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PRO ANNAN V: RETHINKING THE UN-VIABILITY OF THE CONSTITUTIONAL ARRANGEMENT

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Abstract

This chapter argues that despite the post-colonial Zurich-London legacy and the flaws contained in the final version of the Annan Plan its central pillars provided the basis for a viable, workable and fair constitutional arrangement for both Greek Cypriots and Turkish Cypriots. The plan's philosophy is in line with human rights conventions, UN resolutions, the EU *Acquis* and the High Level agreements of 1977 and 1979. It defines 'a bizonal bicomunal federation with a single sovereignty, international personality and citizenship'. The alternative – the indefinite continuation of *de facto* partition, or a *de jure* partition, or a 'return' to a majoritarian unitary non-geographical consociation – is unfeasible, dangerous, painful and costly for one side or the other. The chapter offers a reasoned defence of the spirit and mechanics that define a constitutional logic based on a set of sound constitutional and political criteria. It proposes that the interested parties must go *beyond* the Annan plan to reunify Cyprus as there is scope for significant improvement to meet the post-Annan and post-EU accession era: this would retain the basic constitutional *logic* of a bizonal bicomunal federation and what the two sides have agreed upon without having to start over again from point zero.

1. Introduction: A Historical Rupture - Before and After Annan

Following the publication of Annan I in late 2002, many Greek and Greek Cypriot, and a smaller number of English publications appeared. With few exceptions, the Greek and Greek Cypriot publications opposed the plan, mostly with opinion and distorted pictures of its content and context. The plan transformed the terms of the debate by taking a very specific approach towards the notion of the solution, bringing about rupture within political forces like no other plan or event has since 1974. The plan appeared when Cypriot society, both Greek Cypriot and Turkish Cypriot, were transforming and coincided with the final stages of Cyprus' accession to the EU and the beginning of Turkey's accession process. It was the culmination of thirty years of interrupted UN negotiations, which eventually resulted in an accelerated process moments before Cyprus' EU accession. It was a process

designed to coincide with the beginning of Turkey's own European accession and contradictory internal transformation, which is a by-product of the collapse of the bi-polar world and the expansion of the EU.¹ Yet, the process came to an abrupt end with the Greek Cypriot rejection at the 2004 referendum. It is unrealistic, counterproductive and undemocratic to ignore such strong opposition to the specific plan, despite 65% of Turkish Cypriots voting in favour.

Most Greek Cypriot opponents of the plan did not only oppose it for 'constitutional reasons', but for its 'totality'. Yet today the dominant Greek Cypriot discourse that appears 'politically correct' is that the plan was 'dysfunctional'. There are several contentious points, which have been 'constitutionalised' without them being constitutional issues.² Many commentators, legal scholars included, conflate everything contained in the plan as if it were essentially constitutional. In the Greek Cypriot public debate, instead of locating its most important and apparent weakness, there was a 'demonisation' of almost everything contained in the plan.³ Even legal scholars depicted the Plan as a 'monstrous legal nightmare', citing 'reasons that swayed a large majority of Greek Cypriots to reject the plan' as if they were facts or legitimate and well-founded legal arguments, cantering on the argument that the Republic of Cyprus would be destroyed.⁴ Tassos Papadopoulos, the President of the Republic of Cyprus, reinforced such views when insisting that the plan would 'entrench partition'.⁵ This particular question was amongst the most crucial political differences between Papadopoulos and AKEL, despite the fact that the party eventually said 'No'. AKEL openly disagreed with the President⁶ that the Annan Plan 'does not dissolve the de facto partition, but on the contrary it legitimizes and deepens it'.⁷ To this day Papadopoulos remains adamant on this point, repeating to the UN Secretary-General that the final proposals were 'inspired by the Turkish side' and 'deliberately and unjustifiably limit the sovereignty exercised by one of its members'.⁸

This chapter disputes such viewpoints and presents the plan neither as 'hell', nor 'heaven'. It firstly suggests that it was a functional, viable and to a large extent a 'fair' constitutional arrangement that failed to be realised not because of any intrinsic constitutional weaknesses about its alleged 'non-functionality', but primarily because of political reasons that were essentially external to the constitutional logic of the plan.⁹ Secondly, the terms of the debate were such that they reproduced the old power-centred nationalist dialectic that internalised the language of international relations and law, in an 'imperial logic' and 'nationalist logic', which fed into each other.

The 'solution' to the Cyprus 'problem' is often seen in terms of a constitutional formula that would be 'just', 'functional' and 'lasting'. However, these formulaic approaches, which can be interpreted in different and often conflicting ways across the political-ideological spectrum and across the ethnic/communal divide, must be surpassed in order to avoid one-sided and 'ethnicised' approaches based on particular communal or national(istic) vantage points. Was the Annan Plan a 'just',

‘functional’, ‘viable’ and ‘lasting’ solution to reunifying the country and people? What criteria should be used to make such an evaluation? Was the constitutional ‘balance’, philosophy and rationale ‘fair’ and ‘just’ towards each community and what are the ‘next best solutions’?

