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The Cypriot Doctrine of Necessity and the Amendment of the Cypriot Constitution: The Revision of the Unamendable Amendment Rules of the Cypriot Constitution Through a Juridical Coup D' État

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Abstract: The constitutional design and the complete inability of the two ethnic communities who live in Cyprus (Greeks and Turks) to share the power according to the constitutional rules concluded soon after the independence to a constitutional crisis and consequently to the collapse of the system of governance that the Constitution provided, since the Turk-Cypriots withdraw from all their posts in key state institutions. The Supreme Court, in order to confront the issue that the part of the Constitution which set the system of governance became inoperative, implemented the 'Doctrine of Necessity', according to which the constitutional provisions that prescribe the bi-communal composition of all key institutions are suspended until the crisis comes to an end. The implementation of the Doctrine of Necessity did not leave intact the amendment formula of the Cypriot Constitution, which demands two separate majorities by 2/3rds of each community MPs for the conclusion of the process. However, such implementation of a judge-made standard to the amendment process raises crucial issues regarding the possibility of making clear-cut distinctions between constituent and constituted power, formal and informal constitutional change and about the legitimation of judges to revise through interpretation the amendment rules that the Constitution prescribes.

Keywords: constituent power; Doctrine of Necessity; juridical coup d' Etat; informal constitutional change

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1 The Doctrine of Necessity: Preliminary Remarks[1]

Whereas the debate surrounding the review of constitutional amendments by courts usually refers to cases that result in the annulment of the amendment for procedural and substantive reasons, the Cypriot case is quite different.[2] The Cypriot Supreme Court has ruled that, under certain conditions, amendments of constitutional provisions in a way that does not conform with the amendment formula provided by the Cypriot Constitution are not unconstitutional. This ruling relies on the so-called 'Doctrine of Necessity', which has been invoked by the Supreme Court since 1964.

The Doctrine of Necessity in Cyprus was initially linked to the inability of the Cypriot State to function in line with the organizational structure, namely the bi-communal system established under the 1960 Constitution of Cyprus. Tellingly, the Cypriot Constitution makes no reference to the concept of the people. The citizens of Cyprus do not constitute the Cypriot people but instead belong to two distinct communities (Greek and Turkish), each based on specific criteria, such as origin, language, cultural traditions, and religion. It should be pointed out that citizens who do not belong to either of the two communities based on the above criteria are called upon to choose the community to which they would like to belong.[3] This dual structure also extended to the bodies entrusted with executive powers (the President of the Republic is a member of the Greek-Cypriot community, while the Vice-President of the Republic belongs to the Turkish-Cypriot community), whereupon the powers are distinguished into those exercised conjointly and those exercised separately by each of the bodies (see Articles 47–49 of the Constitution). As regards the Council of Ministers, its composition is based on a specific ratio of ministers from both communities (7:3). This dual structure is also apparent in the legislative function, as Greek-Cypriot and Turkish-Cypriot MPs are elected only by members of their respective communities. The Constitution contains similar provisions about the make-up of other key state bodies, such as the Supreme and Constitutional Courts, the staffing of the Attorney-General of the Republic, the Auditor-General, the Governor of the Central Bank and their assistants. In all cases, the assistants must belong to a community other than that of the head of a body. A similar quantitative distribution is also evident in the composition of the public sector (7:3).

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1 Section 1 of the present paper is mainly based on a previous essay of mine*:* Christos Papastylianos 'The Cypriot Doctrine of Necessity within the Context of Emergency Discourse; How a Unique Emergency Shaped a Peculiar Type of Emergency Law' (2018) 30 Cyprus Rev, 113, 113–115.

2 The literature on the issue of judicial review of constitutional amendments is vast. See among others, Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017); Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (OUP 2019) 139–175, 217 229.

