The exclusion of improperly obtained evidence in Greece: putting constitutional rights first

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Abstract In contrast with England and Wales, where there is a discretion to exclude improperly obtained evidence, exclusion in Greece is automatic. Article 177 para. 2 of the Code of Penal Procedure mandates that evidence obtained by the commission of criminal offences is not taken into consideration. In addition, article 19 para. 3 of the Constitution prohibits the use of evidence obtained in violation of the right to privacy. Inspired by the rigidity of these exclusionary rules, the rights-centred approach that they reflect and the context of a constitutional criminal procedure within which they apply, this article sheds light on the protection of constitutional rights as a rationale for the exclusion of improperly obtained evidence. It does so against the background of the reliability-centred exclusionary doctrine in England.

'The study of other legal systems makes us understand our own system better; what it is, what it must be, what it can become.'[1] With these questions in mind, this article attests to the need to study other legal

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1 Justice S. Bryer (United States Supreme Court), 'Préface' in A. Garapon and I. Papadopoulos, *Juger en Amérique et en France—Culture juridique française et common law* (Odile Jacob: Paris, 2003) 8 (in French).

systems' solutions to one of the most tormenting problems in the law;[2] that of the admissibility of improperly obtained evidence. While there is some interest in England and Wales in developments in the Commonwealth and more generally the common law world,[3] reference to other legal traditions' responses has been rare.[4] This article's main ambition is to demonstrate that important lessons might be learnt by stepping beyond the boundaries of the common law tradition in this domain.[5] More specifically, this article focuses on the exclusionary rules developed in Greece, which are automatic and absolute, and have largely grown under the influence of constitutional doctrine and jurisprudence. As an obvious counterpoint to the discretionary approach to excluding improperly obtained evidence favoured in England and Wales, comparative consideration of Hellenic law and jurisprudence might usefully inform English debates on improperly obtained evidence. The following discussion will be limited to the exclusion of *inherently reliable* non-confession evidence,[6] in particular evidence obtained in violation of the right to privacy. This is where the English debate on improperly obtained evidence is at its most controversial, and the comparative study of Hellenic law may be most illuminating.

1. The road to automatic exclusionary rules in Greece

Given that the first *Arios Pagos* (Cassation Court of Greece) decision prohibiting the use of unconstitutionally obtained evidence dates back to 1871,[7] a brief historical review is in order. Hellenic law on improperly obtained evidence has

2 R. Traynor, '*Mapp v. Ohio* at Large in the Fifty States' (1962) 3 *Duke Law Journal* 319.

3 See, e.g., A. Choo and S. Nash, 'Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales?' (2007) 11 E & P 75; B. Emmerson and A. Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell: London, 2001) 422–6; P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Clarendon Press: Oxford, 1997) 319–70.

4 See A. Choo, 'Improperly Obtained Evidence: A Reconsideration' (1989) 9 *Legal Studies* 26; J. Spencer, 'Evidence' in M. Delmas-Marty and J. Spencer (eds), *European Criminal Procedures*, Cambridge Studies in International and Comparative Law (Cambridge University Press: Cambridge, 2005) 594 at 603–10. To my knowledge, few are the examples of studies of Continental exclusionary rules even if one looks at other common law countries. See, however, C. Bradley, 'Mapp Goes Abroad' (2001) 52 *Case Western Reserve Law Review* 375; C. Bradley, 'The Emerging International Consensus as to Criminal Procedure Rules' (1993) 14 *Michigan Journal of International Law* 171; C. Bradley, 'The Exclusionary Rule in Germany' (1983) 96 *Harvard Law Review* 1032; W. Pakter, 'Exclusionary Rules in France, Germany and Italy' (1985) 9 *Hastings International and Comparative Law Review* 1.

5 For a stimulating discussion on legal traditions see generally H. Patrick Glenn, *Legal Traditions of the World*, 2nd edn (Oxford University Press: Oxford, 2004).

6 In relation to improperly obtained confessional evidence there is again a contrast between automatic exclusion in Greece and discretionary exclusion in England and Wales, s. 76(2) of the Police and Criminal Evidence Act 1984 notwithstanding.

7 Arios Pagos 89/ 1871, 6 Ellinikoi Kodikes 165.

developed in connection with individual rights protected by the Constitution.[8] In particular, the origins of contemporary Hellenic exclusionary rules can be traced back to 19th century *Arios Pagos* case law developed in the context of the right to secrecy of correspondence.[9] During that era, *Arios Pagos* read into the right to secrecy of correspondence a prohibition on using evidence obtained in violation of this right.[10] As succinctly put by the General Prosecutor of *Arios Pagos*, the right to secrecy of correspondence forbade 'the seizure or unsealing of letters as well as the use of their content with the aim of discovering and proving the commission of crimes'.[11] In reality, however, there was hardly ever exclusion at this time. The seizure of *unsealed* letters was held not to amount to a breach of the right to secrecy of correspondence.[12] Moreover, the right ceased to produce its protective effect after the delivery of a letter to its addressee, especially if the addressee became aware of its content.[13] In other words, *Arios Pagos* construed this constitutional right so narrowly that the seizure of letters hardly ever fell within its scope. *Arios Pagos*'s pro-exclusion rhetoric was thus deprived of any practical effect.

8 See Part B of the Constitution of 1975 ('Bill of Rights').

9 The right to secrecy of correspondence is a specific expression of the broader right to privacy. It is protected by article 19 of the Constitution which states that 'the secrecy of letters and all other forms of free correspondence or communication shall be absolutely inviolable'. See D. Giannoulopoulos, 'Protecting the Right to Secrecy of Correspondence: Constitutional Myths and Reality in Modern Greece' (2005) 9(2) *Mediterranean Journal of Human Rights* 119; G. Kaminis, 'Secrecy of Telephone Communication: Constitutional Protection and its Application from the Criminal Law Legislator and the Courts' (1995) 43 *Nomiko Bima* 505 (in Greek); P. Paulopoulos, 'Technological Evolution and Constitutional Rights: The Modern Adventures of Secrecy of Correspondence' (1987) 35 *Nomiko Bima* 1511 (in Greek); S. Tsakirakis, 'Secrecy of Correspondence: Absolutely Inviolable or a Wish of the Legal Order?' (1993) 41 *Nomiko Bima* 995 (in Greek); P. Tsiris, *The Constitutional Protection of the Right to Secrecy of Correspondence* (Ant. N. Sakkoulas Publishers: Athens-Komitini, 2002) 72–3 (in Greek).

10 See G. Kaminis, *Illegally Obtained Evidence and Constitutional Guarantees of Human Rights (The Exclusion of Evidence in Criminal and Civil Proceedings)* (Ant. N. Sakkoulas Publishers: Athens-Komotini, 1998) 23 at 25 (in Greek).

11 K. Kollias, Legal Opinion No. 31/ 1952, 3 Poinika Chronika 457.

12 See Court of Appeal of Athens 235/ 1920, ΛΑ′ Themis 484: 'it is not permitted to seize or adduce evidence of letters in court [...] and it is not possible to make any use of their content [...]. However, this strict version of the inviolability [of the right to secrecy of correspondence] doctrine does not apply in relation to letters in possession of the addressees who can adduce them as evidence [...]'. See also Arios Pagos 70/ 1891, Β′ Themis 345; Arios Pagos 169/ 1893, Δ′ Themis 388; Arios Pagos 76/ 1894, Ε′ Themis 278; Arios Pagos 23/ 1909, Κ′ Themis 130; Arios Pagos 96/ 1919, Λ′ Themis 298; The Court of First Instance of Athens 357/ 1923, ΚΓ′ Themis 14; Arios Pagos 347/ 1924, ΛΕ′ Themis 535; Arios Pagos 189/ 1933, ΜΔ′ Themis 724; Arios Pagos 102/ 1935, ΜΣΤ′ Themis 857; Arios Pagos 581/ 1939, ΝΑ′ Themis 181; Arios Pagos 861/ 1947, ΝΗ′ Themis 581.

13 N. Saripolos, *System of Constitutional Law* (Classic Legal Library: Athens-Komotini, 1987) 94; originally published in 1923 (in Greek).

The rise of telephone communication and greater availability of technology facilitating the covert recording of private conversations, telephone or other, in the 1950s led to an explosion in the use of covertly obtained recordings in civil and criminal trials.[14] It is at this time that *Arios Pagos* abandoned the rhetoric of evidential prohibitions inherent in constitutional rights, turning conformity with criminal law, rather than with the Constitution, into the main criterion for admissibility.[15]

More specifically, telephone taps and recordings of face-to-face private conversations were admissible in court under the condition that they had not been obtained by the commission of a criminal offence. Article 370A of the Penal Code (PC) proscribed the covert recording of conversations between third parties, but, crucially, this provision did not extend to recordings made by one of the parties to the conversation.[16] As a result, when it was one of the parties that covertly recorded the conversation without the consent of the other(s), the recording was admissible, since no criminal offence had been committed.[17] Such recordings were not barred by the Constitution either, after *Arios Pagos* held, in an important decision in 1969, that the right to secrecy of correspondence did not have horizontal effect; it limited the state only and did not apply to interference by private individuals.[18]

14 See A. Psarouda-Benaki, 'The Tape Recorder in the Criminal Trial and the Need to Protect Oral Speech' (1965) 15 *Poinika Chronika* 397 (in Greek).

15 A. Charalabakis, 'The Punishable Nature of Interceptions and the Procedural Use of their Product' (2002) 50 *Nomiko Bima* 1061 at 1065 (in Greek).

16 Arios Pagos 717/ 1984, 34 Poinika Chronika 1030 at 1031; discussed by Kaminis, above n. 10 at 28.

17 See Kaminis, above n. 10 at 29–30.

18 See Arios Pagos 60/ 1969, 17 Nomiko Bima 562. See also General Prosecutor of Arios Pagos, Legal Opinion No. 8/ 1972, 20 Nomiko Bima 1120; Arios Pagos 1002/ 1977, 27 Poinika Chronika 456. Many commentators argued, *contra*, that the act of covertly recording private conversations was always a violation of the Constitution, independently of whether it was the state or private individuals who were responsible for it. They were deducing from this that covertly obtained recordings should not be used in court. See K. Stamatis, Opinion of the Prosecutor of the Court of *Arios Pagos* in Arios Pagos 717/ 1984, 34 Poinika Chronika 1030 at 1033. See also Court of Appeal of Thessaloniki 189/ 1981, 32 Poinika Chronika 552 at 553, where the Court of Appeal held that 'a voice recording without the knowledge of the person whose words are recorded—irrespective of who undertakes it (a private individual or a public service, i.e. the military, the police etc.) and irrespective of its objective—constitutes an illegal means of evidence'.

