

A FEDERALISM PROCESS FOR CYPRUS: AN AMERICAN CONSTITUTIONAL PERSPECTIVE ON THE CYPRUS PROBLEM

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Abstract

This article examines how American constitutional experience bears on the Cyprus Problem. The historical evolution of American federalism, from very limited to expansive federal power, may prove instructive. Cyprus should not seek a comprehensive federal solution now, but rather adopt a federalism process, patterned after the Middle East peace process. This would entail whatever limited federal structures both sides can accept now and a structured process for further considerations as trust, experience, and real confidence develop.

The question of how to develop a viable formula for co-existence of the Greek Cypriot and Turkish Cypriot communities in Cyprus, generally referred to as the 'Cyprus Problem', raises many fascinating and perplexing legal, political, economic, and social questions. As one trained in the American constitutional tradition, my focus is on the constitutional aspects of the Problem.

I do not pretend to have a solution. Even if I secretly had one, I would be most hesitant to present it, as an outsider to the island's two major communities² who has lived there for only a few months. What I thought might be useful, however, is to present an American constitutional perspective on the issues and potential solutions being discussed, in the hope that my analysis might offer a different framework for approaching the Problem.

Overview

What is most striking to an outsider is that, amid all the talk about the Cyprus Problem, essentially no one discusses *why* the two communities should co-exist or *whether* either or both would be better off living separately. It is simply assumed that the solution must be some form of co-existence. My sense - which is admittedly impressionistic - is that the people in both communities (as compared to their current political leadership) truly want a solution and view co-existence, rather than separation, as the preferred endpoint. It is also my own opinion that co-existence would be best for both communities. However, for me, honest consideration of this issue should be the starting point for any analysis of how to solve the Problem.

In contrast, what there is a great deal of talk about are concepts like sovereignty, federalism, community rights, affirmative action, and individual rights. To me, these concepts represent a continuum of mechanisms designed primarily to protect the community in the numerical minority from domination by the community in the numerical majority.³ Thus, for example, I perceive a bicomunal, bizonal federation, the commonly agreed formula for Cyprus, as simply a more elaborate structure for protecting the interests of the Turkish Cypriot community than the traditional American federalist structure. That structure consists of geographically, rather than ethnically, defined states and constitutional protection of individual rights, including non-discrimination, enforced by a federal judiciary independent of politics.

Where the Cypriot communities will ultimately come to rest on this continuum of mechanisms will not be the result of some theoretical construct or a formula derived from another constitutional system, although plainly other experiences may provide useful ideas for Cypriot consideration.⁴ Rather, any resolution must and will reflect primarily the particular history of the island's communities and *the degree of assurance or protection* for its interests that each community feels it needs in light of that history.

The degree of assurance that each community needs, however, is not fixed in time. Rather, it reflects the level of trust at any particular point. Trust can be gained or lost over time, through positive or negative experiences. The American constitutional experience has been one of slow but gradual expansion of federal versus state power as economic and social needs developed. Given the levels of hostility and distrust between the Cypriot communities over the last quarter century, I suggest that, from the perspective of Cyprus' constitutional structure, it is a mistake to attempt to find a single, comprehensive solution all at once, right now. I am not suggesting simply confidence-building measures. Rather, the communities should try to agree on a minimal federal structure, based on the bicomunal, bizonal concept that each side has already accepted in principle, which each community could live with now, given their very limited current level of trust and hence very high current need for assurance or protection.

However, such a basic federation should be the beginning, not the end of the *process*. If such a limited system were to prove successful over time in protecting fundamental interests and building bridges, then each community might feel more trust and less of a need for assurance than at present. They might, then, be willing, at a later time, to entertain suggestions for a more powerful or centralized federal authority than they can imagine at present. I, therefore, suggest that Cyprus draw upon the recent Israeli-Palestinian experience - which involves an incremental and evolving peace process, rather than a single, comprehensive, and permanent peace settlement at the outset - and create, if you will, an incremental, evolving "federalism process" for Cyprus. By that, I mean a structured procedure for continuing discussion and reconsideration of the nature of the federation and the degree of federal versus community authority. Such a developing process may prove a more effective way of proceeding than seeking to conclude a single, comprehensive, permanent federation settlement. I will elaborate on these points below.

Definitions and the American Experience

Part of the problem, from an outsider's perspective, is that various terms of constitutional importance are used without clear or agreed-upon definitions. These terms often carry substantial political as well as emotional baggage.

