1982 November 16, 1983 February 21

[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, MALACHTOS, LORIS, STYLIANIDES, PIKIS, JJ.]

THE POLICE,

v.

ANDREAS GEORGHIADES,

Accused.

(*Question of Law Reserved No.* 190).

Constitutional Law—Human rights—Right to respect for private and family life—And right to respect for, and to secrecy of, correspondence and other communication—Articles 15 *and* 17 *of the Constitution and Article* 8 *of the European Convention on Human Rights,* 1950—*Criminal proceedings—Evidence concerning what a witness had overheard, by means of an electronic device, regarding a conversation between the accused and another person, without the knowledge of either of them, inadmissible in the light of the provisions of the above Articles and, also, of Article* 35.

In the course of the trial of Andreas Georghiades, a psychologist, on charges of perjury and related counts, the trial Court ruled as admissible a conversation, between the accused and his client Eracleous, that took place in the course of medical examination overheard by the use of an electronic listening and recording device, preceded by the installation of a transmitter unknown to either Georghiades or his client, carefully hidden in the room where the examination would take place. Following this ruling the trial Court, on the application of the accused referred to the Supreme Court for its opinion, under section 148(1) of the Criminal Procedure Law, Cap. 155 the following questions of Law:

"(1) Whether, in view of the provisions of Article 17* of the Constitution, the evidence of an advocate–who was a prosecution witness (No.14)–in relation to what he allegedly

* Article 17 of the Constitution is quoted at pp. 41–42 post.

heard through an electronic device (a transmitter and earphones) to be said between the accused and a certain Costas Eracleous, on 3rd April 1981, during the examination of the latter by the former, is admissible evidence.

(2) Whether, in view of the provisions of Article 15* of the Constitution, the said evidence is admissible.

(3) Whether the production of the said evidence constitutes a contravention of the rights of the accused under Articles 15 and 17 of the Constitution and, if so, whether such evidence is admissible".

Held, that the evidence of prosecution witness No.14 in criminal case No. 10033/82, in the District Court of Nicosia, concerning what this witness had overheard, by means of an electronic device, regarding a conversation between the accused in the said case and a certain Costas Eracleous, is inadmissible in the light of the provisions of Articles 15, 17 and 35 of the Constitution and in view of the circumstances in which such conversation was overheard by the aforementioned witness.

Order accordingly.

Cases referred to:

Police v. Ekdotiki Eteria (1982) 2 C.L.R. 63;

Home Office v. Harman [1981] 2 All E.R. 349 at p. 363;

Paverich v. New England Life Ins. Co., 122 GA 190, 50 S.E. 68;

Catz v. United States, 389 U.S. 347, 19 L. Ed. 2nd 576;

Scheichelbauer (*Yearbook of European Convention on Human Rights*) p. 156;

Malone v. Comr. of Police [1979] 2 All E.R. 621;

Vrakas and Another v. Republic (1973) 2 C.L.R. 139;

Attorney-General v. B.B.C. [1980] 3 All E.R. 161;

Minister of Home Affairs v. Fisher [1979] 3 All E.R. 21;

Decisions of the Federal Court of Germany: Bundesgerichthof-20.3.58; *Landgericht*-12.8.55;

Civil Rights Cases (1883) 109 U.S.3;

Ex Parte Virginia (1880) 100 U.S. 339;

Evlogimenos and Others v. Republic, 2 R.S.C.C. 139;

* Article 15 of the Constitution is quoted at p. 37 post.

In re Ali Ratip v. Republic, 3 R.S.C.C. 102;
Chimonides v. *Manglis* (1967) 1 C.L.R. 125;
Pitsillos v. *Xioutas and Others* (1967) 1 C.L.R. 31;
Minister of Home Affairs v. *Fisher* (1979) 3 All E.R. 21;
Anastassiou v. *Demetriou and Another* (1981) 1 C.L.R. 589;
Defreen v. *Sabena* [1981] 1 All E.R. 120;
Macarthys Ltd. v. *Smith* [1981] 1 All E.R. 111;
Somerset v. *Stewart* (1772) 1 Loffit 1-19;
Leatham [1861] 8 Cox C.C. 498 at p. 501;
R. v. *Sang* [1979] 2 All E.R. 1222 (H.L.);
King [1969] A.C. 304;
Police v. *O'Brien* (1965) L.R. 142 at p. 160:
Lawrie v. *Mair* (decided in 1950);
Adams v. *N.Y.*, 19 U.S. 585.

Question of Law Reserved.

Question of Law reserved by the District Court of Nicosia (Laoutas, S.D.J.) for the opinion of the Supreme Court under section 148 of the Criminal Procedure Law, Cap. 155 relative to a ruling of the said District Court made in the course of the hearing of Criminal Case No. 10033/82 instituted by the Republic against the above named accused who was charged of perjury.

A. Evangelou, Senior Counsel of the Republic, for the Republic.

E. Lemonaris with *A. Markides*, for the accused.

Cur. adv. vult.

16th November, 1982.

TRIANTAFYLLIDES P. read the following decision of the Court. The opinion of the Supreme Court in answer to the reserved, under section 148 of the Criminal Procedure Law, Cap. 155, questions of law (A), (B) and (C), taken together, is that the evidence of prosecution witness No.14 in criminal case No. 10033/82, in the District Court of Nicosia, concerning what this witness had overheard, by means of an electronic device, regarding a conversation between the accused in the said case and a certain Costas Eracleous, is inadmissible in the light of the provisions of Articles 15, 17 and 35 of the Constitution and

in view of the circumstances in which such conversation was overheard by the aforementioned witness.

The case is now remitted to the District Court of Nicosia for further proceedings in the light of the above unanimous opinion of this Court.

The reasons for the opinion of this Court will be given as soon as possible and at the latest by the end of January 1983.

21st February, 1983.

TRIANTAFYLLIDES P.: We propose to give our reasons for the Opinion which this Court expressed in this case on 16th November 1982 unanimously.

TRIANTAFYLLIDES P.: It is proposed in this decision to give the reasons for which, in relation to the present Question of Law Reserved, this Court stated unanimously the following on 16th November 1982:

> "The opinion of the Supreme Court in answer to the reserved, under section 148 of the Criminal Procedure Law, Cap. 155, questions of law (A), (B) and (C), taken together, is that the evidence of prosecution witness No. 14 in criminal case No. 10033/82, in the District Court of Nicosia, concerning what this witness had overheard, by means of an electronic device, regarding a conversation between the accused in the said case and a certain Costas Eracleous, is inadmissible in the light of the provisions of Articles 15, 17 and 35 of the Constitution and in view of the circumstances in which such conversation was overheard by the aforementioned witness."

It is useful to refer in a summary form to the contents of the record of the District Court by means of which the present Question of Law Reserved was referred to this Court on 19th October 1982:

It is stated therein that on 4th October 1982 the trial Court gave a Ruling as a result of which counsel appearing for the accused applied that the following questions of law should be referred to the Supreme Court for its opinion, under section 148(1) of the Criminal Procedure Law, Cap. 155:

(A) Whether, in view of the provisions of Article 17 of the Constitution, the evidence of an advocate - who was a prose-

cution witness (No.14) - in relation to what he allegedly heard through an electronic device (a transmitter and ear-phones) to be said between the accused and a certain Costas Eracleous, on 3rd April 1981, during the examination of the latter by the former, is admissible evidence.

(B) Whether, in view of the provisions of Article 15 of the Constitution, the said evidence is admissible.

(C) Whether the production of the said evidence constitutes a contravention of the rights of the accused under Articles 15 and 17 of the Constitution and, if so, whether such evidence is admissible.

