

A Functional Cyprus Settlement: The Constitutional Dimension

TIM POTIER

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The Annan plan was the most comprehensive and ambitious plan ever constructed to resolve the Cyprus problem and as such it is a landmark. Following the publication of the first version of the UN Secretary General's plan to resolve the Cyprus Problem, a number of Greek language publications appeared, and a small number of English language publications. But since then, post-Annan plan Cyprus has become a hot subject with numerous new publications appearing in various languages. Overall, the vast majority of the Greek and Greek Cypriot publications have been opposed to the plan outright, many of them containing rather opinionated approaches based on a distorted picture of its content and context. As time goes by we are seeing a more fruitful debate emerging with more balanced arguments in Greek and English publications about the referendum and the Annan plan.¹ In any case, it cannot be disputed that the publication of the UN plan in late 2002 was a watershed. It decisively transformed the 'terms' of the debate by taking a very specific approach to the notion of the 'solution' and its content, bringing about a rupture in the political constellation in a way that no other plan or event has since 1974.

Tim Potier's book attempts to do something constructive with the UN failure of the Annan plan. Of course this lengthy 764-page effort at "a functional Cyprus settlement", which merely aims to capture what he refers to as "the constitutional dimension", is not bed-time reading. But then again, who said that constitutional texts are to be easy? We must recognise that despite the attraction of making our works as academics, lawyers, and social scientists accessible to a wider audience, such a task is seldom successful. A book of this size covering 16 chapters or "a portion of the Annan plan", as the author suggests (p. 9), reads like an encyclopaedia of the Annan plan; in that sense the book must be very useful to the team of experts surrounding Demetris Christofias and Mehmet Ali Talat, particularly the constitutional brains behind the scenes.

The subject matter of the book as well as the way it was conceived and written invites readers to engage in a political and a constitutional debate over the resolution of the Cyprus problem. In this sense this review will not confine itself to a review function but will take the form of a broader commentary on the issues the book deals with.

1 See for instance Andrekos Varnava and Hubert Faustmann (eds.), *The Failure to Reunify Cyprus: The Annan Plan, the Referendums of 2004 and the Aftermath*. London: I.B. Tauris.

After a short but not particularly insightful survey of the Cyprus problem (ch. 1, pp. 15-18), the author proceeds to deal with the content of the Annan plan. He shapes the general scene with two short chapters: the structure of the plan (ch. 2, pp. 23-32) which outlines the basics of a plan so overwhelmingly rejected by the Greek-Cypriots, and chapter 3 (pp. 19-22) entitled 'Cyprus and the Constitution'. The author misses the opportunity here to set out the basic constitutional theory of the plan, or to critique it, or to explain the theoretical frame on how and on what basis the author proposes to fix it. Rather, these chapters, and indeed the whole book, reads like a long 'surrogate' or 'secondary' text, which really make sense only if the reader has the Foundation Agreement plus the Annexes (i.e. the Annan Plan) open next to Potier's book in order to cross-refer to the texts. In that sense, as a technical commentary, the text is useful.

In chapters 4 to 16 he delves into the nitty-gritty of the Annan Plan: Entry into Force of the New State of Affairs (ch. 4); State Succession (ch. 5); Separation of Competences (ch. 8), and Citizenship and Citizenship Status (ch. 9), all of which are short chapters. The remaining chapters are longer: Federal Parliament (ch. 11, pp. 183-361), Federal Elections (ch. 12, pp. 361-550), Civil Service (ch. 13, pp. 551-570), External Relations (ch. 14, pp. 571-644), EU Relations (ch. 15, pp. 645-728) and finally the Central Bank (ch. 16, pp. 729-762). The book ends with a two page bibliography.