Substantive law thus contributed to a regime of wide admissibility of tape-recorded conversations in criminal[19] and civil[20] trials, which remained intact until the beginning of the 1990s.

The theory of balancing

The majority of criminal law scholars in Greece have traditionally endorsed the 'theory of balancing' (*Abwägungslehre*), following German scholarship on this point. According to this theory, the exclusion of improperly obtained evidence must be determined upon a balancing of competing interests on a case-by-case basis.[21] Courts should exclude improperly obtained evidence only when the interest in not condoning rights-violations, by admitting evidence obtained in violation of individual rights, weighs more heavily than the interest in efficiently combating crime.[22] This balancing exercise gives courts some flexibility, allowing them to avoid 'predetermined legal formulae'[23] incapable of tracking the infinitely variable circumstances of relevant cases.

Since the balancing theory is apparently inconsistent with the idea that exclusion is inherent in constitutional rights, it is revealing to observe attempts to bring it

19 See Arios Pagos 85/ 1962, 12 Poinika Chronika 338; Arios Pagos 139/ 1963, 13 Poinika Chronika 345; Arios Pagos 571/ 1970, 21 Poinika Chronika 159; Arios Pagos 240/ 1974, 24 Poinika Chronika 53; Arios Pagos 717/ 1984, 34 Poinika Chronika 1030; Arios Pagos 1283/ 1985, 36 Poinika Chronika 283; Arios Pagos 26/ 1986, 34 Nomiko Bima 586; Judicial chamber of the Court of Appeal of Athens 187/ 1985, 33 Nomiko Bima 1467; Judicial chamber of the Court of First Instance of Kilkis 50/ 1986, 11 Armenopoulos 1002; Arios Pagos 1150/ 1989, 37 Nomiko Bima 1264.

20 Covertly obtained recordings were being regularly admitted mainly in divorce proceedings until the beginning of the 1990s. See Arios Pagos 673/ 1983, 14 Diki 445; Arios Pagos 381/ 1987, 36 Nomiko Bima 563. See also Charalabakis, above n. 15 at 1065; Tz. Iliopoulou-Stragga, 'The Use of Illegally Obtained Evidence to Prove the Defendant's Innocence after the Revision (2001) of the Constitution' (2002) 2 *Poinikos Logos* 2175 at 2180-1 (in Greek).

21 See N. Androulakis, *Fundamental Notions of the Criminal Process*, 2nd edn (Ant. N. Sakkoulas Publishers: Athens-Komotini, 1994) 181 (in Greek); Th. Dalakouras, 'Prohibited Evidence: Doctrinal Foundations of Evidential Prohibitions in the Criminal Process' in Hellenic Association of Penal Law (ΕΕΠΔ), *Evidence in the Criminal Process*, Proceedings of the 6th panhellenic conference (P. N. Sakkoulas: Athens, 1998) 60 (in Greek); N. Dimitratos, *Evidential Prohibitions in the Criminal Process*, Poinika No. 35 (Ant. N. Sakkoulas Publishers: Athens-Komotini, 1992) 39 (in Greek); A. Kostaras, 'Do the Ends Justify the Means? Or the Procedural Evaluation of Illegally Obtained or Illegally Used Criminal Evidence' (1984) *Efimerida Ellinon Nomikon* 169 at 178 (in Greek); S. Papageorgiou-Gonatas, 'The Problem of Illegally Obtained Indirect Evidence in the Criminal Process' (1989) 39 *Poinika Chronika* 545 at 554 (in Greek); Ch. Satlanis, *Tape Recordings as Evidence in the Criminal Process (A Parallel Contribution to the Evidential Prohibitions Doctrine)* Poinika No. 48 (Ant. N. Sakkoulas Publishers: Athens-Komotini, 1996) 57 (in Greek); D. Spinellis, 'Evidential Prohibitions in the Criminal Process' (1986) 36 *Poinika Chronika* 865 at 880 (in Greek); A. Tzannetis, 'Evidential Prohibitions and Alternative Legal Obtaining of Evidence' (1995) 35 *Poinika Chronika* 5 at 11 (in Greek).

22 See Androulakis, above n. 21 at 181.

23 See Kostaras, above n. 21 at 178.

within Hellenic constitutional doctrine. Some commentators argue that the Constitution itself dictates a balancing approach.[24] Nikolaos Androulakis noted, for example, that the 'revelation of truth in criminal trials as well as the discovery and punishment of crimes constitute principles of a constitutional nature'.[25] From this point of view, the pursuit of truth has a constitutional footing equal to that of individual rights enshrined in the Constitution. As a result—the argument goes—the conflict between the pursuit of truth and the protection of individual rights cannot be resolved *ex ante* and *in abstracto*, but only through a judicial balancing exercise *in concreto*.[26]

Yet this interpretation has a fundamental flaw, which Argirios Karras pinpointed with illuminating precision:

> The balancing exercise has already been conducted by the constitutional legislator. Its outcome is reflected in the Constitution itself or in other statutes, which sanction—directly or indirectly—the relevant evidential prohibitions. Thus, when an evidential prohibition is instituted—either constitutionally or through simple statutory provisions—the legal order accepts that this prohibition may render more difficult, or even impossible, the efficient administration of criminal justice and the pursuit of truth, and yet it proceeds to the introduction of this prohibition, having obviously first balanced the competing values and chosen the protection of a particular legal value over the efficient administration of criminal justice and the pursuit of truth [...] As a consequence, there can be no further balancing by the judge, otherwise the relevant provision [containing the evidential prohibition] is bypassed and the evidential prohibition is undermined [...] If a judge retains the discretion to decide in each case whether illegally obtained evidence can be used, it is possible that fundamental provisions [protective of the defendant] will be completely overturned.[27]

24 On the basis of article 96 para. 1 and article 25 para. 1 of the Constitution. See Androulakis, above n. 21 at 181; Spinellis, above n. 21 at 880; G. Triadafillou, 'Evidential Prohibitions and the Proportionality Principle' (2007) 57 *Poinika Chronika* 295.

25 Androulakis, above n. 21 at 181.

26 See Dalakouras, above n. 21 at 60.

27 A. Karras, *Criminal Procedural Law*, 2nd edn (Ant. N. Sakkoulas Publishers: Athens-Komotini, 1998) 640–1 (in Greek). With reference to secrecy of correspondence, Tsakirakis notes that 'the judge has no scope for his own balancing. He is entirely restricted by the Constitution'. See above n. 9 at 1006.

Karras's argument inevitably leads to automatic exclusion. It leaves no space for balancing and discretion,[28] striking a fatal blow to the 'theory of balancing'. Not everyone is persuaded by 'balancing' in any case.[29] Some commentators point to a serious risk of arbitrary decisions and lack of legal certainty as a result of balancing.[30] Considering these risks, even commentators adhering to balancing stress the importance of conducting the balancing exercise only in accordance with specific criteria, such as the seriousness of the crime, the gravity of the procedural violation, the reliability of the contested evidence, the need to protect the person who has been the victim of the procedural violation, the availability of other evidence or the possibility that the evidence in question could have been legally obtained.[31] Moreover, proportionality is seen as a key component of balancing.[32] In general, the view that only a structured discretion could achieve a compromise between flexibility and legal certainty is shared by supporters of the 'theory of balancing'.[33] Some of these commentators even maintain that certain rights cannot be subjected to balancing at all.[34] Others, however, reject balancing altogether, insisting that exclusion is inherent in certain constitutional rights.[35]

The rise of automatic exclusionary rules

Although Hellenic law on improperly obtained evidence developed exclusively through judicial interpretation[36] for most of the 20th century, Parliament's intervention was ultimately decisive, resulting in a solution diametrically opposed to the 'theory of balancing'. Faced with widespread use of telephone intercepts outside the court (by radio reporters, newspapers, etc.) and amidst intense political controversy,[37] Parliament introduced article 370Δ para. 1 of the Penal

28 Karras (above n. 27) recognised, however, that there is scope for balancing in cases of technical breaches of the Constitution.

29 See Kostaras, above n. 21 at 178.

30 See Tsakirakis, above n. 9 at 1004; Tzannetis, above n. 21 at 11.

31 See Dimitratos, above n. 21 at 51; Papageorgiou-Gonatas, above n. 21 at 559; Tzannetis, above n. 21 at 11.

32 See mainly Triadafillou, above n. 24. See also Kostaras, above n. 21 at 178.

33 Androulakis has recently noted that the theory is in need of 'doctrinal taming'. N. Androulakis, Foreword in Tz. Iliopoulou-Stragga, *Use of Illegally Obtained Evidence—The Evidential Prohibition of Article 19 para. 3 of the Revised Constitution* (Ant. N. Sakkoulas Publishers: Athens-Komotini, 2003) 18 (in Greek).

34 Dalakouras argued that the Constitution prohibited the use of confessions obtained through torture, lie detectors, truth serums or hypnosis as well as the use of tangible evidence covertly obtained through microphones, video or other surveillance equipment. See above n. 21 at 62.

35 See, e.g., Kaminis, above n. 10 at 37–41.

36 This is an interesting feature of the law on improperly obtained evidence in Greece, if one considers the preponderant role of the legislator in the civil law tradition. See generally R. David and C. J. Spinosi, *Les grands systèmes de droit contemporains* (Éditions Dalloz: Paris, 1992) 84.

37 See Tsakirakis, above n. 9 at 995 and 1007.

Code in 1991,[38] which extended criminal liability for covertly recording private conversations and acts not taking place in the public domain to include recordings made by a party to the conversation. This filled a substantial legislative gap that the courts had long exploited to secure the admission of covert recordings.[39] Crucially, a specific exclusionary rule was attached to this provision by article 370Δ para. 2 PC, prohibiting the use in any criminal proceedings, or in proceedings before an investigative or other public authority, of evidence obtained in violation of article 370Δ para. 1.

This was an absolute exclusionary rule that could 'guarantee more efficiently and *ex ante* the protection of privacy, without a balancing of competing interests by the court being necessary'.[40] In opting for such a radical solution, Parliament seemed determined to put an end to the use of illegally obtained tape-recordings in trials. In applying this rule, *Arios Pagos* held that 'the use of an illegally recorded conversation caused nullity of the judgment',[41] requiring the defendant's conviction to be quashed. Surprisingly, however, this exclusionary rule was abolished in 1993, only two years after coming into effect. In its place, Parliament introduced a criminal defence condoning the use in court of covertly obtained recordings when intended to protect 'justified interests' of the parties (article 370A para. 4 PC[42]). In so doing, Parliament reversed the position it had taken in 1991, and it looked like the end of the road for automatic exclusion.

