Going back to the basics: re-examining the usefulness of judicially protecting the right to property in Cyprus

Abstract: This paper seeks to challenge the assumption that only good things can come by protecting the right to property in Cyprus through judicial mechanisms. It does this by examining the effect of three key ECHR decisions concerning the property issue on the island – Loizidou v. Turkey, Demopoulos v. Turkey and Kazali v. Cyprus. In particular, it argues that judicially protecting the right to property in Cyprus has failed on two counts: firstly, it has polarized the negotiating positions of the two sides, thus making the agreement of a comprehensive settlement less possible. Secondly, the two ECHR-approved domestic remedies to property violations have done little to promote feelings of justice and reconciliation among Cypriots. The paper concludes by briefly proposing the creation of a single property commission, which will consist of Greek and Turkish Cypriot members and whose mandate will be to provide a remedy to all Cypriots, while simultaneously acting as confidence-building tool among the two communities.
1. Introduction

As the protracted negotiations of the Cyprus conflict continue, the property issue is proving particularly challenging for the successful reunification of the island. Simultaneously, it is also a much-litigated question, with a reported 1400 cases at the European Court of Human Rights (ECHR) and additional cases raised in domestic bodies.¹ The assumption driving this litigation has been that only the protection of human rights, and in particular property rights, through judicial mechanisms could ameliorate relations between the two communities in Cyprus. My aim is to critically examine this assumption by focusing on the effect of three cases – Loizidou v. Turkey,² Demopoulos v. Turkey³ and Kazali v. Cyprus.⁴ It will firstly be argued that human rights litigation has done little over the years to bring the two sides closer to a negotiated agreement and secondly, that it is also likely to undermine the promotion of justice and reconciliation on the island.

2. Getting to an agreement: from Loizidou to Demopoulos

The international community assumes that protecting human rights can encourage peace in ethnically divided societies;⁵ a common starting point is that protecting human rights is likely to result in a negotiated agreement and help previously warring groups to reconcile with each other. Nevertheless, an analysis of Loizidou and Demopoulos suggests that far from having these positive effects, the two cases have hardened the negotiating positions of both sides and made the possibility of an agreement more distant. In Loizidou the applicant successfully argued that the presence of Turkish troops in the North of the island prevented her from living in her house in Kyrenia and was therefore in violation of the right to property (Article 1, Protocol No. 1 ECHR). Turkey submitted that any case the applicant might have had should not be against her, but against the unrecognised Republic of Northern Cyprus (TRNC), which was not however a member of the Council of Europe. The Court rejected the argument and held that Turkey was exercising ‘effective control’ over the TRNC authorities and should therefore be responsible for their actions.⁶ Since then, Loizidou has been a reference point in the negotiations of the Cyprus problem: Greek Cypriots contend that the ECHR has confirmed their long-standing position that ‘all refugees should return to their homes’, while Turkish Cypriots argue that this interpretation of the case is in stark contrast to the agreed upon legal principle of bizonality.

⁵ This is part of the international community’s assumption that human rights can bring about peace. See for instance the preamble of the ECHR which states that human rights are the ‘foundation of justice and peace in the world’.
⁶ Loizidou, para. 52.
This profound disagreement about the case’s interpretation has polarized each side’s demands and contributed to people’s unwillingness to accept a compromise solution. On the one hand, Loizidou has led Greek Cypriot politicians to argue over the years that nothing short of restitution of all properties could satisfy the European Court’s demands. In Loizidou the Court insisted that it ‘does not consider it necessary, let alone desirable … to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the “TRNC”;’ yet, Greek Cypriots have understood the case to mean that the property issue is a matter of rectifying an ‘illegal situation’, a task that could only be achieved through full compliance with international law. While Greek Cypriots feel that they have the law on their side, so do Turkish Cypriots, which in turn polarizes their demands as well. The starting point for them is not to protect human rights, but the principle of bizonality, which they interpret to mean that Cyprus should be divided in two entities, or zones, and that each community should have primacy in one of them. Turkish Cypriots argue that in order for them to remain a majority in their zone in the North, and therefore to exercise that primacy, it is necessary to restrict Greek Cypriot property and settlement rights there. Bearing in mind these realities on the ground and the passage of time since the beginning of the conflict, they contend that the most appropriate solution is the mass payment of compensation to the displaced and the exchange of properties between the two zones. Thus, instead of providing a common ground, the use of international law by both sides has made them feel that their demands should be met in full and any concession they make is necessary because of the other side’s unreasonableness. Loizidou has convinced Greek Cypriots that Turkish Cypriots will ignore something as basic as human rights in their quest for power and the principle of bizonality has created similar feelings among the other side. With this background in mind, the slow or non-existent progress of the negotiations is unsurprising.