Article 15 of the Constitution reads as follows:

"ΑΡΘΡΟΝ 15

1. Ἕκαστος ἔχει τὸ δικαίωμα ὅπως ἡ ἰδιωτικὴ καὶ οἰκογενειακὴ αὐτοῦ ζωὴ τυγχάνῃ σεβασμοῦ.

2. Δὲν χωρεῖ ἐπέμβασις κατὰ τὴν ἄσκησιν τοῦ δικαιώματος τούτου, εἰμὴ τοιαύτη οἵα θὰ ἦτο σύμφωνος πρὸς τὸν νόμον καὶ ἀναγκαία μόνον πρὸς τὸ συμφέρον τῆς ἀσφαλείας τῆς Δημοκρατίας ἢ τῆς συνταγματικῆς τάξεως ἢ τῆς δημοσίας ἀσφαλείας ἢ τῆς δημοσίας τάξεως ἢ τῆς δημοσίας ὑγείας ἢ τῶν δημοσίων ἠθῶν ἢ τῆς προστασίας τῶν δικαιωμάτων καὶ τῶν ἐλευθεριῶν τῶν ὑπὸ τοῦ Συντάγματος ἠγγυημένων εἰς πᾶν πρόσωπον".

("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.")

It is clear that the said Article 15 has been modelled on Article 8 of the European Convention on Human Rights, 1950, which has been ratified, together with its First Protocol, by means of the European Convention on Human Rights (Ratification)

Law, 1962 (Law 39/62), and which, as a result of the provisions of Article 169.3 of the Constitution, is applicable in our Republic with superior force to municipal law.

The aforesaid Article 8 reads as follows:

"Article 8

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."

In Jacobs on the European Convention on Human Rights, 1975, at pp. 126, 127, there are stated the following:

"The scope of the protection of privacy under the Convention remains largely unexplored in the case-law.

It has been suggested that the Convention protects the individual, under this head, against:

1. Attacks on his physical or mental integrity or his moral or intellectual freedom.

2. Attacks on his honour and reputation and similar torts.

3. The use of his name, identity, or likeness.

4. Being spied upon, watched, or harassed.

5. The disclosure of information protected by the duty of professional secrecy.

The organs of the Convention, however, have not developed the concept of privacy, and those applications which have raised the issue have often been treated on other grounds.

In the *Scheichelbauer* Case, the question arose whether a tape-recording of a conversation, made without the knowledge of the accused, could be used in evidence against

him. The question considered by the Commission, however, was whether use of the recording as evidence prejudiced the applicant's right to a fair trial under Article 6(1). If it had been considered on the merits under Article 8 the question would have been whether the making of the recording could have been justified under paragraph (2)."

In Castberg on The European Convention on Human Rights, 1974, it is stated (at pp. 138, 139) that–

"The other subjects dealt with in Art. 8 belong largely to the area of 'privacy'. Although the aim of respect for privacy is commonly recognised it has never been easy to achieve, and it has also in the age of, inter alia, mass media and data banks become the subject of new types of conflict. However, since the Convention directly protects only against interference by the State and not by others, the impact of Art. 8 in this field has been limited.

The question whether secret tape-recording of conversations during an investigation and its later use as evidence in court constituted a violation of Art. 8 (and Art. 6) was brought before the Commission in the case of *Scheichelbauer v. Austria,* which was declared partly admissible and became the subject of a Report which did not find any violation but has not been published. It must be regarded as obvious, however, that the tape-recording of a private conversation unknown to a participant constitutes in principle an interference with privacy prohibited under Art. 8(1)."

Fawcett, in his textbook on the Application of the European Convention on Human Rights, 1969, observes (at p. 187), that the words "private and family life" should be read disjunctively; and, also, he states that wire-tapping "is an invasion of privacy in correspondence".

The case of *Scheichelbauer v. Austria* (Application No. 2645/65) came up before the European Commission of Human Rights and it was declared admissible by it only in so far as it related to a complaint by the applicant that the use as evidence, by a criminal Court in Vienna, of a recording on a magnetic tape of a conversation between the applicant and another person resulted in a violation of the right of the applicant to a

fair trial, under Article 6 of the Convention, which corresponds to Article 30 of our Constitution (see the Yearbook of the European Convention on Human Rights, 1969, vol. 12, p. 156, at pp. 170, 172).

Unfortunately, the final report of the European Commission of Human Rights, as regards the outcome of the *Scheichelbauer* case, was never made public and the statement by Castberg, supra - who was a member of the European Commission of Human Rights (see the preface to his textbook, supra) - that in the *Scheichelbauer* case the report of the Commission did not find any violation (see p. 138 of his said textbook, supra), is to be taken to mean that the Commission did not find any violation of Article 6. This is, also, obvious from the decision, under Article 32 of the European Convention on Human Rights, of the Committee of Ministers of the Council of Europe in relation to the *Scheichelbauer* case (see the Yearbook of the European Convention on Human Rights, 1971, vol. 14, p. 902) where it is stated (at p. 904) that -

> "Whereas in his application introduced on 10 June 1965, Mr. Peter Scheichelbauer complained of violation of several articles of the Convention alleged to have taken place during the judicial proceedings instituted against him in Austria;
>
> Whereas the Commission, on 19 July 1968, rejected certain parts of the application as being inadmissible and on 3 October 1969 declared admissible the applicant's complaint alleging violation of the right to a fair trial within the meaning of Article 6 of the Convention owing to the use of the recording on a magnetic tape of a conversation between the applicant and his co-defendant as evidence before the Vienna Regional Criminal Court;
>
> Whereas the Commission during its examination of the merits of the case considered that the Commission was not required in the present case to decide the question whether the tape recordings of a private conversation unbeknown to the participants or one of them constitutes in principle an interference with privacy; the problem before the Commission was only whether the use by the Austrian Court of the recording in evidence constituted a violation

in the present case of the applicant's right to a fair hearing within the meaning of Article 6(1) of the Convention;

Sharing this view of the Commission and considering therefore that the only question to be decided is whether in this particular case the applicant was granted a fair hearing, as guaranteed by Article 6(1) of the Convention;"

In the light of all the foregoing and, especially, on the basis of the views expressed by the aforequoted learned authors regarding the nature of the right to privacy, this Court was fully entitled to conclude that the overhearing by the witness concerned, in the present instance, by means of an electronic device (a transmitter and ear-phones), of a conversation between the accused and the aforementioned Eracleous, without the knowledge of either of them, was an act incompatible with the protection of such right, as safeguarded by Article 8 of the European Convention on Human Rights, and, consequently, by Article 15 of the Constitution.

I shall deal, next, with the aspect of this case which relates to the provisions of Article 17 of our Constitution; such Article reads as follows:

"ΑΡΘΡΟΝ 17

Ἕκαστος ἔχει τὸ δικαίωμα σεβασμοῦ καὶ διασφαλίσεως τοῦ ἀπορρήτου τῆς ἀλληλογραφίας ὡς καὶ ἐπίσης ἄλλης ἐπικοινωνίας αὐτοῦ, ἐφ' ὅσον ἡ τοιαύτη ἐπικοινωνία διεξάγεται διὰ μέσων μὴ ἀπαγορευομένων ὑπὸ τοῦ νόμου.

2. Δὲν ἐπιτρέπεται ἐπέμβασις κατὰ τὴν ἐνάσκησιν τοῦ δικαιώματος τούτου, εἰμὴ συμφώνως πρὸς τὸν νόμον καὶ μόνον εἰς περιπτώσεις προσώπων ἐν φυλακίσει ἢ προφυλακίσει τελούντων ἢ ὡς καὶ ἐπὶ ἐπαγγελματικῆς ἀλληλογραφίας καὶ ἐπικοινωνίας τοῦ πτωχεύσαντος κατὰ τὴν διάρκειαν τῆς διοικήσεως τῆς περιουσίας αὐτοῦ".