However, Parliament's experimentations with the law of improperly obtained evidence continued through the 1990s. In 1996 article 177 para. 2 was inserted into the Code of Penal Procedure, mandating the exclusion of evidence obtained through the commission of a criminal offence. Most radically, in 2001 Parliament adopted article 19 para. 3 of the Constitution, expressly inserting an exclusionary rule into the constitutional text. Before examining these two provisions in detail, it is first necessary to describe the procedural context within which they function as an essential prelude to comparative analysis.

2. Excluding evidence in Continental unitary courts

The question of barring the fact-finder's access to improperly obtained evidence, while fundamental to Anglo-American law, is irrelevant to Continental

38 See article 31 para. 1 of Law 1941/ 1991.

39 See above at 184.

40 Th. Dalakouras, 'The Exclusionary Rule for Improper Audio and Video Recordings under Article 370Δ para. 2 of the Penal Code (article 31 of Law 1941/ 1991)' (1992) *Iperaspisi* 25 at 27 (in Greek).

41 Arios Pagos 589/ 1994, 42 Nomiko Bima 1059. See also Arios Pagos 9/ 1994, 44 Poinika Chronika 215.

42 Introduced with article 33 para. 8 of Law 2172/ 1993 and amended with article 12 para. 8 of Law 3090/ 2002.

jurisprudence. The division between bifurcated and unitary courts is crucial to understanding this difference of perspective.[43] In Continental unitary courts, the fact-finder is a professional judge who decides both the admissibility of evidence and the question of guilt. In this context, 'exclusion' of improperly obtained evidence simply means the fact-finder is obliged to ignore the tainted evidence when he decides on guilt; exclusion has little in common with insulating the fact-finder from accessing improperly obtained evidence. In Anglo-American trials the emphasis is placed on averting contamination of the fact-finding process by tainted evidence. More specifically, in Anglo-American bifurcated courts the trial judge decides the admissibility of evidence in a *voir dire* or pre-trial hearing and the jury determines guilt without accessing evidence that has been 'excluded' in the literal sense of the word.

There is no *voir dire* when parties seek to adduce evidence during the trial phase in Greece. Professional judges who finally determine the issue of guilt also decide the admissibility of evidence. A ruling that certain evidence is prohibited as a consequence of falling within the scope of an exclusionary rule simply means judges have to disregard such evidence when they reflect on the question of guilt. If they do base a finding of guilt on prohibited evidence, the conviction is null and void, and should be automatically quashed upon appellate review.

The question that inevitably arises is how realistic it is to expect that this duty to disregard improperly obtained evidence will prevent the fact-finder from relying on such evidence when deciding on guilt. Mirjan Damaška argued that 'where the same individuals decide the admissibility of evidence and the weight it deserves, the taint from the forbidden but persuasive information cannot be avoided: it always affects the decision maker's thinking'.[44] Exclusion under these circumstances 'easily produces an excursion into unreality',[45] so that 'the occasional identity in the wording of Continental and Anglo-American exclusionary rules can thus be deceptive'.[46]

Damaška's analysis implies that, irrespective of how far-reaching they may appear to be, in reality Continental exclusionary rules offer only hollow protections. However, this criticism loses some of its force when one considers that Continental courts have to explain their findings through reasoned opinions. Since professional judges have to indicate the evidentiary basis for their findings of

43 See M. Damaška, *Evidence Law Adrift* (Yale University Press: New Haven & London, 1997) 46.
44 Ibid. at 47.
45 Ibid. at 48.
46 Ibid. at 50. See also M. Damaška, 'Free Proof and its Detractors' (1995) 43 *American Journal of Comparative Law* 343 at 350–2.

guilt, appellate courts are well equipped to check whether prohibited evidence has been relied upon. An efficient system of appellate review thus reduces the significance of procedural divergence between Anglo-American and Continental systems in relation to improperly obtained evidence. Having said that, the risk remains that the opinion may omit reference to evidence that judges have taken into account in spite of their duty to disregard. Referring specifically to the operation of exclusionary rules in Germany, Craig Bradley drew attention to cases where 'the suppressed evidence is not obviously necessary to support a finding of guilt but is in reality the dispositive factor in the minds of the fact finders'.[47]

On the other hand, this criticism applies only to situations where a party seeks to have evidence admitted during the trial phase where there has been no previous opportunity to challenge its admissibility. Continental procedure normally provides parties with the opportunity to contest the admissibility of evidence at the pre-trial phase, usually by an application to the judicial chamber responsible for supervising the pre-trial investigation. In Greece, judicial chambers of courts of first instance[48] have jurisdiction to nullify irregular procedural acts conducted during the pre-trial phase.[49] If an act is conducted in breach of procedural standards, the act is null and void, and consequently without any legal effect.[50] For example, if the judicial chamber finds that a police search has been conducted without the appropriate authorisation, the search will be pronounced null and void and any evidence discovered during that search will not be admissible. Since inadmissible evidence has to be suppressed from the investigation dossier, judicial chamber review during the pre-trial phase can be regarded as the equivalent of the Anglo-American *voir dire* or pre-trial hearing.[51]

47 Bradley, 'The Exclusionary Rule in Germany', above n. 4 at 1064. For similar criticism of exclusionary rules in Italy and Greece see E. Grande, 'Italian Criminal Justice: Borrowing and Resistance' (2000) 48 *American Journal of Comparative Law* 227 at 248; and Dimitratos, above n. 21 at 71, respectively.

48 The chamber is a panel of three professional judges of a court of first instance (articles 5 para. 1 and 305 of the Code of Penal Procedure: 'CPP'). It decides on committal to trial following the culmination of the investigation phase. The most usual avenue for a procedural act to be nullified is by appealing the judicial chamber decision that takes the case to trial. However, a nullity application can also be made during the investigation phase, prior to and independently of the committal decision. See judicial chamber of the Court of Appeal of Athens 1716/ 2000, 3 Poiniki Dikeosini 838. The judicial chamber most often decides in the absence of the parties. For criticism see Androulakis, above n. 21 at 323.

49 Article 176 CPP.

50 Articles 170–176 CPP.

51 It is equally important that the decision of the judicial chamber is subject to appellate review by a judicial chamber of the Court of Appeal (article 478 CPP). *Arios Pagos* also reviews pronouncements of nullity (article 482 CPP), even *ex officio*, at the cassation level (article 171 CPP).

3. Excluding improperly obtained evidence in Greece: legislation and jurisprudence

Greece has developed two separate doctrinal bases for excluding improperly obtained evidence in criminal trials. The first is located in the Code of Penal Procedure, whereas the second exclusionary jurisdiction is to be found in the text of the Constitution. This section examines the scope and rationale of each exclusionary rule, before turning to consider how these legislative provisions have been developed in practice by the courts.

The exclusionary rule for evidence obtained by the commission of criminal offences

Article 177 para. 1 of the Code of Penal Procedure sanctions the principle of freedom of proof, which has the dual meaning of freedom to use any available evidence and freedom to evaluate evidence without being restricted by technical evidentiary rules.[52] In 1996, however, Parliament provided for a specific exception to this principle by inserting a second paragraph to article 177:

> Evidence obtained by [the commission of] criminal offences or through such offences will not be considered with regard to the pronouncement of legal guilt, the imposition of criminal punishment or the determination of restrictive measures, unless [the process concerns] crimes where maximum punishment is life imprisonment and the court makes a judgment that specifically justifies [the consideration of such evidence].[53]

Article 177 para. 2 introduced a rule of automatic inadmissibility making the commission of criminal offences the sole criterion for exclusion.[54] With the exception of 'life imprisonment offences',[55] the rule is wide in scope, at least in theory, as it is not limited to specified offences.[56] Moreover, this rule applies to all

52 A. Karras, 'Free Evaluation of Proof and "Cassation Court" Review' in Hellenic Association of Penal Law (ΕΕΠΔ), above n. 21 at 9.

53 Introduced with article 2 para. 7 of Law 2408/ 1996.

54 Whether the criminal offence has been committed is determined at the trial in which a party seeks to adduce the relevant evidence. The coincidence of criminal prosecution against the person who is accused of having committed this offence does not delay determination of the admissibility issue (see article 177 para. 2 CPP *in fine*).

55 Provision of a maximum of 'life imprisonment' is a rarity in Hellenic law. The majority of serious offences provide for a maximum of 20 years' imprisonment. See article 52 PC.

56 In reality, however, its use has been limited to offences against the secrecy of correspondence, notably the offence punished by article 370A PC.

stages of the criminal process and endorses the 'fruit of the poisonous tree' doctrine.[57]

Article 177 para. 2 is a particularly wide extrinsic exclusionary rule: 'a rule rejecting probative information for the sake of values unrelated to the pursuit of truth'.[58] Admitting evidence obtained by the commission of criminal offences arguably undermines the values implicit in these prohibitions. When constitutional values are implicated in criminal law, the exclusion of evidence vindicates the constitutional values underpinning relevant offences. Thus, the exclusion of evidence obtained through a violation of constitutionally protected private correspondence punishable by criminal law seeks to vindicate the constitutional right to secrecy of correspondence.

Georgios Kaminis argues that protecting the integrity of the criminal justice system is the main rationale behind this exclusionary rule. Taking his lead from the 'life imprisonment offences' exception, Kaminis reasons that 'the integrity [of the criminal justice system] is at stake when evidence obtained by illegal acts of private parties or state authorities is used in a criminal process. It is equally at stake though when defendants guilty of serious crimes are acquitted'.[59] However, this interpretation underplays the emphasis placed on constitutional rights during the parliamentary debates preceding the adoption of article 177 para. 2, and is contradicted by the explicitly rights-centred approach of the text. Evidence is automatically excluded, except with regard to 'life imprisonment offences', irrespective of the impact of an acquittal on the integrity of the criminal justice system. *Arios Pagos* has confirmed that article 177 para. 2 serves to protect individuals' fundamental rights in priority to the pursuit of truth and the efficient administration of justice.[60] Kaminis does not deny this, but rather argues that 'the protection of individual rights does not constitute the *main*[61] objective of the evidential prohibition' in article 177; instead, this objective 'is realised indirectly and as a reflection [of protecting integrity] only'.[62]

57 See N. Dimitratos, 'The Evolution of the Institution of Evidential Prohibitions in Hellenic Criminal Procedural Law—Simultaneously, a Comparative Review of the Correspondent American and German Law' (2001) 51 *Poinika Chronika* 5 at 11 (in Greek); Karras, above n. 27 at 638; A. Tzannetis, 'The Unlawful Obtaining of Evidence (Interpretative Approach of Article 177 para. 2 of the Code of Penal Procedure)' (1998) 48 *Poinika Chronika* 105 at 107 (in Greek).