The success of the Loizidou case from the Greek Cypriot perspective has resulted in a large number of similar cases being submitted to the ECHR, which for a number of years issued judgments in the applicants’ favour. This trend changed with Demopoulos, a case that further undermined the possibility of a negotiated solution being achieved. In that case, the ECHR commented on its unwillingness and inability to deal with numerous cases with identical facts and, pointing to the principle of subsidiarity, held that domestic bodies should deal with them instead. These comments stemmed from the creation of the Immovable Properties Commission (IPC) in the TRNC, which, it was contended in Demopoulos, created an effective domestic remedy and the consequent obligation on Greek Cypriots to exhaust it before turning to the ECHR. The IPC, made up of Turkish-Cypriot judges in the TRNC, hears cases from displaced Greek Cypriots and, if the facts of their claim have been established, provides remedies for the property and the loss of its use since 1974. The effectiveness of the IPC had first been examined in Xenides-Arestis v. Turkey, in which Turkey argued that it would be paradoxical to find it responsible for violations in Cyprus, but prevent it from remediing them. The ECHR accepted that Turkey should be allowed to provide redress for property violations in Cyprus, but held that the IPC did not provide an effective remedy, partly because of its inability to offer

7 Loizidou, para. 45.
8 Demopoulos, para.69.
restitution of at least some of the properties in question.\textsuperscript{10} The Court acknowledged that the passage of time since the original dispossession could mean that restitution was neither desirable nor fair in every case, but it rejected Turkey’s argument that a blanket rule in favour of compensation was adequate. Although \textit{Xenides-Arestis} was found admissible, it turned on the green light for a TRNC domestic mechanism dealing with Greek Cypriot property complaints. As a result, soon after, the TRNC amended the legislation in question in accordance with the ECHR’s recommendations: in addition to compensation, the IPC can now also offer restitution and exchange of Greek Cypriot properties in the North with property of equivalent value in the South.\textsuperscript{11}

The effectiveness of the amended law was examined in \textit{Demopoulos}, where for the first time the Court found a Cypriot property case inadmissible due to a failure to exhaust all domestic remedies, including the now approved IPC.\textsuperscript{12} Since then, all cases to the ECHR have been blocked and the only way a new case can be brought to the ECHR is if the applicant has exhausted all domestic remedies and still feels that she is not adequately remedied. These were the facts in \textit{Meleagrou v. Cyprus},\textsuperscript{13} in which the applicant challenged the Commission’s decisions all the way to the TRNC Supreme Court and unsuccessfully argued that the remedies provided by the IPC were in violation of the right to property and to a fair trial. \textit{Meleagrou} sealed once and for all the future of Greek Cypriot property cases: for an applicant to obtain a remedy before the two sides have signed a comprehensive peace agreement, she will have to go through the IPC, and will most probably be unable to successfully challenge that decision to the ECHR.

