to or inconsistent with any of its provisions. An important aspect of the Constitution is Part II, safeguarding the fundamental rights and liberties of the individual. It is a comprehensive charter of human rights modelled upon the Convention. Among the rights guaranteed is that of respect for private life (Article 15.1) founded on the provisions of Article 8 (art. 8) of the Convention.

To avoid a legal vacuum in the domestic law of the land, the Constitution saved, subject to qualification, the legislation in force before independence. This was achieved by Article 188 of the Constitution. The adoption of laws predating the Constitution was subject to an important and all-embracing reservation designed to uphold the supremacy of the Constitution. While saving laws antedating the Constitution, Article 188.1 expressly made their sustainment dependent upon the compatibility of their provisions with the supreme law, the Constitution. The saving was subject to the condition that such laws would be construed and applied "... with such modification as may be necessary to bring them into conformity with this Constitution". The term "modification" is broadly defined by Article 188.5. It

includes not only amendment and adaptation which are incidental to the power to modify but repeal as well.

As a result, colonial laws or any part of them that could not be reconciled with or brought into conformity with the Constitution by a legitimate process of modification, ceased to be part of the law or survived in such form as to be compatible with its provisions.

The function of adjusting colonial legislation to the Constitution was entrusted to the judiciary to be exercised in the context of the transaction of ordinary judicial business. Article 188.4 provided:

> "Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of the Constitution including the Transitional Provisions thereof."

Inevitably the task of streamlining colonial laws with the Constitution was a slow and laborious process, the more so as the term "law" included, in addition to the statutory law, rules and regulations too (Article 188.5).

As a consequence of Article 188 of the Constitution, a multitude of laws and regulations were kept in force subject to modification, including the 354 chapters of codified colonial legislation of which the Criminal Code with its 374 sections (creating an almost equal number of offences) was but one - CAP.154. The absence of an authoritative pronouncement on the conformity of any such law with the Constitution did not raise any presumption about its compatibility. This is not to say that litigants, including the Office of the Attorney-General, did not frequently refer to the colonial statute book as a readily

available guide to the law on any given subject.

Article 15.1 of the Constitution safeguarded respect for private life as a fundamental human right to the same extent and with similar aspirations as Article 8 (art. 8) of the Convention. The Convention itself, including Article 8 (art. 8), was adopted as part of the domestic law of Cyprus by the enactment of ratification Law 39/62; and inasmuch as this law incorporated treaty obligations of Cyprus, its provisions had a superior force to those of any other municipal law (Article 169.3 of the Constitution), rendering inoperative any aspect of such legislation that conflicted with the Convention. In sum, legislation in force before independence had to conform as a condition for its validity to the provisions of the Constitution, including those of Article 15.1 and, as from 1962, it should not run contrary to the Convention, including Article 8 (art. 8). Moreover, Article 35 of the Constitution, an addendum to Part II of the Constitution, imposed a duty on all authorities of the State to secure within the limits of their respective competence the efficient application of fundamental human rights. Article 35 provides:

> "The legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of this Part."

The rights safeguarded by Article 15 could be circumscribed only in the manner and for the purposes specified in Article 15.2. The wording of Article 15.2 broadly corresponds with that of Article 8 para. 2 (art. 8-2) of the Convention. It is acknowledged that since independence no law was enacted aimed or purporting to limit or curtail the right of respect for private life; and no law was passed criminalising any form of homosexual conduct between consenting adults in private. In Police v. Hondrou and Another (decided on 6 April 1962, 3 Reports of Supreme Constitutional Court, p. 82), the Supreme

Constitutional Court concerned itself with the prerequisites for the limitation of fundamental human rights. The following passage from the judgment of the court (delivered by Forsthoff, P.), illuminates judicial approach to the subject:

> "It is only the people of a country themselves, through their elected legislators, who can decide to what extent its fundamental rights and liberties, as safeguarded by the Constitution, should be restricted or limited and this principle is inherently contained in all constitutions, such as ours, which expressly safeguard the fundamental rights and liberties and adopt the doctrine of the separation of powers."

It follows from the above that the criminalisation of homosexual acts between consenting adults in private rested solely and exclusively on the compatibility of the provisions of section 171 of the Criminal Code with Article 15 of the Constitution and, as from 1962, with Article 8 (art. 8) of the Convention too.