58 Damaška, above n. 43 at 12.

59 Kaminis, above n. 10 at 280.

60 Arios Pagos 1351/ 1997, 48 Poinika Chronika 965.

61 My emphasis.

62 Kaminis, above n. 10 at 278.

A rule that renders the commission of criminal offences the *only* criterion for exclusion entails that unconstitutionally obtained evidence might still be admissible in cases where no criminal offence has been committed. This is problematic, given that 'the constitutional protection of individual rights and the criminal law protection of corresponding legal values do not necessarily coincide'.[63] In other words, an act that violates the Constitution is not always punishable by criminal law.[64] For this reason, an exclusionary rule that revolves *exclusively* around criminal acts may be letting unconstitutional acts slip through its protective net.

In this regard, article 177 para. 2 arguably fails to realise its intended objectives. This provision was introduced into Parliament by Evangelos Venizelos, the eminent Professor of Constitutional Law and, at that time, Minister of Justice. Venizelos pointed out that the admissibility of unconstitutionally obtained recordings of private conversations should reflect the original position of *Arios Pagos* concerning unconstitutionally seized letters.[65] He argued that 'evidential prohibitions stem from constitutional provisions and from provisions contained in international documents for the protection of individual rights'.[66] He added that constitutional guarantees were deprived of substance if they did not lead to evidential prohibitions.[67] But in the event, article 177 para. 2 was tied to the protection of values preserved by criminal law, which fails to give the provision its full effect in protecting constitutional rights.

For example, article 177 para. 2 is entirely pre-empted when the criminal offence by which the evidence has been obtained can be justified or excused under the application of a criminal law defence, such as the defences of necessity or self-defence. The absence of legal guilt in such a case[68] means no offence has been committed and, therefore, the evidence will be admitted irrespective of whether it has been obtained by the violation of a constitutional right. A classic hypothetical posits the victim of blackmail who secretly records her blackmailer's threats. If the act of recording this conversation can be justified as self-defence (and therefore

63 D. Spinellis, 'Legal Values and their Importance in the Modern Teaching of Criminal Law' (1971) 21 *Poinika Chronika* 812 (in Greek). See also N. Livos, 'The Penal Protection of Traffic Data of Telecommunications' (1997) 47 *Poinika Chronika* 737 at 742 (in Greek).

64 Kaminis, above n. 10 at 281.

65 Parliamentary Debates, Proceedings of May 7, 1996, p. 6042; May 9, 1996, p. 6149.

66 Ibid. May 9, 1996, p. 6149.

67 Ibid.

68 The judgment as to whether the supposed criminal offence can be justified under a criminal defence is made in the course of the trial in which the party seeks to adduce the evidential item in question.

non-criminal), use of the evidence thus obtained would be admissible at trial despite its having been procured through the violation of a fundamental constitutional right.[69] This illustrates why, in a legal system prioritising constitutional rights, it does not make sense to confuse the separate issues of criminal liability with the admissibility of improperly obtained evidence.

To my knowledge, however, there is no reported case where illegally obtained evidence was admitted as a result of the operation of a general criminal law defence. The true dimensions of the problem become more apparent when the partial defence applicable to illegal telephone intercepts or recordings of face-to-face private conversations is considered. Thus, while the use of such intercepts is proscribed by article 370A para. 3 of the Penal Code, para. 4 of the same article states that the use of illegal intercepts is not 'wrong' when the use has taken place before a judicial or other investigative authority for the protection of a justified interest that could not be protected otherwise. Given the breadth of the notion of 'justified interest', this provision might considerably circumscribe the scope of the exclusionary rule under article 177 para. 2.[70]

Equally restrictive is the 'life imprisonment offences' exception, covering offences such as murder, aggravated robbery, aggravated forms of drug offences, arson, causing explosions and constructing or possessing explosives. In light of the seriousness of the offences punished with life imprisonment, discretionary exclusion substitutes for the automatic exclusionary rule. Again, however, this exception runs contrary to the protection of constitutional rights. The Constitution does not distinguish between individuals who are charged with serious crimes and those who are not. It protects rights of individuals in general. In fact, it is in relation to serious crimes, with correspondingly severe penalties, that constitutional protection is most needed.[71]

69 See generally Dimitratos, above n. 57 at 13; Livos, above n. 63 at 747; Tzannetis, above n. 57 at 107.

70 See, e.g., Arios Pagos 2383/ 2003, 3 Poinikos Logos 2556. Applying article 370A para. 4, *Arios Pagos* held that the use of intercepts *in order to prove the guilt of the defendant* was a justified interest that could not be protected otherwise. Such use did not amount to the criminal offence provided by article 370A para. 3 and article 177 para. 2 did not apply. The evidence had therefore rightly been admitted.

71 See A. Ashworth, 'Excluding Evidence as Protecting Rights' [1977] Crim LR 723; A. Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell: London, 2002) 112. See also Mirfield, above n. 3 at 31–3, demonstrating that a 'serious offences' exception could not be justified under any of the exclusionary principles. See *contra* J. Kaplan, 'The Limits of the Exclusionary Rule' (1974) 26 *Stanford Law Review* 1027 at 1046–9.

All in all, article 177 para. 2 is marked by considerable contradictions. It indicates that in 1996 Parliament wanted to take a radical step in the direction of automatic exclusion, but was also influenced by public interest considerations that would necessarily qualify the scope for exclusion. This resulted in a rule that generally puts rights first, but also provides for important exceptions, with the further potential for confusion and uncertainty.

The constitutional exclusionary rule for violations of the right to privacy

The 2001 revision of the Constitution revolved around the protection of individual rights,[72] with the right to privacy a notable area of significant developments.[73] In looking for ways to enforce this right, Parliament introduced article 19 para. 3 of the Constitution:

> Use of evidence acquired in violation of the present article [article 19 para. 1] and of articles 9 and 9A is prohibited.

Articles 19 para. 1, 9 and 9A of the Constitution, respectively, protect the right to secrecy of correspondence, the sanctity of a person's home and inviolability of his private and family life, and place restriction on the use of his personal data. The use of evidence obtained in violation of any of these broadly-based privacy rights (privacy *lato sensu*) is now constitutionally prohibited. The exclusionary rule contained in article 19 para. 3 is an important innovation, when viewed in comparative perspective, since it simultaneously possesses the following three characteristics: it is constitutional, automatic and absolute.

First, the fact that the exclusionary rule is now part and parcel of the Constitution means that the rule has become 'fundamental law' (higher order law) and cannot be abolished by statute or other act of Government.[74] Instead, any statutory

72 Fourteen out of the 22 articles of Part B of the Constitution have been amended. See also K. Chrisogonos, *Individual and Social Rights*, 2nd edn (Ant. N. Sakkoulas Publishers: Athens-Komotini, 2002) 12 (in Greek).

73 An innovative right to be 'protected from the collection, processing and use, especially by electronic means, of personal data' (article 9A) has been added to the Constitution. Likewise, article 19 para. 2 provided for the institution of an independent authority for the protection of secrecy of correspondence.

74 Abolition or amendment is possible only through the particularly complex process of constitutional revision. See article 110 of the Constitution. The Constitution of 1975 was revised twice, in 1986 and 2001, and is currently undergoing a new revision process.

legislation infringing this rule must be amended.[75] At a more abstract level, there is a strong symbolism attached to the incorporation of this rule in the constitutional text. Furthermore, exclusion under article 19 para. 3 is automatic. The court does not have any discretion to admit evidence obtained in breach of the right to privacy. The rule of exclusion must be applied mechanically once the relevant constitutional violation has been established.[76] Finally, the exclusionary rule is absolute.[77] The alternative of a less rigid rule was discussed in Parliament, but in the interests of more effective constitutional rights protection the balance tipped in favour of an absolute standard without any exceptions.[78]

The rule applies to all stages of the criminal process as well as to civil and administrative proceedings,[79] and to derivative evidence. Violations by private individuals are covered no less than violations of constitutional rights by the state, since constitutional rights in Greece apply *erga omnes*.[80] This is of great significance for Continental criminal procedure given that private individuals—especially crime victims—actively participate in criminal proceedings against the defendant as

75 E. Venizelos, *'The Constitutional Acquis'—The Constitutional Phenomenon in the 21st Century and the Contribution of the Revision of 2001* (Ant. N. Sakkoulas Publishers: Athens-Komotini, 2002) 148 (in Greek). Following the introduction of article 19 para. 3 of the Constitution, the Authority for the Protection of Personal Data (APPD) held that the 'life imprisonment offences' exception of article 177 para. 2 CPP and the partial defence of article 370A para. 4 PC should be abolished. See APPD 83/ 2002, 53 Poinika Chronika 80. These provisions are no longer compatible with the Constitution. See Charalabakis, above n. 15 at 1067; G. Kaminis, 'The Problem of Illegally Obtained Evidence in the Criminal Process after the Revision of Article 19 of the Constitution' in Volume in Honour of Ioannis Manoledakis, *Democracy—Liberty—Security* (Sakkoulas Editions: Athens-Thessaloniki, 2005) 337 at 345–60 (in Greek); D. Kioupis, Comment on Arios Pagos 1317/ 2001, 1 *Poinikos Logos* 1822 at 1829 (in Greek); G. Tsolias, Comment on Arios Pagos 1568/ 2004, (2005) 8 *Poiniki Dikeosini* 295 at 297–8 (in Greek). See *contra* Triadafillou, above n. 24, who argues that article 370A para. 4 is not incompatible with article 19 para. 3 of the Constitution.

76 Of course, there is discretion as to defining the scope of the right to privacy. The fact-finder, who decides both the question of admissibility and the question of guilt, must first decide whether a violation of the right to privacy has occurred.

77 Commentators agree on this point. See K. Kokkinakis, 'The Importance of Article 19 para. 3 for the Criminal Process' (2001) 4 *Poiniki Dikeosini* 876 (in Greek); X. Kontiadis, *The New Constitutionalism and Fundamental Rights after the Revision of 2001* (Ant. N. Sakkoulas Publishers: Athens-Konotini, 2002) 159 (in Greek); S. Paulou, A. Fountedaki and G. Dimitrainas, 'Evidential Prohibitions and Adoption' (2002) 5 *Poiniki Dikeosini* 915 at 921 (in Greek); S. Papageorgiou-Gonatas, 'Evidential Prohibitions as Expressions of Constitutional Mandates' (2003) 3 *Poinikos Logos* 17 at 25 (in Greek); Tsolias, above n. 75 at 298; Venizelos, above n. 75 at 147.

78 See Commission for the Revision of the Constitution, Proceedings of September 13, 2000, cited by Tsiris, above n. 9 at 72–3. See also Kontiadis, ibid. at 158–9.