2. Did the Annan plan provide for One or Two States? What is a ‘bizonal, bicomunal federation’?

2.1. The Cypriot Constitutional Question and the Greek Cypriot Politics of ‘Federation’

Whether the UN Plan provided for a federation or confederation is not a semantic question: it is a question of constitutional and international law and has caused considerable debate and confusion as to the meaning of the terms. More importantly, the answer is likely to affect the interpretation of any future ‘solution’. This fundamental constitutional question because of its highly political and, to a large extent, ideological significance, is related to the political question. Hence, this analysis is ‘politico-legal’ and must be neither purely ‘legal’ (i.e. ‘legalistic’), nor purely ‘political’.¹⁰ The point of a federal compromise is precisely for reconciling the communities, which transcends *both* ‘majority-minority relationship’ as well as the current partition. Constitutional devices should guarantee the will for unity at one level and that of diversity on another.¹¹

Greek Cypriot critics of the plan are strongly divided over this matter depending on whether they accept in principle the notion of a ‘bizonal bicomunal federation’ or whether they consider this to ‘entrench partition’ amounting to recognition of the territorial results of the invasion and occupation by Turkey, as Tassos Papadopoulos suggested in his speech. This is apparent from the public discourses over the years¹² and more so from the ‘spontaneous’ pre-election debate,¹³ where anti-Annan politicians and lawyers positioned themselves on the question of the desirability of acceptance of a bizonal bicomunal federation.¹⁴ Contrary to some interpretations, the official Greek Cypriot position is that the Greek Cypriot ‘No’ was not a ‘No to federation’. However, there is certainly a significant percentage amongst the 76% who may oppose a federation. The unambiguous ‘mandate’ to reject the plan is contested and highly ambiguous as to the meaning and legacy of the principle of federation. Whilst Papadopoulos repeats his commitment to the high level agreements, he places demands on the solution that negate the concept of federation of two politically equal ethnic communities: in a televised message a few months after signing the Gambari agreement (CyBC 11.09.2007) he insisted that ‘bizonality is a constitutionally in-existent concept’,¹⁵ provoking a strong reaction from AKEL leader and presidential rival, Demetris Christofias that politicians cannot be ‘selective’ in accepting agreements.¹⁶ Papadopoulos is ‘consistent’ with his address to the Greek Cypriots on 7 April 2004, which was seen as an attack on the very core of a bizonal bicomunal federation.¹⁷

2.2 The Proposed Structure of Governance under the UN Plan

The plan provides for the creation of a 'new state of affairs' where the 'United Cyprus Republic' would consist of two politically 'constituent states', the Greek Cypriot and the Turkish Cypriot, which would exercise jurisdiction over the maps agreed with a system of guaranteed majorities based on linguistic grounds in both. Hence, the plan ensures the 'bizonality' of the federation. The constitution, the supreme law of the land, allocates the functions, powers and competences and guarantees human rights of citizens. Centrally a 'federal government' would exercise jurisdiction throughout the territory of the United Cyprus Republic on a list of competences provided by the constitution, whilst a number of competences would go to the constituent states. A federal court adjudicates over disputes. The legislature consists of a bicameral parliament, the Senate and the Chamber of Deputies, each of which have 48 members, elected for five years elected on the basis of proportional representation (art. 22, Foundational Agreement). The Senate would be composed of an equal number of Greek Cypriot and Turkish Cypriot senators, whilst the Chamber of Deputies from both constituent states has seats attributed based on the number of persons holding internal citizenship status of each constituent state. Also it provided that each constituent state shall be attributed a minimum of one quarter of the seats. The Presidential Council carries out the executive functions and consists of six voting members (four Greek Cypriots and two Turkish Cypriots) and another three non-voting members, elected by a special majority in a single list by Parliament. There would be a rotating Presidency between the President and the Vice President every twenty calendar months in a 2:1 ratio in favour of the Greek Cypriots.

2.3 The 'New State of Affairs': Constructive Ambiguity, Virgin Birth and the Emergence of the 'United Cyprus Republic'

The plan explicitly stipulates that sovereignty belongs to the 'United Cyprus Republic' and the neutrality of the terms such as 'the new state of affairs' are diplomatic manoeuvres in the spirit of 'constructive ambiguity' that cannot hide the fact that there is no 'virgin birth'¹⁸ as the Greek Cypriot opponents of the plan allege. Also, like the Zurich accord, the Annan Plan prohibits both annexation and partition. The 'new state of affairs' was put to two separate referendums on the foundation agreement. The fact that the referenda were separate has led some critics to argue that it will amount to recognition of two sovereignties that legitimates the unrecognised TRNC.¹⁹ But this argument does not hold as it fails to take into account that even under the Zurich constitution the two communities vote in separate lists as the Republic is a country with a single sovereignty which consists of two distinct but politically equal communities. As for the transitional arrangement the provisions contained are the result of tough negotiations from Annan III to V. The interim period of 'cohabiting' between the Greek Cypriot President of the recognised Republic and the Turkish Cypriot leader of the

unrecognised TRNC was significantly reduced from one and a half years to 40 days (until 13th June 2004) and the system was fully operational with all laws in place.²⁰

2.4 Did the Annan Plan provide for a Federation or a Confederation?

This issue has attracted considerable controversy. The main anti-Annan legal opinion considers that the UN plan was not a federation, but something ambiguously ‘in between’ a federation and a confederation as the majority of Greek Cypriot anti-Annan commentators who supported the ‘hard No’²¹ opposed the plan primarily on the grounds that it was ‘not a federation’. Papadopoulos repeated this on numerous occasions and was more recently reiterated by the Cyprus Government spokesperson, Vassilis Palmas.²² Interestingly, some Turkish Cypriot scholars supporting the plan argued similarly that the Annan plan was ‘a hybrid between federation and confederation without a specific name’.²³

But what is ‘federalism’? As a political principle it combines unity with diversity, self-rule and shared power. It refers to a two level government, a central and a provincial, with a central/federal constitution regulating the powers and functions of each level. By looking at the establishment, development and modus operandi of federal constitutional arrangements, Wheare (1963: 53)²⁴ sets out four basic characteristics of federalism: (a) supremacy of the federal constitution; (b) allocation of powers/competences between ‘general’ (i.e. federal) and regional (constituent state) governments by the constitution; (c) the general and regional governments ‘coordinate between them’ and are not subordinate as both operative *directly* on citizens (p. 2); (d) the role of adjudication in cases of contest between general and regional government and general interpretation of the Constitution is vested ultimately with the Federal judiciary. As the successor of the Ghali ‘Set of Ideas’,²⁵ the Annan plan was a federal system of governance, which contained all of the above elements.²⁶ A confederation is merely an agreement between two sovereign and independent states; this was not the case with the Annan plan.