The ambit of fundamental human rights incorporated in the Convention (foreshadowed by the Universal Declaration of Human Rights of 1948) was not immediately identifiable or recognisable. This is certainly true of Cyprus. A number of prosecutions was founded on section 171 and convictions recorded for homosexual acts between consenting adults in private, without any question having been raised concerning the compatibility of section 171 with Article 15.1 of the Constitution or Article 8 (art. 8) of the Convention. It is no coincidence, I believe, but it is for similar reasons that we had no authoritative pronouncement on the effect of Article 8 (art. 8) and its implications respecting homosexual acts between consenting adults in private before the decision in Dudgeon v. the United Kingdom (judgment of 22 October 1981, Series A no. 45); a decision not so much concerned with the breadth of the right of respect for private life as with the acceptability of limitations to the right

introduced in the interest of the "protection of morals" or the "protection of the rights and freedoms of others". Sexual conduct, it was affirmed, whatever its nature between consenting adults, is an inherent aspect of private life. The voluntary sexual choices and pursuits of adults in private are their exclusive business. Such is the breadth of the right of respect for the private life of the individual in the area under consideration.

The decision in Dudgeon was followed and applied in the case of Norris v. Ireland with similar consequences (judgment of 26 October 1988, Series A no. 142).

The Cyprus Government submitted that they accept the decisions of this Court in Dudgeon and Norris as definitive of the ambit of the right of respect for private life with regard to homosexual acts committed between consenting adults in private and the inamenity to subject it to limitations; and they have not sought to justify section 171 of the Criminal Code as a legitimate limitation of the right. On the contrary, they take the view that section 171 is incompatible with Article 15 of the Constitution and on that account ceased to be part of the law of Cyprus since independence. Their argument is as follows: prosecutions mounted under section 171 of the Criminal Code before the decision in Dudgeon, were founded on a misconception of the implications of Article 15 of the Constitution and Article 8 (art. 8) of the Convention. When stock was taken of their effect from the decision in the Dudgeon case, they treated section 171 as having ceased to be part of the law of Cyprus; consequently, no prosecution was instituted ever since for homosexual acts between consenting adults in private. The changed attitude of the Attorney-General is not attributed to any policy decision evolved within the context of his discretionary powers but to a reassessment of the content and effect of the right of respect for private life. In the light of the above, they argued that the fear of applicant Modinos about a possible violation or compromise of his rights safeguarded by Article 8

(art. 8) of the Convention has no foundation.

The applicant for his part, submitted that the fear and agony he experiences about the perils to his right of respect for his private life are real and referred to a series of facts that reinforce them:

1. the omission of the State to formally abolish ssection 171 of the Criminal Code;

2. statements made by three successive Ministers of Justice to the effect that they would not initiate legislation to expunge section 171 from the Criminal Code or exclude from its province homosexual acts between consenting adults in private;

3. police investigations into alleged homosexual acts between consenting adults in private. Here it must be noted that the Government denied that any investigations were conducted into homosexual acts between consenting adults in private.

On the other hand, the Attorney-General's decision not to prosecute is no certain assurance for respect of his right safeguarded by Article 8 (art. 8) of the Convention. In effect, his counsel argued, it represents a policy decision liable to change at any future date. Furthermore, a private prosecution cannot be ruled out, which is in itself a source of anxiety.

The fear of the applicant is made more oppressive still by the decision of the Supreme Court of Cyprus in Costa v. The Republic (2 Cyprus Law Reports, p. 120 [1982]), especially the view taken that section 171 of the Criminal Code represents, in the context of the moral fabric of Cyprus, a legitimate limitation of the rights safeguarded by Article 15 of the Constitution and Article 8 (art. 8) of the Convention.

Notwithstanding the vigour and lucidity with which the parties argued their case, I consider it regrettable that neither of them made reference to the case-law of the Supreme Court of Cyprus subsequent to the decision in Costa, definitive of the rights safeguarded by Article 15.1 of the Constitution and the consequences attendant upon breach of fundamental human rights safeguarded by the Constitution. I feel I can, indeed I ought to, draw upon my knowledge of Cyprus case-law to which I drew the attention of my brethren, in determining matters at issue in these proceedings. After all, the cardinal issue, as indicated at the outset of this judgment, revolves around the state of Cyprus law, in particular whether it criminalises homosexual acts between consenting adults in private.

After due consideration of the case, I have come to a contrary decision from the remaining members of the Court. My reasons for dissenting will become more readily understood if I were to recount the basic reasons founding the decision of the Court. The right of the applicant safeguarded by Article 8 (art. 8) of the Convention is imperilled by the continued presence of section 171 in the Criminal Code. Ministerial statements, indicating unwillingness to introduce legislation to abolish section 171, signify governmental approval of its preservation in the statute book. The pronouncements in Costa cannot, whatever their juridical status, but be treated as weighty judicial statements bearing upon the validity of section 171. Moreover, the policy of the Attorney-General not to prosecute cannot be divorced from the views of the incumbent of the post and provides no certain assurance for the future. Consequently, the risk of a prosecution by public authorities is ever present, whereas a private prosecution cannot be ruled out; therefore, the protection of this Court is necessary to sustain the efficacy of the rights of the applicant safeguarded by Article 8 (art. 8) of the Convention.

