“The European courts as political actors in the Cyprus conflict”

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Abstract: The European courts have faced on several occasions questions arising from the Cyprus Gordian knot. The judgments inter alia of the European Court of Human Rights (ECtHR) in Loizidou¹ and in Xenides-Arestis², of the European Court of Justice (ECJ) in the Anastasiou saga³ and most recently of a UK court in Orams⁴, have significantly altered the background of that ancient political conflict. The thesis of the proposed paper is that although the courts have not refrained from becoming actors in this unique political situation by adopting for example a “political question” doctrine, their jurisprudence points to the limits of an “incremental solution” through the legal process and thus proves that in issues of grave political importance it is only a more democratic and deliberative procedure that could provide for a comprehensive solution. In order to achieve its scope the paper examines thoroughly the relevant case law on the protection of human rights in the Areas not under the effective control of the Republic of Cyprus and analyses the jurisprudence of the European courts on the issue of trade relations with the regime in the North.

I  Introduction

The Cyprus conflict has been one of the most ancient political sagas in Europe. 2 ethnic segments, the 1960 bicomunal polity, the 1963 intercommunal armed conflict, a coup d’etat against the elected Greek Cypriot president of the Republic orchestrated by the Greek colonels’ regime, the 1974 Turkey’s “peace operation”, a handful of rejected UN plans for comprehensive settlement are some of the elements of a fascinating political novel, whose end is neither yet known nor seems probable to be “happily ever after”.

In this Gordian knot of international politics, apart from the two communities the three Guarantor States, namely Greece, Turkey and the United Kingdom, international organisations like the United Nations, the Council of Europe, the European Union, international and national courts have also played an important but understated role in shaping the dynamics of the conflict. Decisions in the Loizidou case, the Xenides – Arestis case, the Anastasiou cases inter alia have altered the background of this

¹ Case of Loizidou v. Turkey (Application no. 15318/89) (judgment 18 December 1996).
² Case of Xenides-Arestis v. Turkey (Application No. 46347/99) (judgment 22 December 2005).
political problem. At the same time, by those decisions it has become obvious that through the legal process only incremental solutions could be given to the problems arising from those political situations and thus a more political and democratic procedure is deemed necessary.

The very telos of the proposed paper, which is part of my thesis project is to examine the role of the European courts as actors in that international political problem. It addresses the issue by referring to the historical background of the conflict and by analysing in a concise but thorough manner the relevant case law of international and national courts on the protection of human rights in Northern Cyprus and their jurisprudence on the issue of trade relations with the regime in the North. By examining synthetically the jurisprudence of the ECtHR, the ECJ and several national courts on the same issue, it provides for an original study of the limits of the political role of the European judiciary on issues of grave political importance.

II Historical Background

The Republic of Cyprus gained its sovereign independence from the United Kingdom by virtue of three treaties, namely the Treaty of Guarantee, the Treaty of Alliance and the Treaty of Establishment and a constitution, all of which came into operation the same day –16 August 1960. The Cyprus Constitution has been successfully characterised as the depiction of the political compromise between the United Kingdom, Greece and Turkey, since during the 1950’s on the one hand the struggle against the British colonial powers for Enosis had taken place and on the other hand the first shy suggestions for taksim were expressed.

The viability of this very elaborate and rigid constitution was brought into question from the very first years of its life. The first President of Cyprus, Archbishop Makarios, proposed thirteen amendments to the Vice-president Dr. Kutchuk. The atmosphere after the presentation of the thirteen proposals was very tense, with the Turkish Cypriots interpreting the move as a preparation to slide into Enosis and immediately withdrawing from their posts in the executive, legislative and judiciary. This tension was the main cause that led to the first, low-scale, intercommunal armed conflict and therefore to the establishment of the “Green Line”, a neutral zone between the Greek and the Turkish quarters in the capital city, Nicosia. Parts of the Turkish Cypriot community were secluded in enclaves, whilst the State continued functioning with the constitutional aid of the law of necessity. Moreover, on 4 March 1964, the Security Council adopted unanimously Resolution 186 (1964) which laid down the original mandate of the United Nations Force in Cyprus (hereafter

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5 Working title: “The Cyprus issue: The four freedoms in a (member-) state of siege. The acquis communautaire in the Areas not under the effective control of the Republic of Cyprus”
6 See in general http://www.kypros.org/Constitution/English/
7 Enosis [Ενωσις] means in Greek union; it depicted the devotion of the Greek Cypriots to union with Greece.
8 Taksim means in Turkish partition; it depicted the intention of the Turkish Cypriots for self-governance.
9 See in general The 13 Points November 1963; available at http://www.cyprus-conflict.net/13_points.htm
The reference to the Government of Cyprus in that Resolution was considered as recognition of the legitimacy of the Government of the Republic which was comprised at the moment only by Greek Cypriots. Some contemporary writers refer to those events as “the first partition”.

From that moment on and until 1974, the two Communities together with the three guarantor states and the United Nations were negotiating in order to find a viable solution for Cyprus while disorder and anarchy prevailed on the island. In 1974, following a coup against the President of Cyprus organised by the military regime in Greece, Turkish forces invaded the island. The Security Council, in Resolution 353 (1974), called upon all states to respect the sovereignty and territorial integrity of Cyprus and demanded an immediate end to foreign military intervention in the island that was contrary to such respect. On 13 February 1975 the Turkish Federated State of Cyprus was proclaimed in the area occupied by Turkish forces.