2.5 Independence, Sovereignty, International Personality: State Continuity or State Succession?

Whether the United Cyprus Republic (UCR) would have been a successor state or a continuity of the Republic of Cyprus has legal and political significance, but also a practical importance on the moral legitimacy of both Cypriot communities. One of the main reasons Papadopoulos rejected the plan in his 7 April 2004 broadcast was that it would ‘do away with our internationally recognized state exactly at the very moment it strengthens its political weight, with its accession to the European Union’, a view that surprised the UN Secretary-General.²⁷ But the plan explicitly provided under Article 2(a) of the Main Articles of the Foundation Agreement (MAFA) that:

The United Cyprus Republic is an independent state in the form of an indissoluble partnership, with a federal government and two equal constituent states, the Greek Cypriot State and the Turkish Cypriot State.

Cyprus is a member of the United Nations and has a single international legal personality and sovereignty. The United Cyprus Republic is organised under its Constitution in accordance with the basic principles of rule of law, democracy, representative republican government, political equality, bizonality, and the equal status of the constituent states.

Moreover, Art. 2(a) of MAFA provided that ‘the status and relationship of the United Cyprus Republic, its federal government, and its constituent states, is modelled on the status and relationship of Switzerland, its federal government, and its cantons’. Worldwide, the Swiss model is widely used as an example as accommodating conflicts in multi-ethnic societies;²⁸ whilst the Belgian system is useful in dealing with EU relations.²⁹ Not only is the explicit wording of the text powerful, but all the primary characteristics set out in international law³⁰ weigh in favour of the continuity of statehood in international law of the Republic of Cyprus. The Republic will be internally transformed into a federal state rather than two new states as membership in international organisations (UN, EU etc), state property, state archives, state debt, nationality/citizenship continue. Many non-Cypriot³¹ and Cypriot authoritative legal scholars³² consider the federation emerging as ‘state continuity’. In his second edition on the creation of states in international law, James Crawford (2006: 490) cites the Annan Plan as a prime example of a ‘remedial federation’. In his legal opinion, Crawford (2002)³³ notes that ‘post-Settlement Cyprus will not be a new state but will be the same international legal person as that which emerged to independence and was admitted to the United Nations in 1960’, citing the relevant provisions: although not explicitly stated in the Annan Plan, the definitive characteristics mentioned above strongly indicate continuity rather than succession, whilst allowing for ‘constructive ambiguity’ in naming the animal, hence the neutral references to the ‘new state of affairs’ and the naming of the baby as the ‘United Cyprus Republic’ (UCR) which can be equally construed in either way.

Some confusion may derive from Article 2(b), which, however, cannot take away from the validity of the explicit references of Art. 2(a) MAFA:

The federal government sovereignly exercises the powers specified in the Constitution, which shall ensure that Cyprus can speak and act with one voice internationally and in the European Union, fulfil its obligations as a European Union member state, and protect its integrity, borders, resources and ancient heritage.

The disputed word is sovereignty. Some argued that it lays with the constituent states and not with the United Cyprus Republic and so this will be a segmentation of sovereignty. This is connected with the idea that sovereignty emanates from the constituent state and is legitimated by the separate votes that are required for the agreement to enter into force.³⁴ But as K. C. Wheare (1963: 2) shows in the case of the US, an undisputed federation, ‘the states are co-equally supreme in their sphere’ in support of his overall conclusion that it is ‘necessary for the federal principle’ that ‘each government [i.e. general and regional] should be limited to its own

sphere and, within that sphere, should be independent of the other' (ibid, p.14). In the case of the Annan plan, one scholar suggests that 'external sovereignty lies with the federation', but 'internal sovereignty is distributed equally between the central state and the respective federated states'.³⁵ Clearly, the powers are exercised within the competences of each as provided by the federal constitution which is supreme.

The supporters of the view that the plan provided for confederation and 'state succession' ignore the evidence supporting the opposite view: they base their opinion on what one legal scholar called 'symbolic' and 'secondary' elements within the plan and ignore the primary and most cogent provisions that show that it was a federation.³⁶ A few centuries earlier Walter Bagehot had made similar kind of distinctions between the 'dignified' and 'efficient' elements of the English constitution.³⁷ The function of these 'symbolisms' is in essence to act as a diplomatic device³⁸ and as such, as a matter of law they cannot take away the fundamental elements of state continuity, which make the likes of Crawford conclude that the Annan Plan corresponds more to internal evolution of the same state. The international treaties that set up the Republic of Cyprus continue to exist and are affirmed. Cyprus has a single international legal personality and is a member of the UN. EU membership refers to continuity of the accession process of the Republic of Cyprus. Crawford (2002) refers to article 17 of the proposed constitution which deals with EU accession:

Even if the accession of the Cyprus to the EU were to occur simultaneously with the entry into force of the Agreement or shortly thereafter, Article 17 would not imply any emergence of a new State. On the contrary, since it would be intolerable for the EU to negotiate on the accession with a State which would disappear before acceding and be replaced by a different entity.

Secondly, UN membership is consistent with the continuity thesis:

If Cyprus was a new State, it would need to apply for membership and be admitted to the United Nations, as the Federal Republic of Yugoslavia did in 2000, its claim to continuity not having been accepted by existing membership of Cyprus will continue, the United Nations being invited to take note of 'the new state of affairs in Cyprus.