79 Venizelos, above n. 75 at 148.

80 Article 25 of the Constitution states that constitutional rights 'also apply to relations between private individuals [...]'. See, in that regard, D. Giannoulopoulos, 'The Illusion of Privacy' (2006) 156 *New Law Journal* 572.

'civil parties'[81] and can submit incriminating evidence to the court. Furthermore, the exclusionary rule applies even in cases where evidence has been obtained through a violation of the right to privacy of a person other than the defendant.[82] Finally, a conviction relying on evidence obtained in violation of the right to privacy will be quashed upon appellate review on grounds of nullity. When a conviction is quashed, the court will often order a new trial.

Thus, article 19 para. 3 gives a categorical, and novel,[83] answer to the 'perennial dilemma'[84] at the centre of the debate on improperly obtained evidence. It puts primary emphasis on the protection of rights, communicating the idea that the pursuit of truth, though cardinal, is not an absolute principle of criminal procedure. More specifically, it signals that the right to privacy cannot be sacrificed in the name of the efficient investigation of crime, which must be pursued within the parameters prescribed by the Constitution.[85] Article 19 para. 3 is a means to 'reinforce the efficacy of constitutional provisions protecting private life',[86] reflecting the dominant view among Greek scholars that the exclusion of unconstitutionally seized evidence is inextricably linked with the protection of constitutional rights.[87] Article 19 para. 3 translates the ideology of the protective principle into concrete practice.

Yet, for all its progressive character and wide scope, article 19 para. 3 is at the same time unduly narrow. The rule applies only to violations of privacy, while the admissibility of evidence obtained in violation of other constitutional rights turns either on the application of article 177 para. 2 of the Code of Penal Procedure or judicial interpolation of an evidential prohibition into particular rights. Treating privacy violations differently from other constitutional violations is not easily justified. The right to privacy is a 'qualified right' and, accordingly, there is no

81 See articles 63–70 CPP.

82 Papageorgiou-Gonatas, above n. 77 at 25–6.

83 Iliopoulou-Stragga observes that article 19 para. 3 is a 'European, if not universal, innovation'. See above n. 20 at 2219.

84 See A. Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press: Oxford, 1989) 343.

85 For example, article 19 para. 1 of the Constitution provides for interference with the right to secrecy of correspondence 'for reasons of national security or for the purpose of investigating especially serious crime', but the interference must be taking place in accordance with the relevant statutory scheme (Law 2225/ 1994 as amended with Law 3115/ 2003). This means that evidence obtained through interceptions authorised under this scheme is admissible. Article 19 para. 3 is not a blanket rule of inadmissibility with the potential to 'harm' law enforcement beyond the extent mandated by the Constitution.

86 Kontiadis, above n. 77 at 159.

87 See Dalakouras, above n. 40 at 30; Spinellis, above n. 21 at 879; Dimitratos, above n. 21 at 31; Kostaras, above n. 21 at 176; Papageorgiou-Gonatas, above n. 77 at 21; Paulou, Fountedaki and Dimitrainas, above n. 77 at 920; Satlanis, above n. 21 at 20–2.

logic in protecting it more rigidly than 'absolute rights'[88] such as the right against torture[89] or the right to respect for human dignity.[90] The effect of article 19 para. 3 ought to be extended through teleological interpretation to include the violation of any constitutional right. This would also pre-empt a possible argument *a contrario* that the use of evidence obtained in violation of constitutional rights other than the right to privacy is permitted.[91] Meanwhile, the combination of article 19 para. 3 of the Constitution and article 177 para. 2 of the Code of Penal Procedure constitutes a stringent mandatory exclusion regime encompassing both illegally and unconstitutionally obtained evidence.

Exclusion in practice: judicial developments

The use of evidence obtained in violation of the right to privacy led *Arios Pagos* to quash a number of convictions from the mid 1990s onwards.[92] The turning point was in 2001 when, prior to the introduction of article 19 para. 3, *Arios Pagos*, in plenary, strongly condemned the use of such evidence.[93] The court read an evidential prohibition into the Constitution, as it had previously in cases of improperly seized letters. This decision set the tone for the case law that followed.

In a case in 2002 where the defendant had been convicted of bribery on the basis of a tape-recorded conversation, the conviction was quashed since it was not clear whether the recording had been lawfully obtained.[94] This case demonstrates that the defendant bears no burden of proof on this issue. Any doubts as

88 For a discussion of the division between 'absolute' and 'qualified' rights in the context of the European Convention, see generally A. Ashworth and M. Redmayne, *The Criminal Process*, 3rd edn (Oxford University Press: Oxford, 2005) 35–7; F. Sudre, 'La dimension internationale et européenne des libertés et droits fondamentaux' in R. Cabrillac, M. A. Frichon-Roche and T. Revet (dir.), *Libertés et droits fondamentaux*, 11th edn (Editions Dalloz: Paris, 2005) 32 at 41–4.

89 Article 7 para. 2 of the Constitution.

90 Article 2 para. 1 of the Constitution.

91 See D. Giannoulopoulos, Comment on *Khan* v *United Kingdom* (2001) 6 *Poiniki Dikeosini* 614 at 628 (in Greek).

92 See Arios Pagos 9/ 1994, 44 Poinika Chronika 215, where *Arios Pagos* quashed a conviction for rape and ordered a new trial as a result of the use in court of recordings of telephone conversations between the victim and the defendant. The recordings had been surreptitiously obtained by the victim. See also Arios Pagos (in plenary) 17/ 1993, 43 Poinika Chronika 1105 (regarding exclusion in the context of an administrative process); Arios Pagos 215/ 2000, 50 Poinika Chronika 688.

93 *Arios Pagos* held that the administration of justice did not justify the use of unconstitutional means, that the surreptitious recording of a conversation violated the right to secrecy of correspondence and, therefore, that its evidential use was constitutionally prohibited. Arios Pagos 1/ 2001, 49 Nomiko Bima 1803. See also Charalabakis, above n. 15 at 1066–7.

94 See Arios Pagos 297/ 2002, 3 Praksi & Logos tou Poinikou Dikeou 33. For the offence of bribery, see articles 235-237 PC.

to the provenance of contested evidence work in his favour.[95] In another case, *Arios Pagos* quashed a conviction for insurance fraud,[96] where a witness had installed a listening device that allowed her to eavesdrop on the defendant's discussions from a distance of a hundred metres.[97] The conviction was quashed on grounds of nullity, since the witness's testimony was derivative evidence arising from interference with the defendant's constitutionally protected private conversations. The time limits for prosecution having elapsed in this case, moreover, a new trial could not be ordered.[98] In pre-trial proceedings in 2005, the judicial chamber of the Court of Appeal of Piraeus had committed the defendant to be tried on forgery charges,[99] relying on information derived from a recorded conversation between the civil party and an employee of the defendant. Even though the recording had been obtained by an infringement of the rights of a third party—the rights of an employee of the defendant—*Arios Pagos* reversed the decision to commit for trial, since the use of the information obtained via the recording had breached article 177 para. 2 of the Code of Penal Procedure.[100] Finally, in another case from 2005, the judicial chamber of the Court of Appeal of Athens had committed the defendant to be tried for counselling fraud,[101] relying on an illegally intercepted conversation between the defendant's spouse and a co-defendant.[102] The evidence had again been obtained in violation of the right to privacy of a third party, and *Arios Pagos* reversed the decision. It is apparent from these decisions that the courts have applied the exclusionary rules rigidly in several cases.

However, the courts have also sought to introduce exceptions to automatic exclusion or to avoid its application altogether in some other cases. Improperly obtained *exculpatory* evidence has proved to be a particularly challenging issue. *Arios Pagos* initially interpreted article 177 para. 2 as being compatible with the defendant's reliance on such evidence.[103] Hellenic scholarship concurred on this point.[104] However, the introduction by article 19 para. 3 of the Constitution of an

95 The view is taken in Greece that the *in dubio pro reo* principle and the presumption of innocence militate against burdens of proof, even evidential ones. See Androulakis, above n. 21 at 192–7.

96 Article 388 para. 1 PC.

97 See Arios Pagos 1568/ 2004, 8 Poiniki Dikeosini 295.

98 The time limit for the prosecution of such an offence is five years. See article 111 para. 3 PC.

99 Article 216 PC.

100 See Arios Pagos 1622/ 2005, 56 Poinika Chronika 426. The case was sent back to the judicial chamber to decide whether to proceed to trial or not.

101 See articles 386 and 46 para. 1(a) PC.

102 See Arios Pagos 2035/ 2005, 56 Poinika Chronika 538.

103 Arios Pagos 1351/ 1997, 48 Poinika Chronika 965.

104 See Androulakis, above n. 21 at 182; Dalakouras, above n. 21 at 55; Dimitratos, above n. 21 at 52; Kaminis, above n. 9 at 518–19; Karras, above n. 27 at 641; Kostaras, above n. 21 at 180.

ostensibly *absolute* exclusionary rule was seen by some commentators as going so far as to prohibit the use of unconstitutionally obtained exonerating evidence.[105] Nevertheless, *Arios Pagos* recently held, rightly in my view, that preventing a defendant from using evidence that could prove his innocence would violate the overarching constitutional right to respect of human dignity (article 2 para. 1 of the Constitution) and that courts should therefore admit exonerating evidence, albeit subject to certain conditions. More specifically, *Arios Pagos* mentioned a proportionality requirement, that the gravity of the offence should be taken into account and, most important, that the evidence in question should be the only exonerating evidence available to the defendant.[106] This decision demonstrates the need to balance the constitutional right to privacy with respect for human dignity in such cases.

This balancing exercise is further complicated when the exonerating evidence that the defendant (D1) seeks to adduce has been obtained by violating the right to privacy of a co-defendant (D2), for example when D1 has covertly recorded a conversation with D2, which is exonerating for D1 but inculpates D2. *Arios Pagos* indicates that such evidence is admissible: the fact-finder should take the exonerating part into account when deciding on D1's guilt, but must then disregard the incriminatory part when deciding on D2's guilt.[107] However, D1 still has to argue that the evidence he seeks to adduce is the only exonerating evidence available to him.[108] This jurisprudence effects a delicate compromise between respecting D1's right to human dignity, which would be seriously undermined if he were wrongly convicted as a result of not being able to adduce exonerating evidence, and D2's right to privacy, which would be equally damaged if evidence obtained in breach of the relevant constitutional protection were admitted. Whether the fact-finder can realistically be expected to disregard the incriminating part of the evidence once he becomes aware of it is another question, which in these circumstances cannot be addressed through suppression of the evidence.

