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The Evolution of the Case Law in Relation to Criminal Law in Cyprus

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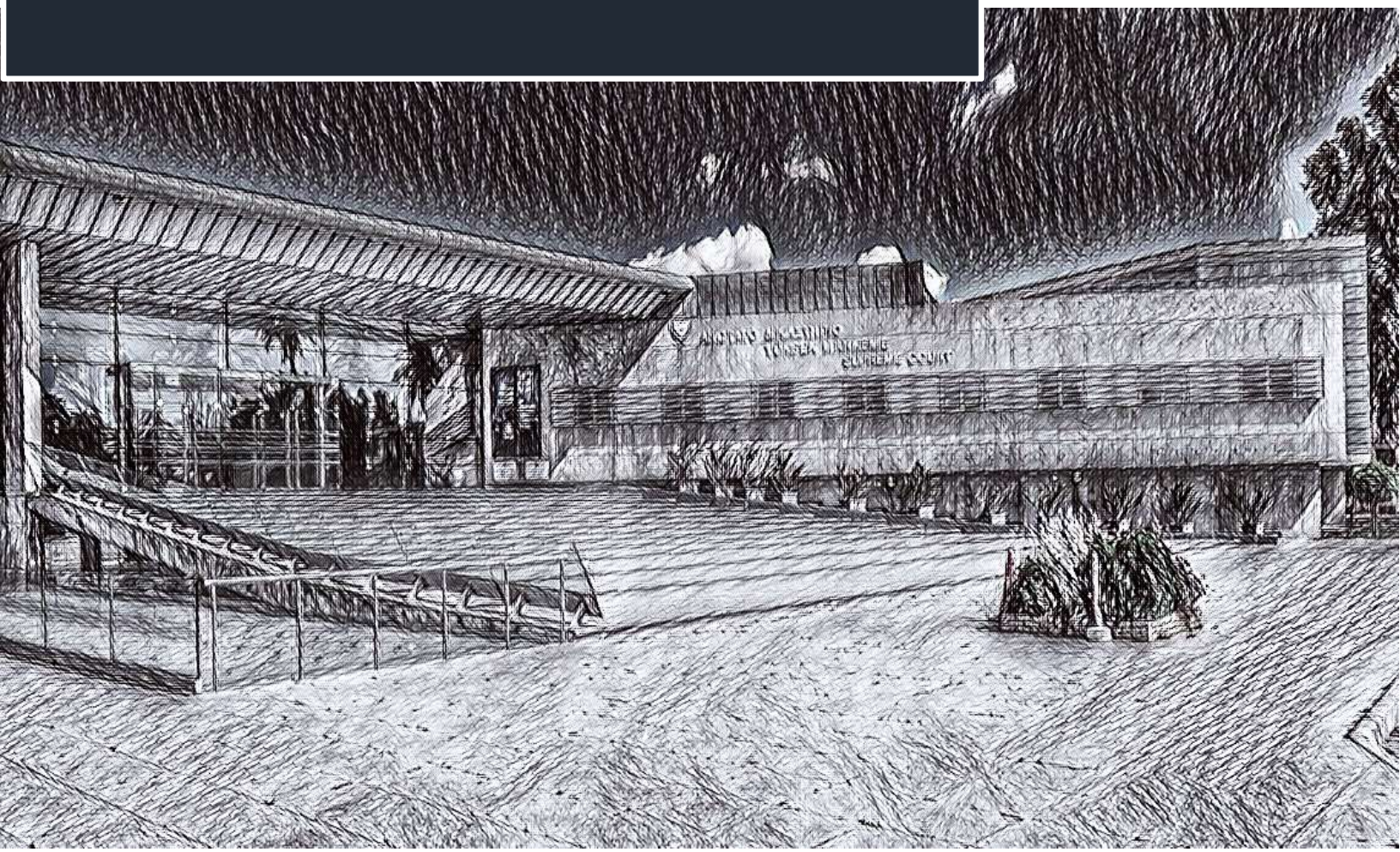

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Abstract

This paper aims to examine the evolution of case law in relation to the Cypriot legislation in the area of criminal law, in particular the Cypriot Criminal Code (CCC). Emphasis is given to the impact of case law on the Cypriot legal order in general, as well as on specific areas, such as the imposition of sentences, which is an important judicial function performed by Cypriot criminal courts. Moreover, the paper examines the issue of illegally obtained testimonies, as it was addressed by the Cypriot courts. We argue that with the help of case law, the "*sacred mission of Justice*" can remain intact in the Republic of Cyprus. We further argue that Cypriot case law has developed very useful criteria to be taken into account in the process of interpreting the CCC and administering criminal justice.