("ARTICLE 17

1. Every person has the right to respect for, and to the secrecy of, his correspondence and other communication if such other communication is made through means not prohibited by law.

2. There shall be no interference with the exercise of

this right except in accordance with the law and only in cases of convicted and unconvicted prisoners and business correspondence and communication of bankrupts during the bankruptcy administration.").

There is no corresponding provision in the European Convention on Human Rights because the right to respect of correspondence is protected by its Article 8, which has already been quoted earlier on in this decision; and there is no reference in it to any "other communication", as it exists in Article 17 of our own Constitution.

Jacobs, supra, observes (at p. 138) that correspondence refers primarily to communication in writing, and Fawcett, supra, states the following (at pp. 194, 195):

"*correspondence/correspondance*

The term, both in English and French, means communication in writing, and this is emphasized by the equivalent in the German official text (Briefverkehr). The German courts have been inclined to treat conversation, either direct or by telephone, as being part of private life, rather than of correspondence, in Article 8(1). So it has been held that tape-recording of a conversation, without the speakers' consent, is a breach of Article 8(1), unless the speaker is pursuing an unlawful purpose."

In view of the fact that in Article 8 of the European Convention on Human Rights there is reference only to "correspondence" and there is no reference at all to "other communication", as in Article 17 of our Constitution, I am of the opinion that an oral communication is protected, too, by such Article 17, and not only by Article 15 of our own Constitution, which corresponds to Article 8 of the European Convention on Human Rights.

It is useful to refer, also, to Sgouritsas on Constitutional Law ("Σγουρίτσα Συνταγματικόν Δίκαιον"), Vol. B, Part B, p.102, where, in commenting on Article 20 of the Greek Constitution of 1952 - which corresponds, more or less, to Article 17 of our Constitution - he points out that the principle of the inviolability of the means of communication is consequential to the freedom to express and impart opinions and that such

freedom includes the right not to express opinions or to express them to one and only person.

The freedom to express and impart opinions was protected by Article 14 of the Greek Constitution of 1952, which corresponds to Article 19 of our Constitution and to Article 10 of the European Convention on Human Rights.

It is to be noted that in the new Greek Constitution of 1975 Article 19 corresponds to our own Article 17. When, indeed, the Appeal Court of Thessaloniki (see "Νομικὸ Βῆμα" 1982, vol. 30, p. 103) was called upon, in case No. 189/1981, to decide whether a tape-recording, made as a result of a wire-tapping a telephone conversation, was admissible in evidence in a criminal proceeding, it was held that such wire-tapping offended Articles 2 and 5 of the Greek Constitution of 1975 and it does not appear from the text of the judgment of the said Appeal Court that the aspect of a possible contravention, too, of Article 19 of the said new Greek Constitution was considered.

Article 2 of the Greek Constitution of 1975 relates to the respect and protection of the value of a human being and Article 5 safeguards the right to free development of the personality and participation in the social, political and economic life of the country.

There are no corresponding provisions in our own Constitution or in the European Convention on Human Rights.

Though from all the foregoing it appears that what has taken place in this case, that is the overhearing by means of an electronic device without the knowledge of the accused or of Eracleous of their conversation, could be regarded as violating more than one human right, I am of the opinion that, in any event, in view of the wording of our own Article 17, such overhearing was incompatible with such Article, in addition to being incompatible with Article 15 of our Constitution.

As the issue of admissibility of the evidence concerned has arisen in a criminal case in which the prosecution is seeking to introduce such evidence for the purposes of the determination, by a Court of the Republic, of the outcome of such case, there

does not seem to come within the scope of the statement, on this occasion, of the opinion by this Court, under section 148 of Cap. 155, a pronouncement as to whether conduct incompatible with Articles 15 and 17 of our Constitution vests in the accused, as a private individual, rights which he can vindicate as against another private individual, such as the advocate who has monitored, in the aforedescribed manner, his conversation with Eracleous.

It suffices, for the purposes of the present case, to refer to Article 35 of the Constitution, which reads as follows:

"Αἱ νομοθετικαὶ, ἐκτελεστικαὶ καὶ δικαστικαὶ ἀρχαὶ τῆς Δημοκρατίας ὑποχρεοῦνται νὰ διασφαλίζωσι τὴν ἀποτελεσματικὴν ἐφαρμογὴν τῶν διατάξεων τοῦ παρόντος μέρους, ἑκάστη ἐντὸς τῶν ὁρίων τῆς ἁρμοδιότητος αὐτῆς".

("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.").

It is, also, pertinent to bear in mind that, by ratifying the European Convention on Human Rights, our Republic has undertaken, by means of Article 1 of the said Convention, to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention (in which Section there is included Article 8 of the Convention).

In view, therefore, of the duty of the trial Court in the present instance, under Article 35, to secure within the limit of its competence the efficient application of Articles 15 and 17 of our Constitution and, moreover, when such duty is viewed against the background of the international obligation of our Republic under Article 1 of the European Convention on Human Rights, it is abundantly clear, in my opinion, that the trial Court, in the present case, could not have treated as admissible the evidence adduced regarding the overhearing, as aforementioned, of the conversation in question between the accused and Eracleous; and, consequently, there was no room for exercising, in this respect, any discretion, in accordance with any principles governing, in other situations, the admissibility of evidence illegally obtained.

It is to be stressed, in this connection, that no "law", in the sense of Articles 15.2 and 17.2 of the Constitution (and as construed in, inter alia, the *Police v. Hondrou,* 3 R.S.C.C. 82, 86) authorized the overhearing of the conversation of the accused with Eracleous in the particular circumstances in which such conversation was overheard in the present instance (see in this respect, too, the judgment of the European Court of Human Rights, on 6th September, 1978, in the case of *Klass*).

Before concluding I would like to point out that my opinion as regards the effect of Article 35 of our Constitution is strengthened by the approach of the Appeal Court of Thessaloniki in the afore-quoted case regarding the effect on the admissibility of a tape-recording of the telephone conversation concerned of Articles 87(2) and 93(4) of the Greek Constitution of 1975, which, though not identical with Article 35 of our Constitution, clearly enshrine the same notion of the duty of the Courts to abide by the Constitution; and, as was found by the Appeal Court of Thessaloniki, this duty entailed the exclusion, for the purposes of a criminal proceeding, of evidence obtained in a manner incompatible with the Greek Constitution of 1975.

It is for all the foregoing reasons that there was already expressed the opinion that the evidence regarding what the advocate concerned has overheard, by means of an electronic device, concerning the conversation between the accused and Eracleous, was inadmissible in the criminal proceeding in question.

HADJIANASTASSIOU J.: I have read the judgment of my learned colleague Pikis, J., with care. As I find myself in full agreement with the exposition of the law made therein, there is nothing further useful to add.

For the reasons given therein, I answered the questions of law raised for our decision, in the way already indicated in the opinion of the Supreme Court.

MALACHTOS J.: I agree with the reasons given in the Decision just delivered by the President of the Court and I have nothing to add.

LORIS J.: I had the opportunity of reading in advance the reasons given by my brother Judge Pikis. I fully agree with him.

STYLIANIDES J.: The opinion of the Supreme Court in answer to the three questions reserved by the District Court of Nicosia for our consideration, is mentioned verbatim in the decision of the learned president of the Supreme Court.