On 15 November 1983, the Turkish Cypriots proclaimed their independence as the so-called “Turkish Republic of Northern Cyprus” (hereafter “TRNC”). By Resolution 541 (1983), the UN Security Council deplored “the purported secession of part of the Republic of Cyprus” and called upon all states “not to recognise the purported State of the “Turkish Republic of Northern Cyprus” set up by secessionist acts”. This was reiterated in Security Council Resolution 550 (1984).

Since 1963, numerous attempts have taken place to solve the Gordian knot of the Cyprus problem. The Comprehensive settlement of the Cyprus problem, (Annan Plan) presented to the 2 communities on 31 March 2004 in Burgenstock (Switzerland), consisted of the most holistic attempt to solve the problem since the 1960 Cyprus Agreements but it was overwhelmingly rejected by the Greek Cypriot community.

At the same time with those political evolutions, members of the Greek Cypriot and the Turkish Cypriot communities and the Republic of Cyprus itself were filing cases in national and international courts in order to protect their legal rights. The decisions of those fora have created results on the ground that have altered the scene of this ancient European political problem.

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11 The original mandate of UNFICYP was described in a document prepared on 29 April 1964 by the UN Secretary General (S/5671, 29.4.1964, Annex I). It was to exert its best efforts (a) to prevent a recurrence of fighting; (b) to contribute to the maintenance and restoration of law and order; and (c) to contribute to a return to normal conditions.
16 Atcheson plan, Javier Perez de Cuellar's set of ideas, Boutros Boutros-Ghali's set of ideas etc.
III The right to property and beyond…

A The European Court of Human Rights

The Strasbourg Court has proved that it is a court that can decide on cases with a strong political element. The case of Loizidou v. Turkey, where the court recognised, for the first time, the extraterritorial application of the human rights obligations, is a prime example of an international court becoming a political actor in a conflict by altering the status quo ante, since on the one hand it was for the first time that an international court recognised that Turkey has the overall effective control of Northern Cyprus and on the other gave the opportunity to Cypriots to claim damages for their properties that have been affected by the post-1974 situation. In that case, the applicant, a Greek Cypriot, had owned a property in the “Areas” North of the Green Line and alleged that the Turkish forces had prevented her from returning to it. She alleged that Turkey was responsible for continuing violations of Article 1 of Protocol No 1 and of Article 8 of the ECHR. Hence, pursuant to the decision of the Grand Chamber of the European Court of Human Rights in Loizidou v. Turkey (Preliminary Objections), according to which, the preliminary objections of the respondent State concerning an alleged abuse of process, the ratione loci of the application and the territorial restrictions attached to Turkey’s Article 25 and 26 declarations, were dismissed, the Strasbourg Court delivered its judgment on the merits of the case on 18 December 1996.

The Court held by eleven cotes to six that the Turkish army exercises “effective overall control over that part of the island” and that such control entails Turkey’s responsibility for the policies and actions of the “TRNC”. Hence, the denial of access and the subsequent loss of control of the property was imputable to Turkey, and that there had been a breach of Article 1 of Protocol No 1.

With a later judgment the Court determined the amount of the pecuniary compensation that had to be awarded to the applicant in accordance with Article 50 of the ECHR. Apart from its immense importance for the jurisprudence of the Strasbourg Court, the decision in Loizidou, consisted of a “green light” for thousands of Cypriots to claim damages for their properties, which either have been illegally expropriated by the de facto regime in the North or the access to which has been denied.

17 See inter alia Case of Bankovic and Others against Belgium and another 16 Contracting states (Application No. 52207/99) (decision 12th December 2001); Case of McCann and Others v. the United Kingdom (Application No. 18984/91) (judgment 27th September 1995); Case of Refah Partisi and Others v. Turkey (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98) (judgment 13th February 2003); Case of Lykourezos v. Greece (Application No.33554/03) (judgment 15th June 2006).
18 Case of Titina Loizidou v. Turkey (Preliminary Objections) (Application No. 15318/89) (judgment 23 March 1995).
19 Case of Titina Loizidou v. Turkey (Application no. 15318/89) (judgment 18 December 1996).
20 Para. 56 of the judgment.
21 Para. 57 of the judgment.
22 Para. 64 of the judgment.
23 Case of Titina Loizidou v. Turkey (Article 50) (Application No. 15318/89) (judgment 28 July 1998)
24 At the time that the case Xenides-Arestis v. Turkey (Application No. 46347/99) (judgment 22 December 2005), 1400 property cases were pending before the Court.
25 In paragraph 1 of the dissenting opinion of Judge Bernhardt joined by Judge Lopes Rocha in Loizidou (Merits) case it is mentioned that “[t]he Court’s judgment concerns in reality not only Mrs
Moreover, the Republic of Cyprus encouraged by the Court’s verdict in *Loizidou* filed its fourth inter-State application since 1974 against Turkey. All the violations alleged by the applicant Government concerned essentially the fate of Greek Cypriot missing persons, interference with the property and homes of Greek Cypriot displaced persons, the living conditions of enclaved Greek Cypriots in the Karpas peninsula, alleged violations of the rights of Turkish Cypriots and the Gypsy community in northern Cyprus. Finally, the legitimate Government of the Republic of Cyprus complained under former Article 32(4) of the ECHR that the respondent state had failed to put an end to the human rights violations found in the Commission’s 1976 Report.

The Grand Chamber in its judgment of 10 May 2001 followed the *Loizidou* judgment to hold unanimously that it had jurisdiction to examine the preliminary issues raised in the proceedings before the Commission and that Cyprus had *locus standi* to bring the application, by sixteen votes to one that the facts fall within the “jurisdiction” of Turkey within the meaning of Article 1 ECHR and thus entail the responsibility of the respondent State under the Convention, and by ten votes to seven that for the purposes of the then Article 26 (now 35(1)) ECHR available remedies in the “TRNC” could be regarded as domestic remedies of the respondent state.