This is a rare example of an exception to evidentiary exclusion inspired by the need to safeguard the rights of the defendant. It contrasts with other *Arios Pagos* jurisprudence tending to undermine the protective effect of article 177 para. 2 of the Code of Penal Procedure and article 19 para. 3 of the Constitution. In a 2001

105 See, e.g., Iliopoulou-Stragga, above n. 20 at 2204.

106 Arios Pagos 42/ 2004, 4 Poinikos Logos 66.

107 See Arios Pagos 1351/ 1997, 48 Poinika Chronika 965.

108 See Arios Pagos 42/ 2004, 4 Poinikos Logos 66. In this case a covertly recorded tape exonerating D1 was not admitted, since D2 objected to its use and D1 had in fact submitted to the court other exonerating evidence.

case,[109] a video camera had been covertly installed in church premises where money and other items dedicated to the church were kept. A priest was charged with theft and 15 videotapes were submitted to court showing him stealing the money. In a similar case decided in 2004, a video camera had been secretly installed in a shop. Twenty-eight video stills were produced in court showing an employee committing theft.[110] In both cases, *Arios Pagos* concentrated on whether the evidence had been obtained by the commission of the offence of 'improperly recording non-public acts' (article 370A para. 2 PC). It gave a negative answer to this question: the relevant acts were not non-public (private) since they were conducted 'in the context of administrative duties [which were] subject to public control and public criticism'.[111] Article 177 para. 2 consequently did not apply and use of the recordings was lawful.

These decisions have rightly been criticised for putting forward a restrictive interpretation of the notion of private life.[112] Their effect is that conduct related to occupational activities falls outside the protective scope of the right to privacy, irrespective of whether such conduct can be regarded as 'private' in a wider sense.[113] This may be an example of inflexible exclusionary rules leading to narrow interpretations of the constitutional rights they are supposed to protect, calling to mind an important criticism of automatic exclusion.[114] One might respond by pointing out that inflexible exclusionary rules oblige the courts to reflect openly on the extent of constitutional limits, rather than, hypocritically, subscribing to constitutional rights rhetoric while validating the use of evidence obtained in violation of these very rights under a discretionary admissibility regime.

Finally, it can be argued that groundbreaking though it may be in theory, article 19 para. 3 has not yet had the dramatic impact in practice one would have expected to see. In fact, courts have blatantly ignored it in some cases, applying

109 Arios Pagos 1317/ 2001, 1 Poinikos Logos 1822.

110 Arios Pagos 874/ 2004, 5 Praksi & Logos tou Poinikou Dikeou 229.

111 Arios Pagos 1317/ 2001 and Arios Pagos 874/ 2004, above nn. 109 and 110 respectively.

112 Iliopoulou-Stragga, above n. 20 at 2201; Kioupis, above n. 75 at 1826.

113 It could be argued that in the above cases the recording was conducted in a place where the public had no or limited access, implying that acts taking place there were of a private nature. See Kioupis, ibid. at 1827.

114 See generally A. R. Amar, 'Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)' (1997) 20 *Harvard Journal of Law & Public Policy* 457 at 465; Mirfield, above n. 3 at 321–2; D. Ormerod, 'ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches' [2003] Crim LR 61 at 72; W. Pizzi, *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (New York University Press: New York and London, 1999) 39. See also M. R. Wilkey, 'A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak' (1979) 62 *Judicature* 351 at 355, who points to 'one most salient vice of the exclusionary rule—[...] the judges are corrupted by the exclusionary rule'.

article 177 para. 2 instead.[115] In addition, there is *obiter dicta* to the effect that the 'life imprisonment offences' exception of article 177 para. 2 remains valid.[116] However, this exception is incompatible with article 19 para. 3 and should be abolished.[117] More specifically, the starting point should be that article 19 para. 3 prevails over any conflicting statutory provision. When dealing with violations of the right to privacy, courts should apply article 19 para. 3 directly rather than resort to article 177 para. 2. Post 2001, the Constitution itself prohibits the use of evidence obtained in violation of the right to privacy, independently of whether that violation also constitutes a criminal offence.

4. Improperly obtained evidence in England and Wales: discretionary exclusion and stays of the proceedings for abuse of process

English law on improperly obtained evidence is notoriously difficult to decipher. Its discretionary nature leads to inconsistent case law and lack of legal certainty.[118] Yet, it is well documented in relation to discretionary exclusion under s. 78(1) of the Police and Criminal Evidence Act (PACE) 1984 that reliability considerations reign supreme[119] and that protection of rights is peripheral to pursuing accurate fact-finding.[120]

Nowhere is this more evident than regarding evidence obtained in violation of Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private life, home and correspondence.[121] Recent case law illustrates that, in spite of the 'incorporation' of the Convention, such evidence

115 See Arios Pagos 874/ 2004, 5 Praksi & Logos tou Poinikou Dikeou 229. *Arios Pagos* made no reference to article 19 para. 3. It investigated whether the twenty-eight video stills admitted had been obtained by the commission of a criminal offence instead of asking whether their obtaining had been in violation of the constitutional right to privacy. See also 2383/ 2003, 3 Poinikos Logos 2556.

116 Arios Pagos 42/ 2004, 4 Poinikos Logos 66; Arios Pagos 1622/ 2005, 56 Poinika Chronika 426.

117 See above n. 75.

118 See Auld LJ, *Review of the Criminal Courts of England and Wales* (2001) ch. 11, para. 108; P. Roberts and A. Zuckerman, *Criminal Evidence* (Oxford University Press: Oxford, 2004) 165.

119 See generally A. Choo and S. Nash, 'What's the Matter with Section 78?' [1999] Crim LR 929 at 933; J. Spencer, 'Bugging and Burglary by the Police' (1997) 56 *Cambridge Law Journal* 6 at 7; S. Uglow, 'The Human Rights Act 1998: Part 4: Covert Surveillance and the European Convention on Human Rights' [1999] Crim LR 287 at 293; *R* v *Cook* [1995] 1 Cr App R 318; *R* v *Chalkley* [1998] 2 All ER 155 at 180; *Attorney-General's Reference (No. 3 of 1999)* [2001] 1 All ER 577; *R* v *Sanghera* [2001] 1 Cr App R 299.

120 See B. Fitzpatrick and N. Taylor, 'Human Rights and the Discretionary Exclusion of Evidence' (2001) 65 JCL 349 at 358; P. Mirfield, 'Regulation of Investigatory Powers Act 2000: Part 2: Evidential Aspects' [2001] Crim LR 91 at 101.

121 See *R* v *Khan* [1996] 3 All ER 289.

is readily admitted on the basis of its strength and cogency.[122] This has sparked some criticism and proposals for reform, ranging from moving to a structured discretion[123] to introducing a presumption of exclusion for specified rights,[124] even a strong presumption that 'should be able to be rebutted only by compelling considerations in favour of the evidence being admitted'.[125] However, commentators have stopped short of advocating automatic exclusion, since this is considered too radical an option with no realistic prospect of being adopted by English courts.[126] In addition, scant support for this approach can be derived from the jurisprudence of the European Court of Human Rights, which has held that evidence obtained in violation of Article 8 does not necessarily violate the right to a fair trial.[127] Nor does it appear likely that automatic exclusion will gain significant ground in the near future, given the general trend within the English law of evidence to 'move away from mandatory precepts and detailed technicalities in the direction of structured discretion and more flexible norms'.[128]

The English law on improperly obtained evidence is to a considerable extent marked by a one-dimensional preoccupation with the pursuit of truth (*intrinsic policy considerations*).[129] It seems more in tune with 'crime control' than 'due process' values[130] and appears to rest on a consequentialist basis that allows rights considerations to be sidestepped in pursuit of accurate fact-finding and the

122 *R* v *Loveridge* [2001] 2 Cr App R 29; *R* v *Mason* [2002] 2 Cr App R 38; *R* v *Button* [2005] EWCA Crim 516.

123 D. Ormerod and D. Birch, 'The Evolution of the Discretionary Exclusion of Evidence' [2004] Crim LR 767 at 786–7; M. Wasik, T. Gibbons and M. Redmayne, *Criminal Justice: Text and Materials* (Longman: London and New York, 1999) 450.

124 See Ormerod, above n. 114 at 78–80.

125 A. Choo and S. Nash, 'Evidence Law in England and Wales: The Impact of the Human Rights Act 1998' (2003) 7 E & P 31 at 49.

126 Ibid.

127 See *Shenk* v *Switzerland* (1988) 13 EHRR 242; *Khan* v *United Kingdom* (2001) 31 EHRR 45; *PG and JH* v *United Kingdom* [2002] Crim LR 308, (2002) 6 E & P 125; *Allan* v *United Kingdom* (2002) 36 EHRR 143, (2003) 7 E & P 137.

128 W. Twining, *Rethinking Evidence—Exploratory Essays*, 2nd edn (CUP: Cambridge, 2006) 223. See also Auld LJ, above n. 118 at para. 78. See Mike Redmayne, who speaks of a 'drift away from exclusionary rules, [...] significant, especially after the Criminal Justice Act 2003, in criminal litigation'. M. Redmayne, 'The Structure of Evidence Law' (2006) 26 *Oxford Journal of Legal Studies* 805 at 807.

129 For the distinction between intrinsic and extrinsic policy considerations see A. Choo, *Evidence* (Oxford University Press: Oxford, 2006) 19–20.

130 See H. Packer, *The Limits of Criminal Sanction* (Stanford University Press: Stanford, 1968) 149–73. For brief discussion on the questions of continuing applicability and value of the due process and crime control models see L. Zedner, *Criminal Justice* (Oxford University Press: Oxford, 2004) 116–18.

conviction of the guilty.[131] In marked contrast, an approach much more compatible with excluding evidence on 'broader considerations of the integrity of the criminal justice system'[132] (*extrinsic policy considerations*) is taken in the field of abuse of process. Andrew Choo and Susan Nash have observed that 'the narrowness of the discretion to exclude an item of "tainted" prosecution evidence stands uneasily alongside the width of the discretion to discontinue a "tainted" prosecution'.[133]

Interestingly, the gap between the two doctrines may now be closing. Reflecting on *A and Others* v *Secretary of State for the Home Department (No. 2)*,[134] Choo and Nash suggest that this important decision 'represents an acknowledgment that there may be circumstances in which a court should be prepared, "on moral grounds", to exclude reliable evidence because of the way in which it was obtained'.[135] Viewed in this light, exclusionary discretion may be pulled towards the wider exclusionary orbit of abuse of process. It may be wise to sound a note of caution. *A and Others* concerned evidence obtained in violation of the *ius cogens* absolute prohibition against torture, and related to inherently unreliable confessional evidence rather than tangible (real) evidence. Nonetheless, if the position endorsed in *A and Others* were confirmed in future cases involving tangible evidence and violations of qualified rights, a major step towards an approach more compatible with excluding improperly obtained evidence on extrinsic policy grounds would have been made.