Keywords

Criminal law, criminal justice, case law, illegally obtained testimony, exclusionary rule, sentencing.

1. Introductory Remarks

This paper aims to examine the evolution of case law in relation to the Cypriot legislation in the area of criminal law, in particular the Cypriot Criminal Code (hereinafter: CCC). Emphasis is given to the impact of case law on the Cypriot legal order in general, as well as on specific areas, such as the imposition of sentences, which is an important judicial function performed by Cypriot criminal courts. Moreover, the paper examines the court's interpretation of the exclusionary rule in the case of illegally obtained testimonies, i.e. the rule that prevents evidence obtained or analyzed in violation of the defendant's constitutional rights from being used in a court of law.

The CCC and the jurisprudence of the Cypriot criminal courts have constituted a bulwark against State overreach and arbitrariness in the fight against crime. They have ensured an increased level of protection of the rights of the defendants in criminal proceedings, while also protecting the public interest. The dialogue of the Cypriot criminal courts with the case law has been dynamic and constructive, through the adoption and use of a rich diversity of principles and criteria.

In this context, this paper also takes into consideration the continuous dialogue between the Cypriot case law and the case law of the European Court of Human Right (ECtHR). For instance, with regard to criminal sentencing, very interesting interpretive approaches have been adopted at the level of case law. The methodology applied in the present work is based on the study of the Cypriot legislation, in particular the CCC, combined with the critical examination of decisions of the Cypriot criminal courts, since public criticism of court decisions is "*the most significant counterweight to the evolution of the old Cypriot Criminal Law*"[1].

[1] Paraskeva K., The critique of court decisions and the importance of its reasoning, Legal Think Tank "Rule of Law", June 4, 2020, https://kratosdikaiou.com/index.php/2020/06/04/h-kritikh- twn-dikastikwn-apofasewn-kai-h-shmasia-ths-aitiologias-tous /

It has been correctly pointed out that the criminal justice system is "*the barometer of social development*"[2]. This statement implies that the criminal proceedings will always have to balance between conflicting interests, i.e., the need to protect the public interest, on the one hand, and individual rights, especially the rights of the defendants in criminal proceedings, on the other. For this reason, the criminal justice system cannot remain stagnant and immovable. In all criminal justice systems, there is a key public interest in discovering the truth. This task cannot be executed successfully, if we rely exclusively on legislative texts and objective factors. We must also resort to flexible criteria and observations set out in the case law. The pursuit of truth as well as the protection of the public interest have to be taken into account when formulating criminal sanctions, as well as the rules on the protection of the rights of the defendants in criminal proceedings. These rights include the right to a fair trial, due process, the right to seek redress or a legal remedy, protection against physical violence and torture, the right to privacy, the right to recognition of mitigating factors, etc. Preventing violations of these rights remains a challenge for criminal law at national and international level[3]. The main question in this context is how the courts can ensure the evolution of the case law itself, as well as the evolution of the legislation through the judicial interpretation.

2. Interpretation of Criminal Law and Influences from the Case Law

The Cypriot justice system is independent, according to the constitutional rules on the separation of powers[4], and it can carry out its mission efficiently and with high quality standards. Nevertheless, it becomes often the target of criticism.

[2] Gless S. and Richter T. (eds), Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules, Springer, 2019, p. 1, with references to German legal theory, in particular to: Roxin, C., Schünemann, B., Strafverfahrensrecht, 28. Aufl., München 2014, p. 9.

[3] According to Christine Vanden Wyngaert, former judge on the International Criminal Court, makes a reference to the dual function of human rights in criminal law ("moving from the 'shield' of human rights – their protection – to the 'sword' of human rights – punishing those who violate them"). On this dual mission, see Tulkens F., The Paradoxical Relationship between Criminal Law and Human Rights, Journal of International Criminal Justice, Volume 9, Issue 3, July 2011, pp. 577–595.