Overall, the book is timely and highly relevant to the current negotiations' phase as a sourcebook on the various dimensions the author is dealing with. It is comprehensive and covers a broad range of issues which have been identified as "thorny". A major weakness however is the absence of a detailed index: the content list which broadly sets the outline cannot make up for this. It is nowhere as detailed as one would expect, particularly when one tries to make sense of the interconnections between the various themes. Other weaknesses relate to the way this book has been conceived and produced: it is too embroiled in the Annan plan context; in other words, *it is too much a product of the specific conjuncture and as such it fails to take a longer-term perspective past this political moment*. At the same time, it is highly technical and does not have socio-historical and the necessary political rooting *to be read by researchers beyond those legal scholars interested in the detail*. Then again, we all know that the "the devil is in the detail" – in this sense what Potier does is valuable in providing such a scrutiny on various aspects of the plan for those who are currently and others in the future working out the details of a settlement. However, it would have been particularly useful and interesting intellectually if he had devoted some more thought and space in the outcome, to spell out explicitly where he is coming from theoretically: what form of democracy should Cyprus strive for; how best to combine consociational with federal principles; what kinds of representation should be preferred and why are they best suited to the situation? He has no references to the normative theory behind his own proposal which he conveniently designates as 'functional'.

Potier does, however, take one point of reference passionately – his starting point in the Annan plan – and he diligently sets out to mend two things which he identifies as problems of the plan, to "identify the countless errors, gaps and inconsistencies" and to present "a compromise

acceptable to both sides” (p. 9). We may assess the book on these two criteria. On the first criterion Potier is correct in pointing out the errors and inconsistencies. In fact he has rendered a good service by putting in “thousands of hours of careful thought”, as he points out (p. 12). On the second criterion, matters are far more complicated. I agree with Potier that his proposals are in general balanced and even-handed in line with good mediating traditions of legal crafting. What I do take issue with is his insistence, mostly implicit but nevertheless quite apparent, that he provides *the answer*. Of course in his book title he refers to *a* functional settlement and not *the* functional settlement. Yet he does not provide the reader with *any* alternatives: the proposal he puts forward in each of the chapters is *merely one possibility amongst many, which may also be balanced*. In his defence he could say that this would have made the book too long – it is already massive. The answer to that, however, is that he chose to deal with too many aspects that are *not* strictly speaking *constitutional* and could have been dealt with in another shorter and more focused volume: for instance, the Central Bank chapter oddly enough is longer than his Human Rights chapter. Moreover, he does not deal with crucial questions such as whether we are dealing with a federation, a confederation, or other contentious points.

I would like to finish my assessment of the book with three comments that refer more generally to rethinking the Annan plan now that the dust has settled but while negotiations are still taking place for what is likely to be the last opportunity to resolve the problem on the basis of a bizonal, bicomunal federation.

Firstly, although the Annan plan is misguidedly cited many times as a 10,000-page long document,² the truly *constitutional aspect* refers to the ‘Foundational Agreement’ and the Constitution (Annex I): this was published in all the Cypriot newspapers and was debated heavily throughout the media, albeit in a highly distorted manner, at least in the Greek-Cypriot context. These define the core elements of the new constitutional arrangement in terms of (a) the nature and status of the state, the constitution and the institutional structure of governance; (b) the relations between the various institutions, the ‘central’ or ‘federal’ Government and ‘regional’ or ‘constituent states’; (c) the rights of citizens. Of crucial importance there are, of course, various

2 Even expert lawyers, who know better, such as Claire Palley (2005) *An International Relations Debacle. The UN Secretary-General’s Mission of Good Offices in Cyprus 1999-2004* (London: HART Publishing) make such comments; in fact all the anti-Annan Greek-Cypriot literature claims this, whilst it is well-known that it was the Greek-Cypriot side who insisted that all the lengthy 10,000-page laws were to be part of the agreement; and rightly so, to ensure that there is a fully functioning state with its laws and treaties in place, should it be approved by the people of Cyprus. But it remains grossly misleading to suggest that the incorporation of these laws as part of the Foundational Agreement required that Cypriots had to study and digest before making a decision in 2004. This is an absurd argument: such laws are currently in operation at the moment; no one has ever read them all but they are publicly available as part of the Cypriot legal order (for a critique of the literature on the Annan plan and the referenda see book reviews, Trimikliniotis, N. (2005) ‘The Cyprus Problem: An International Relations Debacle or Merely An Unclimbed Peak?’, *The Cyprus Review*, Vol. 17, No. 1, pp. 144-153.

issues from an international and EU law perspective that acquire a constitutional entrenchment and are treated in the context of the discussion.

