Reform of the reform: The European Court of Human Right’s endless quest for efficient justice

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By Nikolas Kyriakou**

Abstract
This article addresses the changes to be introduced in the edifice of the European Convention on Human Rights through the 14th Protocol. Particular attention will be paid on the impact of the said amendments on cases relating to property claims initiated by Cypriot nationals against Turkey. In essence, along with a bird’s eye view to institutional issues and restructuring, the author will present the two latest reforms in the judicial system of the Court. Protocols Nos. 11 and 14 are oriented in rendering the Strasbourg Court more efficient and delve upon its quasi-constitutional nature in the European judicial setting. The reforms are not only of procedural interest. They will have a significant impact on the handling of Loizidou-type of cases. It is this impact that will be also explored.

Introduction
In 1994, when Protocol No.11 was opened for signature, 3500 applications were pending before the Court. Four years later, when it came into force, there were 7800 and as of 1 July 2007 the number of pending cases raised to 97 850.¹ This dramatic increase is mainly attributable to the accession of new States to the Convention, now numbering

* This article constitutes an updated and edited version of the author’s thesis entitled: “The European Court of Human Rights’ jurisprudence on Article 1 of Protocol No. 1 as applied in the Cypriot cases. Principles discerned and the compatibility of the Annan Plan with them”, (Leiden University, the Netherlands, 2005).

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up to 47 States Parties, and the acceptance of the right of individual application under (former) article 25 ECHR by the contracting parties. These factors have caused a backlog in the Court’s capacity to deliver judgments within a reasonable time frame. Protocol No. 11 was the reaction of the Council of Europe in dealing with the increasing workload of the Court. Although these figures illustrate the Convention’s success and serve as a proof of the trust European citizens show towards it, “they have also put the Court’s institutional machinery under increasing strain and [the crucial] question was how it can be adapted to cope with the new situation.”

Eleventh Protocol Amendments

The major amendments introduced by Protocol No.11 are the following, outlining the Court’s function as it stands nowadays:

- The Commission and the Court of Human Rights have been replaced by a single Court which is now endowed with all the functions the former bodies had;
- The infrastructure of this Court is based on three different formations: Committees of three, Chambers of seven and Grand Chambers of seventeen judges, each vested with different powers;
- The cases are assigned to a Judge Rapporteur that will present them to the Committee examining their admissibility;
- The right of individual application has become mandatory and there is no need for the States to accept it separately, as former Article 25 provided for;
- The Committee of Ministers is kept only to supervising the execution of judgments.

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These amendments however, have not proven drastic enough to achieve the purported result. This is evident by the following statement of Luzius Wildhaber, former President of the Court: “I am now more than convinced that, only just over three years after the radical reform of the Convention mechanism implemented by Protocol No.11, replacing the two original institutions by a single judicial body, the system is in further need of a major overhaul.”

**The Fourteenth Protocol**

This call coming from the most authoritative of lips could not be disregarded. In 2001, an ‘Evaluation Group’ was created by a decision of the Ministers’ Deputies, assigned with the task to propose means of furthering the effectiveness of the Court and to this end consider the need for reform. Its conclusions come under five headings: national measures, execution of judgments, measures involving no amendments to the Convention, resources, and measures involving amendments of the Convention. Cumbersome negotiations on the proposed reforms, finally led to the adoption of Protocol No.14, “the reform of the reform” as it has been named, at the ministerial meeting on 12 May 2004. 46 countries have since ratified the Protocol and one more is still pending on the part of the Russian Federation. It seems that political complexities are delaying this final ratification, which would bring the Protocol into force.

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6 Ibidem, 1.