The provisions of Articles 15 and 17 of the Cyprus Constitution are based on those of Article 8 of the European Convention on Human Rights that, in turn, derives its origin from Article 12 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10th December, 1948.

The Evidence Law - Cap. 9, is based on the provisions of the English evidence law. English law does not recognize a right to privacy nor does it specifically safeguard a right to freedom of communication. Consequently, no specific benefit may be derived from examination of English case-law and, generally, English jurisprudence, on the subject of privacy and freedom of communication. Guidance may be derived from a study of the decisions of the European Commission on Human Rights and the European Court of Human Rights, based on the application of the provisions of the European Convention on Human Rights. Also, it is profitable to look for guidance to decisions of the Courts of European countries that incorporated in their system of domestic laws the provisions of the Convention.

I agree with the reasons given in support of the decision of the Supreme Court by the learned President.

However, I would like to add that privacy is a concept with a very wide meaning and includes, inter alia, a right to the non-dissemination of information about the individual, the right of association, the right to one's beliefs in the sphere of politics and elsewhere, the autonomy of the individual, as well as the right to confidentiality. Consequently, the notion of privacy has not been defined with the necessary legal precision, nor do I regard it as necessary in this case to supply a definition of "privacy", considering it may not be as comprehensive as it should be. Moreover, the facts of the present case do not warrant undertaking such a task.

The right to privacy is fundamental and protects the freedom and dignity of the individual in society.

Taking into consideration -

(a) That a right to the protection of private life is a fundamental human right safeguarded by the Constitution,

(b) the provisions of Article 13 of the European Convention on Human Rights and those of Article 17 of the Convention of Civil and Political Rights of the United Nations, ratified by Cyprus by Laws 39/62 and 14/69,

(c) the recommendations of the Consultative Assembly of the Council of Europe set out under 582(70),

(d) the Conclusion of the Nordic Conference of Jurists on the Right to privacy, May 1967, point 1 and,

(e) decisions of European Courts, such as that of the Court of Appeal of Celle - Celle Court of Appeal, 30 September 1964, *Neue Juristische Wochenschrift*, 1965, p.362 and, the decision of the Federal Court of Germany B.G.H.Z. 27, p.284 of 20th May, 1958 and, the opinions of learned authors on the subject of human rights,

I came to the conclusion that the right to privacy is safeguarded not only against the State but against everyone - individuals, groups and associations.

The rapid development of technology in recent years has created vast dangers for human rights. The right to privacy is at risk from a wide variety of devices, such as electronic acoustics, recordings of conversation—optical, film and photographic—and the computerisation and assembly of data by individuals, the State, private institutions and organisations. The right to privacy may be imperilled by the use of anyone or more of the aforementioned devices, whether used by the State or anybody else. Therefore, the protection to be effective, must extend against everyone.

The State has an obligation to protect the citizen from intrusions in his private life. Therefore, I suggest, as a first measure, the introduction of legislation making it a crime for anyone to use any device for listening into, recording or pictorial reproduction of any conversation or discussion at a meeting in which the culprit does not participate without the consent of the

speaker or speakers. Afortiori, the use of tape-recording devices should be prohibited by the provisions of the law. I may point out that legislation along similar lines exists in Norway, Switzerland, Austria and elsewhere.

PIKIS J.: In the course of the trial of Andreas Georghiades, a psychologist, on charges of perjury and related counts, the trial Court ruled as admissible in evidence a conversation between the accused and his client Eracleous, that took place in the course of medical examination overheard by the use of an electronic listening and recording device, preceded by the installation of a transmitter unknown to either Georghiades or his client, carefully hidden in the room where the examination would take place. Following this ruling, the Court was moved on behalf of the accused to reserve for consideration the questions of law relevant to the admissibility of the evidence pursuant to the provisions of Article 148(1) of the Criminal Procedure Law, empowering a Court exercising criminal jurisdiction to reserve "at any stage of the proceedings a question of law, arising during the trial, for the opinion of the Supreme Court". The Judge sustained the motion, notwithstanding objections of the prosecution in view of the gravity of the issues raised and their constitutional importance. Notwithstanding the reservations expressed in *Police* v. *Ekdotiki Eteria* (1982) 2 C.L.R. 63, as to the invocation of the powers vested under s.148, the reference in this case demonstrates that, in appropriate cases, rare as they must be, the jurisdiction under s.148(1), Cap. 155, may be invoked with benefit to the interests of justice. Recourse to Article 148(1) may be had, where the point of law involved is not covered by authority and its resolution is of crucial importance to the progress of a criminal case. The questionnaire raised requires answer to three questions of constitutional law of supreme importance. They concern—

(a) The scope, effect and application of Article 15 of the Constitution.

(b) The scope, effect and application of Article 17 and,

(c) the powers of a Court of law to admit evidence obtained or secured in contravention to the provisions of the Constitution safeguarding fundamental rights and liberties embodied in Part II of the Constitution.

The Background Facts: Eracleous was the victim of an accident that left him seriously incapacitated. He was examined, among others, by Mr. Georghiades, a psychologist, for his opinion on the implications of the injuries on the mental health of the patient. In the meantime, civil proceedings were instituted on behalf of Eracleous, foreshadowing a heated trial contest. One more examination was arranged by Mr. Georghiades at the house of Eracleous. The advocates acting for the plaintiff, were becoming increasingly suspicious about his ultimate stand on the condition of their client and they wanted to guard against the possibility of Mr. Georghiades manipulating his evidence as to underestimate the repercussions of the injuries. Acting with that end in mind, the lawyers of Eracleous contrived, unknown either to Georghiades or his client, to install and, did install, a transmitter in the room where the medical examination would take place, for the purpose of transmitting the conversation, thus enabling one of the advocates to listen to and record it on a tape for subsequent use, as occasion might necessitate. Admission to the use was gained by the consent of the wife of Eracleous, who was, according to all indications, in joint possession husband. Therefore, entry thereto was not unlawful.

A few months later, Mr. Georghiades gave evidence at the civil action, allegedly false, in that it misrepresented the statements and reactions of Eracleous to questions and tests to which he was subjected. Thereafter, criminal proceedings were instituted against Georghiades, founded on the falsity of his testimony in Court. To prove that falsity, the prosecution relied on the evidence of the lawyer of Eracleous who overheard the conversation in the circumstances above mentioned and, so far as we may gather, it was within their contemplation to produce in evidence the tape itself in order to reinforce the oral evidence of the lawyer in question. The trial Court held the evidence admissible but subsequently reserved, as indicated, the whole question for consideration by the Supreme Court, in view of its implications of the further conduct of the case and, presumably, the implications of holding admissible evidence on what is, prima facie, a private matter, by the employment of electronic and other devices of modern technology.

The case was powerfully argued before us for both sides and we feel dutybound to record our appreciation for the assist-

ance given by Mr. Evangelou and Mr. Markides to resolve the difficult questions raised, novel so far as our caselaw goes.

Counsel made extensive reference to the jurisprudence and juridical thinking of many countries on the subject of privacy and freedom of communication, as well as the current of authority and legal thinking on the subject of admitting illegally or improperly obtained evidence. Mr. Evangelou, it must be said, disputed that the evidence in question was improperly obtained notwithstanding his inclination to agree that the installation of a transmitter without the prior authority of the Council of Ministers constituted a criminal offence under the provisions of the Wireless Telegraphy Law—Cap. 307. The only serious gap in the addresses of counsel lies in their omission to refer to and discuss the implications of the Universal Declaration of Human Rights that spurred post-war legal action to protect fundamental human rights in the aftermath of the Nazi holocaust.