"Sovereignty," for example, means different things to different people. This has been as true throughout American history as it is in Cyprus today. Americans who have been concerned about the extent of the federal government's power, from anti-Federalists in the late 18th century to so-called "militiamen" today, have frequently asserted that American states are "sovereign." Indeed, in a very recent decision known as *Seminole Tribe v. Florida*⁵ the United States Supreme Court decided for the first time that our federal Congress could not use the powers expressly delegated to it in the Constitution to compel states to submit to lawsuits in federal court as part of an enforcement mechanism for a federal regulation. This protection from being sued in court is generally referred to as "sovereign immunity." In so ruling, the majority flatly stated that "each State is a sovereign entity in our federal system."⁶ Just five years earlier, the Court had similarly stated that "the States entered the federal system with their sovereignty intact."⁷

These statements are, to be blunt, a distortion. A sovereign entity (certainly in international and American law, if not in all legal systems) is one that has all the powers of government - both foreign and domestic - and is eligible for international recognition, like Japan, Guatemala, or South Africa. In contrast, American states have not, since the formation of our Republic, been authorized to maintain their own armies or foreign policies, to send or receive foreign ambassadors, to negotiate treaties with foreign countries, or to coin their own currency, to mention just a few key matters.⁸ If, as the Supreme Court has said, "each State is a sovereign entity," then each of them would have authority to do such things. The truth is much more limited, as the Court appropriately acknowledged only a few sentences later in the *Seminole Tribe* opinion: "the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity."⁹

As Justice Souter explained in dissent in *Seminole Tribe*, "[b]efore the new federal scheme appeared, 18th century political theorists had assumed that 'there must reside somewhere in every political unit a single, undivided final, power, higher in legal authority than any other power'.... The American development of divided sovereign powers ... 'shatter[ed] ... the categories of government that had dominated Western thinking for centuries.'¹⁰ Of course, the Swiss, who developed a unique and highly successful form of federalism in the thirteenth century, may well take exception to this sweeping statement.¹¹ But the basic point cannot be disputed: The American system of federalism divided up attributes of traditional sovereignty between the national government and its constituent parts in an unusual way that was surely a break with the predominant mode of Western governance at the time.

Discussions about any solution in Cyprus (other than partition into two separate countries) will advance only if talk about "sovereignty" is dropped and the focus is turned to *which attributes of sovereignty* will remain with each community in a federation and

which will belong to the federal entity. Will there be one federal army or two community (federated state) armies, a federal police force as well as community forces? Will there be a single foreign policy, trade policy, immigration policy, and tourism policy, or will each community retain the right to maintain certain relations separately with some or all foreign countries? Will there be one currency or two? Will there be a federal bank? Will there be a federal court system with supervisory jurisdiction in addition to the community court systems and, if so, how broad will the federal jurisdiction be?¹² None of these questions are easy, but they will never be answered if the starting point remains: "each community must [be][remain][become] a sovereign entity."

Indeed, the term "federation" itself is susceptible to innumerable meanings. At its core, it signifies any system in which several separate (and in most cases pre-existing) communities, colonies, states, provinces, or other political entities agree to establish a joint government with some powers over the entire area. The interesting and important questions are: what powers does the federal entity have or, stated more positively, which functions does it serve, which powers or functions are retained by the component parts, and what are the component parts. These questions address the same point as the prior question: which attributes of sovereignty are to rest with the community entities and which with the federal entity? Such questions do not often get seriously addressed in Cyprus, because of distracting debates about history, blame, the source or nature of sovereignty, or what is the only "fair" or "correct" form of Cypriot federation.

But there is, of course, no such thing as a "true" federation. There is only, as noted, a continuum of different arrangements - from almost complete local control and responsibility for government functions to almost complete federal control and responsibility - which make more or less sense for different societies at particular times depending on their past experiences and current needs.

Many consider the American federalism experience essentially irrelevant to the current situation in Cyprus, because American federalism is not based on entities defined by discrete ethnic communities. I suggest that the American experience in protecting smaller states from domination by larger states, even though neither are ethnically identifiable, has some relevance. Moreover, as discussed below, the mechanisms used in the United States to protect racial minorities from majority domination may also prove helpful.

But what is most important, yet entirely ignored, is that American federalism has been dynamic, changing dramatically over time. The balance of federal power versus state power in the United States has altered drastically over the years. First, there was a significant shift from the Articles of Confederation to the Constitution. Even then, the Constitution provided for a very limited federal government, and the states were very concerned about federal usurpation of state powers.

Of greater importance, federalism has evolved substantially over our 207 years of experience with the Constitution - once by civil war and ensuing constitutional amendments, sometimes by changing court interpretations, and sometimes simply

through changed practices and general acquiescence to them. The most dramatic non-economic change was the adoption of the three post-Civil War constitutional amendments, which for the first time authorized federal judicial and legislative enforcement of civil rights within the states.¹³ The most striking shift in the economic arena occurred in 1937. That year, the Supreme Court changed direction and upheld the federal National Labor Relations Act and other industrial regulations implemented during the Depression under the federal legislative power known as the Interstate Commerce Clause, after having struck down similar legislation in preceding years as beyond that power.¹⁴ But the 1937 reversal was only one of several modifications of the Court's interpretation of the scope of that congressional power - and of federal power generally - over the past two centuries, including most recently the *Seminole Tribe* decision. The federalization of basic economic regulation, not to mention of social issues such as discrimination, domestic violence, and gun control, that has occurred in the last sixty years would have been literally inconceivable when the Commerce Clause was drafted and approved by the thirteen states that formed the federal government in the 1780s.