The changes that will take place pursuant to its provisions are the following:

- A single judge may take an (in)admissibility decision, as regards manifestly ill-founded applications;
- There will be the possibility for a committee of three judges to take a decision on the admissibility and at the same time render a final judgment on the merits of a case where there is a well-established case law on the question of the application (Manifestly well-founded cases). A unanimous vote is required in this case;
- The Committee of Ministers will exercise more control over the execution of judgments;
- The possibility for the accession of the EU is provided for;
- The Commissioner for Human Rights may intervene in a procedure before the Court as an amicus curiae;
- A new ground for admissibility is introduced.\(^8\) “The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: a) […], b) the applicant has not suffered a significant disadvantage, unless respect for human rights […] requires an examination of the application on the merits […].”\(^9\)

From the list above, the element singled out for the purposes of this article is the possibility of the simultaneous delivery of a decision on the admissibility and judgment on the merits. The committees of judges, when dealing with repetitive cases will be able to hand down a final judgment, provided that there is a well-established case-law both on the violation and on the just satisfaction afforded by the Court. The requirement of unanimity is a safeguard against potential misconstruction of the Court’s case-law.

The Committee of Ministers by its Resolution (2004) 3 on judgments revealing an underlying systemic problem, invited the Court “to identify in its


\(^9\) Protocol No.14, Article 12.
judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.”

The Court’s reaction

The Court’s response to this call was the introduction of the “pilot judgment” procedure in the case of Broniowski v. Poland. A pilot-case “is a judgment which points to structural or general deficiencies in national law or practice […] and a large number of applications to the Court concerning the same problem are pending or likely to be lodged.” “[…] Protocol No.14 does not provide for a special “pilot judgment procedure”. On this issue, however, the drafters of the Protocol paved the way for an initiative by the Court itself. The Court […] through a rather spectacular development of its case-law laid down the foundations of such a special procedure.”

In the case of Broniowski v. Poland, the Court found a violation of the applicant’s right under Article 1 Protocol No. 1 of the Convention and then went on to identify “a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons.” The Court elaborated on the notion of

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11 ECtHR, 22 June 2004, Broniowski v. Poland, (Application no. 31443/96) [GC]. All decisions and judgments of the Court can be found at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en


14 Ibidem, §189.
systemic violation and underlined the States’ obligation not only to compensate for the breach but most importantly to remedy the causes that gave rise to the violation in the first place. Failure on behalf of the State would represent a threat to the future effectiveness of the Convention’s machinery, in the sense that it would “overburden the Convention system with large numbers of applications deriving from the same cause.” The Court concluded by indicating to Poland the measures to be taken: “either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu.” The Court also decided to adjourn all pending applications emanating from the same source, pending the implementation of the measures.

The Court’s choice was reaffirmed in subsequent judgments. In Sejdovic v. Italy, the Court concluded “that the facts of the case disclose the existence, within the Italian legal order, of a shortcoming as a consequence of which anyone convicted in absentia who has not been effectively informed of the proceedings against him may be denied a retrial” capable of subsequently giving rise to numerous applications. In Hutten-Czapska v. Poland which “was chosen by the Court as a “pilot case” for determining the issue of the compatibility with the Convention, of the relevant legislative scheme of rent control that affected a large number of persons (some 100 000 landlords and 600 000 to 900 000 tenants), the Court found that “the facts of this case reveal the existence of an underlying systemic problem, which is connected with a serious shortcoming in the domestic

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15 The Court introduced this notion in Ferrari v. Italy (application no. 33440/96), § 21 and Bottazzi v. Italy (application no. 34887/97).
16 Ibidem, §193.
17 Ibidem, §194.
18 ECtHR, 10 November 2004, Sejdovic v. Italy, (Application no. 56581/00).
19 Ibidem, §44.
20 ECtHR, 22 February 2005, Hutten-Czapska v. Poland (application no. 35014/97)
21 Ibidem, § 14.
legal order”22. The principles established in *Broniowski* were equally applied in this case, too.

Both legal frameworks, i.e. the power of a committee to hand down a final judgment and the pilot-judgment procedure, work towards the achievement of the same goal: reducing the workload of the Court in an efficient manner and maintaining the general standard of human rights protection in Europe. The issue does not solely concern procedural nature or improved efficiency. The underlying dilemma is “whether the primary purpose of the Convention system is to provide for individual relief or whether its mission is of a more ‘constitutional’ nature, intended to determine issues on public policy grounds in the general interest.”23 The trend of pilot cases, would allow the Court when finding a systemic deficiency, to hand down a judgment stressing the elements that constitute this deficiency and to make specific recommendations to a state as to the solutions to be applied. In this way, the Court would not be compelled to deliver a judgment to all pending (or future) applications but it would rather seek to decentralize the system of justice by referring the case back to the state and thus enhance the respect for human rights, in the context where they should be applied in the first place: the national legal order. This would be achieved by the correction of the structural problem within the national legal order through appropriate means.

