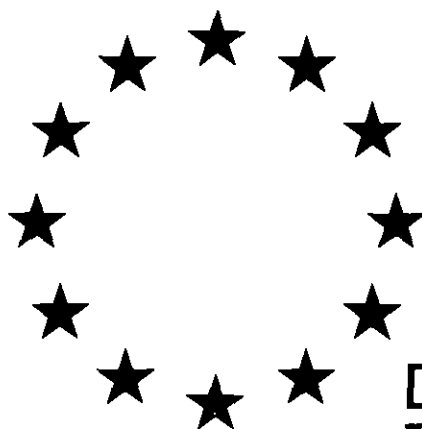


COUNCIL  
OF EUROPE



CONSEIL  
DE L'EUROPE

Or. English

EUROPEAN COMMISSION  
OF HUMAN RIGHTS

**Application No. 15070/89**

**Alecos Modinos  
against  
Cyprus**

**Report of the Commission**

(Adopted on 3 December 1991)

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I. **INTRODUCTION**

1. The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

A. The application

2. The applicant is a Cypriot citizen, born in 1933. He is an architect and resides in Nicosia. He is represented before the Commission by Mr. Achilleas Demetriades, a lawyer practising in Nicosia.

3. The application is directed against Cyprus. The respondent Government are represented by their Agent, Mr. Michael A. Triantafyllides, Attorney General of the Republic of Cyprus.

4. The applicant is a homosexual. He complains of Cypriot legislation which prohibits male homosexual activity.

5. The applicant alleges that the prohibition on male homosexual activity constitutes a continuing interference with his right to respect for private life, ensured by Article 8 of the Convention.

B. The proceedings

6. The application was introduced on 22 May 1989 and registered on 31 May 1989.

7. On 2 October 1989, the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits of the application before 8 December 1989.

8. After having obtained an extension of the above time-limit, the Government submitted their observations on 17 January 1990. The applicant submitted observations in reply on 6 April 1990.

9. On 8 June 1990, the Commission decided to invite the parties to appear before it at a hearing on the admissibility and merits of the application. At the hearing on 6 December 1990 the Government were represented by Mr. Michael Triantafyllides as Agent, and by Mr. Rallis Gavrielides and Mrs. Leda Koursoumba, Senior Counsels of the Republic, and Miss Daphne Papadopoulou, Counsel of the Republic, as counsel, and Mrs. Anny Cariolou, Administrative Officer at the Ministry of Justice, as adviser. The applicant, who was present at the hearing, was represented by Mr. Achilleas Demetriades as representative and Mr. Lellos Demetriades, Barrister-at-law, as counsel.

10. Following the hearing the Commission declared the application admissible. The text of the Commission's decision was notified to the parties on 25 January 1991. The parties were also invited to submit, if they so wished, further observations on the merits of the application.

11. After declaring the case admissible the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Active consultations with the parties took place between January and September 1991. In the light of the parties' reaction, the Commission now finds that there is no basis upon which a settlement can be effected.

C. The present Report

12. The present Report has been drawn up by the Commission in pursuance of Article 31 para. 1 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NØRGAARD, President  
E. BUSUTTIL  
A. WEITZEL  
J.-C. SOYER  
H. DANELIUS  
Mrs. G. H. THUNE  
C.L. ROZAKIS  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
J.-C. GEUS  
A.V. ALMEIDA RIBEIRO  
M.P. PELLONPÄÄ

13. The text of this Report was adopted on 3 December 1991 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

14. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

15. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

16. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

17. The applicant is a homosexual having a physical relationship with another male adult. He is the president of the "Liberation Movement of Homosexuals in Cyprus".

In a number of letters addressed to the President of the Republic of Cyprus, to the President of the Parliament and to the Minister of Justice between June 1988 and February 1989, the applicant requested that legislation in Cyprus prohibiting male homosexual activity be amended. No answer was given to his requests.