With regard to alleged violations of the rights of Greek-Cypriot missing persons and their relatives, although the Court decided by sixteen votes to one that there has been a continuing violation of Article 2 and 5 on account of the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life threatening circumstances and there is an arguable claim that they were in Turkish custody at the time of disappearance. In addition, the Court found that there has been an Article 3 violation in respect of the relatives of the Greek-Cypriot missing persons.

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27 The first (No. 6780/74) and second (No. 6950/75) applications were joined by the Commission and led to the adoption on 10 July 1976 of a report under former Article 31 of the Convention in which the Commission expressed the opinion that the respondent State had violated Articles 2, 3, 5, 8, 13 and 14 of the ECHR and Article 1 of Protocol No.1. on 20 January 1979 the Committee of Ministers of the Council of Europe adopted Resolution DH (79) 1 in which it expressed, *inter alia*, the conviction that “the enduring protection of human rights in Cyprus can only be brought about through the re-establishment of peace and confidence between the two communities; and that inter-communal talks constitute the appropriate framework for reaching a solution of the dispute”. In this resolution the Committee of Ministers urged the parties to resume the talks under the auspices of the Secretary-General of the United Nations in order to agree upon solutions on all aspects of the dispute. The Committee of Ministers viewed this decision as completing its consideration of the case.
29 Para. 56-58 of the *Cyprus v. Turkey* judgment.
30 Para. 62 of the *Cyprus v. Turkey* judgment.
31 Para. 80 of the *Cyprus v. Turkey* judgment.
32 Para. 102 of the *Cyprus v. Turkey* judgment.
33 Para. 136 of the *Cyprus v. Turkey* judgment.
34 Para. 150 of the *Cyprus v. Turkey* judgment.
35 Reference to the findings of that judgment with respect to the missing persons has been made by the European Parliament Resolution of 15 March 2007 on missing persons in Cyprus (Not yet published in
Furthermore, with regard to the alleged violations of the rights of displaced persons to respect for their home and property the Court found that there has been a continuing violation of Article 8 by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in Northern Cyprus\(^{36}\) and of Article 1 of Protocol No. 1 by virtue of the fact that Greek Cypriot owners of property in Northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights\(^{37}\), following in essence the *Loizidou* judgment.

As far as it concerns the alleged violations arising out of the living conditions of Greek Cypriots in Northern Cyprus, and especially the ones enclaved in the Karpas peninsula, the Court noted in paragraph 245 of the judgment that the restrictions placed on the freedom of movement of the respective population curtailed their ability to observe their religious beliefs, in particular “their access to places of worship outside their villages and their participation in other aspects of religious life”, and thus consist of a violation of Article 9\(^{38}\). The Court also found a violation of the Article 10 freedom of expression in so far as the school books destined for use in the primary schools of the Greek Cypriot community living in the North, were subject to excessive measures of censorship\(^{39}\) and of the right of education under Article 2 of Protocol No.1 since so appropriate secondary facilities were available to them\(^{40}\).

Unsurprisingly, the Court affirmed that there are violations with regard to the property rights under Article 1 of Protocol No.1 of the Greek Cypriots residing in the areas North of the Green Line given that their right to the peaceful enjoyment of their possessions was not secured in case of their permanent departure from that territory and in that in case of death, inheritance rights of relatives living in the South were not recognised. In addition, a multitude of adverse circumstances, such as restrictions to the freedom of movement, the absence of normal means of communication, the unavailability of the Greek-Cypriot press, the insufficient number of priests, the difficult choice with which parents and schoolchildren were faced regarding secondary education, the impossibility of preserving property rights upon departure and death etc.\(^{41}\), that were the direct result of the official policy conducted by Turkey and its subordinate administration violated the right of that population to respect for their private and family life\(^{42}\). Last but not least, the Grand Chamber held that there has been an Article 3 violation in the Greek Cypriots living in the Karpas peninsula have been subjected to discrimination amounting to degrading treatment\(^{43}\).

Finally, with regard to the alleged violations in respect of the rights of Turkish Cypriots, including members of the gypsy community, living in the “Areas”, the Court followed the decision of the Commission and thus it declined jurisdiction to examine those aspects of the applicant Government’s complaints under Articles 6, 8, 10 and 11 of the ECHR in respect of political opponents to the regime in the North as

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\(^{36}\) Para. 175 of the *Cyprus v. Turkey* judgment.
\(^{37}\) Para. 189 of the *Cyprus v. Turkey* judgment.
\(^{38}\) Para. 246 of the *Cyprus v. Turkey* judgment.
\(^{39}\) Para. 254 of the *Cyprus v. Turkey* judgment.
\(^{40}\) Para. 280 of the *Cyprus v. Turkey* judgment.
\(^{41}\) Para. 300 of the *Cyprus v. Turkey* judgment.
\(^{42}\) Paras. 296 and 301 of the *Cyprus v. Turkey* judgment.
\(^{43}\) Para. 311 of the *Cyprus v. Turkey* judgment.
well as their complaints under articles 1 and 2 of Protocol No. 1 in respect of the Turkish-Cypriot gypsy community, which were held by the Commission not to be within the scope of the case as declared admissible. But, it found that there has been a violation of Article 6 on account of authorising the trial of civilians by court.