Below I explain my reasons for coming to a contrary conclusion but, before doing so, I must note the existence of an

error in the findings of the Commission under the heading "Relevant domestic law and practice". In paragraph 24 it is stated that the offence in Costa "had been committed in private in a tent but within the sight of another person who was legitimately using the same tent". Thereafter, an extract is quoted from the judgment of the Court in Costa, indicating the reasons that justify in Cyprus the criminalisation of homosexual acts between consenting adults in private, in the interests of the protection of morals. Thus, the impression is conveyed that the remarks of the Court in Costa were necessary for the resolution of an issue involving homosexual acts in private. Presumably, the Commission had identified the subject at issue in the Costa case by reference to the headnote of the report that erroneously omitted the word "not" between "committed" and "in private" from the relevant text of the judgment. In the case of Costa, the offence did not concern the commission of acts of sodomy in private but in a tent temporarily set up to accommodate soldiers during military exercises and inevitably subject to overseeing by military authorities.

Now, the reasons for my dissent:

A. The presence of section 171 in the Criminal Code does not of itself suggest that it continues to be part of the law. A study of the case-law of Cyprus since independence indicates that, notwithstanding the effluxion of thirty or more years since independence, the course of reconciling colonial legislation with the Constitution is by no means complete. This is exemplified by two recent decisions of the Supreme Court of Cyprus: In The United Bible Societies (Gulf) v. Hadjikakou (Civil Appeal No. 7413, decided on 28 May 1990 - not yet reported in the official series), it was decided that the relevant provisions of the Civil Procedure Rules in force before independence, providing for the service of process on non-Greek or Turkish litigants, in English - the official language before independence - were incompatible with the Constitution and on that account they should be applied with necessary modification to bring them into

accord with the Constitution; an exercise resulting in the substitution of the official languages of the State, Greek and Turkish, for the English language. A more recent example still is the case of Republic v. Samson (Civil Appeal No. 8532, decided by the plenum of the Supreme Court on 26 September 1991 - not yet reported in the official series), where it was held that the provisions of the Prisons Regulation Law (part of the codified law of Cyprus at the time of independence) - CAP.286, conferring power on the Prisons Authorities to reduce sentence, should be applied in a manner compatible with the doctrine of separation of powers underlying the Constitution, making the judiciary the sole arbiters of the punishment for breach of penal laws.

B. Not only Ministers have no say in the prosecution of crime but in their official endeavours to ascertain the law they must seek the advice of the Attorney-General. Article 113.2 of the Constitution provides that the Attorney-General "shall" be the legal adviser of the Executive, including Ministers. Consequently, ministerial statements on the subject of criminalisation of homosexual acts in private are in no sense authoritative; moreover, they conflict with the view taken of the law by the legal adviser of government so they can be ignored as irrelevant.

The Attorney-General, it must be explained, is not a member of the Government but an independent officer of the Cyprus Republic, holding office on the same terms and conditions as judges of the Supreme Court (Article 112.4 of the Constitution).

C. The decision in Costa does not establish a binding judicial precedent concerning the compatibility of section 171 with Article 15 of the Constitution or as a legitimate limitation of the right safeguarded thereby or under Article 8 (art. 8) of the Convention, as part of the law of Cyprus (Law 39/62). In the judgment of the Court in Costa, it is made clear that the statements made and opinions expressed with regard to criminalisation of homosexual acts in private were of no direct

relevance to the case under consideration; they were aimed to furnish an answer to arguments raised, broadening the issue before the Court. As such, they had no direct bearing on the outcome of the case. The offence of which Costa was convicted did not involve homosexual acts between consenting adults in private.

Judicial statements having no direct bearing on the resolution of matters at issue classify or qualify as obiter dicta. Under the Cyprus system of judicial precedent (as in other countries where the English system of judicial precedent applies), obiter dicta do not constitute an authoritative exposition of the law and as such are not binding. Only the ratio of a case, that is the reasons directly and inextricably supporting the outcome of the case, is binding in the sense of stare decisis. A Cyprus court is not bound to follow judicial pronouncements made obiter; of course, they do carry weight such as is warranted by the source of their emanation and the reasoning associated therewith. Hence the Attorney-General was justified not to treat the decision in Costa as an authoritative statement of the law concerning the applicability of section 171 of the Criminal Code, at any rate so far as it affected consensual homosexual acts in private.

Subsequent decisions of the Supreme Court diminish to the point of extinction any weight that might be attached to the obiter pronouncements in Costa.