The fact that the current American federal structure was literally unforeseen when the Constitution was first written should be a sign of hope, not despair, for Cyprus. What it means is that there is no such thing as a permanent plan, and that no one can envision all future needs. Rather, Cyprus, like America, should, I believe, *start* with a limited plan along the lines of the much-discussed bicomunal, bizonal federation, honestly focussing on each community's current needs and accounting for the extremely low current level of trust between the communities in light of past experience. However, this initial plan should also build into the federal structure *procedures* to insure the *possibility of change*, and not solely by ad hoc proposals, as trust, experience, and social and economic needs develop.

In considering a current or future federal structure, Cyprus might also benefit from examining the American approach to the concepts of community or group rights versus individual rights, and affirmative action. Group or community rights are legal benefits flowing to a group rather than to an individual. Cypriots have, of course, already had some experience with group rights. Under the 1960 Cyprus Constitution, for example, the Greek Cypriot community was entitled to elect seventy percent of the seats in Parliament and the Turkish Cypriot community thirty percent.¹⁵ Similar fixed percentages were provided for the two communities' participation in the Council of Ministers, the army, and the civil service.¹⁶ The communities as a whole, but not any particular Turkish or Greek Cypriot individuals, had the right to those seats or jobs. This is an arrangement occasionally used, as in Cyprus in 1960, when: a) there are clearly identified communities clamoring for power and recognition; b) the communities are not geographically contiguous and not in substantial control of separate political entities, such as states or provinces within a federation; and c) there is insufficient trust by the minority community in the protections provided by a system of simple majority rule.

The American constitutional system has never recognized group rights below the

level of individual states, none of which are, or typically have been, racially, ethnically, or religiously homogeneous in anything like the way that northern and southern Cyprus currently are.¹⁷ The original states had differing economic interests (slavery-based agriculture versus a mercantile economy, for example) but were not reflective of ethnic communities. Rather, the American system has relied primarily on private group action in the political process. That is, people with common interests (whether trade or occupation, natural resources, religion, or ethnic origin) form what we call "interest groups," which use their voting, financial, and other power to create or influence the fluctuating political majorities both within states and in the federal system. The American interest group political process is supplemented by a limited constitutional protection against inequality which permits only individual claims of discrimination to be heard and remedied in the courts. Indeed, even that has been true only since the equality provision, known as the Equal Protection Clause, was inserted into the American Constitution 130 years ago and, more significantly, only over the last forty years when that guarantee has finally been seriously enforced by the courts.¹⁸

This individualistic American approach is reflected in the strong, indeed growing, constitutional resistance to affirmative action.¹⁹ By that term, I mean to denote a range of efforts to assure minorities (or at least individuals within minority communities) of access to enhanced opportunities in employment, contracting, and education. In its more extreme forms, such efforts include assuring minorities a fixed proportion of positions in those settings.

The American constitutional resistance to affirmative action grows as the technique approaches, or at least resembles, bestowing group rights. Thus, an African American denied the right to vote may challenge the denial on constitutional grounds in court. The relief that a court might grant in such a situation may well affect many thousands of members of that community - as, for example, when the federal courts struck down literacy tests for voter registration in certain states because they had been used to prevent African Americans from registering.²⁰ But even such broad-impact decisions are not intended to afford, or perceived as affording, a group or community right to representation, for example, by assuring control of a particular legislative seat. Rather, precisely because of this deep-seated aversion to group rights, recent efforts in southern American states to create voting districts in which African Americans or Latinos are in the majority have been struck down by the Supreme Court as unconstitutional denials of equal protection to white voters,²¹ even though earlier suits challenging deliberate exclusion of African Americans from voting districts had succeeded.²² It is worth noting that these unsuccessful efforts to enhance African American voting power provided less of a group right or guarantee of representation to the minority community than did the 1960 Cyprus Constitution.²³

Despite the refusal to bestow community rights, American democracy has experienced a slow but consistent expansion of African American political power over the last thirty years.²⁴ This reflects primarily two developments - a) increased federal legal guarantees of access to the system, most prominently the Voting Rights Act first enacted in 1965;

and b) enhanced minority use of the interest group process on both the federal and state levels - by forming coalitions, swapping political support for differing legislative goals, and the like. The election of African American candidates in state-wide elections in states that do *not* have an African American majority, such as Douglas Wilder's election as governor of Virginia and Carol Moseley-Braun's election as senator from Illinois, is but the most striking example of this phenomenon.

Given the long struggle for, and less than satisfactory status of, minority rights in America, and the current status of Cypriot relations, I am not suggesting that the American model of federally-enforced individual protection from discrimination and an interest-group political process within an ethnically diverse federal structure would be a successful model for Cyprus now. Rather, I have explored these concepts for two reasons. First, the concepts of community rights and affirmative action are frequently discussed in Cyprus and the American experience sheds some light on those concepts. Indeed, the Set of Ideas, the most complete attempt to sketch out a comprehensive solution, includes certain community rights.²⁵ Second, and more importantly, if an evolving federalism process were established, as I propose, and the federal entity's authority were enhanced over time, the communities might wish to consider other countries' experience with different techniques for protecting minority rights within a stronger federal structure, such as affirmative action or community rights.