One could not overstate the significance of the two formerly mentioned judgments and the euphoria brought to the Greek Cypriot side. The Court, by the aforementioned decisions rejected de facto Turkey’s main justification for the 1974 operation, according to which, Turkey invaded the island in order to restore the constitutional order of Cyprus and also their argument that the regime in the North is an independent state. Instead, it was reaffirmed that Turkey has effective control of the Areas to the North of the Green Line and had been found liable for a number of human rights violations arising from the post-1974 status quo. At the same time, thousands of Greek Cypriots could claim damages for their illegally expropriated properties.

The political impact of those judgments is obvious for the conflict. According even to some very serious analysts the legal dimension of the political problem of Cyprus was very closely to be solved in the aftermath of the aforementioned judicial decisions. What was missing from the picture was that it was for the Committee of Ministers, a rather weak political institution of the Council of Europe to supervise Turkey’s compliance to those judgments. And even though since 2001, the human rights situation has been radically improved in Northern Cyprus, especially due to the partial lift of the restrictions of movement across the Green Line, the full implementation of the *Cyprus v. Turkey* judgment has not obviously taken yet place. On the other hand, since 3 October 2005, the EU through the mechanism of its Accession negotiations is also responsible for reviewing the full implementation of that decision.

The European Court of Human Rights, though, as an actor in this political saga does not act in vacuum. On the contrary it is influenced by the dynamics of the conflict. Thus, the 1,400 property cases pending before it brought primarily by Greek Cypriots against Turkey, as a result of the *Loizidou* case law, that threaten the Court with paralysis and the prospects of political stagnation in the aftermath of the rejection of the Annan Plan led the Court to alter somewhat its previously analysed stance in the *Xenides-Arestis* case.

More analytically, on 30 June 2003 the “Parliament of the TRNC” enacted the “Law on Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus” which entered into force on the same day. On 30 July 2003, under Article 11 of this “Law”, an “Immovable Property Determination Evaluation and Compensation Commission” was established in the “TRNC”. On 2 September 2004, though, the European Court of Human Rights in its decision as to

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44 Para. 335 of the *Cyprus v. Turkey* judgment.

45 The *Loizidou* judgment was reaffirmed in the Case of *Evgenia Michaelidou and Michael Tymvios v. Turkey* (Application No. 16163/90) (judgment 31 July 2003) and the Case of *Demades v. Turkey* (Application No. 16219/90) (judgment 31 July 2003).

46 See Drousiotis, M., *Ευρωζαλάδες για τον Νίκητα* [Euro-headaches for Denktash], Article in *Eleftherotypia* newspaper 13th April 2003.

47 In accordance with Article 46 of the Convention as amended by Protocol No. 11, the Committee of Ministers supervises the execution of judgments of the European Court of Human Rights.


49 “Law no. 49/2003”
the admissibility of the application of Mrs. Xenides-Arestis\(^{50}\) held that the aforementioned commission did not provide for an adequate or effective remedy under Article 35(1) of the ECHR.

On 22 December 2005 the Court delivered also its judgment in *Xenides-Arestis v Turkey*. And, although, the Court unsurprisingly followed its decisions in *Loizidou, Cyprus v Turkey*, *Evgenia Michaelidou Developments Ltd. and Tynvios and Demades* to hold that breaches of Article 8 and of Article 1 of Protocol No 1 were made out\(^{51}\) after referring to the widespread nature of the problem of Greek Cypriot property in northern Cyprus, and to the fact that the Court had approximately 1,400 property cases pending before it brought primarily by Greek Cypriots against Turkey, it stated that the respondent state should introduce “a remedy, which secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before the Court, in accordance with the principles for the protection of the rights laid down in Articles 8 of the Convention and 1 of Protocol No. 1 and in line with its admissibility decision of 14 March 2005\(^{52}\) since a “judgment in which the Court finds a breach imposes on the respondent State a legal obligation […] to select, […] the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.”\(^{53}\) Such remedy should be available within three months from the date that the judgment would be delivered and the redress should occur three months thereafter\(^{54}\). Thus, it is obvious from both the decision of the Court as to the admissibility of Mrs. Xenides-Arestis’ application and its judgment in that case that Turkey, shall and can, if it follows the indirect guidelines spelled out in the admissibility decision, introduce an adequate and effective means for redressing the Greek Cypriot applicants’ complaints.

In other words, the Strasbourg Court by that decision went one step further from its previous decisions where it just held that Turkey has overall effective control over that part of the island and is responsible for the human rights violations in the North. With that decision the Court advised Turkey to establish such remedy with which one the one hand part of the property issue, which lies in the core of the Cyprus problem to be resolved without a comprehensive settlement to take place and on the other hand such remedy to be under its own aegis. Although, such decision could only be understood in the context of the existence of thousands of Greek Cypriot applications that threaten the Court with paralysis and the political stasis created by the Greek Cypriot rejection of the Annan plan, the decisions of such organ, if established by Turkey and then accepted by the Strasbourg court, would create facts on the ground that would make the restitution impossible and the restoration of property rights even more complicated than it already is, as shown by the relevant scheme adopted in the *Annan Plan*\(^{55}\). The reason for that such committee could not deal with the property issue comprehensively and that any future plan for a comprehensive settlement should

\(^{50}\) *Xenides-Arestis v. Turkey* (Application No. 46347/99) (Decision as to the admissibility 2 September 2004).

\(^{51}\) Paras. 22 and 32 of the *Xenides-Arestis* judgment.

\(^{52}\) Paragraph 40 of the *Xenides-Arestis* judgment.

\(^{53}\) Paragraph 39 of the *Xenides-Arestis* judgment.

\(^{54}\) Paragraph 40 of the *Xenides-Arestis* judgment.