Secondly, to understand the plan it must be located within the historical and wider socio-political context of Cyprus, where there is an 'imbalance' of military and political forces in what can be considered a *system of multiple asymmetrical power relations* between the various political actors. In other words, the plan cannot be seen outside the context of the failed Zurich accord that created a consociational Republic, the ten years of inter-ethnic strife (1964-1974) and the thirty years of de facto partition that was the result of the Greek coup and the Turkish military invasion and occupation of the northern territories of the island. In this context the Annan plan marks a significant move forward in the direction of finding a solution to the divided island and provides the essentials for a peaceful and lasting solution. This is because it defines a bizonal bicomunal federal republic which ensures a functional and viable arrangement of power in the light of 'democratic constitutionalism' and because basic human rights, international law and the EU *Acquis* are safeguarded, in spite of the derogations that are conceded.

Finally, a constitutional assessment of the UN plan must not assume that the political failure of the referendum necessarily implies a constitutional failure of the logic or basic philosophy of the plan. As argued elsewhere we must de-link the political and other social, economic as well as legal aspects of the failure from the *constitutional logic* if we are to properly assess the latter in addressing the Cyprus problem.³ The challenge for the post-Annan endeavours to search for a solution is to be reflexive about the failure of the initiative and define a post-Annan and post-accession constitutional framework that may draw on the foundational logic of the Annan plan in order to move into a future whereby Greek Cypriots and Turkish Cypriots would agree on a common bizonal bicomunal federation. There is however considerable scope for improving the Annan plan to make a solution workable, viable and above all legitimate in the eyes of both communities, which means *moving beyond* the strictly 'constitutional' issues:

1. Deal with the security and military issues, which are essentially international law and political issues.
2. Radically reduce the transitional arrangements such as timetables and uncertainty in the implementation.
3. Enhance the incentives for cooperation that encourage the inter-communal action and political representation.
4. Address the questions of the right of displaced persons to settle as well as the issue of the Turkish settlers in a more acceptable way.
5. Redress and fine-tune some of the governance issues.

3 See Nicos Trimikliniotis (2009) 'Annan V: Rethinking the Viability of the Constitutional Arrangement and its Future Importance' in Andrekos Varnava and Hubert Faustmann (eds.), *The Failure to Reunify Cyprus: The Annan Plan, the Referendums of 2004 and the Aftermath*. London: I.B. Tauris, pp. 105-119.

6. Provide a better property regime for both communities.
7. Deal with the question of 'legitimacy' of the proposed plan in such a way that the solution is 'owned' by the people.

There are matters which have been 'resolved' by the passage of time: for instance the question of 'virgin birth' is history now, as we cannot return to the pre-accession era; others are becoming more difficult such as the derogation issues and above all the developments on the ground, as the property question and other human rights issues remain unresolved. We are living in the post-Annan and post-accession era, and a solution must be sought that takes into account this reality. Yet the legacy of the UN plan and the meaning of the popular mandate that was given on 24 April 2004 remains a bitterly contested political issue between and betwixt the communal and inter-communal politics of Cyprus. This era requires that the prospect of a solution in the short-term be re-evaluated and that the experience and knowledge gained in the last failed attempt become a source for reflection and reflexivity.

To this end, Potier's effort is welcome for he engages with the core issues of the demise of the last effort to resolve the problem. As a constitutional document the Annan plan remains an active force that will inevitably illuminate the future, and in this sense we can remark with confidence – perhaps tongue in cheek – that this defines the ironic wisdom we can derive from a truly ghost-like affair: 'the Annan plan is dead, long live the Annan plan'.

NICOS TRIMIKLINIOTIS