3 Constitution of Cyprus, art 2(1) and (2).

Nonetheless, although cooperation between the two political communities has been established, the Constitution provides no safeguards in the event the system is unable to function due to the two communities refusing to work together.[4] These conditions created the context within which the law of necessity was relied upon and applied in Cyprus. Failure to apply provisions of the Constitution and rigid application of other provisions to the bi-communal structure initially resulted in complete paralysis of crucial functions of the Cypriot state.[5] The inefficiencies inherent in the organizational structure of governance adopted under the Constitution of Cyprus ultimately led to a 'constitutional crisis', with Turkish-Cypriots leaving all posts they had held in the government and the House of Representatives, and with the Presidents of the Constitutional and Supreme Courts, who did not belong to either of the two communities, resigning.[6] This development caused certain state bodies to become fully unable to operate in line with the provisions of the Constitution. This was the context within which the Supreme Court relied on and applied the Doctrine of Necessity for the first time.[7] From the outset, the Doctrine of Necessity, as it manifests in Supreme Court case law, has had two dimensions. The first concerns the reasons for its use, namely the complete inability of specific state bodies to function. The second concerns the impact of that inability on the existence or absence of a constituted Cypriot state, ordered by and through its constitution.[8]

4 Achilles Emilianides, *Beyond the Constitution of Cyprus* (Sakkoulas Publications 2006) 38 (in Greek). It must also be noted that where constitutional arrangements operated efficiently in states with deep ethnic, religious or linguistic divisions, it was because the constitutions of those states left several critical issues open to future regulation or provided for flexible conflict resolution mechanisms at the legislative level or at the level of other bodies which functioned free of commitments of a constitutional nature. On this issue, see Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press 2011) 30–51.

5 Constitutional provisions on the establishment of two separate municipalities in the five largest cities, the establishment of a Cypriot army and the recruitment quota in the public sector were not immediately applied. On the other hand, the strategically oriented application of the constitutional provision that the two communities require separate majorities for passing tax laws resulted in an inability to pass such laws.

6 They came from neutral countries (Germany, Canada).

7 *Attorney-General of the Republic v Mustafa Ibrahim* [1964] CLR 195. This case was about the constitutionality of Law 33/1964, which merged the two supreme courts of Cyprus (Constitutional and Supreme Court, whose functions were established in the Constitution of Cyprus) into one court.

8 Constantinos Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas Publications 2015) 175; Polyvios Polyviou, *The Case of Ibrahim, the Doctrine of Necessity and the Republic of Cyprus* (Chryssafinis & Polyviou Publications 2015) 35–51. On the constitutive function of the Constitution, Stephen Holmes, *Passions and Constraints*, *On the Theory of Liberal Democracy* (University of Chicago Press 1995) 163; Frank I Michelman, 'Constitutional Authorship' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 2001) 64–65; Ernest A Young, 'The Constitution Outside the Constitution' (2007) 117 Yale L J 408, 417–422.

In applying the Doctrine of Necessity, the Supreme Court attempts to go beyond the Constitution with a view to maintaining constitutional order. Reliance on the Doctrine of Necessity differs from a state of emergency, in which the inability of existing state bodies to respond to an emergency by exercising their powers under the Constitution necessitates the temporary suspension of certain constitutional provisions. State bodies are still able to function and fulfill their tasks during a common emergency, and the state of emergency itself aims to make their operation feasible during said emergency.

However, the Cypriot case is different. The crucial—for any state—functioning bodies, such as the presidency, cabinet, and Parliament, were unable to function due to the two communities' lack of cooperation, which ultimately resulted in the Turkish-Cypriots resigning from their posts in public administration and organs of the state. However, cooperation was the implied prerequisite for the efficient operation of the organizational provisions of the Constitution of Cyprus.[9] While not a legally binding rule according to the constitutional framework, its absence nevertheless had specific legal consequences, namely, that the Cypriot state could not exist as a constituted state, whose coherence relied on state bodies functioning as envisaged in the Constitution. Therefore, in Cyprus, necessity (the contingency) arises due to the complete inability of state bodies to carry out their duties as prescribed by the constitution and not due to a common emergency. In the Cypriot case, the Constitution is not viewed as a framework that does not allow state organs to confront an emergency. On the contrary, the structure of the constitution itself is the source of the contingency. In Cyprus, the inability of state organs to function according to the Constitution is the reason behind the contingency, while emergencies usually occur when a contingency makes it impossible for state organs to function in line with constitutional limitations. Thus, the suspension of constitutional provisions by virtue of the Doctrine of Necessity serves different ends than the suspension of constitutional provisions due to an ordinary state of emergency. The former allows for the function of state organs (within their competences) despite the contingency, while the latter sets aside the operation of state organs according to what the Constitution prescribes because of the contingency.[10]