Finally, the issue of citizenship is also consistent with continuity 'the reference to persons who held Cypriot citizenship in 1960 as the critical date for the primary category of citizens, strongly points the other way'. In fact, as other scholars also illustrate the so-called 'virgin birth did not imply ex post recognition of the TRNC'.³⁹

2.6 Allocation of Powers, Competences and the Functions of Governance

The question of allocation of powers and competences between the federal government and the constituent states has a long history in Cyprus. The Greek Cypriots favour a 'strong federation' to remain as close as possible to their goal of a 'unitary state' and the Turkish Cypriots want a 'loose federation', which is closer to a two-state solution or a confederation.⁴⁰ The allocation of competences was

exactly the same as in the Ghali 'Set of Ideas',⁴¹ with some additional powers granted to the federal government in the Annan plan emanating from EU accession and developments.⁴² Residual powers (i.e. for matters not explicitly provided for in the constitution) remain with the constituent states, a usual federal practice.⁴³ The wording of the provision copies article 3 of the Swiss constitution.⁴⁴

At another level the doctrine of 'separation of powers' between the three branches of government, the executive, the legislature and the judiciary requires that these functions be kept distinct without interfering with each other, whilst there is a 'balance and an effective system of checks and balances'. The consociational Republic of Cyprus collapsed only three years after independence and has ever since operated under the so-called 'doctrine of necessity' as a *de facto* mono-ethnically Greek Cypriot controlled state.⁴⁵

The UN plan provides for a radical change away from the bi-communal American-based presidential system towards a parliamentary form of government modelled on the Swiss model. In fact the system is an improvement from Zurich because it provides what Sartori (1997) referred to as 'incentives' for trans-ethnic and trans-communal collaboration by the watering down of the veto powers⁴⁶ and provides for common elections rather than separatist electoral processes. Moreover, the system proposed is *more* democratic as it does away with what may be referred to as 'authoritarian presidentialism' or Hailsham's famous term 'elective dictatorship'.⁴⁷ The executive pivots a single personality, who is communally elected and appoints the executive with little checks and balances by parliament.

As for the judiciary, particularly at the federal level, it is the last resort in cases of deadlock. The presence of the non-Cypriot judges, which anti-Annan critics targeted, was very much in line with Zurich and was the best solution both sides could find as a deadlock resolution system, which respects political equality.

2.7 Citizenship, Human Rights and the EU Acquis

Art. 3 of MAFA refers to 'a single Cypriot citizenship' regulated under federal law as well as the 'internal constituent state citizenship status' which 'all Cypriot citizens' will enjoy. The plan lays out a set of complicated rules about preserving 'identity'. An agreed constitutional law dealing with the issue of settlers from Turkey regulates the acquisition of citizenship. Moreover the plan envisages a federal law on 'aliens and immigration'⁴⁸ as well as a federal law for international protection and the implementation of the Geneva Convention on the status of refugees and the 1967 Protocol on the Status of Refugees,⁴⁹ which, in the event of a settlement, would replace the current laws on immigration and refugees.

There were four contentious issues over citizenship: (a) the rights of displaced persons (mostly Greek Cypriots) to settle/return to their original homes against the rights of Turkish Cypriots who are currently residing there; (b) the timetables and phases of implementation of the provisions for return; (c) the specific provisions contained about the number of settlers who would be granted nationality; and (d) the exercise of civic duties and political rights within the constituent states.

As far as the exercise of political rights is concerned, the objections raised⁵⁰ are not significant, especially in the way differences were resolved with Annan V: basically all residents of the constituent states irrespective of ethnic origin would vote for their respective lower house, whilst the senate would be voted in on a communal basis⁵¹. Also the extensive transitional timetable over the right to settle is problematic; in fact it would have been impossible to adhere with as it was too long and too elaborate (some extended up to 18 years), although it recognised that the implementation of (re)settlement should be done orderly and taking into account the practicalities of Turkish Cypriot re-housing.

The main objections are related to the provisions on rights of displaced Greek Cypriots to resettle or settle in the Turkish Cypriot constituent state and the numbers of Turkish settlers. The latter issue proved particularly sore for Greek Cypriots: it is widely believed that one of the reasons for the Greek Cypriots 'No' was fear over the 'large numbers' of settlers remaining.⁵² Greek Cypriots saw these provisions as problematic in that they were alleged to allow for a 'perpetual inflow of settlers', despite the five per cent cap that was put for any future migration from Turkey and Greece. The property question is a complex issue that should be dealt with on its own right,⁵³ rather than be considered as part of the 'constitutional question'. As far as the human rights dimension, the formula for compensation and/or restitution was based on the negotiations which may be renegotiated, but it was not a 'gross violation' of human rights as the anti-Annan critics suggest;⁵⁴ nor is it a breach of the EU Acquis as Hoffmeister's study illustrated.⁵⁵ As for the attack that the plan was a 'property developers charter',⁵⁶ the resounding 'no' to it resulted in the greatest boost to the selling and developing of Greek Cypriot properties in the occupied territories.⁵⁷ Moreover, with the ECHR case of *Xenides Arestis*,⁵⁸ the court seems to regard the 'Property Compensation Commission', a 'court supervised by Turkey', as an 'effective domestic remedy' which may well mean that the Greek Cypriot cases before the ECHR on the question of property in the occupied north will be 'resolved' *without* Cyprus' reunification.⁵⁹

Derogation from the EU Acquis was expected because the negotiated settlement is a compromise based on the transformation of the Zurich consociational antecedent into a 'bizonal bicomunal federation'. The key question is that these derogations do not infringe on basic constitutional and human rights as contained in the Acquis and other international human rights standards. By the time Annan V was finalised the Treaty of Accession had already been signed and these derogations, although unusual, in all the versions of the plan apparently 'respected the outer limits' of the international and EU framework: in fact, the 'EU favoured a flexible approach to the Act of Adaptation under Article 4 of Protocol 10'.⁶⁰ In terms of principles of democracy, the rule of law and human rights, the plan is in line.⁶¹ Moreover, the plan met the requirements that the UCR 'speaks with one voice in the EU' and upheld the supremacy of the EU law. Hoffmeister (2006: 238) concluded that:

Any Greek Cypriot legal contention that Annan V does not comply with the principles of EU law or were inconsistent with the relevant UN Security Council resolutions is not convincing.