Why a United or Federated Cyprus?²⁶

It is remarkable how infrequently people in either community in Cyprus discuss whether it is a good idea, and if so why, to seek a resolution involving a unified or federated country. I am aware that, to a large degree, this issue is seen as a bridge already crossed, because both communities have for many years officially accepted the idea of a bicomunal, bizonal federation as the basis for a resolution of the Cyprus Problem. I am not suggesting that the island would be better off otherwise - indeed, I believe that a federation is the better resolution - but it is worth analyzing why the concept is so widely accepted and rarely discussed, in determining how to proceed to reach that goal.

First, Cyprus is a small island and all Cypriots relate to the island as a whole. The English colonial experience from 1878 to 1960, not to mention earlier experiences with other external powers, strengthened the common feeling of an island facing the outside world, despite the ethnic conflicts which the English period also engendered. Nevertheless, I suggest it is important to examine the interests of each community separately. I will assume here that a united or federated Cyprus would include a united economy.

The Greek Cypriot community has a booming economy, full international recognition, and strong trade, diplomatic, and travel ties to the outside world. What does that community have to gain from joining in a single state and economy with the Turkish Cypriot community?

Most Greek Cypriots do not see a social gain, as they are in no sense isolated from

the world or restricted in their social contacts (except with Turkish Cypriots). On the other hand, I do see an enrichment in interacting, as I did, with persons of both communities inhabiting the same island.

It is most unlikely that there would be any short-term economic benefit for the Greek Cypriots. They will doubtless have to share their successful economy with the far less successful Turkish Cypriot economy, incurring many transitional and welfare costs, although on a much smaller scale than the recent West German economy's absorption of East Germany. Nevertheless, a unified economy should hold some potential for longer-term economic benefits. A simple example would be that a federated state would probably allow Greek Cypriots to engage in tourism business in the north (whether in joint ventures or otherwise), which is currently impossible. That example suggests that the freedom of movement, discussed below, has economic as well as social and emotional value.

Unification would benefit the Greek Cypriot community with regard to international recognition only if the European Union (EU) were to make resolution of the Cyprus Problem a precondition to full membership in the EU. The European Union announced in March 1995 that it would begin accession discussions with Cyprus six months after the current Intergovernmental Conference ends in spring or summer 1997, although it hedged its bets by saying "taking account of the results of" that Conference.²⁷ European behavior since that announcement suggests that the EU will (in my view wisely) walk a fine line between making resolution of the Cyprus Problem a precondition to EU membership and clearly stating that Cyprus can come into the Union in its present, divided form. The hope is that the ambiguity will be a spur to both communities to negotiate seriously, out of fear that they would otherwise be left out of the EU. Significantly, some observers believe that Cyprus would not gain economically and might even suffer competitively from accession to the EU.²⁸ This suggests that membership holds some recognition/legitimacy value to the Greek Cypriot community, even though it already has international recognition as the only legitimate government of Cyprus.

I perceive two primary benefits to Greek Cypriots from federation, beyond the small potential for longer-term economic benefits and the greater assurance of EU accession. First, for twenty-two years, Greek Cypriots have been denied physical access to the thirty-seven percent of the island under the Turkish Cypriot administration.²⁹ Cypriots of both communities have very strong attachment to the land, in strong contrast to Americans accustomed to vast open spaces and a tradition of, some would say obsession with, mobility. For hundreds of thousands of Greek Cypriots, their "homes" are in the northern portion of the island. The younger generation obviously does not have the same level of intense feeling for those areas, which they have never visited, let alone resided in. Yet many still say that they, or at least their family, "come" from Kyrenia or Famagusta. Regaining the ability to return to those areas is very meaningful to, and thus a high priority for, Greek Cypriots, at least those of the generations that had lived in the north. By "return," they do not generally mean simply the ability to visit for the

day and have a picnic in Kyrenia's beautiful harbor. Rather, they mean the right to move back and live there permanently. Moreover, the Cypriot attachment to land makes the American concept of financial compensation for the lost property³⁰ unsatisfying.

It is extremely unlikely that any bizonal, bicomunal resolution of the Cyprus Problem acceptable to the Turkish Cypriots, at least at this point in time, would include the right of Greek Cypriots to move to, and live in, the north. The only exception that most people anticipate is that some portion of land in the north would be turned over to Greek Cypriot community control when a federation is formed, because of the current disproportion between the Turkish Cypriot percentage of the island's population and the percentage of the total land currently controlled by the Turkish Cypriot community. It may well be, therefore, that there can be no solution until the younger generation that has never lived in the north comes to power in the Greek Cypriot community. This particular sticking point is a good example of why developmental or incremental federalism may be the only realistic approach to the Cyprus Problem.

Second, the Greek Cypriot community would gain some military security through federation, because it is assumed that any federal solution would include a reduction in the number of Turkish armed forces on the island. Such a reduction could also provide an economic benefit, in that the Greek Cypriot community would feel freer to reduce its own defense expenditures.