\(^{55}\) Annex VII of Appendix A Foundation Agreement: Treatment of Property affected by Events since 1963.
take into account the decisions of that institution. Lately, according to the news56, there was an agreement for a friendly settlement between a Greek Cypriot and a Turkish Cypriot under the aforementioned regime. It would be interesting to see whether the Court would accept such friendly settlement given that according to Article 39 and 37(1) of the European Convention of Human Rights, the Court could accept such settlements as long as they do not violate the protection of the Convention rights57.

For matters of completion we have to add that another important question that is posed with regard to Turkey’s obligation to execute all the aforementioned judgments is that given that according to the most current Accession Partnership58 such obligation is deemed to be a short-term priority and that according to the Xenides-Arestis judgment, Turkey has to introduce a remedy that would secure effective redress for the violations of Article 1 of Protocol 1 of the Convention, in accordance with the indirect guidelines given by the Court as previously analysed, is whether the introduction of such remedy is an EU pre-accession obligation and as such the Association Council and the Commission59 could review whether Turkey complies with it. If the reply to that question is affirmative, it would be for the first time that in a candidate country’s human rights record would be taken into account her “extraterritorial” performance and thus it may be held responsible for violations that have occurred in areas, where although they are regarded as part of the EU territory, it is the candidate state, in question, that exercises effective control. This might prove particularly significant since it would equate to recognition by the Union that Turkey exercises effective control over some EU areas.

B National Courts

At the other end of the spectrum, it is critical to examine the stance of the national courts with regard to questions arising from the Cyprus issue. To achieve that we will briefly examine case law from Cypriot and UK courts.

Although in the aftermath of the 1974 Turkish intervention, the urgent need to rehouse displaced Greek Cypriot refugees has led the Government of the Republic to use the properties of the Turkish Cypriots that have gone to the North60, the Supreme Court of Cyprus in its groundbreaking decision Arif Moustafa v. The Ministry of Interior61 held that the applicant, a Turkish Cypriot citizen of the Republic has the right his property to be returned to him, since he has proved that his permanent

56 See http://www.in.gr/news/article.asp?lngEntityID=833544&lngDtrID=244
59 According to paragraph 23 of the Framework, “the Commission will closely monitor Turkey’s progress in all areas, making use of all available instruments, including on-site expert reviews by or on behalf of the Commission”.
residence is in the Government Controlled Areas. In other words, the Cypriot court by that judgment, it overruled a well-established policy of the Republic of Cyprus.

In order to hold that decision, it based its reasoning mainly in the case law of the Strasbourg Court in Aziz v. Cyprus. The judgment of the Court of Human Rights in that case is important for the protection of the rights of the Turkish Cypriots as citizens of a bi-communal state since it found that the refusal of the Cypriot Ministry of Interior to enrol the applicant, a Turkish Cypriot, on the electoral roll in order to exercise his voting rights in the parliamentary elections of 2001 consisted of a breach of the obligations of the Republic as a Contracting Party to the Convention under Article 3 of Protocol No 1 and Article 14 according to which “[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Thus, in this case an international court played the role of the guardian of the constitutional order of what meant to be a bicomunal polity according to the 1960 constitution.

In all the aforementioned cases, the respondent was a state that is part to that conflict, namely either Turkey or Cyprus and in all the decisions the Courts reaffirm their role as guardians of the human rights and the “European public order” without adopting a “political question” doctrine. Very interesting and important questions for the “European public order”, the Union legal order and the role of the European courts as actors in the Cyprus conflict arise from a case, where there was a conflict between property rights of EU citizens and courts from two different legal orders were involved.

In Orams v. Apostolides, the facts are as follows. Mr Apostolides, a Greek Cypriot, used to live in the “Areas”, where his family owned land. As a result of the invasion he had to flee. In 2002 Mr and Mrs Orams, British citizens, purchased from a Turkish Cypriot, who was the registered owner under the relevant “TRNC law” part of the land which had come into the ownership of Mr Apostolides. The Orams paid £50,000 and they spent a further £160,000 improving the property. On Tuesday, 26 October 2004, Mr. Apostolides issued a specially endorsed writ in the District Court of Nicosia naming Mr and Mrs Orams as defendants. It claimed an order that they demolish the villa, the swimming pool and the fence around their property in Lapithos, that they deliver the respondent free occupation of the land, and damages for trespass. On 9 November 2004 Mr. Apostolides, obtained a judgment in default of appearance in the Nicosia District Court in Cyprus according to which, the appellants had to demolish the villa, the pool and the fencing, to give Mr Apostolides possession of the land, and to pay damages. On 15 November 2004, same day an application was issued on the behalf of the appellants that the judgment be set aside. Following a hearing, the Nicosia District Court held that Mr Apostolides had not lost his right to the land, citing Loizidou, that the conduct of Mr and Mrs Orams towards the property amounted to trespass and thus that the application for setting aside the judgment should be dismissed. Mr and Mrs Orams appealed against the judgment of 19 April

62 Case of Aziz v. Cyprus (Application No. 69949/01) (judgment 22 June 2004)
2005 to the Supreme Court of Cyprus, which, by its decision on 21 December 2006\(^\text{65}\), rejected the appeal. In accordance with the procedure laid down in Regulation No 44/2001\(^\text{66}\), on 21 October 2005 it was ordered that the judgments be registered and be declared enforceable in the UK. The Orams appealed against that order.