[4] Salzberger E., A positive analysis of the doctrine of separation of powers, or: Why do we have an independent judiciary? International Review of Law and Economics, vol. 13, issue 4, December 1993; Von Achenbach J., Separation of powers and the role of political theory in contemporary democracies, International Journal of Constitutional Law, Volume 15, Issue 3, July 2017; Waldron J., Separation of Powers in Thought and Practice, 54 (2) Boston College Law Review, vol. 2013.

Constructive and impartial criticism of court decisions is welcome, but unfounded aphorisms affect citizens' trust in the courts and the justice system. This may have detrimental consequences for the country. Indeed, "*trust in the administration of Justice is earned through hard work, but it can be quickly lost*"[5].

The Cypriot criminal law includes the CCC and several other legislative text that deal with specific types of criminal activities. The CCC had been drafted and entered into force before the independence of Cyprus from the British Empire, more specifically on 01.04.1959. The original text of the CCC had been drafted in English. With regard to the interpretation of CCC, the general rule of Article 3 provides that the code's provisions shall be interpreted in accordance with the legal principles prevailing in England and in the sense given to them by English criminal law. As the Cypriot case law has evolved, the Cypriot courts have elaborated gradually their own interpretation of the CCC provisions.

In the Poutziouris case[6], the Cypriot Supreme Court found that the CCC is based on the standard penal code that was drafted and implemented in the territories of East Africa that were under British rule. For this reason, the Cypriot Supreme Court accepted that it could use judgments of the East African Court of Appeal to better interprete the provisions corresponding to Articles 20 and 21 of CCC. Such judgments could provide an interpretative guidance in a more appropriate manner than the study of the case law of Indian courts.

In the Ioannis Pefkos case[7], it was affirmed that the provisions of the CCC originate from the English common law, as it is the case for most part of English law. The court found that in interpretating and applying the CCC it must resort for guidance, where necessary, to the English common law as it has been developed in England.

[5] Speech by Mr. Myronas Nikolatos, President of the Supreme Court dedicated to the memory of N. Solomonidis, Limassol, 9 November 2015.

[6] Poutziouris and others v. The Republic (1990) 2 AAD 309.

[7] Ioannis Pefkos and others v. The Republic (1961) CLR 340.

In the same context, in the Queen case[8] the Supreme Court examined whether, in interpreting any legislative provision of the CCC, the Cypriot courts are bound or have the discretional power to be guided by English decisions. The Chief Justice Hallinan made following statement: "*However, in our opinion, the Courts of the Colony are bound to follow the decision of the Privy Council, the House of Lords and the Court of Appeal and the Court of Criminal Appeal in England when deciding matters in which the law of Cyprus and the law of England are the same; And the Courts of unlimited jurisdiction in the Colony should in such matters give to the decisions of the High Court of Justice in England the same comity as given to Courts of concurrent jurisdiction. This has long been the practice of the Courts in the colonial territories. When cases are heard in the Privy Council on appeal from colonial courts and relate to a matter upon which the Law of England and the Law of the Colony is in all material respects the same, the English authorities are cited and relied upon"* (pages 145-146). In the Hailis case[9] and the SeaIsland case[10], the Supreme Court has examined how a criminal law provision must interpreted, by making reference to English case law. Thus, the matter is judged in principle by the wording of the provision and only in doubt does one refer to other rules[11].

On the other side, however, in the cases Costas Michael Platritis[12] and Azinas[13], the court stated that the interpretation of Cyprus Law must be based on previous cases of the Cypriot courts. Finally, in Soteriou[14], the court found that it is safer to approach the case and the task of legal interpretation having in mind the provisions of the CCC and Cypriot case law than to refer to English law. Therefore, since the entry into force of the CCC in the Republic of Cyprus, it is understood that the interpretation of its provisions must take into account the

[8] Queen v. Erodotou 19 CLR 144.

[9] Hailis v. The Police (1982) 2 CLR 99.

[10] Sea Island & Tours Ltd and others (1995) 2 AAD 196.

[11] Migotto Silvano and others v. The Police of Nicosia (1996) 2 AAD 25.

[12] Costas Michael Platritis v. The Police (1967) 2 CLR 174.

[13] Azinas and another v. The Police (1981) 2 CLR 9.

[14] Charalambos Soteriou (Pambos) v. The Republic (1962) CLR 188.

pre-existed case law. The case law is not sole source for the evolution of the legislation, but it constitutes the most important means of interpretation of the legislation, such as the CCC.