In sum, the Greek Cypriot community would probably derive some enhanced economic opportunities, greater assurance of EU accession, increased access to the north, and greater security as a result of the development of a Cypriot federation.

What interest do the Turkish Cypriots have in federation, having once experienced the disadvantages of being a relatively small numerical minority under Greek Cypriot control? Their interests seem quite clear to an outsider. Turkish Cypriots certainly have an economic interest in being joined to the vastly more successful Greek Cypriot economy, which also has access to foreign markets without impediment. They would probably also benefit from EU membership. Further, Turkish Cypriots have a profound interest, reflected in conversations with outsiders, media commentaries, and formal political communications, in being recognized as a legitimate community by the international community. The existing resentment against the European "boycott,"³¹ the international refusal to recognize the community, and the resulting economic, social, and political isolation is enormous and readily palpable to an outsider. Federation offers the possibility of international legitimacy and contact, as well as substantial economic improvement for the Turkish Cypriot community.

Of course, any agreement on a federal government would probably result in a reduction in the size of the existing armed forces in each community. This would reduce the sense of physical security that Turkish Cypriots have enjoyed over the past 22 years as a result of the presence of approximately 30,000 Turkish soldiers in northern Cyprus. For Turkish Cypriots, then, the question seems to be how to balance security needs against economic, legitimacy, and outside contact needs.

So far I have discussed only Cypriot interests. Of course, a major obstacle to resolution

of the Cyprus Problem, some would say "the" major obstacle, is the conflict between the two "motherlands" - Turkey and Greece. I am not an expert in international relations and thus leave to others a precise definition of the diplomatic, military, economic, or other interests of those two countries.³² Nevertheless, I fully recognize that no analysis is complete, and thus no solution, permanent or evolving, is possible, without recognizing and satisfying those national interests. However, it seems clear that a divided, heavily armed Cyprus will continue to be a flashpoint or focus of that broader conflict. I suspect that a strong, unified, independent, and demilitarized Cyprus would not be as vulnerable to manipulation by the motherlands in their ongoing dispute. A very limited initial federal structure in Cyprus along the lines of the bicomunal, bizonal federation in the Set of Ideas would not substantially remove Cyprus from the Greek-Turkish conflict. However, my proposal for building in the possibility for expansion of the federal structure as trust and circumstances develop might provide Cyprus with the opportunity gradually to withdraw itself from that longer-standing, more volatile, and more intractable international conflict, an end, I believe, that is devoutly to be desired.

How to Proceed?

If unification/federation is in fact perceived as beneficial or desirable - whether to assure admission to the European Union and physical access to all parts of the island or to achieve economic well-being and international legitimacy - the question is how to proceed to reach that goal? The prevailing assumption, among both communities, the United Nations, and now the European Union, has been that a comprehensive, overarching, permanent solution must be negotiated at this time to resolve "the Problem." The UN's proposal some years ago of "confidence building measures" (CBMs) - specific, limited steps, such as opening Varosha and the Nicosia airport, to provide benefits to both communities and improve relations - recognized that the level of trust between the two communities was currently so low as to preclude a full settlement and that measures must be taken to increase that trust before a settlement is possible. The steps suggested, however, in the CBM proposal were very limited.

The failure to achieve agreement on CBMs is a devastating comment on the state of relations between the communities and on the prospects for a settlement. I suggest that one reason for the failure of the CBMs might have been that the plan offered both communities *too little* and thus they tried to incorporate into the CBMs aspects of the large solution that they cared about. On the other hand, the concept of a comprehensive and permanent solution tries to do *too much*. The avenue that I suggest is in between those two extremes: an initial, very limited federal structure - with each community ceding to the federal structure only those powers that it could live without indefinitely - but with a built-in process for review, discussion, and further negotiations, leaving open the possibility of further expansion of the federal system, as experience and development of trust permit, and economic and social developments suggest are desirable.

The Israeli-Palestinian peace process is a model. The "settlement" of that intense

dispute was not a "peace" but a "peace process." That is, the first Oslo agreement provided for some small steps - more than simply confidence-building tidbits, but far from a full resolution - and for a process for continuing along that road. There was, in fact, an Oslo II agreement, that substantially expanded the original agreement, both geographically and functionally, but left a "final" resolution of the hardest issues to yet a further round of negotiations. It is true that the Middle East process is designed to move in the opposite direction of what a Cypriot process would aim for - namely, from a single, unified state (Israel) with very limited rights for the minority community (Palestinians) towards a separation of the two communities with increasing authority (and potentially even full sovereignty) for the minority community. The Cypriot process, on the other hand, would be designed to go from two essentially separate communities to a single federated state with the communities retaining significant aspects of their current separateness and authority.

Yet, despite the diametrically opposed goals, the tentative, developmental, incremental nature of the Middle East process seems to me to be instructive and, given the far greater degree of prior hostilities between the communities there, to provide a possible model and source of hope for Cyprus. This is true despite the significant, disheartening, and tragic current setback in the Middle East process. The existing agreements have not unraveled (indeed, even the new Israeli government does not contend that it plans to undo them) and substantial pressure exists in both communities to continue the "process" even though the end result of the process is unknown.