However, this change in the tide after \textit{Demopoulos} has arguably further hardened the Turkish Cypriot negotiating position. The Court in \textit{Xenides-Arestis} had claimed that the IPC should at least provide the possibility for restitution, but in \textit{Meleagrou} it chastised the claimants for demanding restitution instead of compensation for their properties.\textsuperscript{14} If however the IPC provides the opportunity to the TRNC to resolve the overwhelming majority of claims through its preferred remedy, this removes any incentive from the Turkish Cypriot side to negotiate an agreement, which is likely to require the return of considerable areas of land back to the Greek Cypriots. A correct interpretation of the property saga should focus on what the Court does not consider acceptable, rather than on what it allegedly demands from the applicants. The ECHR has clearly indicated that only providing restitution or only providing compensation is unsatisfactory,\textsuperscript{15} irrespective of Cypriots’ selective reading of the case law. However, this idea that an agreement requires compromise between the two ideal approaches is ‘Conflict Negotiation 101’. The fact that it took the ECHR a decade to reach the same conclusion, while managing to further polarize the two communities in the process, raises questions about whether human rights litigation is the best way to settle the conflict on the island.

\textsuperscript{10} \textit{Xenides-Arestis}, section 3(d).
\textsuperscript{11} For a summary of the legislation, see \textit{Demopoulos} para. 35-7.
\textsuperscript{12} \textit{Demopoulos}, para. 127.
\textsuperscript{13} \textit{Meleagrou and Others v. Turkey}, App. No. 14434/09, Admissibility decision delivered 2 Apr. 2013.
\textsuperscript{14} \textit{Meleagrou}, para.14.
\textsuperscript{15} \textit{Demopoulos}, para. 119.
3. The inefficiency of domestic remedies: Demopoulos and Kazali

Perhaps this disadvantage of the case law would have been an acceptable price to pay if human rights protection induced a feeling of justice to the applicants while they are waiting for the final settlement of the conflict. Nevertheless, both Demopoulos and the equivalent Turkish Cypriot case, Kazali v. Cyprus, fall short of this expectation as well. Kazali arose due to the Custodianship legislation, passed by the legislature of the Republic of Cyprus, which applies to all Turkish Cypriot properties in the South. The Law, which was implemented in 1991 and amended in 2010, states that all abandoned Turkish Cypriot properties will remain the responsibility of the Custodian until the end of the ‘abnormal situation’ on the island. Even though the rationale of the legislation was the protection of these properties, the pre-2010 legislation provided no mechanism for reclaiming them if Turkish Cypriots returned to live permanently in the South and no longer needed the Custodian’s protection. The applicants in Kazali challenged the old law for preventing their use of the property, but before the case could be heard in the ECHR, the Republic amended the legislation allowing, in principle, those who wanted to return to their properties to apply for the lifting of their custodianship. The ECHR examined the domestic courts’ practice since the amendment of the law and found Kazali inadmissible because the applicants had not conclusively proven that the domestic courts could not provide an inadequate remedy.

Ultimately, Demopoulos and Kazali should be read together because it would have been strange indeed if the Court opened one door to the Cypriot property problem with Kazali, shortly after it had closed another with Demopoulos. Combined, the two approaches make the property problem a Cypriot rather than a European one and empower domestic bodies to take action. However, the remedies that the ECHR has blessed with these two decisions are unlikely to create feelings of justice and willingness to reconcile among Cypriots.

On the one hand, the IPC offers compensation in the overwhelming number of cases it decides, usually at a small fraction of what the property is worth. It is therefore likely that applicants turn to the IPC because they have lost faith in the political negotiations or because they are in need of money, rather than because they see the remedy as a just outcome of their displacement. Moreover, it is unclear what happens when restitution is provided and whether applicants are allowed to move in their properties immediately. The remedy of exchange is also hugely problematic, as illustrated through Tymvios v. Turkey. In that case, the applicant exchanged his property in the North with Turkish Cypriot property in the South on which two schools had been built. This move arm-twisted the Republic into buying the land from Tymvios, thus confirming that this remedy cannot be used in good faith on a regular basis unless the Republic indicates to the IPC which land can be exchanged, something which is unlikely to happen. Cases like Tymvios and allegations that many applicants turn to

18 Kazali, para.152-153.
the IPC due to financial difficulties do little to promote the sense of justice that human rights are supposed to be all about.