The interpretation of the provisions of Articles 15 and 17 was discussed mostly in conjunction with those of Article 8 and related provisions of the European Convention of Human Rights, enacted as part of our law, by virtue of Law 39/62—a law ratifying the European Convention on Human Rights and rendering it part of our municipal law. The issues raised involve important questions of constitutional law, as well as the policy of the law respecting violations of fundamental human rights. We took, therefore, time to consider our judgment and reflect, as carefully as we could, on the subjects under consideration, before giving our judgment.

On 16th November, 1982, shortly after the conclusion of the hearing on appeal, the Supreme Court gave a unanimous judgment, pronouncing the evidence to be inadmissible "in the light of the provisions of Articles 15, 17 and 35 of the Constitution and in view of the circumstances in which such conversation was overheard.....".

I propose to discuss and resolve the legal questions posing for decision, in a manner following the sequence dictated by the logic of the questionnaire. First, I shall deal with the interpretation of Article 15, then with that of Article 17 and, lastly, with the power of the Court, if any, to admit evidence

obtained in contravention or violation of the fundamental provisions of the Constitution.

Article 15—*Interpretation—Application:*

Article 15.1 of the Constitution lays down:

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

It is the first time that Article 15.1 comes up before the Supreme Court for interpretation. The interpretation of constitutional provisions need not necessarily follow the pattern of construction of municipal legislation, although the traditional interpretation of statutes and rules relevant thereto is nowadays of lesser consequence in view of emphasis being laid on the teleological interpretation of every kind of legislation. In *Minister of Home Affairs v. Fisher* [1979] 3 All E.R. 21, the Privy Council proclaimed that the Constitution is a document sui generis that should be interpreted subject to the traditions and usage that led to its enactment. The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10th December, 1948, as the Court noticed, formed the back-ground to the entrenchment of fundamental human rights after the war in national constitutions. Consequently, the spirit and aims of the Declaration should guide the Courts in determining the scope and objects of constitutional provisions on the subject of human rights.

The wording of Article 15.1 suggests protection of two distinct activities of human life–

(a) Private life and

(b) family life.

Fawcett suggests the two terms be read disjunctively, a course warranted by the wording of analogous provisions of the *European Convention of Human Rights, Article* 8(1), and the Minutes of the Committee entrusted with the formulation of the Articles of the Convention (*Application of the European Convention on Human Rights* by *Fawcett,* p.185). Neither the European Commission nor the European Court of Human Rights has, so far, supplied a comprehensive definition of privacy. Certainly, the concept is elusive enough, making virtually impossible an exhaustive definition. *Fawcett* takes the view that privacy

embraces both the physical framework of personal life, as well as inner life (see, *Fawcett,* supra, p.185 et seq.). *Jacobs* supports a similar interpretation of "privacy" in the context of Article 8(1) and argues that privacy of personal and family life lie at the core of Article 8(1) of the Convention. (See, *Jacobs - The European Convention of Human Rights,* 1975, p. 125 et seq.). Lord Denning M.R. regards confidentiality as an aspect of privacy, with privacy depicted as a fundamental human right - *Home Office v. Harman* [1981] 2 All E.R. 349 at 363.

Mill, in his work on liberty, understood "privacy" as encompassing acts "over himself, over his own body and mind, the individual is sovereign". The freedom of the individual to keep for himself a private preserve emerging as a fundamental aspect of liberty, underline the celebrated article by *Warren and Brandeis* that gave impetus to American Courts to recognise "privacy" as a fundamental human right in the early years of this century. (1890 4 *Harvard Law Rev.* 193–*Paverich v. New England Life Ins. Co.*, 122 *GA* 190, 50 *S.E.* 68–*Catz Unions,* 389 *US* 347, 19 *L. Ed. 2nd,* 576).

The right to be left alone, consonant with the sentiments of civilised people mark the approach to privacy in U.S.A., wide enough to embrace the non self-crimination as an aspect of privacy (see, *The Protection of Privacy,* by *Raymond Wax,* p.20).

Wire tapping of a conversation, unknown to the interlocutors, is almost uniformally regarded as an invasion of privacy, invidious to the right of privacy - See, *Jacobs* supra, at p.126 and, *Castberg - The European Convention on Human Rights,* 1974, pp. 138, 139. Tentative support for this view is provided by the decision of the *European Commission on Human Rights* in *Scheichelbauer - Yearbook of European Convention on Human Rights,* p.156, declaring admissible examination of the merits of a complaint arising from the tape-recording of a conversation unknown to the individual. (The decision of the Commission on the merits was never published, therefore, no further guidance can be derived from the examination of this complaint). Direct support for the view that tape-recording in surreptitious circumstances is offensive to privacy and kindred rights, comes from a decision of the *Salonica Court of Appeal* in *Case* 189/81, reported in *Legal Tribune,* Vol. 1, January, 1982, p.103. It

was held that the tape-recording by the complainant of a conversation of his wife with a third party, unknown to her, offended Articles 2 and 5 of the Greek Constitution, safeguarding dignity of man and unfettered development and expression of human personality, respectively (*The Greek Constitution* - 1975). Human dignity, as well as the need to make proper room for the development of human personality require, as may be inferred from the tenor of the decision, respect for privacy. The product of illegal tape-recording was held inadmissible in evidence notwithstanding the unfettered discretion vested in Greek Courts to admit evidence relevant and probative to the sub-judice issues (see *Article* 177 *of the Greek Criminal Procedure Law,* making the conscience of the Judge the guardian of the ends of justice, the arbiter of admissibility) in order to block inroads to the effectiveness of the right. The judgment reveals, if I may say so with respect, keen awareness of the dangers to liberty from modern technology and aims to reduce them by preserving the autonomy of the individual.

In France, the taking of a photograph in a private space, was held to involve a violation of the concept of private life, an unjustified intrusion in the domain of the individual (see the work of *Professor Jean Morage,* 1979). The decision of *Megarry V-C* in *Malone v. Comr. of Police* [1979] 2 All E.R. 621, is important in that it supports the view that the common law recognised no right to privacy as such; otherwise it does not purport to define the scope or the elements of the right. Such privacy, as it is acknowledged to the individual under common law is incidental to certain torts, such as the torts of trespass to land and tespass to the person. According to Blackstone, eavesdropping constitutes a common nuisance (Commentaries IV, p.168 - *Note:* The offence was abolished by s.13 of the Criminal Law Act - 1967). We need not debate in this judgment the validity of this proposition or the contrary view taken in the U.S.A. following the lead of Warren and Brandeis who proclaimed the existence of a right to privacy under common law as arising from the principles of the common law as well as those of equity. The predominant view in England is that English law does not recognize any law to privacy. (See the recent book of *Lord Denning - 'What Next in Law"* - 1982, p.219 et seq.). *Megarry V-C* found the law unsatisfactory and crying out for legislation. So far, attempts in England by private members

of Parliament, made in 1961, 1967 and 1969, to introduce legislation, acknowledging a right to privacy, were unsuccessful. The *Younger Committee,* set up to review the law, recommended against the adoption of a specific right to privacy and, advocated instead the creation of a crime and a tort, fencing the citizen from surreptitious surveillance as a necessary protection from the misuse of modern devices.

We need concern ourselves no further with the state of English law for, in Cyprus a right to privacy is explicitly recognised and entrenched in the Constitution. That the trend is towards the recognition of a specific right to privacy, is manifest from Article 17 of the *United Nations Convention of Civil and Political Rights* - 1966.

A sound principle of interpretation of constitutional documents, where the right, as well as possible limitations to it, are spelled out in the Constitution itself, is to construe the right as being subject to no further limitation (see *Police v. Ekdotiki Eteria* (1982) 2 C.L.R. 63).