B. Relevant domestic law and practice

18. Sections 171, 172 and 173 of the Criminal Code of Cyprus provide as follows:

"171. Any person who -

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

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

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

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

19. Article 15 of the Constitution of Cyprus reads as follows:

"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."

20. The provisions of Sections 171-173 of the Criminal Code have been applied on several occasions.

In a judgment dated 26 September 1967 in *Re Kokkino v. the Police* (Cyprus Law Reports 1967 p. 217) the Supreme Court allowed an appeal against conviction for "unnatural offence, contrary to section 171 (b) of the Criminal Code, that is of permitting another person to have carnal knowledge of him against the order of nature". The Supreme Court set aside the conviction and discharged the applicant after having found that a confession by the applicant to the police was not, in the particular circumstances of that case, admissible evidence.

21. In a judgment of 27 August 1969 in *re Peristianis v. the Police* (Cyprus Law Reports 1969 p. 137) the Supreme Court dismissed an appeal against conviction and sentenced to twelve months imprisonment for a sexual offence provided in section 171(b) of the Criminal Code committed with a soldier. The Supreme Court held the following:

"The function of the Courts is to apply the law of the State as it comes to us from the legislature. The offence of which the appellant stands convicted, is punishable with imprisonment for five years. If one were to look for reasons for such severity of punishment, one would see more than one good reasons. The community in this country, the great majority of its people, consider this kind of conduct a social evil; a habit which tends to undermine morality (individual as well as public) and to affect detrimentally sober, disciplined and healthy life. Such practices are here considered as a moral and physical stigma. It is not for the Court to say why; but it is for the Courts to apply effectively the law intended to prevent the spreading of such practices. Especially where selfishness strikes with them the young."

22. In a judgment of 13 September 1973 in *re Matsentides v. the Police* (Cyprus Law Reports 1973 p. 250) the Supreme Court dismissed an appeal against conviction of an "attempt to have carnal knowledge" of an eighteen year old person "against the order of nature".

23. In its judgment of 1 November 1975, in the case of *Mavros and others v. the Police*, the Supreme Court dismissed an appeal against a conviction of homosexual offences involving five persons.

24. In the case of *Costa v. the Republic* the Supreme Court dealt with an appeal against conviction of the offence of permitting another male person to have carnal knowledge of the accused. The offence "had been committed in private in a tent but within the sight of another person who was legitimately using the same tent". The accused had moreover invoked Article 15 of the Constitution of Cyprus and Article 8 of the Convention. In its judgment of 8 June 1982 (Cyprus Law Reports 2- 1982 p. 120) the Supreme Court held the following:

"In ascertaining the nature and scope of morals and the degree of the necessity commensurate to their protection, the jurisprudence of the European Court and the European Commission of Human Rights has already held that the conception of morals changes from time to time and from place to place, and that there is no uniform European conception of morals; that, furthermore, it has been held that state authorities of each country are in a better position than an international judge, to give an opinion as to the prevailing standards of morals in their country; in view of these principles this Court has decided not to follow the majority view in the Dudgeon case, but to adopt the dissenting opinion of Judge Zekia, because it is convinced that it is entitled to apply the Convention and interpret the corresponding provisions of the Constitution in the light of its assessment of the present social and moral standards in this country; therefore, in the light of the aforesaid principles and viewing the Cypriot realities, this Court is not prepared to come to the conclusion that Section 171 (b) of our Criminal Code, as it stands, violates either the Convention or the Constitution, and that it is unnecessary for the protection of morals in our country.

By adopting the dissenting opinion of Judge Zekia this Court should not be taken as departing from its declared attitude that for the interpretation of provisions of the Convention, domestic tribunals should turn to the interpretation given by the international organs entrusted with the supervision of its application, namely, the European Court and the European Commission of Human Rights."

25. According to information provided by the respondent Government a number of prosecutions against persons accused of homosexual offences have been set aside or not proceeded with on advice by the Attorney General, based, inter alia, on the consideration that at least one of the partners was a "known homosexual".