The substance of the case concerned the constitutionality of Law 33/1964, which merged the two Supreme Courts provided by the Cypriot Constitution (the Constitutional Court and the Supreme Court) into a single court composed of

9 According to the structure of the Cypriot Constitution, both communities possessed the right to veto to protect their vital interests. The lack of mutual cooperation between the two communities effectively made any decision upon issues related to these interests impossible.

10 A major part of the reasoning of Judge Triantafyllides' opinion is based on this assumption.

three Greek-Cypriot and two Turkish-Cypriot judges. The House of Representatives adopted the law, but only the Greek-Cypriot members voted in favour due to the withdrawal of their Turkish-Cypriot counterparts. From a procedural point of view, the adoption of the act did not presuppose the consent of both communities since the Constitution did not number issues related to the administration of justice among those which required such consent. The law could thus have been enacted via a simple majority vote. The newly established Supreme Court ruled that (a) it has the competence to review the case, (b) due to the Doctrine of Necessity, the merging of the two Courts was possible despite the relevant constitutional provisions which provide for two different courts with bi-communal composition and a Presidency held by Judges from 'neutral' countries, because these provisions were inapplicable as long as the situation of necessity lasts and (c) the provisions which provide for the bi-communal structure of Parliament are not applicable either, due to the implementation of the Doctrine of Necessity, thus, Parliament could enact laws by a simple majority of the members who belong to the Greek-Cypriot community.

Therefore, the Court's reasoning underlying the ruling on the Doctrine of Necessity is founded not on Article 183 of the Constitution of Cyprus, which outlines the constitutionally acceptable measures in an emergency, but on Article 179, according to which the Constitution is the supreme law of the Republic of Cyprus.[11] Judge *Triantafyllides*, who wrote the opinion in question, argued that the supremacy of any constitution is derived from the fact that it is founded on the will of the people, which is not the case in Cyprus. The bargaining which gave birth to the Republic of Cyprus was concluded, under conditions of secrecy—no official records kept—in the summit meeting of Zurich from 5 to 11 February 1959, where the Prime Ministers of Greece and Turkey *Konstantinos Karamanlis* and *Adnan Menderes* respectively approved the documents of the Zurich Agreement.[12] The first of these documents, entitled 'Structure de base de la République de Chypre',[13] prescribed in great detail the bi-communal structure of the future Cypriot state, and it stipulated that all

11 Costantinos Kombos (n 8) 166–168; Polyvios Polyviou (n 8) 48–51. It should be pointed out that the declaration of a state of emergency required the involvement of the Turkish Cypriot Vice President, who no longer performed his functions at the time. See Polyvios Polyviou, ibid 56. Also, the state of emergency, envisaged in Article 183 of the Constitution of Cyprus, is about the adoption of measures to combat political violence. It applied only to aspects of the emergency in Cyprus during 1963–1964, as a result of the action of paramilitary units that left victims on both sides. It is, however, extremely doubtful whether the withdrawal of Turkish Cypriot officers from state bodies constitutes an act of political violence.

12 The original documents which comprised the Zurich Agreement were drafted in French. They are reprinted in Stella Soulioti (ed), *Fettered Independence – Cyprus, 1878–1964, Volume two: The Documents* (Minnesota University Press 2006), 225–233.