3. Sentencing Principles and the Role of the Case Law

The jurisprudence of the Cypriot courts has evolved in a progressive and conspicuous manner. An important development concerns the process of imposing criminal sentences. In the Pittordi case[15], which was applied and extended by subsequent rulings of the Supreme Court, it was stated that *"no matter how serious a crime is, the Court must individualize the criminal punishment, so that it is appropriate to the circumstances of each offender."* The court must always take into account the human element when imposing criminal law sanctions. Thus, it has been correctly pointed out that *"law and justice lose all their substance if separated from the human element. But the human element is presumably taken into account by the legislature as well, when legislature drafts the law. It is for the legislature to consider the effect of proposed legislation upon people, at the time of enactment. When the draft becomes the law, the Courts must apply it as it comes to them. Their function is to apply the law. They have to do it upon human beings, it is true; But they must apply it with due regard to the purpose for which the law was made. Considerations of hardship, or consequences on the feelings of the persons concerned, must always be given due weight, but they cannot be allowed to undermine the application of the law".*

In the Falconetti case[16], the Supreme Court correctly stated that the process of individualization of the sentence does not negate either the seriousness of the crime or the sentencing purpose of deterrence. However, the individual circumstances of the offender justify the imposition of a sentence that does not only constitute a criminal punishment, but also is proportionate to such

[15] Criminal Appeal no. 2890, 13.04.1967.

[16] Christos Filippou aka Falconeti v. The Police (1989) 2 AAD 245.

circumstances. In order to decide how the convicted person would be treated at the sentencing level, the court must take into account the personality of such person and at the same time determine which sentence would best promote his/her social reintegration.

In the El – Beyrouty case[17], the court correctly pointed out that the desired uniformity in the imposed sentences must not lead to their leveling. The facts of each case, as well as the personal circumstances of the defendants in criminal proceedings, play a significant role in the sentencing stage. The individualization of punishment is achieved by balancing the seriousness of the facts of the case and the criminal behavior, as defined by the legislature, as well as the personal circumstances of the defendants in criminal proceedings, so that the punishment is proportionate and socially useful.

In several decisions of the Cypriot courts, the issue of the court's leniency emerges, in particular with regard to the reduction of criminal sentences. In the Ieronymidis case[18] that court stated that it was *"not convinced that the proper administration of justice in the field of sentencing must come in predefined molds, percentages and discounts. We feel that in the process of sentencing the discretion of the Court should be guided by three broad principles, the nature and circumstances of the offense, the personal circumstances of the offender with all mitigating or aggravating factors that may exist, as well as previous case law and penalties imposed in similar cases".* Thus, the court has to decide on the appropriate sentence, taking into account the need to protect law and order, society and the citizens' rights. Only then does the justice system appear to be stable, generous and evolving, as it should be.

[17] Criminal Appeals no. 5430 and 5431, 19.11.1991.

[18] Ieronymidis v. The Republic (1982) 2 CLR 258.

4. Exclusionary Rule and Illegally Obtained Testimony

Article 6 of the European Convention on Human Rights (ECHR) guarantees the right to a fair trial, but it does not contain detailed rules on the admissibility of evidence, which is primarily a matter for national law, as the ECtHR has expressly held in the Schenk and Heglas cases[19]. Therefore, the ECtHR, does not examine whether specific types of evidence are admissible on principle. This is a task of the national courts, which can refer to the general principles on the admissibility of evidence that have been developed by case law.

The court must take into consideration key elements such as the quality of the evidence, the circumstances under which it was obtained and whether these circumstances cast doubt on the credibility or accuracy of the piece of evidence. According to the ECtHR, "*while no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker*"[20].

In cases where the evidence was obtained and used in a court of law in violation of the rights of the defendant, the ECtHR examines whether or not the evidence in question was decisive for the outcome of the criminal proceedings[21]. A similar balancing test has been developed by the national courts, which have followed the principles formulated by the ECtHR, in cases related to:

- Illegal taking of samples for forensic analysis[22];
- Putting pressure on a co-defendant to testify[23];
- Use of "planted" evidence against the defendant in criminal proceedings [24];

[19] Schenk v. Switzerland , §§ 45-46; Heglas v. the Czech Republic, § 84

[20] Bykov v. Russia [GC], § 89; Jalloh v. Germany [GC], § 96

[21] Gäfgen v. Germany [GC], § 164

[22] Horvatić v. Croatia (application no. 36044/09)

[23] Erkapić v. Croatia; Dominka v. Slovakia; Stephens v. Malta (no. 3), §§ 64-67.