On the subject of citizenship and rights, the plan marked a significant improvement from the current constitutional status of citizenship in the Republic of Cyprus which has been subordinated to communal citizenship. For the first time the Cypriot citizen would emerge, transcending the communal divide,⁶² albeit within the confines of a federal post-Zurich accord. It would not completely break away from the 'communal' citizenship, but it would move away: (a) at the level of constituent state and municipality there was scope for trans-ethnic/trans-communal political cooperation in the same constituencies; (b) at a federal level the political actors must cooperate to elect a 'presidential council'; (c) at the same time it ensures 'minimum participation' somehow 'melting' or 'watering' down the divisive veto. Overall this significantly improves the 1959 accords.⁶³

3. From a Failed Consociational Republic to a Failed Bizonal Bicomunal Federation: Fairness, Functionality and Viability of a 'Remedial' Federation

No constitutional arrangement can be perfect; more so if the system is a product of constitutional engineering. Overall, the UN system proposed, despite its imperfections, was good for immediate functioning and viable governance. It required good will to work, but it also provided for 'state of the art' means for deadlock resolution mechanisms to cope with potential friction. The question of fairness and justice remains open, as this depends on perceptions. A solution will necessarily be a compromise but must be legitimised by the people; they must own the 'solution'.

The Annan plan is in many ways *more* 'democratic' than the 1960 Constitution. It is not a 'racist' nor an 'apartheid' system as some of its opponents alleged.⁶⁴ Democracy cannot be reduced to mere *majoritarian* rule, as the Greek Cypriot ethno-national perspective wants, nor can it be reduced to a *rigid ethnic-communal based system* as the Turkish Cypriot ethno-national perspective desires. The Republic of Cyprus was designed from the outset as a 'consociational democracy' and *not* a 'unitary centralised state' with some 'distortions' (as Greek Cypriot commentators allege).⁶⁵

The political system under the Zurich-London accords centres on an all powerful executive, appointed by the President *and* Vice-President, with separate veto powers and enormous power of patronage. To function it requires collusion by the two communal political elites. Greek Cypriot legal perspectives on the Cyprus question, including Annan plan critics, ignore the reasons for the duality and consociational nature of the Republic of Cyprus, which was to ensure effective community participation in decision-making. To treat consociationalism and federation as an undemocratic 'distortion' or 'deviation' from the *majoritarian* principle of 'the will of the people' is to deny any accommodation to the problem. On the other side, the hegemonic Turkish Cypriot perspectives stress the *communal*

elements and the adherence to the letter of the constitution rather than foster potential commonalities.⁶⁶ Within the constitution of the Cyprus Republic there are certain ‘distortions’, such especially the ethno-communal divide. It is well established that the system failed partly due to its rigidity, but mostly due to the absence of political will to make it work.⁶⁷ Any attempt to blame one side or the other on their own is historically inaccurate.⁶⁸

This must be taken into account when examining the various versions of the Annan Plan, including version V, so the mistakes of the past are not repeated. According to Lijphart⁶⁹ for the success of a consociation, and to a large extent the same applies in the case of a federation, four key elements are essential: (a) a grand coalition, (b) mutual veto or concurrent majority, (c) proportionality as the principal standard of political representation, civil service appointment and allocation of public funds and (d) high degree of autonomy for each segment to run its own affairs. Elements of consociationalism were necessarily reproduced in the Annan Plan, yet some institutional devices were ‘watered down’ (e.g. the veto was removed in favour of the ‘softer’ minimum percentage participation). A geographical-territorial element was introduced to transform the state from a dualist consociational state into a bicomunal bizonal federal polity. If Santori is correct that, constitutions are predictable because ‘they are pathways’ and that ‘constitutions as ‘forms’ that structure and discipline the states decision-making processes’,⁷⁰ we may conclude that the plan was both ‘functional’ and ‘viable’, even if it proved eventually undesirable to one side.

4. In search of the Constitutional Angelus Novus

Federations and consociations in ethically divided societies are costly and time-consuming systems because they need to build alliances and consensus across an ethnic divide. This however is the cost of reunification: it is absurd to reject democracy in favour of dictatorship on the grounds of ‘functionality’ and ‘effectiveness’, it is thus equally absurd to reject a reunited federal Cyprus on the grounds that it is not ‘functional’. Moreover, often ‘functionality’ is the code word for the ideology of majoritarianism.⁷¹ This chapter has argued that the Annan Plan was constitutionally workable, fair and viable for the future. But it was nonetheless rejected; therefore we have to move *beyond* the Annan Plan.

Although this chapter gave an overall positive constitutional assessment of the Plan, its failure should lead to a post–Annan and post-accession constitutional framework that draws on the foundational logic of the Annan Plan in a way that both Greek Cypriots and Turkish Cypriots agree on the form of a common bizonal bicomunal federation.

There is scope for improving the Annan plan. It can be made more viable and more legitimate in the eyes of *both* communities, which means moving beyond the strictly constitutional issues to address the security and military issues; international law and political issues as regards the ‘guarantees’ and presence of foreign troops; the transitional arrangements, such as reducing the timetables and ensuring

implementation; the elements that contain incentives for cooperation and encourage inter-communal action and political representation must be enhanced; and the right of displaced persons to settle and the issue of Turkish settlers should be addressed in a more acceptable way to Greek Cypriots. Finally, in order to address the question of 'legitimacy', the plan must reconsider the procedure of constitution-making and approval of plan.

Interestingly, time has resolved some matters such as the question of 'virgin birth' because there is no return to the pre-accession era. Other issues however are becoming more difficult, such as derogation from the Acquis. Above all developments on the ground, such as the property question, right of return and other human rights issues remain unresolved.⁷² A solution that takes into account this reality must be urgently sought. No matter what the legacy of the UN plan and the meaning of the popular mandate that was given on the 24th April 2004, there remains a bitterly contested political issue within intra-communal and inter-communal Cypriot politics to be resolved in the political arena. Despite the prevailing pessimism, there are prospects of a solution in the short-term provided that lessons are learnt from the experience of the last failed attempt: the Annan plan, albeit dead, remains an active force as a constitutional document that will inevitably illuminate the future.