26. Several convictions of homosexual activity concerned homosexual conduct in public (police case files "Larnaca 112/82", "Paphos 211/84", "Famagusta S/5/86").

### III. OPINION OF THE COMMISSION

#### A. Complaint declared admissible

27. The Commission has declared admissible the applicant's complaint that the maintenance of a legislation prohibiting homosexual activity between consenting male adults violates his right to respect for his private life.

#### B. Point at issue

28. Consequently the point at issue in the present case is whether sections 171, 172 and 173 of the Criminal Code of Cyprus in so far as they prohibit homosexual activity between consenting male adults violate the applicant's right to respect for his private life, guaranteed under Article 8 of the Convention.

#### C. On the alleged violation of Article 8 of the Convention

29. Article 8 of the Convention provides as follows:

"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."

30. In order to examine whether there has been a violation of this provision in the present case, the Commission must first determine whether the maintenance in force of the impugned legislation constitutes an interference with the exercise of the applicant's right to respect for his private life within the meaning of Article 8 of the Convention.

31. The applicant submits that sections 171 - 173 of the Criminal Code are still in force and have been applied by Cypriot courts over the last thirty years. There is no indication that the respondent State has the intention of changing the legislation. On the contrary, the competent Ministers stated on several occasions that the legislation prohibiting male homosexual activities will remain unaffected. Moreover, the Attorney General's practice to discontinue prosecution in several cases cannot be regarded as a sufficient guarantee against possible prosecution. This practice may change and in any event does not prevent private prosecution, as shown by reports in a Cypriot newspaper on harassment of homosexuals in June 1991.

32. The applicant claims that, as a homosexual, he suffers great strain, apprehension and fear of prosecution, by reason of the existence of the penal law in question. This stress and fear of prosecution are constant, given the absolute nature of the prohibition on homosexual activity and the absence of any clear policy on the part of Cypriot authorities.



33. Furthermore, the applicant refers to the considerations and conclusions of the Commission and Court in the Dudgeon and Norris cases. He contends that there is no necessity of maintaining the criminalisation of adult homosexual activities in Cyprus. In particular, there is no evidence of any pressing social need for such an interference with private life.

34. The Government submit that the challenged provisions of the Criminal Code are in practice no longer in force. Sections 171, 172 and 173 of the Criminal Code are in conflict with Article 15 of the Constitution of Cyprus, the text of which is almost identical to that of Article 8 of the Convention. No prosecution for homosexual activities in private between consenting male adults has taken place since the Dudgeon judgment of the European Court of Human Rights and the practice of the Attorney General is not to institute such a prosecution and to discontinue any eventual private prosecution. Moreover, a Parliamentary Commission has taken steps to amend the legislation complained of.

35. The Commission refers to the judgments of the European Court of Human Rights in the cases of Dudgeon (judgment of 22 October 1981, Series A n° 45) and Norris (judgment of 26 October 1988, Series A n° 142) which also concerned legislation prohibiting homosexual activities. As in those cases, the Cypriot criminal law imposes an absolute prohibition on certain forms of sexual acts, regardless of whether they are committed in public or private, or whether or not the parties thereto are consenting parties. Such private consensual acts clearly fall within the sphere of private life and the existence of a legislation prohibiting them may continuously affect the exercise of the right to respect for private life.

36. The Commission finds that, as a general rule, it is necessary to take into account the way a law is applied in practice when deciding whether it gives rise to an interference with the private life of an individual applicant. However, the mere fact that the implementation of a penal law has not led to criminal convictions, does not of itself negate the possibility that it has effects amounting to interference with private life. A primary purpose of any such laws is to prevent the conduct it proscribes, by persuasion or deterrence. It also stigmatises the conduct as unlawful and undesirable.

37. In the circumstances of the present case and having regard to the information provided by the parties as regards the implementation of sections 171, 172 and 173 of the Criminal Code, the applicant's fear that the legislation complained of may be enforced cannot be regarded as unfounded. In particular, the stated practice of the Attorney General not to prosecute individuals committing homosexual acts in private is not a sufficient guarantee since he could not prevent but merely discontinue private prosecution.