**Ramifications on the Cypriot cases**

How can this new trend of the Court be of assistance to the Cypriot cases? Is it possible that they are eligible for being dealt with in the same way as the aforementioned judgments? It is submitted that the principles established in *Broniowski* may well be applied in the same manner in these cases. Employing the words of the Court, it may be stated that interference with the peaceful enjoyment of property is neither prompted by an isolated incident nor is it attributable to the particular turn of events in the Cypriot applicants’ case. They are rather the

22 Ibidem, §191.

consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens, namely the Loizidou\textsuperscript{24}-type claimants. The occupation of a part of Cyprus and the continuous violation of human rights, as identified in Cyprus v. Turkey\textsuperscript{25}, prove that this condition is satisfied.

Further, the States not only have the obligation to pay compensation but are also under an obligation to take the appropriate measures to put an end to the violation found by the Court. It is also submitted that the Court is in a position to identify a systemic violation in the Cypriot cases. In Loizidou, the Court awarded just satisfaction but the restitution of the rights of the applicant is still at issue. The Court in Cyprus v. Turkey indicated that Turkey did not afford an adequate remedy to the Greek Cypriots not residing in northern Cyprus to secure their rights therein. In Myra Xenides- Arestis\textsuperscript{26} it examined the “Law on Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus” that was promulgated in accordance with article 159 of the “TRNC constitution” and purported that this “Law” did provide for a remedy. However, it did not find this to constitute an effective remedy, one of the reasons being the non-provision of \textit{restitutio in integrum}. In consistency with Broniowski, the Court went on to identify the problematic issues, thus impliedly suggesting specific recommendations that the aggrieving State must adopt in order to correct a structural problem within its jurisdiction.

Finally, the case of Broniowski affected nearly 80 000 people and 167 applications on the same subject matter are pending before the Court.\textsuperscript{27} In the Court’s opinion, this was an aggravating factor, as well as a threat to the effectiveness of the Convention. The figures were even bigger in Hutten-Czapska. Although not only an issue of arithmetic, it is recalled that as a result of the Turkish invasion, around 200 000 people were displaced and 1300 applications are currently pending before the Court. The same \textit{raison} underlying Broniowski also exists here. It would make little sense for the Court to deliver ‘clone’ judgments on


\textsuperscript{25}ECtHR, 10 May 2001, \textit{Cyprus v. Turkey}, (application no. 25781/94).

\textsuperscript{26}ECtHR, 6 April 2005, \textit{Myra Xenides-Arestis v. Turkey}, (Application no. 46347/99; admissibility decision).

\textsuperscript{27}ECtHR, 22 June 2004, \textit{Broniowski v. Poland}, (application no. 31443/96), §193.
these identical cases, only to remain non-executed vis-à-vis the *restitutio in integrum* part. The credibility of the institution would be seriously compromised and the general protection of human rights would at best remain stationary.

The *Myra Xenides-Arestis* case was the Court’s opportunity to apply the Broniowski principles and to a great extent it did so. In its subsequent judgment on merits, it stated the following under the heading of application of Article 46: “It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, 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. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment”\(^{28}\). The Court continued to apply the aforementioned principles in the case it had before it: “The Court considers that the respondent State must 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 it, in accordance with the principles for the protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 and in line with its admissibility decision of 14 March 2005. Such a remedy should be available within three months from the date on which the present judgment is delivered and redress should be afforded three months thereafter.”\(^{29}\)

Having already delivered an admissibility decision, it identified the existence of a systemic problem in occupied northern Cyprus, i.e. the lack of an adequate and effective remedy for current and potential applicants like Mrs. Loizidou and Mrs. Xenides-Arestis. Based on the observations it made in its admissibility decision and in its judgment, it requested the introduction of a remedy for the

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\(^{29}\) Ibidem, § 40.
applicant and for all similar applications pending before it, to be exhausted before having recourse to the Court.