In its decision, the Queen’s Bench division of the High Court of Justice, after referring to the case law of the European Court of Human Rights in *Loizidou, Cyprus v. Turkey* and *Xenides-Arestis*, turned to whether under the aforementioned EC regulation the decision of the Cypriot court could be declared enforceable in the UK. And, although, it affirmed that the order was in full accordance with the procedure of the Regulation and especially with Article 22(1) which provides that in proceedings which have as their object rights *in rem* in immoveable property, the courts of the Member State where the property is situated shall have exclusive jurisdiction, it still held that pursuant to Article 1 of Protocol No 10 of the Act of Accession 2003, which provides for the suspension of the *acquis* in the “Areas”, the *acquis* and therefore Regulation 44/2001 are of no effect in relation to matters which relate to the “Areas”. Thus, Mr. Apostolides cannot rely on it to enforce the judgments, which he has obtained. According to the judgment, as Mr. Apostolides “could not rely on the *acquis* against his own government in connection with his human rights arising from matters relating to the area controlled by the TRNC, he cannot rely on the *acquis* against”\(^\text{67}\) the appellants to enforce his judgments against them. Although, the judge affirmed that according to the case law of the Strasbourg Court the “TRNC laws” cannot be relied on by the appellants to deprive the respondent of his title, he pointed out that this would have involved a review of the judgment of the Nicosia District Court contrary to Article 36 of the aforementioned Regulation, pursuant to which “under no circumstances may a foreign judgment be reviewed as to its substance”.

Although, the judge points out that by its answer to the given situation, the conflict, which would otherwise arise in cases between the de facto situation in Northern Cyprus and its system of law and the enforcement of judgments against the new “owners” of Greek Cypriot property, who have assets elsewhere in the EU, is avoided and that compensation could be obtained at a higher level of litigation according to the case law of the European Court of Human Rights, it is our position that the judge has erred in his decision by not applying properly the Regulation.

Firstly, it should be noted that the High Court by its decision has failed to apply correctly the Regulation 44/2001. According to recital (10) of the Regulation, “for the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation”. This is the reason why Article 33(1) provides that “a judgment given in a Member State shall be recognised in the other Member State without any special procedure being required”. In addition, the Regulation in Articles 34 and 35 provides for the reasons for which, a national court of a Member State may not recognise and enforce the judgment of the court of another Member State. But despite the fact that the judge, as we have already mentioned, admitted that the order was in full accordance with the procedure laid down by the Regulation, he refused to recognise the judgment on grounds not included in the Regulation namely the

\(^{65}\) *Orams v. Apostolides* (Case No. 121/2005) (judgment 21 December 2006)


\(^{67}\) Para. 30 of the judgment
suspension of the *acquis* in the “Areas”. And although, it is true that the *acquis* is suspended in the North of the Green Line, the judgment was delivered by a court in the Government Controlled Areas bound by that Regulation, which has exclusive jurisdiction over the issue in accordance with Article 22 of the Regulation. But the UK High Court of Justice, by not recognising the judgment of the Cypriot court on the ground that the *acquis* is suspended in the North, in essence, it reviewed the judgment of a national court of another member State in contrast with Article 36 of the respective Regulation by implying that the Cypriot national court did not have jurisdiction to decide on proceedings which have as their object rights *in rem* in immovable property in the North because of the *de facto* situation that has led to the suspension of the *acquis*.

Moreover, it should be pointed out that the result of the ruling of the English court was that the violation of Mr. Apostolides’ property rights was not remedied on the ground that the *acquis* is suspended. Given that EU is founded among else on the principle of the protection of human rights and that pursuant to Article 6(2) TEU, the EU respects “fundamental rights, as guaranteed by the” ECHR, it would seem rather absurd to be argued that by Article 1(1) of Protocol No 10 on Cyprus of the Act of Accession 2003, a legal obligation not to respect the fundamental rights of the EU citizens in those “Areas” has been created for the EU Member States. It is rather the case that the purpose of Protocol 10 was to prevent the Republic of Cyprus from being found in breach of Community law by reason of matters occurring in northern Cyprus and beyond its control. Such interpretation is supported also by the principle of effectiveness of public international law, which is used in order to give effect to provisions in accordance with the intentions of the parties and rules of international law. If the latter interpretation of the suspension of the *acquis* had prevailed, the Regulation would have applied and thus the violation of the applicants’ property rights would have been remedied.

But, even if it could be proved that the intention of the parties was to provide practically that the “Areas” should not be the subject of EC law for any purpose, and as such the application of the Regulation could rightly be denied on the ground of the suspension of the *acquis*, there is an opportunity for the European Court of Human Rights to review EU primary law and find it incompatible with the Convention as it was the case in *Matthews v. U.K.*. According to the Court’s decision, although “the Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”” and thus, “Member States’ responsibility […] continues even after such a transfer”.

It also noted that it was the respondent state “together with all the other parties to the Maastricht Treaty that is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty”. This would mean in our case that all EU member states could be held responsible for those human rights violations that have taken place because of the application of Protocol No.10 which provides for the suspension of the *acquis* in the “Areas” and *in extremis* even the Republic of Cyprus alone.