Endnotes

¹Nikos Trimikliniotis, 'A Communist's Post-modern Power Dilemma: One Step Back, Two Steps Forward, 'Soft No' and Hard Choices', *The Cyprus Review*, XVIII, 1, 2006, 37-86.

²As Ahmet Sözen and Kudret Özersay, 'The Annan Plan: State Succession or Continuity', *Middle Eastern Studies*, XLIII, 1, 2007, 125-126, point out that several fundamental issues divided the two communities: (1) the future political system; (2) guarantorship; (3) three freedoms; (4) military status; (5) displaced persons; (6) Turkish settlers; (7) territorial adjustment; and (8) EU membership.

³Trimikliniotis, 'A Communist's Post-modern Power Dilemma'; Takis Hadjidemetriou, *Το Δημοψήφισμα της 24^{ης} Απριλίου και η Λύση του Κυπριακού*, Athens, 2006, 37-86; Chrysostomos Pericleous, *Το Δημοψήφισμα του 2004, το Περιφερειακό και Διεθνές Περιβάλλον, η Πρόσληψη της Λύσης και η Συγκυρία*, Athens, 2007.

⁴See Claire Palley, *An International Relations Debacle*, Oxford, 2005, 221-238. Palley alleged that it was 'a plan of foreign interests' and 'foreign imposed' (Palley 221) and 'serves the interests of Turkey and not the Turkish Cypriots'; Others claim that 'it was too ambiguous endangering the existence of the republic'. Savvas Papasavvas, *Το Σχέδιο Ανάν*, Athens, 2003; Another view is that the state would not be sovereign but a mere 'protectorate' (see Costas Chrysogonos, 'Η πρόταση του ΓΓ του ΟΗΕ για Νέο Σύνταγμα', (in Greek), 'UNSG's Proposal for a New Cypriot Constitution', *Geostratigiki*, I, 2003, 45-48; also Achilles Emilianides, *Οι Συνταγματικές Πτυχές του Σχεδίου Ανάν*, Athens, 2003, 55-69.

⁵Papadopoulos address to the (Greek) Cypriot people on all TV channels, 7 April 2004.

⁶This is the basis around which the contest between the 'hard No' and the 'soft No' against the Annan plan remains an unfinished business and will determine the eventual 'legacy' of the Annan Plan in a future settlement of the problem.

⁷See AKEL www.akel.org.cy/archive_anakoinoseis_2004.html#_100404.

⁸Quoted by Palley, *An International Relations Debacle*, 159.

⁹I have analysed this thesis in a number of papers such as Nicos Trimikliniotis, 'Nationality and Citizenship in Cyprus since 1945: Communal Citizenship, Gendered Nationality and the Adventures of a Post-Colonial Subject in a Divided Country', Rainer Bauböck, Bernhard Perchinig, Wiebke Sievers (eds.), *Citizenship in the New Europe*, 2007; 'Reconciliation and Social Action in Cyprus: Citizens' Inertia and the Protracted State of Limbo', *Cyprus Review*, Volume XIX, 1, 2007; *Η Διαλεκτική του Έθνους-Κράτους και το Μόνημο Καθεστώς Έκτακτης Ανάγκης, Συνταγματισμός και οι Περιπέτειες ενός Εθνικού Ζητήματος την Εποχή του Αστάθμητου παράγοντα*, Athens, 2008 (forthcoming).

¹⁰Toumazos Tsielepis, 'Η Αλήθεια για το Σχέδιο Ανάν', *Alitheia*, 10 April 2004 outlines how the Annan Plan should be approached; Dimitris Dimoulis, *Το Δίξαιο της Πολιτικής*, Athens, makes a similar argument on a more theoretical level.

¹¹See Daniel J. Elazar, *Exploring Federalism*, London, 1987.

¹²Nicos Trimikliniotis, *The Role of State Processes in the Production Solution of 'Ethnic' and 'National' Conflict: The Case of Cyprus*, unpublished PhD Dissertation, Uni. of Greenwich, London, 2000.

¹³From June to September 2007 in *Phileleftheros*, *Politis*, *Simerini*, *Harangi*, *Macbi* and the TV and radio channels.

¹⁴DIKO Parliamentary spokesperson, Andreas Angelides, a specialist in administrative and constitutional law, revealed that although the party officially supports a bizonal bicomunal federation, in post-accession Cyprus the party need not stick to this idea, claiming that Makarios never supported a 'bizonal federation'. EDEK officials made similar statements. Their veteran leader and honorary chair Vassos Lyssarides, claimed that 'bizonality has 'Nazi terminological origins', while EDEK leader Yiannakis Omirou considers the term 'extremely dangerous' (*Phileleftheros*, 5 August 2007). Similar views are held by the far right EVROKO and Archbishop Chrysostomos II.

¹⁵Papadopoulos expressed his opposition to the idea of 'two ethnically pure constituent state in a federal republic', so he rejects that each constituent states should have an ethnic/communal majority and thus the High Level and the Gampari Agreements.

¹⁶*Phileleftheros*, 16 September 2007.

¹⁷See David Hannay, *Cyprus: The Search for a Solution*. London, 2005; Hadjidemetriou, *Το Δημοψήφισμα της 24ης Απριλίου*, 2006; Trimikliniotis, 'A Communist's Post-modern Power Dilemma', 2006; Pericleous, *Το Δημοψήφισμα του 2004*.

¹⁸These are terms used by Hannay, *Cyprus*, 180-185.

¹⁹See Papasavvas, *Το Σχέδιο Ανάν*; Emilianides, *Οι Συνταγματικές Πτυχές του Σχεδίου Ανάν*; Palley, *An International Relations Debacle*.

²⁰Tsielepis, 'Η Αλήθεια για το Σχέδιο Ανάν', notes that the system was operational from the minute of approval of the plan.