This idea of a developing federalism also draws strength from the American experience. As noted earlier, the current federal system, with vast federal control over all aspects of the domestic economy - e.g., manufacturing, distribution, transportation, and financing - contrasts strikingly with the early American scene in which it took a Supreme Court decision to clarify that the states could not interfere with federal regulation of river navigation between two states.³³ Partly this change reflects the development of railroads, airplanes, telephones, faxes, computers, and the like. However, primarily it reflects the growing recognition by citizens in different states of a commonality of economic interests and the likelihood that federal uniformity of regulation will enhance the competitiveness of all. Significantly for Cyprus, it also reflects increased trust by all states and citizens in the federal government and in the federal political process.

What would a federalism process look like for Cyprus? I am hesitant to define such a process in any detail because of my firm conviction that, to be successful, the nature of the process, as well as the end results, must be worked out by the affected parties themselves. Nevertheless, having raised the idea, I feel some obligation to indicate the kinds of possible approaches to such a process.

The mechanism most similar to the Israeli-Palestinian peace process would be to resolve some issues initially and then identify the issues that will be addressed in the second, third, and any further stages. For example, the first step of the Middle East peace process, the first Oslo agreement, created a Palestinian Authority with a police force and carefully defined the territories they would have authority over -

the Gaza Strip and Jericho. The second stage was dedicated primarily to a broader Israeli withdrawal from the West Bank and the holding of Palestinian elections. The final stage is scheduled to address the hardest issues - including the ultimate status of Jerusalem and the ultimate form of Palestinian autonomy.

Using that analogy, the first step of a Cyprus federalism process might entail the creation of a limited federal entity with some military and/or police forces and clear definition of which issues the federal entity would control. For example, the first stage would, presumably, define the name of the federal entity, the titles of federal entity officials, the national flag, emblem, and anthem, the official language(s), the size, location, and functions of any federal military force or police force, and other functions of the federal entity. It would, of course, be possible to clarify that some functions would be federal, but leave the specifics of that authority to further bicomunal negotiations. A good example might be the federal economic policies needed to conform to EU regulations. That the federal entity would be the one to deal with the EU and would have the authority to adopt appropriate economic and trade regulations to conform to EU regulations seems plausible (although, again, it is vital to note that nothing is inevitable or beyond discussion and negotiation). Yet EU regulations and requirements are numerous and complex. It might not be possible to spell out in an initial Cypriot federation agreement all that might be needed on a federal level to achieve EU conformity. An agreement to negotiate and reach agreement on such details would reflect a basic commitment and a flexible open-endedness, which is both scary to some and, at the same time, a sign of trust and hope.

The status of foreign military forces is also a classic target for multi-step negotiations. The first agreement might provide for a specific reduction and a relocation of remaining outside forces to particular locations. The first step might also include agreement on a long-term goal of removing all foreign forces, with the possible exception of those under the command of a United Nations or other international agreement-preserving entity. It might not, however, specify the numbers to be removed each year or the ultimate date for complete withdrawal, but simply set a date to begin the second round of discussions on the topic. Again, the open-endedness entails risks - that no further agreement will be reached and the status quo will continue indefinitely. Yet open-endedness also makes possible a current limited first step because it does not require a comprehensive, long-term commitment (other than to talk again) by either party. This allows whichever party is hesitant on an issue to reserve the most substantial matters until a later time, when the first step will have been implemented, tested, and reviewed.

Finally, the difficult problem raised by Greek Cypriot claims to freedom of movement, property ownership, and settlement might be subdivided into stages. The Set of Ideas already includes such a division.³⁴ For example, the first agreement might provide for freedom of movement for all Cypriots throughout the island. This would allow Greek Cypriots to visit the towns where their families previously resided and other areas of interest on day trips, but not resolve the more difficult questions of ownership of land,

compensation, or ability to settle. Cypriots have lived so long with this unsettled state of affairs that another few years would be neither a surprise nor a burden. Yet it would allow time for the experiment with free island-wide movement (and tourism) to take hold, create good-will and trust, and perhaps offer new ideas for a more permanent or complete arrangement.

Each of these examples - EU-compatible economic regulations, military forces, and freedom of movement, property, and settlement - are intended simply to highlight the possibilities raised by an ongoing process. I do not seek to direct the parties to do it one way or another. The first agreement might be close to the Set of Ideas in both substance or detail, less detailed, or more so. The key point is to start negotiations with an understanding that not everything must be resolved now, but that things are not put off forever, but rather to a date certain and a specific process.