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68 See in general the *Fisheries Jurisdiction (Spain v. Canada)* case, ICJ Reports, 1999, p. 432; the *Ambatielos* case, ICJ Reports, 1952, p. 28; the *Corfu Channel* case, ICJ Reports, 1949, p. 4.
69 Case of *Matthews v. United Kingdom (Merits)* (Application No. 24833/94) (judgment 18 February 1999).
70 Para. 32 of the *Matthews* judgment.
71 Para. 33 of the *Matthews* judgment.
But, given that the High Court by its decision in essence reviewed the judgment of the Nicosia court it should also be noted that it has failed to comply with well established rules of the legal order established by the European Convention of Human Rights, and thus it has erred in its judgment as a matter of legal doctrine as well. More precisely, according to paragraph 3 of Resolution 1226 of the Parliamentary Assembly of the Council of Europe “[t]he principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention erga omnes (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice”72. Applying this view to the facts of the given case, it would mean that the UK High Court of Justice should have taken into serious consideration the case law of the Strasbourg Court, according to which, the property title of Mr. Apostolides is not invalidated by the “TRNC laws” and thus the appellants could not present themselves as lawful owners of the relevant property.

Finally, by its decision the UK court does not respect the “European public order”. The reason for that is the following. According to the Commission, the purpose of the High Contracting Parties to the Convention was "to establish a common public order of the free democracies of Europe" and that the obligations undertaken by the Parties in the Convention "are essentially of an objective character" - a character which also appears in the machinery provided in the Convention for its collective enforcement - "being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves"73. This “European public order” notion was reaffirmed both in the decision as to the admissibility of the applications of Loizidou and Papachrysostomou74 but also in the judgment of the Court as to the merits of the Loizidou case75. In those instances the Court pointed out “the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human beings” and its own mission, as set out in Article 19, “to ensure the observance of the engagements undertaken by the High Contracting Parties”. Hence, ruling in contrast with the well established principles of the Strasbourg court case law, as laid down in Loizidou and the subsequent case law, the UK court contravenes the principles of the European public order.

C. Remarks

To sum up the argument of that section, one could argue that the courts both on national and international level and especially the Strasbourg Court have been proved particularly active in protecting the human rights of people affected by the post-1974 status quo without ever resorting to the political question doctrine (Loizidou, Cyprus

73 Case of Austria v. Italy (Application No. 788/60) (judgment 11 January 1961).
75 Paras. 75 and 93 of Loizidou v. Turkey (Preliminary Objections) (Application No. 15318/89) (judgment 23 March 1995).
v. Turkey, Aziz, Arif Mustafa etc.) and have created facts on the ground that should be taken into serious account in any future comprehensive settlement (Xenides-Arestis). This later development is largely a result of the extra-judicial background of the conflict ie. the post-Annan plan political stagnation and the threat of the Court’s paralysis because of the thousands Greek Cypriot applications. The situation is somewhat different when we look at the Orams case. Despite the fact that the decision might be overruled by the House of Lords, one could detect the unwillingness of a “medium-level” national court to rule against citizens of the same nationality because of a political situation.

IV The right to trade

Although before the EU Accession\textsuperscript{76} of Cyprus, the Association Agreement of 19 December 1972 and the attached Protocols provided for the bilateral legal basis of the relationship between Cyprus and the EEC/EU insofar as it concerned the dispute resolution, trade and accompanying provisions on services, persons and capital and other common provisions it was the ECJ with its decisions in the Anastasiou cases that set the rules that applied with regard to the trade with the “Areas” and therefore the right of the Turkish Cypriots to trade with EEC/EU.

More analytically in Anastasiou I, the Court held that the 1977 Origin Protocol of the Association Agreement\textsuperscript{77} and the Plant Health Directive\textsuperscript{78}, which lays down rules governing the issue of phytosanitary certificates, and thus governs the import of citrus fruit and potatoes had to be interpreted as precluding acceptance by the national authorities of Member States, when such products were directly imported from northern Cyprus, of movement and phytosanitary certificates issued by authorities other than those of the Republic of Cyprus\textsuperscript{79} despite the fact that both the United Kingdom and the EC Commission maintained that the acceptance of the Turkish Cypriot certificates was certainly not tantamount to recognition of the "TRNC" as a state, but represented the “necessary and justifiable corollary of the need to take the interests of the whole population of Cyprus into account”\textsuperscript{80}. That meant practically that Turkish Cypriot goods could still be imported into the EC but were treated as goods from a country not associated with the EC, thus exposing them to import duties ranging from 3 per cent to 32 per cent.

In the aftermath of Anastasiou I, exporters who had until then been shipping citrus fruit from Northern part of Cyprus to the UK under cover of phytosanitary certificates issued by officials of “TRNC”, concluded an agreement with a company established in Turkey, which provided that the ship carrying the citrus fruit from Cyprus would put in to the Turkish port of Mersin for less than 24 hours, where Turkish officials would inspect the cargo on board the ship and issue a certificate, before it continued...

\textsuperscript{76} For a more comprehensive analysis of the case law of the ECJ on the Cyprus issue until 2001 see in general Talmon, S., “The Cyprus Question before the European Court of Justice” (2001) 12 EJIL 727.
\textsuperscript{79} Case C-432/92 Anastasiou I para. 67.
\textsuperscript{80} Case C-432/92 Anastasiou I paras. 31-34.
its voyage to the UK\textsuperscript{81}. So, in \textit{Anastasiou II}\textsuperscript{82}, the question was whether, and if so under what conditions, the Directive permitted a Member State to allow into its territory plants originating in a non-member country, to which special requirements applied, where the required phytosanitary certificates that accompanied those plants were issued by the authorities of a non-member country from which the plants were transported to the EC and not by the authorities of the non-member country of origin of the plants\textsuperscript{83}.

The ECJ decided that the Plant Health Directive permitted Member States to admit into their territory plants originating in a non-member Country, which were subject to the issue of a phytosanitary certificate dealing with special requirements, where, in the absence of a certificate issued by the authorities empowered to issue certificates in the plants’ country of origin, the plants were accompanied by a certificate issued in a non-member country from which they did not originate, provided that the plants (i) had been imported into the territory of the country where checks had taken place before being exported from there to the EC, (ii) had remained in that country for such time and under such conditions as to enable the proper checks to be completed and (iii) were not subject to special requirements that could only be satisfied only in their place of origin\textsuperscript{84}.