²¹See Trimikliniotis, 'A Communist's Post-modern Power Dilemma'.

²²*Phileleftheros*, 3 September 2007.

²³Ahmet Sözen, 'A Model of Power-Sharing in Cyprus: From the 1959 London-Zurich Agreements to the Annan Plan', *Turkish Studies*, V, 1, 2004, 61-77; Ahmet Sözen and Kudret Özersay, 'The Annan Plan: State Succession or Continuity', *Middle Eastern Studies*, XLIII, 1, 2007, 125-141.

²⁴Kenneth C. Wheare, *Federal Government*, London, 4th ed., 1963.

²⁵I have elaborated on this point in *A Federal System of Government: A Constitutional Settlement for Cyprus*, Dissertation, BA Honours, Law and Economics, 1992, Oxford Brooks University.

²⁶ Tsielepis, 'Η Αλήθεια για το Σχέδιο Ανάν'; Alecos Markides, 'Το Σχέδιο Ανάν', *ΝΑΙ-ΟΧΙ, Τα Υπερ και τα Κατά*, έκτακτη έκδοση, *Phileleftheros*, 22 April 2004; Petros Liakouras, *Το Κυπριακό, Από την Ζωργή στη Λουκέρωση σε Αναζήτηση Ομοσπονδιακής Επιλογής*, Athens, I. Σιδέρης, 2007, 407-410.

²⁷Papadopoulos quoted in the Report of the Secretary General on his mission of Good Offices to the UN Secretary Council, 2004.

²⁸Linder Wolf, *Swiss Democracy, Possible Solutions to Conflict in Multicultural Societies*, London, 1994.

²⁹See Michael Emerson and Nathalie Tocci, *Cyprus as Lighthouse of the East Mediterranean, Shaping EU Accession and Re-unification Together*, Brussels, 2004, internet: <http://www.ceps.be>.

³⁰See the Vienna Conventions (1978 and 1983), as analysed by James Crawford, *The Creation of States in International Law*, 2nd ed., Oxford, 2006; Malcolm N. Shaw, *International Law*, 5th ed., Cambridge, 2003; and Ian Brownlie, *Principles in International Law*, 5th ed., Oxford, 1998.

³¹Such as James Crawford, *Legal Position under the Basis for Agreement on a Comprehensive Settlement of the Cyprus Problem, legal opinion*, Prof. James Crawford SC, 21 November 2002; Nicos Alivizatos, 'Τα Συνταγματικά του Σχεδίου Ανάν', *Geostratigiki*, I, January-April 2003, 25-36; Giannis Drosos, 'Η Συνταγματική Διάσταση του Σχεδίου Ανάν' ('The Constitutional Dimension of the Annan Plan'), *Geostratigiki*, I, January-April 2003, 37-44, Liakouras, *Το Κυπριακό, Από την Ζυρίχη στη Λουκέρνη σε Αναζήτηση Ομοσπονδιακής Επίλυσης*.

³²Tsielepis, 'Η Αλήθεια για το Σχέδιο Ανάν'; Markides, 'Το Σχέδιο Ανάν'.

³³Crawford's opinion referred to Annan I, but these aspects continued in later versions.

³⁴Loukis Loukaides, who has served as an ECtHR judge, argued this (*Phileleftheros*, 8 September 2002 and recently *Simerini* 12 August 2007, *Phileleftheros*, 20 January 2008). Papasavvas extensively quotes him in *Το Σχέδιο Ανάν*, 48-49. Similar comments are made by Chrysogonos, 'Η πρόταση του ΓΓ του ΟΗΕ για Νέο Σύνταγμα', Emilianides, *Οι Συνταγματικές Πτυχές του Σχεδίου Ανάν*, Palley, *An International Relations Debacle* and Andreas Theophanous, *Το Σχέδιο Ανάν και η Ευρωπαϊκή Επιλογή*, Athens, 2003.

³⁵Liakouras, *Το Κυπριακό*, 407.

³⁶Tsielepis, 'Η Αλήθεια για το Σχέδιο Ανάν', 8.

³⁷The *Dignified* (that part which is symbolic) and the *Efficient* (the way things actually work and get done). Walter Bagehot, *The English Constitution*, 1867 <ftp://opensource.nchc.org.tw/gutenberg/etext03/thngl10.zip>.

³⁸See Tsielepis, 'Η Αλήθεια για το Σχέδιο Ανάν'.

³⁹Frank Hoffmeister, *Legal Aspects of the Cyprus Problem, Annan Plan and EU Accession*, Laiden-Boston, 2006, 60.

⁴⁰See Zaim M. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, 1989; Kypros Chrysostomides, *The Republic of Cyprus*, The Hague, 2000; Sözen and Özersay 'The Annan Plan: State Succession or Continuity'; Liakouras, *Το Κυπριακό, Από την Ζυρίχη στη Λουκέρνη σε Αναζήτηση Ομοσπονδιακής Επίλυσης*.

⁴¹Tsielepis, 'Η Αλήθεια για το Σχέδιο Ανάν', compares these in some detail.

⁴²These include relations with the EU; continental shelf and seabed wealth; crime; ancient monuments and so forth. The fact that the continental shelf and seabed wealth is under federal control supports continuity rather than succession as Antonio Cassese, *International Law in a Divided World*, Oxford, 1986, 377-378 points out.

⁴³See Wheare, *Federal Government*; Elazar, *Exploring Federalism*; Liakouras, *Το Κυπριακό*.

⁴⁴Tsielepis, 'Η Αλήθεια για το Σχέδιο Ανάν'; Linder, *Swiss Democracy, Possible Solutions to Conflict in Multicultural Societies*.