The nature of that future process should also be considered at the outset. One very formal way of handling a future procedure for a multi-stage process is to create a formal federal constitution now but agree that, in perhaps three or five years, a further, bicommunal constitutional assembly will be convened, to consider modifications and expansion, if appropriate. To me, this is too stilted, cumbersome, and public a mechanism and, thus, less likely to produce any revisions in the second stage. Rather, my instinct is to plan for a second round of high-level, bicommunal negotiations with or without outside facilitation, mediation, or other assistance. But again, it is not for an outsider to direct either the contents of the first stage or the procedure for future stages. Rather, outsiders should only try to assist the parties to come together and suggest a variety of formulas and strategies to help the parties create a process that works for them now and into the unknowable future.

In sum, the key is to start with a limited agreement and to make specific plans for further planning and agreements that, hopefully for Cyprus, will produce a more positive and satisfying future.

Notes

1. Eric Neisser is a professor of constitutional law at Rutgers University Law School in Newark, New Jersey and author of *Recapturing the Spirit: The Bill of Rights at 200*. He was a Senior Fulbright Scholar in Cyprus in constitutional law from January to April 1996, affiliated with, and presenting a series of lectures at, Intercollege in Nicosia.

2. I am fully aware that, in addition to the Turkish Cypriot and Greek Cypriot communities, there are Maronite, Armenian, and Latin communities in Cyprus. With due respect to those communities, I think it is fair to say that the problem of co-existence with and among those communities is perceived by commentators and participants as far less severe and complex than the issues regarding the two major communities.

3. I am aware that some members of the Turkish Cypriot community do not like it to be referred to as a "minority" or a "minority community," because those terms are seen as undermining the key concept of "political equality." There is, of course, no dispute that, whatever the precise numbers, there are far fewer Turkish Cypriots than

Greek Cypriots on the island. Reference to a numerical minority here reflects solely this demographic reality, not a political conclusion or preference on my part.

4. See, e.g., Sotiris Drakos, *Cyprus: A Constitutional Motion for Mediation* (1995)(presenting a comprehensive proposal for resolution of the Cyprus Problem based on the Swiss canton federation model).

5. 116 S. Ct. 1114 (1996).

6. *Id.* at 1122.

7. *Blatchford v. Native Village*, 501 U.S. 775, 779 (1991).

8. See, e.g., U.S. Const. art. I, sec. 10 ("No State shall enter into any Treaty, Alliance, or Confederation ... No State shall, without the Consent of Congress, ... keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."); Articles of Confederation, art. VI, sec. 1 ("No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with, any king, prince or state.").

9. *Seminole Tribe*, 116 S.Ct. at 1122, quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

10. *Seminole Tribe*, 116 S. Ct. at 1169, quoting B. Bailyn, *the Ideological Origins of The American Revolution 198* (1967) and G. Wood, *Creation of The American Republic 1776-1787*, 345, 385 (1969).

11. See, e.g., G. Codding, *The Federal Government of Switzerland* (1961).

12. I recognize that many of these questions have been expressly discussed, and tentatively resolved, in prior negotiations about a Cypriot federation. See, e.g., *Set of Ideas on an Overall Framework Agreement on Cyprus* (1992), Appendix 16 in Z. Necatigil, *The Cyprus Question and The Turkish Position in International Law* (2nd ed. 1993). I mention them both to highlight aspects of sovereignty and because my proposal for a very limited initial federal structure with a process for an evolving federalism would probably force the communities to review even some of the most basic points again.

13. U.S. Const. amend. XIII (ending slavery); amend. XIV (protecting due process and equal protection rights against state infringement); amend. XV (prohibiting racial discrimination in voting).

14. *Compare NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)(upholding National Labor Relations Act) with *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)(invalidating a predecessor statute setting labor conditions for various industries).

15. Cyprus Constitution, art. 62, paragraph 2.

16. *Id.* art. 46 (Council of Ministers - 7 Greek, 3 Turkish); art. 123, paragraph 1 (civil service - 70% Greek, 30% Turkish); art. 129, paragraph 1 (army - 60% Greek, 40% Turkish).

17. For a period of time, some of the colonies and early states were far more homogeneous than they are in modern times. Thus, for example, the Pilgrims predominated for a long time in what became Massachusetts. Also, many northern and western states and territories were overwhelming white over the first century of the country, prior to the end of slavery, the northern migrations of African Americans, and the immigration influxes of Asians and Latin Americans. Even so, given the differing European immigrations and the differing religious groupings even among the English migrants, none of the American states have, since the Constitution's adoption, been as homogeneous as the two Cypriot communities are at the present time. *See, e.g.,* David Potter, "Social Cohesion and the Crisis of Law," in *American Law and the Constitutional Order: Historical Perspectives* (L.Friedman & H. Scheiber eds., 1978).

18. U.S. Const., amend. XIV, sec. 1. *Compare* *Brown v. Board of Educ.*, 347 U.S. 483 (1954)(holding racial segregation in public schools unconstitutional) and its progeny *with* *Plessy v. Ferguson*, 163 U.S. 537 (1896)(upholding racial segregation in public transportation) and its progeny.

19. *Compare, e.g.,* *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995)(striking down an affirmative action program in federal contracting and imposing the strictest constitutional review on all affirmative action programs) *with* *Fullilove v. Klutznick*, 448 U.S. 448 (1980)(upholding a short-term congressional contracting program with a fixed percentage of funds designated for minority contractors under a more lenient constitutional standard of review).