Apart from s. 78 of PACE and abuse of process, brief reference to the English Regulation of Investigatory Powers Act 2000 (RIPA) is in order, given that Hellenic law is mostly concerned with evidence obtained by intercepting private communications. Section 17 of RIPA precludes any forensic use of communications intercepted in the course of their transmission by means of a postal service or telecommunication system[136] and forbids all disclosures relating to an

131 For a discussion of consequentialist approaches to criminal process values see Ashworth and Redmayne, above n. 88 at 45; P. Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication' in A. Duff et al., *The Trial on Trial—Volume Two* (Hart Publishing: Oxford, 2006) 37.

132 *R* v *Latif and Shahzad* [1996] 1 WLR 104 at 112.

133 Choo and Nash, above n. 125 at 47.

134 [2006] 2 AC 221; [2005] UKHL 71; [2005] 3 WLR 1249. See N. Grief, 'The Exclusion of Foreign Torture Evidence: A Qualified Victory for the Rule of Law' [2006] EHRLR 201; T. Thienel, 'The Admissibility of Evidence Obtained by Torture Under International Law' (2006) 17 *European Journal of International Law* 349.

135 Choo and Nash, above n. 3 at 86.

136 See RIPA, s. 17(4).

interception warrant.[137] This is an automatic 'rule of inadmissibility, there being no discretion in the judge'.[138] It is designed to protect the public interest in '[preserving] the secrecy of the warrant system'.[139] In this way, s. 17 'limits the use of material gathered from postal or telephone intercepts to an "intelligence" rather than an "evidential" role'.[140] Being a matter of public interest immunity rather than evidentiary exclusion, s. 17 is not directly relevant to a comparison between English and Hellenic law on improperly obtained evidence, irrespective of the fact that it excludes from criminal trials a whole category of intercept evidence.

Section 17 is limited to telephonic and postal intercepts. The admissibility of evidence obtained by other forms of surveillance or covert human intelligence sources is governed by the generally applicable fairness standard under s. 78 of PACE. This means that with regard to most clandestine eavesdropping, surveillance and tape-recording activity in both Greece and in England and Wales, including covert recordings of face-to-face conversations and covert audio recordings procured other than by telephone-tapping, there can only be a comparison between discretionary exclusion in England and automatic exclusion in Greece. Section 17 of RIPA therefore has only marginal bearing on a comparative study of the exclusion of improperly obtained evidence in Hellenic and English law.

5. The significance of Hellenic law on improperly obtained evidence for England and Wales

Hellenic law offers a fine example of an exclusionary system that implements the idea of 'excluding evidence as protecting rights'. Andrew Ashworth explored this idea in a seminal article in 1977,[141] where he sketched the 'protective principle'. This principle signified that rights' protection and the exclusion of evidence were intertwined: 'an infringement of an individual's rights [...] supplied a prima facie justification for the exclusion of evidence obtained as a result of that infringement';[142] exclusion was 'necessary to vindicate those rights'.[143] The protective principle has had some impact in England and Wales, especially with regard to

137 For analysis of s. 17, see Mirfield, above n. 120 at 93; D. Ormerod and S. McKay, 'Telephone Intercepts and their Admissibility' [2004] Crim LR 15; S. Uglow, *Evidence: Text and Materials*, 2nd edn (Sweet & Maxwell: London, 2006) 265–7.

138 Mirfield, above n. 120.

139 *Attorney-General's Reference (No. 5 of 2002)* [2005] 1 AC 167 at 184, *per* Lord Nicholls.

140 Ormerod and McKay, above n. 137 at 31.

141 Ashworth, above n. 71.

142 Ibid. at 725.

143 I. Dennis, *The Law of Evidence*, 2nd edn (Sweet & Maxwell: London, 2002) 86.

breaches of PACE.[144] However. exclusion 'remains firmly anchored in the reliability rather than rights-based principle'.[145] Greece, on the other hand, has strongly endorsed the protective principle. Its exclusionary rules clearly gravitate around the protection of constitutional rights, exclusion seen as the only means to vindicate such rights. Hellenic law may therefore serve as an example and inspiration for commentators in England and Wales who argue for an approach based on the protective principle in opposition to the prevailing emphasis on reliability (or emerging integrity and moral legitimacy principles);[146] as well as to those who advocate presumptive exclusion for the violation of certain constitutional or Convention rights.[147] At the very least, the Hellenic example reinforces the view, in the context of discretionary exclusion, that the case for exclusion is surely stronger when constitutional or Convention rights have been breached.[148]

The particular strength of Greece's protective principle merits emphasis. Ashworth has spoken of a *qualified* protective principle and of a *prima facie* justification for exclusion.[149] He argued that the protective principle would be better linked with an exclusionary discretion[150] and conceived its operation as largely dependent upon the evidentiary impact of the rights violation in question. Thus, evidence should be excluded, 'unless the court is satisfied that the accused in fact suffered no disadvantage as a result of the breach'.[151] By contrast, exclusion in Greece is not dependent upon such '*post hoc* rationalization of events'.[152] There is no *in concreto* review aimed at discovering whether the accused has actually been disadvantaged as a result of a constitutional violation. Exclusion is rather seen as a means to vindicate constitutional rights *in abstracto*.[153]

Secondly, automatic exclusion in Greece can be seen as a counterweight to the predominance of discretionary approaches in the common law world. This

144 Ashworth and Redmayne, above n. 88 at 329.

145 Ormerod and Birch, above n. 123 at 779.

146 See A. Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' in P. Mirfield and R. Smith (eds), *Essays for Colin Tapper* (LexisNexis Butterworths: London, 2003) 107 at 122. On moral legitimacy, see I. Dennis, 'Reconstructing the Law of Criminal Evidence' [1989] *Current Legal Problems* 21; A. Zuckerman, 'Illegally Obtained Evidence—Discretion as a Guardian of Legitimacy' [1987] *Current Legal Problems* 55.

147 See above, nn. 124 and 125.

148 See Ashworth, above n. 146 at 112; *Mohammed* v *The State* [1999] 2 AC 111 at 124, *per* Lord Steyn.

149 Ashworth, 'Excluding Evidence as Protecting Rights', above n. 71 at 729.

150 Ibid. at 733.

151 Ibid. at 729.

152 Choo, above n. 129 at 44.

153 The example of Greece becomes even more significant for English commentators if seen in the light of recent developments in New Zealand. See *R* v *Shaheed* [2002] 2 NZLR 377; R. Mahoney, 'Abolition of New Zealand's *Prima Facie* Exclusionary Rule' [2003] Crim LR 607.

counterweight role has traditionally been reserved for the exclusionary rules derived from the Fourth and Fifth Amendments to the US Constitution. However, relentless judicial undermining of the American exclusionary rule since the 1970s—including the recognition of deterrence-based exceptions to automatic exclusion[154]—means that US law today supports only considerably qualified exclusionary rules. The Hellenic exclusionary rules, by contrast, are automatic and absolute. Exceptions previously carved out of article 177 para. 2 of the Code of Penal Procedure are now incompatible with article 19 para. 3 of the Constitution and can have no further effect, at least in relation to violations of the right to privacy.

Another salient feature of automatic exclusion in Greece is its unusually wide scope. As demonstrated above, the exclusionary rules apply to both illegally and unconstitutionally obtained evidence.[155] They apply at all stages of criminal proceedings[156] both to evidence directly tainted by the improper manner in which it was obtained and to derivative evidence, whoever was responsible for obtaining the evidence (state officials or private individuals) and regardless of whose rights were infringed (defendant or third parties). Such a distinctive approach to regulating improperly obtained evidence should not be overlooked when weighing competing evidentiary regimes in the comparative balance.[157]

Developments in Hellenic law have been underpinned by a liberal constitutional tradition incorporating a conception of the right to privacy as 'probably the most sacred and most necessary [constitutional right] for the very dignity of humans'.[158] More specifically, if one looks at privacy from an English-Hellenic comparative perspective, one may associate the existence of a 'Bill of Rights' with endorsement of the protective principle. Whilst a right to privacy has featured in all Hellenic Constitutions during the last two centuries, 'in English law there [was] no right to

154 See generally Y. Kamisar, 'Confessions, Search and Seizure and the Rehnquist Court' (1999) 34 *Tulsa Law Journal* 465.

155 Interestingly, this is identical to the approach advocated by Justice Holmes and Justice Brandeis in their dissenting opinions in *Olmstead* v *United States* 277 US 438 at 470 and 479 respectively (1928).

156 Article 19 para. 3 applies to civil and administrative proceedings as well.

157 This puts into perspective Craig Bradley's finding in 1993 that 'no other country has gone as far as the United States' in terms of 'the scope of the mandatory exclusionary rule'. Bradley's findings were based on a review of the law of Australia, Canada, England, France, Germany and Italy. See 'The Emerging International Consensus as to Criminal Procedure Rules', above n. 4 at 173.

158 A. Sbolos and G. Blaxos, *The Constitution of Greece*, Tome B (Athens, 1955) 311. For an analysis of the Hellenic right to privacy in a comparative perspective see Giannoulopoulos, above n. 9 at 124–30.

privacy' until recently.[159] This may explain why there is so much emphasis on privacy violations in Greece and why automatic exclusion has become the favoured remedy, whereas privacy violations rank only as one factor among others in the context of discretionary exclusion in England and Wales.

Bitter, and not-too-distant, experience of rule by military junta in Greece is another factor influencing a robust approach towards violations of civil liberties, and the right to privacy in particular. Mirjan Damaška's general observation finds ample confirmation in the case of Greece:

> In the aftermath of the traumatic totalitarian experience, the sensitivity to values such as human dignity, or privacy, has impelled most continental jurisdictions to accept the idea that probative material should be rejected when obtained in violation of certain human rights.[160]

Automatic exclusion for violations of the right to privacy must also be seen in the context of the procedural framework within which this doctrine was developed in Greece. Hellenic criminal procedure is 'applied constitutional law',[161] demanding that the protection of constitutional rights within the criminal process takes priority over countervailing public interests.[162] In other words, criminal law doctrines develop within a culture of constitutional rights, and probably as a result of it. The development of automatic evidentiary exclusion in Greece, culminating in a constitutional exclusionary rule for violations of the right to privacy, is one manifestation of this phenomenon. This development occurred despite criminal law scholarship strongly advocating a balancing approach.

The basis in the Constitution of both automatic exclusion and the protective principle approach in Greece should be of particular significance for England and Wales, given the 'looming constitutionalization of English criminal procedure law'[163] under the European Convention umbrella. Regardless of its short-term impact,[164] the European Convention on Human Rights will probably strengthen

159 See *Kaye* v *Robertson* [1991] FSR 62 at 66. Following the incorporation of article 8 of the European Convention under the Human Rights Act 1998 and further developments since then, a right to privacy now seems to exist in England and Wales. See D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 3rd edn (Oxford University Press: Oxford, 2002) 546.