[24] Layijov v. Azerbaijan, § 64; Sakit Zahidov v. Azerbaijan, §§ 46-49; Kobiashvili v. Georgia, §§ 56-58.

- Use of evidence obtained through an irregular identification procedure (lineup) without the presence of a lawyer[25];
- Unfair use of other incriminating testimonies and evidence against a defendant in criminal proceedings [26];
- Illegal use of self-incriminating statements in criminal proceedings[27].

Without departing substantially from the ECtHR case law, Cypriot courts have developed their own interpretative approaches to the problem of illegally obtained testimony and the need to respect the rights of the defendant in criminal proceedings. Articles 8 of the ECHR and 15 and 17 of the Constitution of Cyprus create a system of protection for the right to privacy and family life and the right to respect for the confidentiality of correspondence. Evidence obtained in violation of the aforementioned provisions must be considered as illegally obtained and thus be excluded by the criminal court. In this context, of course, the concept of private and family life must be defined first. The theory has rightly pointed out that these concepts should not be interpreted so narrowly as to render constitutional protection meaningless and ineffective. The case law of the ECtHR has also recognized that it is neither appropriate nor possible to give an exhaustive definition of the term "privacy". Following the same logic, Cypriot case law has adopted a broad definition of the term in question[28].

Already since the 1980s and the landmark Georgiadis case[29], the Cypriot Supreme Court has adopted a strict approach to the issue of illegally obtained testimony. The issue in that case was whether a recorded conversation between the psychologist, who was accused of forgery, and a client should be admitted as evidence, given that the conversation was recorded unknowingly during a medical session. The Supreme Court held that such testimony should be excluded

[25] Laskaand Lika v. Albania

[26] Ilgar Mammadov v. Azerbaijan (no. 2); Ayetullah Ay v. Turkey

[27] Belugin v. Russia, § 68-80

[28] Grigoriou v. The Republic of Cyprus No. 2, (1996) 4 AAD. 1100, 1105.

[29] Georgiadis v. The Police (1982) 2 CLR 33.

by the Court of First Instance in accordance with Articles 15 and 17 of the Constitution.

This approach permeates later jurisprudence in Cyprus. Indicatively, ten years later, in the Giallourou case[30], the Supreme Court ruled that the recording in violation of Articles 15 and 17 of the Constitution should be excluded as evidence for any purpose. In fact, this prohibition is "*absolute and cannot be circumvented"*. It is therefore clear under Cypriot case law that a testimony, which was obtained in violation of constitutional principles, cannot be admitted in a court of law[31]. An example is the case of testimony obtained following an illegal arrest, a testimony which according to the case law "*must be rejected and ignored, because no statement, oral or otherwise, can be taken into account following an illegal arrest"*[32]. Consequently, there is no discretion of the court when it is faced with a violation of rights enshrined in the Constitution, in which case the court must reject the illegal testimony[33]. Otherwise, the use of evidence would have substantially affected "*the integrity of the administration of justice and the legal and ethical dimension of the judiciary"* [34].

This strict approach has also been followed by the legislator. Indeed, according to Article 16 (1) of the Law for the Protection of the Confidentiality of Private Communications. (Surveillance of Telecommunications) of 1996 (Law 92(I)/1996), the testimony arising from illegal interception may not be admitted in any criminal or civil proceedings. Otherwise, there would be a violation of Article 6 of the ECHR and the right to a fair trial[35].

Under English common law, which has greatly influenced both legislation and jurisprudence in Cyprus, at least in their first steps, there is the possibility of excluding evidence ("*exclusionary rule*"), in a manner similar to the solution

[30] Giallourou v. The Police (1992) 2 A.A.D. 147.

[31] See Nosyrevv. Bakotin et al., No. 298/18, 13.02.2019, where the Larnaca District Court had to rule on the admissibility of illegally received electronic data (intercepted exchange of personal e-mail).

[32] Larnaca Police Director v. Andrea Antoniou etc., No. 18864/2009, 12.10.2011.