20. *See, e.g.,* *United States v. Mississippi*, 380 U.S. 128 (1965); *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La.1963), *aff'd*, 380 U.S. 145 (1965).

21. *See, e.g.,* *Bush v. Vera*, 116 S.Ct. 1941 (1996); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Miller v. Johnson*, 115 S.Ct. 2475 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

22. *See, e.g.,* *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)(invalidating an Alabama statute that had altered a city's boundaries from a square to an irregular 28-sided figure in order to remove almost all African American voters).

23. A similar hesitance to recognize group rights is reflected in European human rights law. The European Convention for the Protection of Human Rights and Freedoms has now been ratified by 31 Europe nations, including Turkey, Greece, and Cyprus, and signed by seven others. Council of Europe, Chart of Signatures and Ratifications of European Treaties 5-7 (updated as of January 2, 1996). Like the United States Constitution, it provides only individual political and civil rights, but with a weaker equality provision guaranteeing only equality in the exercise of the other rights. European Convention, Articles 2-14.

Recently, the Council of Europe promulgated a Framework Convention for the Protection of National Minorities, which has been signed by many nations, but not yet ratified. Council of Europe, Chart of Signatures and Ratifications of European Treaties 157 (updated as of September 1, 1995). Although designed to advance the status

of members of national minorities, the Convention quite explicitly focusses on the rights of individual members of such groups, rather than on the rights of the group itself. For example, Article 3, the opening statement of basic principles, provides that "Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such" and "persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention *individually* as well as in community with others." Framework Convention for the Protection of National Minorities, art. 3, para. 2 (emphasis added).

In short, European human rights law, both now and in the foreseeable future, like American constitutional law, does not afford significant community or group rights as compared to individual rights.

24. Before the passage of the Voting Rights Act in 1965, there were fewer than 300 elected African American officials throughout the United States and fewer than 100 in the seven states of the Deep South. By January 1993, there were 8015 elected African American officials nationwide and 3704 in the South. Loughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 Miss. L.J. 271, 271-72 (1995), citing U.S. Comm'n On Civil Rights, *Political Participation* 15 (1968) and Joint Center for Political and Economic Studies, *Black Elected Officials: A National Roster* xi (1993).

25. *Set of Ideas*, *supra* note 12, at 457-58 (providing, for example, that seventy percent of the lower legislative house seats would be Greek Cypriot and thirty percent Turkish Cypriot and that seven Ministers would be Greek Cypriot and three would be Turkish Cypriot).

26. I recognize that some Turkish Cypriots consider the term "united" inappropriate, either because they perceive the term as suggesting that Turkey or the Turkish Cypriots are responsible for the current state of affairs, or because they believe that a bizonal, bicomunal federation, which both communities have agreed to in principle, does not constitute "unification" into a single state. I use the term "united" interchangeably with the term "federated" and use both terms simply to contrast any possible future arrangement involving some common, federal government, with the current state of affairs.

27. General Secretariat of the Council, Presidency Proposal, at 2 (adopted March 6, 1995).

28. See, e.g., Michael S. Michael, *Cyprus Under the Common Agricultural Policy: The Impact Effect*, 19 J. Econ. Studies 22 (1992) .

29. I consciously use the term "administration" to avoid political and legal disputes about the status of the Turkish Cypriot community's current structure.

30. The Fifth Amendment to the United States Constitution assures private property owners of "just compensation," to be determined, if necessary, by independent courts, for any "taking" of private property "for public use." U.S. Const. amend. V. Thus, in the

United States, both the federal and the state governments, are free to take over private property at any time - as long as the taking is for a "public use" and the government pays "just" monetary compensation.

31. The ruling of the European Court of Justice regarding treatment of goods from the Turkish Cypriot area is not a "boycott" in the literal sense of banning importation of such goods. Rather the decision denies to citrus fruits and potatoes not bearing an appropriate certificate from the Republic of Cyprus (that is, produce from the Turkish Cypriot community) the preferential duty treatment afforded by the customs agreement between Cyprus and the European Union. *R.v. Minister of Agriculture, Fisheries and Food, ex parte Anastasiou (Pissouri Ltd.)*, Case 432/92 (Eur. Ct. J. July 5, 1994).

Of course, there is another, more real boycott. The Greek Cypriot community refuses to allow any Turkish Cypriot goods to come into or through the Greek Cypriot community. This very real embargo has a very significant economic impact on the Turkish Cypriot community.

32. See, e.g., Oliver Richmond and James Ker-Lindsay, *The Conflict Researcher and the Strategist: Theoretical Approaches to the Analysis of the Cyprus Problem*, 7 *Cyprus Rev.* 35 (1995).

33. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

34. *Set of Ideas*, in Z. Nectagil, *supra* note 12, at 459 (specifying that freedom of movement would be implemented immediately but that freedom of settlement and property would be implemented only after the resettlement process arising from territorial adjustments).