13 See 'Structure de Base de le République de Chypre', ibid 225–230.

points therein would become basic and thus unamendable articles of the Constitution.[14] The second document was a draft Treaty of Guarantee between Cyprus, on the one hand, and Greece, the United Kingdom and Turkey, on the other.[15] Under this Treaty, the Republic of Cyprus undertook 'to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution', and each of the three powers reserved 'the right to take action with the sole aim of re-establishing the state of affairs established by the present Treaty'.[16] Furthermore, the process of formulation and enactment of the Constitution of Cyprus makes it an 'imposed' constitution, as it was prepared by an ad hoc joint committee in which Greece, Turkey and the two communities were represented.[17] The drafting of the constitution was assigned to a Joint Commission consisting of four members, that is, representatives of Greece, Turkey, and of the two Cypriot communities, each heading a delegation composed of a small number of experts, mostly lawyers or politicians. In total, the Greek delegation had eight members, the Turkish delegation six, and the delegations of the two Cypriot communities (Greek- and Turkish-Cypriot) were comprised of five each. None of these delegates were elected, instead being appointed either by the two governments

14 Ibid point 27 in conjunction with point 7.

15 See 'Traité de Garantie', in Soulioti (n 12) 231–232. The consequent conference in London left the Treaty unaltered except for a new article whereby Greece, Turkey, and Cyprus undertook to respect the integrity of the British Sovereign Base Areas. For the final text, see Treaty of Guarantee between the United Kingdom of Great Britain and Northern Ireland, Greece and Turkey, and Cyprus (signed at 16 August 1960), Registration No 5475; also available at https://peacemaker.un.org/cyprus-greece-turkey-guarantee60 accessed 26 August 2023.

16 Ibid. Both Treaties possess constitutional status according to the Cypriot Constitution: see art 181 of the Cypriot Constitution.

17 The issue of the imposed character of the Cypriot constitution is quite complicated, and the scope of the present paper precludes further elaboration. Thus, I would briefly like to mention only the following issues: The drafting process cannot be considered to have been entirely imposed on the Cypriots by external forces, while the external imposition can be detected in the composition of the Joint Committee, in which 14 out of the 24 members belonged to external forces (Greece–Turkey), in the mission of the Joint Committee as defined by the text of the Zurich Agreement and in the role of the external forces in guaranteeing the enforcement of the basic articles of the Constitution through the Treaty of Guarantee. The internal imposition may be identified in the drafting process of the Constitution by a Joint Committee whose members—even those belonging to the two communities—were appointed and not elected, as well as in the lack of any other form of popular participation in the enactment of the Constitution. As far as content is concern, the imposition can be detected mainly in the part which provides for the structure of governance and not in the part which provides for the protection of rights. Since the Zurich agreement did not contain any provisions on rights, the members of the Joint Committee could determine the content of the relevant provision free from external coercion. On the distinction between external and internal imposition, Yaniv Roznai, 'Internally Imposed Constitutions', in Richard Albert, Alkmene Fotiadou, Xenophon Contiades, *The Law and Legitimacy of Imposed Constitutions* (Routledge 2019), 64, 79–80.

(Greek–Turkish) or by the two communities, respectively. A neutral legal advisor, Professor *Marcel Bridel* of the University of Lausanne, aided the Commission, and its competence was strictly limited to 'scrupulously observing' the points contained in the documents of the Zurich Conference.[18] The decisions of the Joint Committee were made unanimously, and the final text of the Constitution was signed by Sir *Hugh Foot*, the last Governor of the colony of Cyprus, Mr *Georgios Christopoulos*, the Consul General of Greece, Mr *Turrel*, the Consul General of Turkey, Archbishop *Makarios* and Dr *Küçük*, both elected President and Vice President of the Republic respectively, and it entered into force on 16 August 1960.[19] In addition, the extremely cumbersome constitutional amendment process undermined from the outset any possibility of the citizens making changes to the Constitution. Therefore, the 'constitutional engineering' of the Constitution of Cyprus[20] effectively weakened its substantive and symbolic nature as the supreme law of the state.[21]

2 The Doctrine of Necessity as an Initial Factor for the Revision of the Unamendable Constitutional Provisions

The Doctrine of Necessity in Cyprus was originally linked both indirectly and directly to the Constitutional revision. Failure to revise the Constitution, a procedure which, according to the Cypriot Constitution, requires the consent of MPs from both (Turkish