[33] Siamisis Dimitris v. The Police (2011) 2 AAD 308.

[34] Parpas v. The Republic (1988) 2 CLR 5.

[35] Iliadi T., Santi N., The Law of Evidence: Procedural and Essential Aspects, 2016, p. 758 ff. See also Harris D.J., O'Boyle M. and Warbrick C., Law of the European Convention on Human Rights, London, Butterworths, 1995.

given in Cyprus[36]. It is worth mentioning here the 1963 decision in the Payne case[37], where after a car collision, the defendant was invited to provide a blood sample on the pretext that the police had determine whether he was ill, when in fact the purpose was to show whether he had consumed alcohol. Another significant case is Sang[38], in which the defendant alleged that he had been induced to commit the offense by an informant acting on the orders of the police and, therefore, the Judge had to exclude the evidence in question. In that case, it was held that the court had the discretion to exclude evidence obtained illegally in order to ensure a fair trial for the defendant in criminal proceedings, when the damage to the defendant's rights outweighs the probative value of the evidence. This balancing test means that the judge has no discretion to exclude evidence merely because it has been obtained by inappropriate or unjust means. Since the 1980s, English law (Police and Criminal Evidence Act[39]) explicitly allows the Judge to exclude certain evidence, to protect the right to a fair trial, after assessing all the circumstances of the case, including the pre-trial phase[40]. Finally, with the adoption and entry into force of the Human Rights Act 1998, there are more legal bases for questioning the admissibility of evidence in cases of violation of the ECHR.

According to the balancing test, the violation of a procedural rule, which protects individual rights, should not automatically lead to the exclusion of a piece of evidence. The criminal court should evaluate and balance the protected rights on a case-by-case basis. In international theory and jurisprudence, the exclusionary rule becomes absolute only when the protection of the human value or the core of a right is at stake. In other cases, the Court has to make a balancing test and examine whether it will admit the evidence in question, taking into

[36] See also Ogiso R., The Exclusionary Rule in Criminal Procedure: a comparative study of the English, American, and Japanese approaches, Amicus Curiae Issue 37 September / October 2001, pp. 28-32.

[37] R v. Payne [1963] 1 WLR 637.

[38] R v. Sang [1980] AC 402.

[39] Section 78 of the Police and Criminal Evidence Act 1984.

[40] Hungerford-Welch, P., Criminal Litigation & Sentencing, 5th ed., Cavendish Publishing, 2000, p.448-449. See also Davis, M., Croall, H., Tyrer, J., Criminal Justice, 2nd ed., Longman, 1999, p. 208.

account the principle of proportionality, in particular the gravity of the offense and the risk for defendant's rights.

5. Concluding Remarks

Unfortunately, in recent years, justice in Cyprus seems to be in a state of crisis and there is criticism that the quality of legislation and justice in Cyprus deteriorates. If problems in the justice system are left unaddressed, the system will be taken in a dangerous and self-destructive path. But, which is the proper and most efficient manner to administer justice? This is a question that has been discussed passionately by the brightest minds, from Plato to Kant and beyond. And yet, the question remains unanswered to this day. Perhaps because it is one of those questions to which "*man will never find a definitive answer, he can only constantly try to give better answers*".

One of the most prominent jurists and respected Judges in Cyprus had mentioned in one of his speeches: "*Justice needs to prove every day that despite the difficult economic and social conditions that undoubtedly affect the work of lawyers and judges, it stands unwavering in its mission. We, as its ministers, owe it to the younger generations to recognize the need for its evolution, and to deliver it enriched and independent, as we received it from our ancestors. Rest assured that this is what we strive to achieve every day, sacrificing our personal and family life on the altar of the performance of our legal duty and the evolution of legislation through its better interpretation in the decisions that we issue*[41]. With the help of case law, the "*sacred mission of Justice*" can remain intact in the Republic of Cyprus. The jurisprudence of Cypriot courts has evolved and it has developed valuable criteria for the interpretation of criminal law provisions. Certainly, these criteria are neither exhaustive, nor static, but the harmonic evolution of the jurisprudence in relation to the legislation is perhaps one of the greatest achievements of the Cypriot courts.

[41] Speech by Judge Costas Satolias during the presentation of his book "Elements of Criminal Law and Procedure: An Analytical Approach" at Neapolis University Pafos.

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