On the other hand, the provisions of the Custodianship Law only apply to a small section of Turkish Cypriots, thus implying that the remedy approved of in Kazali is also problematic. In particular, the practice of the Cypriot domestic courts so far suggests that those living in the TRNC and who are unwilling to move to the South, in other words, the vast majority of potential applicants, will be unable to lift the Custodianship. Furthermore, both the IPC and the Custodianship remedies are suffering from a lack of trust among the people about the reliability and impartiality of the other side’s remedy-providing body. This, in addition to the fact that applying to the other side’s authorities is accompanied by a stigma as applicants are perceived as doing something unpatriotic, prevents a number of people from applying. Thus, while the remedies are technically available, important psychological barriers compromise their effectiveness. Even in cases where applicants receive some material benefit from these processes, the facts that they often have to do it in secret and with little trust in the decision-making bodies, makes it unlikely that the remedies will leave them with the feeling that justice has been done and it is now time for reconciliation.

The most persuasive explanation for these limitations is that there are two independent redress mechanisms rather than a single combined effort between the two communities. As a result, each side does enough so as not to get caught by the Court’s minimum standards, but this half-baked remedy does little to really offer redress to the applicants. Perhaps a more appropriate body that could deal with the concerns raised in terms of legitimacy and willingness to offer adequate remedies to all is a single high-profile and transparent committee, being composed of both Greek and Turkish Cypriots. Being faced with claims from both sides, it could strike a balance between demands for compensation and restitution, while also taking into account the wishes of the individual applicants. Such a committee would not necessarily follow a comprehensive peace settlement, but could be its predecessor, a confidence-building measure that could lead to the gradual rather than one-off resolution of the property issue. This would not be the first time that the two communities have cooperated with each other and logic and sheer proximity between them suggests that it will not be the last either.\footnote{The first such cooperation project, the Nicosia Sewage Water Treatment Plan, started in 1978. Other joint projects have followed, most notably the Committee for Missing Persons, which has been described as a ‘model of successful cooperation’ by the UN.} However, despite the ECHR’s persistent urging for a swift political agreement on the Cypriot property issue,\footnote{Demopoulos\textsc{,} para.85.} its vindication of the two remedies is unlikely to do much to push things in that direction. Even more worryingly, \textit{Demopoulos} and \textit{Kazali} are probably the best outcomes that we could have expected from the ECHR. Despite dissatisfaction with the domestic remedies, leaving the cases to be decided by the European judges would have been more problematic. Moreover, the artificial division between the two remedy-providing bodies dealing with the same problem is the unavoidable result of the way litigation works and nothing could have been done by the ECHR to avoid it. Like with \textit{Loizidou}, this raises questions as to whether human rights litigation is really the way to peace.
4. Conclusion

This paper focused on three cases – Loizidou, Demopoulos and Kazali – in an attempt to challenge the orthodoxy that ‘a bit more human rights can never make things worse’.22 On the one hand, the combination of Loizidou and Demopoulos have made the reaching of a negotiated agreement less likely because of the way each has hardened the positions of the two sides and negatively affected people’s willingness to accept a negotiated outcome. On the other hand, the combination of Demopoulos and Kazali are weakening rather than promoting the possibility that applicants will receive redress in the absence of a negotiated agreement. While they meet the Court’s minimum standards of rights protection, they do not create a sense that justice has been done, thereby undermining reconciliation among Cypriots. This is not an argument against the protection of human rights in general since humanity as a whole would have been worse off without them; however, we should go back to the basics and reconsider the assumption that in addition to being valuable in and of themselves, human rights should also be protected because of their peacebuilding potential. Such an exercise could be valuable to the extent that it allows us to overcome the almost theological appeal that human rights exert so that we can focus our attention and resources to peacebuilding tools that have proven more effective.

Bibliography