160 Damaška, 'Free Proof and its Detractors', above n. 46 at 348.

161 Androulakis, above n. 21 at 33.

162 See Karras, above n. 27 at 35.

163 Roberts and Zuckerman, above n. 118 at 181.

164 See Choo and Nash, above n. 125 at 31; P. Roberts, 'Rethinking the Law of Evidence: A Twenty-first Century Agenda for Teaching and Research' [2002] *Current Legal Problems* 297 at 333.

the incipient quasi-constitutional procedural culture in England in the long run, eventually producing a more hospitable jurisprudential climate for the protective principle, if not the adoption of automatic exclusion.[165] This would be all the more likely if the European Court were to abandon its current position and embrace the view that admitting evidence obtained in violation of the right to privacy conflicts with the right to a fair trial.[166]

At the same time it must be acknowledged that the Hellenic example also lends support to more sceptical views. Critics of the protective principle might point to the risk that inflexible exclusionary rules lead courts to interpret the Constitution too narrowly or pay only lip-service to evidentiary provisions. Critics might also stress that Greece abandoned the rights-centred approach in the context of serious criminality (anyway limited to evidence obtained by the commission of criminal offences) and that the Hellenic exclusionary rules focus exclusively on surreptitiously recorded private conversations. The admissibility of other tangible evidence, even in the context of privacy violations—e.g. improperly obtained DNA evidence or real evidence obtained by unauthorised police searches—has very rarely troubled the courts in the past. In addition, it is nearly always the 'civil party' rather than the prosecution that submits the contested evidence. Prosecution authorities are perhaps unwilling to risk compromising their surveillance methods or the identities of their sources by adducing covertly-recorded conversations at a public trial, considering that intercepted communications can still be useful intelligence leading towards alternative sources of evidence.[167] Critics

165 The possibility of a criminal procedure system that would be much more conscious of human rights considerations must be seen in connection with the proposition that 'by the Human Rights Act Parliament transformed [the United Kingdom] into a rights-based democracy'. See Lord Steyn, 'Laying the Foundations of Human Rights Law in the United Kingdom' (2005) 4 EHRLR 349. It is, in fact, the 'lasting effect on attitudes and expectations' that the Human Rights Act 1998 is expected to have which could, in my view, generate this change. See R. Stone, *Civil Liberties & Human Rights* (Oxford University Press: Oxford, 2006) 66. As Roberts and Zuckerman also argue, the impact of the Human Rights Act on criminal procedure and evidence is pivotal in constitutional developments that could exert progressively greater influence on the way the subject of criminal evidence is conceived. See Roberts and Zuckerman, above n. 118 at 32.

166 This view has been rejected in a number of cases. See above n. 127. It has the support of dissenting opinions only. See the dissenting opinions of Judge Loucaides and Judge Tulkens in *Khan* v *United Kingdom* (2001) 31 EHRR 45 and *PG and JH* v *United Kingdom* [2002] Crim LR 308, (2002) 6 E & P 125 respectively. Likewise, Judge Rozakis has argued that not finding a violation of the right to a fair trial when evidence obtained in violation of the right to privacy has been used is a paradox. See Ch. Rozakis, 'Comment' in Centre of International and Financial Law, *The Road to the European Constitution and the Recent Revision of the Hellenic Constitution: Thoughts, Trends and Perspectives*, Thessaloniki 28–29 October 2001 (Ant. N. Sakkoulas Publishers: Athens-Komotini, 2002) 216 at 219 (in Greek).

167 See Kaminis, above n. 10 at 31–5.

would therefore be right to insist that the Hellenic exclusionary model has its limitations with regard to constitutional rights protection.

The more fundamental objection that Continental criminal procedure presents only an 'exclusionary illusion', as a result of the fact-finder's access to 'excluded' evidence, has already been exposed as an exaggeration.[168] More generally, the sceptic might contend that the significance of evidentiary exclusion is muted in Continental jurisdictions, where the fact-finder has access to more information than is typically the case in common law trials, including hearsay and bad character evidence,[169] and scrupulously examines the defendant and other witnesses in court.[170] The Continental fact-finder works on the basis of an 'investigation dossier' providing him with the fruits of an extensive pre-trial 'official inquiry' conducted by a powerful 'investigating judge'. In his single-minded pursuit of truth the Continental fact-finder can count on the assistance not only of a powerful prosecutor, but also of a 'civil party' determined to assist in the conviction of the defendant. In this light, the sceptic might conclude that in a Continental setting the fact-finder has sufficient means to pursue the truth even when important incriminating evidence has been excluded. This might explain the progressive approach to evidentiary exclusion encountered in some Continental systems.

In response it should be emphasised that the scope for exclusion is much wider in Greece than in Anglo-American legal systems, and the impact on truth-finding is therefore potentially much more significant. The absence of 'alternative' procedures in Greece—most notably bargained guilty pleas—results in many more trials where exclusionary rules apply.[171] It cannot therefore be said that exclusionary rules in Greece impose no costs in terms of convictions being quashed. Greece has adopted mandatory exclusionary rules in spite of their potentially considerable 'exclusionary toll', and against the background of a Continental criminal procedure committed to the principle of free proof and traditionally hostile

168 Above section 2.

169 For a comparison of English and French rules limiting access to evidence, see J. Spencer, 'Les limites en matière de preuve—Aspects actuels', *Revue des sciences criminelles* 1992, p. 42. However, divergence between England and other Continental countries on this point is arguably less apparent today than it was prior to the reforms brought with the Criminal Justice Act 2003 in England.

170 See generally M. Delmas-Marty, 'La preuve pénale', *Droits* 1996, p. 52.

171 Conversely, there is no scope for exclusion in the 64 per cent of Crown court and 62 per cent of magistrates' court cases that end with guilty pleas in England and Wales. See Crown Prosecution Service, *Annual Report and Resource Accounts 2005-06*, HC 1203 (2006) 81 at 83.

towards evidentiary barriers to conviction.[172] Viewed from this angle, Greece's endorsement of a stringent exclusionary approach to improperly obtained evidence reflects a conscious political choice.

Greece made this choice under the influence of a culture of constitutional rights and despite countervailing practical considerations. For example, close judicial supervision of criminal investigations in Greece[173] reduces the need for *ex post facto* vindication of defendants' rights through exclusionary rules. Judicial supervision can provide defendants, in theory at least, with sufficient protection *ex ante*. In addition, the existence of a centralised police force under the jurisdiction of the Ministry of Public Order means there is no need for exclusionary rules to lead, through relevant case law, to standardisation of police practices.[174] Such practices are more or less taken for granted in Continental countries like Greece, where the police force is bureaucratically organised and its activities are governed by a Code of Penal Procedure.

6. Conclusions

Considering that 'modern law's cosmopolitan tendencies [can open] up new vistas of possibility for Evidence teaching and scholarship',[175] attention to Hellenic law might be enriching in many ways for the debate on improperly obtained evidence in Anglo-American legal systems. First of all, it reveals that the exclusionary rule is not idiomatic to Anglo-American law.[176] In particular, Greece possesses significant automatic exclusionary rules, which can also be found in other Continental

172 See M. Damaška, 'Evidential Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506.

173 The most characteristic example is that house police searches can only take place in the presence of a magistrate. See article 9 of the Constitution and articles 254–255 CPP.

174 This need was one of the main causes of the development of the exclusionary rule in the United States. See, e.g., *Irvine* v *California* 374 US 128, 138 (1954), *per* Justice Clark.

175 Roberts, above n. 164 at 298.

176 Damaška argues that to consider that exclusionary rules are a hallmark of Anglo-American evidence is a gross exaggeration. See above n. 43 at 12. On a more narrow point, the Hellenic example demonstrates that the exclusionary rule is not unique to American jurisprudence. On the view that the United States exclusionary rule has no correspondent in comparative law see generally *Bivens* v *Six Unknown Named Agents* 403 US 388 (1971), *per* Chief Justice Burger; L. Crocker, 'Can the Exclusionary Rule Be Saved?' (1993) 84 *The Journal of Criminal Law & Criminology* 310; M. Reynolds, 'Why Stop Halfway?' (1995) *National Review* 59 at 60. In my opinion, this view pinpoints the '"intellectual unilateralism" [that] has hit the Common law, especially the American Common law'. See Sir B. Markesinis and J. Fedtke, *Judicial Recourse to Foreign Law—A New Source of Inspiration?* (UCL Press: 2006) 192.

jurisdictions.[177] This article also equips common law scholars with a detailed illustration of a legal system where the protective principle has been explicitly endorsed and implemented in practice. Hellenic law demonstrates that a rights-centred approach to improperly obtained evidence may be a realistic option for some countries. In the case of Greece, it was a realistic option for a country with a strongly liberal Constitution and a rights-centred approach to criminal process values.

Analogies with Greece must be taken for what they are worth, however, especially in terms of legal reform. After all, '[t]he decision to endorse a particular approach to the exclusionary rule [...] is partly a political choice'.[178] Independently of whether the law develops under the influence of a liberal Constitution—be that in a common law or Continental law procedural setting—adopting a particular approach to the exclusion of improperly obtained evidence will always come down to a difficult balance between the protection of rights and the efficient investigation of crime. In that respect, Greece offers the interesting example of a country which has taken the unreserved political decision that constitutional rights come first.

177 By way of example, Belgium, Italy, Luxembourg, Portugal and Spain can be mentioned here. For brief reference to their exclusionary rules see generally Bradley, above n. 4; E.U. Network of Independent Experts on Fundamental Rights, *Opinion on the Status of Illegally Obtained Evidence in Criminal Procedures in the Member States of the European Union*, CFR-CDF opinion 3/ 2003 (2003); D. Giannoulopoulos and R. Parizot, 'La preuve technologique des interceptions et surveillances' in G. Giudicelli-Delage (dir.), *Les transformations de l'administration de la preuve pénale—Perspectives comparées* (Société de législation comparée: Paris, 2006) 265–9; W. Pakter, 'Exclusionary Rules in France, Germany and Italy' (1985) 9 *Hastings International and Comparative Law Review* 1; J. Pradel, *Droit pénal comparé* (Editions Dalloz: Paris, 1995) 427–8; Spencer, above n. 4 at 603–10; S. Thaman, *Comparative Criminal Procedure* (Carolina Academic Press: North Carolina, 2002); The Law Society, *Study of the Laws of Evidence in Criminal Proceedings throughout the European Union*, Summary Report, October 2004.

178 Ashworth and Redmayne, above n. 88 at 328.