18 The competence of the joint committee was stipulated by par 2 of the 'Agreed Measures to Prepare for the New Arrangements in Cyprus' reprinted in Stella Soulioti (n 12) 221–22. The 'Agreed Measures' was one of the documents signed at Lancaster House, where, a few days after the Zurich Agreement (17–19 February 1959), the documents of the Agreement were approved by the government of the United Kingdom and the leaders of the two Cypriot communities, Archbishop Makarios and Dr Fazil Küçük respectively. On the role of the joint committee, see also Achilles Emilianides, *The Secret Negotiations: The Birth of the Republic of Cyprus (1959–1960)*, (in Greek), (Papazisis, Athens 2022).

19 The constitution entered into force on 16 August 1960 by means of an Order in Council, issued in accordance with Section 1 of the Cyprus Act, whereby the UK relinquished sovereignty over Cyprus. See Cyprus Act in Stella Soulioti, (n 12) 297.

20 'Constitutional engineering' means mechanisms that prevent the manipulation of the Constitution by way of incentives intended to limit the self-motivation of actors and attain desirable constitutional behavior with a view to the smooth functioning of the state. On constitutional engineering, see Giovanni Sartori, *Comparative Constitutional Engineering* (New York University Press 1997) 195–203. Although he does not use the term 'constitutional engineering', Jon Elster puts forwards some useful observations in his *Securities Against Misrule* (Cambridge University Press 2013) 15–98.

21 *Ibrahim* (n 7) 222.

and Greek) communities, was one of the sources of strain resulting in the Turkish-Cypriots' withdrawal from all state institutions and said institutions' inability to function under the bi-communal composition provided for in the Constitution, thereby enforcing the Doctrine of Necessity. However, the factual background of the case which led to the implementation of the Doctrine of Necessity, that is, the inability of the state institutions to function under bi-communal composition, has gradually paved the way for the implementation of the Doctrine of Necessity in the constitutional amendment process. This initially became impossible after the Turkish-Cypriots left the Parliament, as the participation of MPs from both communities in separate majorities (2/3rds of the MPs of each community, according to Article 182 par 3) is a prerequisite for any amendment.

The Supreme Court has already – since the mid-1980s – been confronted with the question of whether the amendment of the Constitution is acceptable despite the absence of Turkish Cypriot MPs, pursuant to the Doctrine of Necessity. The issue defies an easy answer, as the Doctrine of Necessity justifies derogations in the implementation of the Constitution only under certain conditions. The first condition is that derogation is temporary and lasts only for as long as the extraordinary circumstances last, so it is extremely doubtful whether the constitutional amendment, which introduces permanent changes to the constitution, fulfills this condition. The second condition for the implementation of the Doctrine of Necessity is that its implementation cannot change the competences of state institutions, which are exercised as stipulated in the Constitution. The Doctrine of Necessity permits derogations from the Constitution only insofar as they are necessary for the institutions to operate and exercise their powers. However, the implementation of the Doctrine of Necessity to the amendment process would lead to a change in the powers of the Amendment Assembly, as it would allow Parliament to revise the provisions on the amendment, that is, to revise a fundamental and thus non-amendable provision of the Constitution, while the relevant constitutional provision (Article 182 C) only allows revision of non-fundamental provisions.[22] Accepting the view that the Doctrine of Necessity allows for derogation from constitutional provisions relating to the amendment process establishes, in effect, a new amendment procedure, which is equivalent to establishing a new constitution; that is to say, exercising constituent power.[23]

22 According to the relevant provision, which refers to Annex III of the Constitution, art 182 belongs to the unamendable provisions of the Cypriot Constitution. Annex III includes all the Fundamental articles of the Constitution prescribed by the Zurich Agreement (Art 182 par 1). The Zurich Agreement is composed of various documents, including the document which prescribes in great detail the bi-communal structure of the state.

23 See Alf Ross, 'On Self-Reference as a Puzzle in Constitutional Law' (1969) 78 Mind: a Quarterly Review of Psychology and Philosophy, 1.