⁴⁵Little critical literature has been produced that scrutinizes the 'doctrine of necessity'. See Trimikliniotis, 'Το Κυπριακό «Δόγμα της Ανάγκης»: Μια Δημοκρατία σε Κατάσταση Εξαιρέσεως', *Περσπέτιες Ιδεών*, 15, *Politis*, 1 September 2007; Trimikliniotis (2008 forthcoming). An exception is Costas Constantinou, *On the Cypriot States of Exception*, Oslo, 2007. Most Greek Cypriot accounts are uncritical of the 'doctrine' referred also as 'law of necessity'. See Criton Tornaritis, *Cyprus and Its Legal and Constitutional and Other Problems*,

Nicosia, 1982; Chrysostomides, *The Republic of Cyprus*; G.M. Pikiş, *Constitutionalism – Human Rights- Separation of Powers, The Cyprus Precedent*, 2006.

⁴⁶Giovanni Santori, *Comparative Constitutional Engineering*, 2nd ed., London, 1997.

⁴⁷Richard Dimbleby Lecture at the BBC, 21 October 1976.

⁴⁸Foundation Agreement, Attachment 5, Law 1.

⁴⁹*Ibid.*, Law 2

⁵⁰See Palley, *An International Relations Debacle*; Papasavvas, *To Σχέδιο Ανάν*, Emilianides, *Οι Συνταγματικές Πτυχές του Σχεδίου Ανάν*.

⁵¹Hoffmeister, *Legal Aspects of the Cyprus Problem, Annan Plan and EU Accession*; Liakouras, *To Κοιριακό, Από την Ζυγίση στη Λουκέωση σε Αναζήτηση Ομοσπονδιακής Επίλυσης*.

⁵²There was much scare mongering by the Greek Cypriot ‘no’ campaign on this issue. See Palley, *An International Relations Debacle*.

⁵³See Ayla Gurel and Kudret Ozensay, *The Politics of Property in Cyprus*, Oslo, 2006; Stelios Platis, Stelios Orfanides & Fiona Mullen, *The Property Regime in a Cyprus Settlement*, Oslo, 2006.

⁵⁴See Palley, *An International Relations Debacle*; Papasavvas, *To Σχέδιο Ανάν*, Emilianides, *Οι Συνταγματικές Πτυχές του Σχεδίου Ανάν*; Loukaides, *Phileleftheros*, 8 September 2002.

⁵⁵Hoffmeister, *Legal Aspects of the Cyprus Problem*, 230-238.

⁵⁶Palley, *An International Relations Debacle*, 187.

⁵⁷See Pericleous, *Το Διμοψήφισμα του 2004*.

⁵⁸ See [www.internal-displacement.org/.../\(httpDocuments\)/6E8DDCA70869EBF3C125723D0055FA1F/\\$file/E8C95FAD.pdf](http://www.internal-displacement.org/.../(httpDocuments)/6E8DDCA70869EBF3C125723D0055FA1F/$file/E8C95FAD.pdf)

⁵⁹*Zaman* newspaper (8 December 2006), which is close to Erdogan’s party, welcomed the decision as ‘a serious diplomatic success’.

⁶⁰Hoffmeister, *Legal Aspects of the Cyprus Problem, Annan Plan and EU Accession*, 238.

⁶¹*Ibid.*, 133-135; 135-137; 137-139.

⁶²Nicos Trimikliniotis, ‘Προς Μια Υπέρ-Εθνικτική Έννοια του Πολίτη: Η Κύπρος Πέραν του Έθνους – Κράτους’, 167-244 and (ed.) *Το Πορτογαλί της Κύπρου*, Athens, 2005, 218-221

⁶³See Nicos Trimikliniotis (2000; 2005; 2003) ‘Το Ελβετικό Σύστημα, το Σχέδιο Ανάν και η Ομοσπονδopoποίηση της Κύπρου: Για Ένα Αριστερό Συνταγματισμό’, *Theseis* 83, March - April 2003, 43-66 [see website: <http://www.theseis.com/76-/theseis/t83/t83.htm>].

⁶⁴Loukaides, *Phileleftheros*, 8 September 2002; *Simerini* 12 August 2007; *Phileleftheros*, 20 January 2008; Palley, *An International Relations Debacle*; Emilianides, *Οι Συνταγματικές Πτυχές του Σχεδίου Ανάν*.

⁶⁵See Tornaritis, *Cyprus and Its Legal and Constitutional and Other Problems*; Chrysostomides, *The Republic of Cyprus*; Pikiş, *Constitutionalism – Human Rights – Separation of Powers*.

⁶⁶See Necatigil, *The Cyprus Question*; Metin Tamkoç, *The Turkish Cypriot State, the Embodiment of the Right to Self-determination*, London, 1988.

⁶⁷See Stanley Kyriakides, *Cyprus: Constitutionalism and Crisis Government*, Philadelphia, 1969; Thomas Ehrlich, *Cyprus: 1958-1967*, London, 1974; Kyriakos C. Markides, *The Rise and Fall of the Cyprus Republic*, London, 1977; Ibrahim H. Salih, *Cyprus, the Impact of Diverse Nationalism on a State*, Philadelphia, 1977; Michael Attalides, *Cyprus, Nationalism and International Politics*, Edinburgh, 1979.

⁶⁸Papasavvas, *To Σχέδιο Ανάν* and Emilianides, *Οι Συνταγματικές Πτυχές του Σχεδίου Ανάν*, present such a distorted picture. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, represents Turkish Cypriot propaganda. Arend Lijphart, *Democracy in Plural Societies*, New Haven, 1977, 160, notes: ‘The main reason why consociationalism failed in Cyprus is that it cannot be imposed against the wishes of one or more segments in a plural society and, in particular, against the resistance of a majority segment. In this respect, the

Cypriot case parallels that of Northern Ireland. The dual imbalance of power constituted the crucially unfavourable factor.'

⁶⁹Lijphart, *Democracy in Plural Societies*, 25.

⁷⁰Sartori, *Comparative Constitutional Engineering*, 199-200.

⁷¹See Trimikliniotis, 'Nationality and Citizenship in Cyprus since 1945'.

⁷²*Ibid.*