In earmarking the scope and extent of privacy, one may begin by contrasting private with public. To my comprehension, only aspects of private life objectively identified come within the compass of the Constitution and merit protection under Article 15. As the Concise Oxford Dictionary suggests, "private", when encountered in a context similar to that we are concerned with, signifies "kept or removed from public knowledge or observation." A private act is one that falls in the sphere of the private affairs of man, so regarded objectively. "Private" is not synonymous with "secluded"; it is the antithesis of "public".

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. To attempt to supply a comprehensive definition of "privacy", would be unprofitable and probably an impossible task. Perhaps the definition of

"privacy", furnished by the *Canadian Protection of Privacy Act* - 1973, comes as close to a comprehensive definition as one may contemplate. It covers "any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it."

The question we are required to answer in the present proceedings is, whether the medical examination of a patient by his doctor is private in the sense that the doctor has a right to insist on the non disclosure of what goes on between him and the patient, by an unauthorised third party. In other words, the question is whether a medical consultation is a matter of private life, in the sense of Article 15.1. Few would disagree and none of us had any hesitation in concluding that it is indeed a matter of private life that should attract constitutional protection. Not only a medical examination is an intrinsically private matter but its conduct, in an atmosphere of privacy, is most essential for the effectiveness of the examination.

Mr. Evangelou submitted that under the common law, communications between doctor and patient are not subject to privilege - a proposition subscribed to by Cyprus Courts - *Pantelis Vrakas and Another v. The Republic* (1973) 2 C.L.R. 139. In fact, under common law, privilege can only be claimed by the client, respecting a communication with his lawyer. Actually, we were invited by Mr. Evangelou to interprete the Constitution subject to the rules of the common law on privileged communications. There is no warrant in the wording of Article 15 justifying this course, nor any reason in principle. As we have already noticed, English law recognises no right to privacy nor are privileged communications under English law determined by reference to any wider right. Far from it, privilege under English law is primarily recognised as an evidential rule. It would be wrong in principle and contrary to the letter and spirit of the Constitution to subject the rights under Article 15.1 to limitations that were evolved outside the concept of a right to privacy and in circumstances totally different from those that led to the enactment of a right to privacy as a fundamental

human right. If one should look anywhere for guidance, attention should be focused on the dictates of the Universal Declaration on Human Rights and the European Convention of Human Rights that followed shortly afterwards as a specific step in the direction of giving effect to specific provisions of the Universal Declaration in the area of Western Europe.

To construe Article 15.1, as suggested by counsel for the Republic, would virtually neutralize the right to privacy in opposition to the letter and spirit of Article 15.1 itself. The right to privacy, safeguarded by Article 15, is intended to establish the autonomy of the individual in his private and family life. In our judgment, the constitutional right of the accused, to retain as private the medical consultation he had with his client vis-a-vis third parties, was violated in a most flagrant manner. The pursuit of truth is no warrant for watering down fundamental rights. If that were to be allowed to happen, fundamental human rights would soon be chased out of the statute book. The recognition and effective enforcement of basic human rights is, in itself, an ultimate truth for the realisation of the human ideal, of supreme importance for the release of the creative forces in man. Recognition of fundamental human rights is a principal object of civilisation.

Therefore, our answer to the question posed is that the conversation between the accused and his patient Eracleous, was overheard and recorded contrary to Article 15.1 and in violation of the right of the accused to the privacy of the conversation.

Article 17 - *Freedom of Communication:*

Article 17 provides:-

"1. Every person has the right to respect for, and to the secrecy of, his correspondence and other communication if such other communication is made through means not prohibited by law.

2. There shall be no interference with the exercise of this right except in accordance with the law and only in cases of convicted and unconvicted prisoners and business correspondence and communication of bankrupts during the bankruptcy administration."

The right conferred by Article 17 is, on the face of its wording, far reaching and extends prima facie to every written and oral communication, provided always it is carried out by means not prohibited by law. Freedom of communication is an aspect of freedom of speech, intended to keep permanently open channels of communication between individuals. And freedom of speech is one of the pillars of liberty itself. (See the judgment of *Lord Salmon* in *Attorney-General v. B.B.C.* [1980] 3 All E.R. 161). Communication, in the context of Article 17, in contrast to freedom of speech safeguarded by Article 19, encompasses freedom of speech in a special area and engulfs both oral and written communications.

"Communication" signifies imparting something orally or in writing (correspondence), with a view to bringing it to the notice of another or others, in the context of an exchange of views, feelings or ideas. Like privacy, it aims to secure maximum freedom for the individual in his private exchanges.

Counsel for the Republic submitted that the right conferred by Article 17.1 is limited to written communications. In support of this proposition, he relied on Greek works of constitutional law, namely *Svolos* on *Constitutional Law, Vol. A* and, *Sgouritsas* on *Constitutional Law, Vol.B, Part B* - 1966, analysing the position of Greek law in the era prior to the 1975 Greek Constitution. Greek jurisprudence is unhelpful to the solution of the problem in hand for it turns on the interpretation of Greek constitutional provisions, the wording of which is different from that of Article 17. A comparison of the wording of Article 17 with that of Article 8(1) of the European Convention of Human Rights (ratified by Law 39/62), outrightly suggests that the drafters of the Cyprus Constitution intended to expand the right conferred by Article 8 and extend it to means of communication other than written correspondence. Under Article 8(1), the right is limited to correspondence.

Even if we applied canons of construction of domestic legislation, contrary to what was pointed out in *Minister of Home Affairs v. Fisher* [1979] 3 All E.R. 21, no rule of statutory construction warrants the limitations suggested by Mr. Evangelou. The only rule that might be invoked in aid of the submission,

for limiting the otherwise plain language of Article 17.1 to written communications, is the rule known under its Latin name - ejusdem generis. It applies whenever the legislature makes the law applicable to things forming part of a genus so convincingly as to limit the application of the law to that genus only; in that case, objects named in the law are not self-suggestive of legislative intent but subject to the limitations of the genus of which they form part. For the rule to apply, two or more objects must be named so that a presumption as to genus may arise. The rule is, by definition, inapplicable when one object is named, as in the present case "correspondence". In other words, the first object named by Article 17.1 - "correspondence" - could not, under any circumstances, lead to the application of the rule. If anything, the juxtaposition of "correspondence" and "communication" in the same context, invites application of the provisions of the Constitution to every communication, whether oral or written.

In our opinion, overhearing the conversation between the accused and Eracleous, as well as the recording of its contents, infringed the right of the accused to the secrecy of the communication. Their conversation amounted in every sense to a communication within the meaning of Article 17.1. It was specific and private. Overhearing this conversation, constituted an invasion of the freedom of the accused to its secrecy, invidious to the right guaranteed by the Constitution.

In consequence, the evidence received by the trial Court originated, as well as resulted, from a violation of fundamental rights of the accused. It was the product of unconstitutional acts.

We shall next debate the scope and extent of Articles 15 and 17, with a view to determining the range of application of their provision and the remedies available to a party whose guaranteed rights are inveighed in the surreptitious manner earlier indicated.

The Scope of Articles 15 *and* 17:

The nature of fundamental freedoms and liberties, guaranteed by Part II of the Constitution, their scope and effect, were the

subject of protracted discussion in these proceedings, with a view to establishing the nature of the protection and the rights vested in the individual; more specifically, lengthy arguments were devoted to ascertaining whether the rights entrenched in this part of the Constitution are only safeguarded as against the State or against every invasion, whoever the invader may be. The subject is not new, it has been a subject of discussion in the Courts of many countries with entrenched constitutional provisions, as well as in international forums.