The decision of the plenum of the Supreme Court in Police v. Georghiades (2 Cyprus Law Reports, p. 33 [1983]) is a landmark in the case-law of Cyprus. The Court was asked to decide, upon a question of law reserved for its opinion, whether evidence deriving from the overhearing of a conversation between a psychologist and his client by means of an electronic listening and recording device was admissible in evidence upon a charge of perjury preferred against the psychologist. The Supreme Court was asked to decide, inter alia, whether the obtaining of the

evidence constituted a breach of the rights of the psychologist safeguarded by Article 15 and, if the answer was in the affirmative, whether it could be admitted in evidence. The Court held unanimously that the evidence had been obtained in breach of the rights safeguarded by Article 15 and Article 8 (art. 8) of the Convention amounting to a right of privacy. It was the first case since independence when the Supreme Court of Cyprus made a comprehensive survey on the right of respect for private life in the context of Article 15 of the Constitution and Article 8 (art. 8) of the Convention. The following passage from one of the two leading judgments in the case (given by myself) highlights the ambit of the right guaranteed by Article 15:

> "The right to privacy is regarded as fundamental because of the protection it affords to the individuality of the person, on the one hand and, the space it offers for the development of his personality, on the other. Man is entitled to function autonomously in his private life and the right to privacy is aimed to shield him in this area from public gaze ..."

Elsewhere in the same judgment, it is explained that:

> "The right to privacy, safeguarded by Article 15, is intended to establish the autonomy of the individual in his private and family life ..."

In the same judgment it is explained that evidence obtained or resulting from breach of fundamental human rights is inadmissible under any guise or circumstances. The matter is put thus:

> "I am of the opinion that the basic rights safeguarded in this part of the Constitution, those referring to fundamental freedoms and liberties, are inalienable and inhere in man at all times, to be enjoyed and exercised under constitutional protection. Interference by anyone,

be it the State or an individual, is unconstitutional and, a right vests thereupon to the victim to invoke constitutional, as well as municipal, law remedies for the vindication of his rights. The rights guaranteed by Articles 15.1 and 17.1 fall in this category, aimed as they are, to safeguard the dignity of man and ensure a quality of life fit for man and his gifted nature."

The decision in Georghiades (supra) has been consistently applied by the courts of Cyprus since 1983. In Merthodja v. The Police (2 Cyprus Law Reports, p. 227 [1987]), the Supreme Court ruled, on the authority of Georghiades, that a statement amounting to a confession made by the accused (charged with the offence of publishing information relating to the defence works of the Republic contrary to section 50A of the Criminal Code) to the Police Authorities while detained contrary to law was ipso facto inadmissible as evidence stemming from a breach of the fundamental right of liberty safeguarded by Article 11 of the Constitution. More recently, in Police v. Yiallourou (Question of Law Reserved No. 279, given on 7 April 1992), the Court held, on the authority of Georghiades, that a telephone conversation constituted a matter of private life, irrespective of the content of the conversation. Consequently, telephone tapping constituted a violation of the right and on that account a rule of absolute exclusion of its content operated, making the evidence inadmissible for any purpose whatsoever.

The case-law of the Supreme Court of Cyprus establishes that the right to respect for private life, safeguarded by Article 15 of the Constitution and Article 8 (art. 8) of the Convention, should be given effect to in all its breadth and that no attempt to whittle it down can be countenanced by the Court. In the light of the aforesaid interpretation of the fundamental right of respect for private life, it can be predicated that section 171, to the extent that it criminalises homosexual acts between consenting adults in private, is no part of the law because of its repugnancy to Article 15 of the Constitution and

Article 8 (art. 8) of the Convention (Law 39/62). The absence of a prosecution for such acts, for the past eleven or more years, can justifiably be regarded as a reflection of this reality.

D. Unlike the Norris case, the policy not to prosecute homosexual acts between consenting adults in private does not rest on the discretionary powers of the Attorney-General exercised by reference to the facts of each individual case but on the correct understanding that Cyprus law does not criminalise such conduct.

E. The risk of private prosecution is inexistent. Unlike the position in Ireland explained in the Norris case, there is no actio popularis in Cyprus. Only the victim of a crime can mount a private prosecution, as explained in the decision of the Supreme Court in Ttofinis v. Theocharides (2 Cyprus Law Reports, p. 363 [1983]). Only a party injured by criminal conduct is in law entitled to raise a private prosecution. Adults engaged in homosexual acts in private cannot, under any circumstances, be regarded as the victims of the conduct in which they voluntarily engage. The fact that no case of a private prosecution was cited for homosexual acts between consenting adults in private is no coincidence but a due reflection of the limitation of the right to raise a private prosecution. And so far as I am aware, no private prosecution was ever raised concerning homosexual acts in private.

F. In the Norris case the point was made that the complaint of the applicant must have a sound objective basis although actual violation is not necessary in order to validate it. The facts that the applicant was never harassed in his private personal affairs and that he has been able to propagate the causes of the "Liberation Movement of Homosexuals in Cyprus" of which he is the President, without let or hindrance, are in themselves suggestive of the absence of a valid basis for his perceived fear of a likelihood of breach of his rights under

Article 8 (art. 8) of the Convention.