38. Consequently, the Commission finds that the maintenance in force of the legislation complained of amounts to an interference with the applicant's right to respect for his private life as guaranteed by Article 8 para. 1 of the Convention.

39. As regards the question of the justification of this interference under Article 8 para. 2, i.e. whether it is "in accordance with the law", whether it pursues a legitimate aim under the Convention and whether it is "necessary in a democratic society", the Commission observes the following:

40. The interference is plainly "in accordance with the law", within the meaning of Article 8 para. 2, since it arises from the very existence of the legislation.

41. The aim of this interference must be assumed to be the protection of morals and of the rights of others, which are as such legitimate aims under Article 8 para. 2 of the Convention.

42. Furthermore, the Commission refers to the Court's judgment the Dudgeon case (loc. cit. pp. 19-25, paras. 48-63) where the issue was discussed whether criminalisation of homosexual activities between consenting male adults could be regarded as "necessary in a democratic society" within the meaning of Article 8 para. 2.

43. The Commission accepts that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified "as necessary in a democratic society". The overall function served by the criminal law in this field is to preserve public order and to protect the citizen from what is offensive or injurious. Furthermore, this necessity of some degree of control may even extend to consensual acts committed in private, notably where it is necessary to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence (above mentioned Dudgeon judgment, p. 20, para. 49).

44. However, the interference resulting from regulation of sexual life, a most intimate aspect of private life, requires particularly serious reasons before it can be legitimate for the purposes of para. 2 of Article 8 (above mentioned Dudgeon judgment p. 21, para. 52).

45. In the Commission's view the Government have failed to show the existence of such "particularly serious reasons" creating a pressing social need to maintain in force in Cyprus the prohibition by criminal law of homosexual activities between consenting male adults. On the contrary, the Government's admission that the challenged provisions are contrary to the Cypriot Constitution, combined with the position of the Attorney General not to prosecute persons in the situation of the applicant, show that, in comparison with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour in Cyprus, as it is in the great majority of the member States of the Council of Europe.

46. In view of the above the Commission considers that, as regards Cyprus, it cannot be maintained that there is a pressing social need to consider homosexual acts as criminal offences. In this respect it should be noted that the retaining of the law in force unamended on the ground that members of the public in Cyprus may be offended or disturbed by the commission by others of private homosexual acts, a

question not expressly raised by the Government, is outweighed by the detrimental effects which the very existence of the impugned provisions can have on the life of a person with a homosexual tendency like the applicant.

47. The Commission therefore finds that the interference with the exercise of the applicant's right to respect for private life resulting from the maintenance in force of sections 171, 172 and 173 unamended is not necessary in a democratic society.

D. Conclusion

48. The Commission concludes unanimously that there has been a violation of Article 8 of the Convention in the present case.

Secretary to the Commission



(H. C. KRÜGER)

President of the Commission



(C. A. NØRGAARD)

**Appendix I**

## HISTORY OF THE PROCEEDINGS

Date	Item
22.05.89	Introduction of the application
31.05.89	Registration of the application
<u>Examination of admissibility</u>	
02.10.89	Commission's decision to give notice of application to respondent Government and to invite parties to submit written observations on admissibility and merits
17.01.90	Government's observations
06.04.90	Applicants' observations
08.06.90	Commission's decision to hold a hearing on admissibility and merits of the application
06.12.90	Hearing on admissibility and merits of the application. Commission's decision to declare the application admissible
<u>Examination of the merits</u>	
25.01.91	Decision on admissibility notified to parties
13.04.91	Consideration of state proceedings
05.09.91	Consideration of state of proceedings
03.12.91	Consideration of the state of proceedings and decision to examine the merits of the applications. Deliberations on merits and on text of its Article 31 Report. Final votes taken and adoption of Report