There are two schools of thought with corresponding trends in jurisprudence. One adheres to the view that constitutional fundamental rights are only guaranteed as against the State. The second proclaims their universality; the guarantee is intended to shield the individual from every possible violation, whether committed by an individual, an organisation or the State. The dignity of man is inviolable. You can convict man but not insult him. You can condemn him but not debase him. At the core of the theory lies the conviction that degradation of human nature is antinomous to the sustainance of a human society, the foremost object of civilisation.

Both theories were evolved in response to events of different epochs but with the same end in mind: How best to protect man from threats to his dignity in the light of experience. Historically, the rights were first entrenched vis-a-vis the State in order to safeguard the individual from the unfettered exercise of State police power before which the individual was otherwise powerless. According to this theory, the protection is limited to invasion of fundamental rights by the State. The subject is left to the remedies available under municipal law in respect of violations of his rights by fellow-citizens. The second theory gained prominence after the Second World War, as a result of and in response to the Nazi holocaust that originated from the Nazi State and groups operating on the fringe of the State. The Nuremberg Charter, adopted in 1945, proclaimed the existence of crimes against humanity. The underlying concept was that certain species of conduct could not be tolerated under any circumstances. They could not be sanctioned by man or be countenanced by humankind. The Universal Declaration of Human Rights, adopted by the General Assembly of the

United Nations on 10.12.1948, acknowledged fundamental rights as inherent in man - fundamental, inalienable and inviolable. It chartered a new era for humanity.

The European Convention of Human Rights of 1950 and *the Protocol* of 1952, aimed to give effect to basic provisions of the Universal Declaration and ensure their observance by member States of the Council of Europe. It was intended to provide a code by which member states should abide and serve as a framework for streamlining domestic legislation along the directives of the Convention. Consequently, decisions of the organs entrusted with the screening of the conduct of member States, i.e. *The European Commission of Human Rights* and *The European Court of Human Rights,* offer little guidance on the impact of the provisions of the Convention in the sphere of national legislation. Such help, as may be derived, is inconclusive though the interim decision of the European Commission, in the case of *Scheichelbauer* (*Yearbook of European Convention of Human Rights,* p.156), lends support to the view that violation of the rights safeguarded by an individual, entitles the injured party to a remedy under the Convention. Academic writers find the question perplexing and difficult to answer. *Jacobs* points out that the provisions of Article 13 of the Convention support the view that the rights vested by the Convention can be vindicated against everyone, although he acknowledges that the matter is far from settled. Responsibility may, as he observes, attach to a State for failure to implement effectively the provisions of the Convention (*Jacobs - The European Convention on Human Rights,* 1975, p.11 et seq. and p.227 et seq.). *Castberg* takes the view that the safeguard of the fundamental rights guaranteed by the Convention, is a matter of public law for each member State (*Castberg - The European Convention on Human Rights,* 1974, p.13).

Marc-Andre Eissen, in a paper submitted on the *European Convention on Human Rights* and the duties of the individual, argues that the rights safeguarded by the Convention are protected against everyone and not merely the State and points to two German decisions supporting this view (*Federal Court* (*Bundesgerichthof*) – 20.3.1958; *Regional Court of Munheim* (*Landgericht*) – 12.8.1955). (See *Extrait de la Nordisk Tidss-*

krift for International Ret. (*Acta Scandinavica juris gentium*), 1962). The learned author draws attention to the provisions of Article 17 of the Convention declaring that, neither the State nor any group of persons or individual has a right to engage in any action designed to destroy rights and freedoms protected by the Convention, establishing thereby the universality of the rights proclaimed therein. As a matter of interpretation, he submits that expressions, such as "no one shall ....." or "everyone has the right to ....", imply a guarantee against infringement from any guarantee with a corresponding remedy. The rights conferred by Articles 15 and 17 of our Constitution are couched in the terminology identified by *Eissen*, as coining a universal right.

Basu, in his *Commentary on the Constitution of India*, debates at length the nature of constitutional guarantees granted by the Indian Constitution and, concludes on a review of Indian case-law that a lot turns on the nature of the right and the wording adopted for its definition. The protection is all embracing in respect of the rights guaranteed, for example, under Articles 17, 18.1, 23.1 and 24 of the Indian Constitution, whereas the constitutional protection, in regard to other fundamental rights, is limited against the State. As the learned author observes, the distinction is relevant to constitutional safeguards and not the character of the right that retains its universality. The distinction is between a bare right and one fledged by constitutional remedies. The main difference between the two classes of constitutional rights lies in the remedies avialable for suppression of abuse. Where the right is unaccompanied by constitutional remedies, the victim is left only to the remedies of municipal law. That the right remains intact, notwithstanding the absence of constitutional remedies, was vigourously proclaimed by the *American Supreme Court* in the *Civil Rights Cases* - 1883 109 *US* 3 - *Ex parte Virginia* - 1880 100 *US* 339.

The Supreme Constitutional Court held in *Stelios Evlogimenos and Two Others v. Republic*, 2 R.S.C.C. 139 and, *In Re Ali Ratip v. The Republic*, 3 R.S.C.C. 102, that the right to property, safeguarded by Article 23.1, is not a right in abstracto but a concrete right, definable and subject to regulation by civil law. The restrictions to the exercise of the right, imposed by Article

23.2, supplemented by Article 23.3, prohibiting interference with the exercise of the right, impose fetters upon the State in the exercise of its administrative or executive powers but impose no corresponding limitations on the legislature to regulate the exercise of the right under domestic law. (See also, *Constantinos Chimonides* v. *Evanthia K. Manglis* (1967) 1 C.L.R. 125). The principles expounded in the above decisions leave unaffected the view that fundamental rights under Part II of the Constitution have a universal character. The expropriation of property can only be undertaken by a public authority, as laid down in para. 4 of Article 23 of the Constitution; therefore, any interference with the right to property, except by such authority, cannot conceivably be proclaimed as an act of expropriation. Thus, the limitations to the exercise of the right under Article 23.2, apply only to those authorities that have a right to expropriate property. (See also the dicta in the case of *Modestos Savva Pitsillos* v. *Pavlos Xioutas and Two Others* (1967) 1 C.L.R. 31, with regard to limitations to the exercise of the right safeguarded under Article 25 "to practise any profession or to carry on any occupation, trade or business").

In *Minister of Home Affairs* v. *Fisher* [1979] 3 All E.R. 21, we repeat, it was emphatically decided that a constitutional document must be construed and interpreted in accordance with usage and traditions that led to its enactment and formulation. Few would disagree that the Universal Declaration of Human Rights of 1948 and the European Convention of Human Rights, fashioned to the spirit and letter of the Declaration, gave the impetus for the entrenchment of human rights in postwar constitutions of countries such as Cyprus, freed from colonial rule. In the preamble to the Declaration, it is declared that the rights proclaimed in the *International Bill of Human Rights*, constitute the common standard of achievement for all people and, to that end, every individual and every organ of society must keep the Declaration constantly in mind and must strive to safeguard "their universal and effective recognition and observance, both among the peoples of member States themselves and, among the peoples of territories under their jurisdictions". It is in that spirit and with that end in mind that the Universal Declaration was adopted, intended to secure

for man what is due to him by everyone under any circumstances in the interests of humanity. To deny their universality would undermine their effectiveness and leave room for their abuse. I would loath to think that our Courts would be powerless to invoke constitutional remedies to suppress abuse of human rights by individuals, such as the criminal gang that staged the coup of 15th July, 1974 and those that aided them in their unconstitutional pursuits. (Aspects of this issue are discussed in the case of *Anastassiou* v. *Demetriou and Another* (1981) 1 C.L.R. 589).