The Court revisited the issue a year later, while dealing with the just satisfaction question. In a paragraph that has caused intense controversy amongst jurists in Cyprus, it stated: “The Court welcomes the steps taken by the Government in an effort to provide redress for the violations of the applicant's Convention rights as well in respect of all similar applications pending before it. The Court notes that the new compensation and restitution mechanism, in principle, has taken care of the requirements of the decision of the Court on admissibility of 14 March 2005 and the judgment on the merits of 22 December 2005.”

This statement should have been anticipated and the turn it signifies as to the perception of the Court towards similar cases should not be taken as a surprise. It is self-evident that the Court does not wish to engage in an issue with a high degree of politicisation. It had already handed down several important judgments pertaining to the particularities of the Cyprus problem, which were overall positive for the Greek Cypriots. Additionally, the Court had already shot its warning shots, already since 2001 in the interstate application Cyprus v. Turkey, where it did not exclude the possibility for the state to set up a judicial mechanism to address human rights violations. The following excerpt could not be more illuminating: “[...] It cannot be excluded that former Article 26 of the Convention requires that remedies made available to individuals generally in northern Cyprus to enable them to secure redress for violations of their Convention rights have to be tested. The Court, like the Commission, would characterise the developments, which have occurred in northern Cyprus since 1974 in terms of the exercise of de facto authority by the “TRNC”. As it observed in its Loizidou judgment (merits) with reference to the Advisory Opinion of the International Court of Justice in the Namibia case, international law recognises the legitimacy of certain legal arrangements and transactions in situations such as the one obtaining in the “TRNC”, for instance, registration of births, deaths, and marriages, “the effects of

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30 ECHR, 7 December 2006, Myra Xenides-Arestis v. Turkey (Application no. 46347/99; just satisfaction).
31 Ibidem, § 37.
which can only be ignored to the detriment of the inhabitants of the [t]erritory”. This stance taken by the Court should suffice to rebut the argumentation, which claimed that a referral should have been requested for the *Xenides-Arestis* judgment of 22 December 2005. In any case, the issue of legality of the “Immovable Compensation Commission” is still open for consideration. The author will risk a prediction that the Court will eventually have to address the issue of the legality of the said “commission”.

**Concluding remarks**

One of the Court’s observations was that the introduction of a legal instrument/ mechanism to address systemic violations occurring in the occupied part of Cyprus should allow for restitution of the property withheld. It is doubtful whether Turkey can assume the political cost of providing for such a remedy. In conclusion, the Court has already come at a crossroads where certain choices have to be made. It can either choose to apply the *Broniowski* principles and await Turkey to abide by its recommendations to remedy the structural problem or alternatively when Protocol No. 14 comes into force make use of the possibility of deciding on the admissibility and at the same time handing down judgments on the merits. If the former case were to be applied, this would result in the exercise of political pressure on Turkey, since this option would emphasize Turkey’s responsibility in northern Cyprus and would require for a right of restitution for displaced Greek Cypriots not residing there. Were the Court to opt for the second possibility, tremendous economic pressure would be exerted on Turkey, as a result. It will be recalled that the latter eventually paid 1.2 million Euros to Mrs. Loizidou. A simple multiplication of this sum, due to pending applications would suffice to suggest the costs that are to be incurred. To conclude, what politicians and jurists should have in mind is that the Court’s role in the European system of protection of human rights is subsidiary to the one played by national courts. The tremendous stress, under which the functioning of the Court has come, will not be entirely resolved by Protocol No. 14 and further innovative solutions will have to be considered. Ideas have surfaced, voicing that the Court should move to a more “constitutional” premise and choose to deal with certain cases only to the extent that these pose new challenges. It is obvious that the efficacy of the right of
individual application would thus be undermined and one may easily foresee the consequences for the particular cases of Cypriot nationals against Turkey.