But, it was only in \textit{Anastasiou III} that the Court ruled, on the question whether the special requirements applicable to the citrus fruit at issue in the main proceedings, could be fulfilled at places other than the fruit’s place of origin. The Court of Justice on 30 September 2003 decided that the phytosanitary certificate required in order to bring those plants into the Community should be issued in their country of origin by, or under the supervision of, the competent authorities of that country\textsuperscript{85}. Thus, the relevant authorities of the Republic of Cyprus were the only competent authorities for affixing an origin mark to the plants’ packaging.

Although those cases concern only citrus fruits, given the limited exporting capacity of the entity called “TRNC” and that following the Turkish military invasion, the Government of the Republic of Cyprus declared as closed all ports of entry into the Republic which are situated in the areas not under its effective control\textsuperscript{86}, the

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\item[\textsuperscript{81}] Case C-219/98 Anastasiou II para. 11.
\item[\textsuperscript{82}] Regina v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others (hereafter Anastasiou II) (Case C-219/98) [2000] ECR I-5241.
\item[\textsuperscript{83}] Case C-219/98 Anastasiou II para. 14.
\item[\textsuperscript{84}] Case C-219/98 Anastasiou II para. 38.
\item[\textsuperscript{85}] Case C-140/02 Anastasiou III para. 75.
\item[\textsuperscript{86}] In the Letter dated 19 August 2005 from the Chargé d’ affaires a.i. of the Permanent Mission of Cyprus to the United Nations addressed to the Secretary-General it was stated: “On the specific matter of airports and ports in the occupied area of Cyprus, it should be stressed that, following the Turkish military invasion and occupation of the northern part of the island, the Government of the Republic of Cyprus declared all ports of entry into the Republic of Cyprus which are situated in those areas as closed. In particular with regard to airports, it should be noted that the Government of the Republic of Cyprus acted in accordance with the Chicago Convention on International Civil Aviation, which provides that “the contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory”, including designation of official ports of entry. Moreover, according to International Civil Aviation Organisation decisions of 1974, 1975 and 1977, a country not exercising, temporarily, effective control over its territory by reasons of military occupation, does not lose its sovereign rights over its territory and the airspace above it. In that context, the two airports operating in the occupied area of the island – over which the Republic of Cyprus has temporarily no access or effective control and consequently is not in a position to impose the terms of operation and
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Anastasiou decisions has resulted to even greater economic isolation of the Turkish Cypriot population. It has lately been suggested that the ECJ by “its doctrinal reasoning, has established the judicial foundations towards the regularisation of the trading relationship between the northern part of Cyprus and the EU, guided by the existing political framework of the EU in this matter and by the rules of the Internal Market.” But it is rather difficult to believe, given inter alia the submissions of the parties, that the Court of Justice, when ruling on Anastasiou, in essence it was calling the communities and the Union to establish a different trading relationship among them and was advocating for greater economic and European integration of the Turkish Cypriot community. Instead, it is far more probable that the ECJ taking into account international law concerns and wider political effects that a different decision would have triggered, limited the right of trade of the Turkish Cypriots although their future status of EU citizenship at the time of Anastasiou III was certain. That’s why the scope of the Green Line Regulation with regard to the crossing of goods was to provide for a legal formula according to which, goods originating in the “Areas” would cross the line and be circulated not as third country goods following the decisions in the Anastasiou saga but rather as Community goods. The Anastasiou judgments show in the most emphatic way that in issues of grave political importance, it is rather difficult even for an international court to offer a comprehensive solution.

V Conclusion

It is obvious that although the courts, both national and international, have not refrained from becoming actors in this unique political situation by adopting for example a “political question” doctrine, their jurisprudence points to the limits of an “incremental solution” through the legal process. With regard to the protection of human rights, although in the aftermath of the Loizidou judgment it has been suggested that the legal aspect of the Cyprus conflict has been solved, the latest decisions of the European courts prove that the property issue remains unresolved in substance and create facts on the ground that will make restitution impossible and the restoration of property rights even more complicated. The reason is that following the judgment of the ECtHR in Xenides-Arestis a Turkish Cypriot “Immovable Property Commission” was established, recognising in essence another authority on the island apart from the Republic of Cyprus, the decisions of which should be taken into account in any future plan for a comprehensive settlement. Moreover, the very recent decision in Orams questions the sovereignty of the Republic of Cyprus by holding that the orders of the courts of the Republic concerning human rights violations are not enforceable in the North.

As far as it concerns the trade relations between EU and the regime in the North, the judgments of the Court of Justice in the Anastasiou saga clearly depict the limits of

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88 Ibid. at p. 635.
the role of the judiciary in such a complex political issue. On the other hand, those decisions suggested that a more active role of political actors is necessary in order the political *stasis* to be effectively dealt with. The reason for that is that those decisions did not offer a sufficient solution to the problem of the economic isolation of the Turkish Cypriot community given the international law concerns of such decision and dictated to the Union to adopt legislation that could bring an end to the economic isolation of the Turkish Cypriot community.

Thus, it could be argued that in issues of grave political importance it is only a more democratic and deliberative procedure that could provide for a comprehensive solution. In the case of the Cyprus conflict, such solution should be a comprehensive settlement, the provisions of which should be the result of negotiations between all the parties but especially between the two communities of the island.