The decisions of the Court of Justice of the European communities in *Defreen* v. *Sabena* [1981] 1 All E.R. 120 and, *Macarthys Ltd.* v. *Smith* [1981] 1 All E.R. 111, support the view that fundamental rights invariably inhere in man, consequently, the rights guaranteed by *Article* 119 of the *Treaty of Rome*, safeguarding equality, bind not only the State but all organs of society.

The decision of Hadjianastassiou, J., in the case of *Andreas Demosthenous* (1967) 1 C.L.R. 186, authorising the issue of a writ of habeas corpus at subjiciendum, directing the master of a ship to release a sailor from captivity, clearly implies that rights pertaining to fundamental freedoms are universal and that constitutional remedies, such as the writ of habeas corpus conferred by Article 155.4 of the Constitution, are available to the victim against everyone denying or interfering with their exercise. The case is reminiscent of the decision of *Lord Mansfield in Somerset* v. *Stewart* (1772) 1 Loffit 1–19, ordering the release of a black slave held by the captain of the boat anchored in English waters.

On a consideration of the objects of Part II of the Constitution, the character of the rights entrenched therein and, the background thereto, outlined in this judgment, 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.

There remains to decide whether there is discretion to relax, under any circumstances and, if so, in what circumstances, the guarantee and, admit evidence obtained in contravention of basic human rights, notably those safeguarded by Articles 15.1 and 17.1.

Discretion to admit Evidence obtained in Violation of Fundamental Human Rights:

Under English law, evidence improperly or illegally obtained —confessions and admissions apart—is admissible evidence, subject to a limited discretion on the part of the Court to reject them under well defined circumstances. The approach of English Courts to the matter, in the nineteenth century, is reflected by the statement of the law on the subject, by *Crompton, J.*, in *Leatham* [1861] 8 Cox C.C. 498, 501—

> "It matters not how you get it; if you steal it even, it would be admissible in evidence".

The bluntness of this rule was somewhat mitigated in the twentieth century, as *Heydon* observes in a most illuminating discussion of the subject, published in 1973 *Criminal Law Review, p.* 603 *et seq.* and *p.* 695 *et seq.* The author finds the origin of the rule obscure and difficult to trace. A series of decisions in the twentieth century, acknowledged discretion to the Court to reject evidence improperly obtained, where its admission would be likely to result in unfairness. Unfairness was narrowly defined as arising whenever prejudice to the accused from its admission outweighed its probative value. In *R.* v. *Sang* [1979] 2 All E.R. 1222 (H.L.), the matter was settled beyond peradventure by the House of Lords, declaring that there is no discretion to reject evidence improperly obtained, except in the aforementioned circumstances, taking the view that it is not the function of the Court to control police action; its jurisdiction is confined to ensuring that the evidence admitted is relevant and the trial fairly conducted. An element of unfairness is only infused if the probative value of the evidence is minimal, compared to the prejudice it is likely to occasion to the accused. In *King* [1969] A.C. 304, there are dicta suggest-

ing that it matters not that the evidence was obtained in breach of common law rules or the statute. However, there are dicta that different principles may apply in cases of breach of constitutional rules, in countries where the jurisdiction is found in a single statute.

English precedent was not uniformly followed in all common law countries. In Scotland and Ireland a wider discretion is acknowledged to the Courts to reject evidence improperly obtained. Summarising the effect of case-law in the aforementioned countries, *Heydon*, in the above article, observes that evidence may be rejected notwithstanding its probative value, if the means employed were such that a Court of law should not countenance. It is, therefore, open to the Court to scrutinize the nature and extent of the irregularity, the deliberateness involved, as well as whether the impropriety was committed by an individual or a member of the police force. In the former case, the attendant dangers are greater because individuals operate outside any pre-ordained code of conduct and, are not subject to internal discipline for breaches of it which is normally the case with members of the police. (See, *People* v. *O'Brien* [1965] L.R. 142, 160, as well as the case of *Lawrie* v. *Mair* in 1950).

The English approach was accepted by American Courts until 1914, when the trend was reversed in *Adams* v. *N.Y.*, 192 US 585. Thereafter, American Courts have consistently rejected evidence obtained in contravention of fundamental provisions of the Constitution, as the case of *Katz* v. *United States*, 389 US 347, 19 L. Ed. 2nd 576, indicates.

In Germany, Courts have evolved the rule of proportionality, making the test of admission dependent on balancing the good resulting from the admission of evidence improperly obtained, with the evils associated therewith.

The decision of the Appeal Court of Salonica supports the view that evidence obtained in breach of fundamental provisions of the Constitution, ought to be rejected as a matter of constitutional necessity. *Professor Androulakis*, in a *Commentary* on the implications of the above decision, suggests that evidence illegally obtained, ought to be rejected if it violates the nucleus

of a constitutionally protected right (*Fundamental Notions of the Criminal Trial*, by *Professor N. K. Androulakis*—1979).

Any suggestion, that a discretion vests in Cyprus Courts to admit evidence obtained in defiance to the right guaranteed by the Constitution, is untenable in view of the provisions of Articles 34 and 35 of the Constitution. Article 34 denies to everyone any liberty to destroy any of the rights and liberties safeguarded by Part II of the Constitution, ruling out thereby discretion to admit evidence obtained in contravention of the provisions of Part II of the Constitution. The acknowledgment of any discretion to the Courts, would also run counter to the duty cast upon all authorities of the State, including the Courts, to ensure the efficient application of Part II of the Constitution (Article 35). Admission of evidence obtained in breach of fundamental rights, would be incongruous with the efficient application of the provisions of this part of the Constitution.

In our judgment, there is no discretion to admit evidence obtained or secured by contravention of the fundamental rights and liberties safeguarded by Part II of the Constitution. One may go a step further and argue that evidence thus obtained, would violate the concept of a fair trial, safeguarded by Article 30.2 of the Constitution.

Mr. Evangelou argued that the right to privacy, safeguarded by Article 15.1, must be deemed to have been duly limited in virtue of para. 2 of Article 15, permitting limitations in the interests of public order in virtue of the common law rules elucitated in the declaration of the law in *R.* v. *Sang*, supra (see *s.* 29(1)(*c*) of the *Courts of Justice Law*—14/60). This submission overlooks the decision of the *Supreme Constitutional Court in Police* v. *Theodoros Nicolas Hondrou and Another*, 3 R.S.C.C. 82, establishing that limitations to constitutional rights authorised by the Constitution, may only be introduced by legislation of the House of Representatives or legislation deemed to be part of our law, under Article 188.1 of the Constitution. It would be strange if it was otherwise and constitutional rights were held to be subject to limitations, having no relevance to the usages and traditions that led to the enactment of fundamental rights. The common law rules relevant to the admissibility of evidence improperly obtained, were evolved without reference to a code such as Part II of our Consti-

tution safeguarding basic human rights and, were never intended by our legislature as a necessary limitation of the rights under Article 15.1. As to Article 17.1, the submission of counsel is remoter still for, the common law rules hardly have any relevance to the permitted heads of limitation under Article 17.2 limited to communications of prisoners and bankrupts.

There is room for limiting the right to privacy by law, in the interests of constitutional order, public safety, public order, public health and public morals. Whether need arises for the limitation of the right and, then, to what extent, is a matter for the legislature, who are, in the first place, the judges of the need, if any and, the arbiters of the extent of the limitation.

The opinion of the Court, given on 16th November, 1982, is founded on the reasons above given that constitute a necessary supplement to the opinion given.

Order accordingly.