In the first case where this issue was raised, the Supreme Court rejected the possibility of changing the arrangements for amendments provided by the Cypriot Constitution pursuant to the Doctrine of Necessity on the grounds that allowing such action in Parliament would lead to (a) adopting permanent changes to the constitution as opposed to implementing the Doctrine of Necessity up until then and making only temporary changes,[24] and (b) Parliament would exercise constituent rather than amendment power.[25] However, the Court's ruling left open the possibility for the Court to modify its opinion on the implementation of the Doctrine of Necessity in the amendment process in the future, as it ruled that 'under present circumstances' the amendment of the Constitution no longer outweighs the need to comply with the revision procedure it provides. That is to say, the Court ruled that, at that time, the need—which had justified the implementation of the Doctrine of Necessity until then—relating to the continued operation of the state institutions did not exist in the case of the amendment, as adopting the opposite view would result in changes to the competences of institutions instead of permitting them to continue functioning. However, since the implementation of the Doctrine of Necessity was context-oriented from the outset, the Court was open to the possibility of changing its stance if circumstances were ever to dictate such a change.

Indeed, a few years later, the Supreme Court changed its stance on the matter.[26] By a marginal majority,[27] the Court ruled that the Doctrine of Necessity could also be implemented in the amendment procedure. The Cypriot Constitution could thus be amended without the participation of Turkish-Cypriot MPs in the relevant decision-making, despite the explicit requirement for two separate majorities of 2/3rds each. The judges in favor argued that: (a) inability to revise the non-fundamental articles of the Constitution due to the absence of Turkish-Cypriot MPs, in essence, renders all articles fundamental, thus changing the operation of the Constitution; (b) Constitutional amendment is necessary to adapt the constitution

24 Temporary in terms of time, since the Doctrine of Necessity allows the non – enforcement of some constitutional provisions only as long as the abstention of Turkish-Cypriots lasts and in terms of the gravity of the change of the provisions affected, since non-enforcement is not equivalent to total and definite reform.

25 *President v House of Representatives* [1986] 3B CLR 1439. The decision concerned amending the Constitutional provision which stipulated that the voting age was 21, lowering the age limit to 18 years.

26 *Nicolaou v Nicolaou* [1992] 1B CLR 1338.

27 Five judges voted in favor of revising the constitution and five judges opposed it. However, by applying the presumption of constitutionality, which stipulates that a law is regarded as constitutional unless its content is indisputably contrary to the Constitution beyond any reasonable doubt, the tied vote meant accepting the constitutionality of such law as the absence of a clear majority against the constitutionality of the law cannot be considered as an indication of law's unconstitutionality 'beyond all reasonable doubt'.

to changing conditions, which is an element of democracy; (c) the specific amendment, which removed the power to determine family law issues (such as divorce) from church authorities and transferred it to family courts, is necessary for Cyprus to comply with obligations arising from ratified international treaties such as the ECHR; (d) The objective of the Doctrine of Necessity is to allow state institutions to continue exercising their powers as provided in the Constitution despite the absence of Turkish-Cypriots from their posts in said state institutions.

Since Parliament, pursuant to the Constitution, has the power to amend the Constitution, the absence of Turkish-Cypriot MPs cannot impede the exercise of that power. For all these reasons, the scope of the Doctrine of Necessity should not be distinguished by excluding from its scope the provisions amending the Constitution. The ruling also justifies derogation from the binding precedent[28] of the first ruling—when the issue was raised—as it considers the earlier ruling to be based on a wrong principle of law, with the following arguments: (a) recourse to the criterion of conditions that determine whether the Doctrine of Necessity outweighs the need to comply with the Constitution—a condition on which the reasoning of the earlier ruling is based—means the judge is exercising review of policy issues and not a judicial review of a statute; (b) the earlier ruling was opposed to the binding precedent of earlier rulings,[29] which held that state institutions could exercise the full range of powers conferred on them by the Constitution despite the absence of Turkish-Cypriot MPs. According to these rulings, such an exercise is within the range of the competences of the institutions without altering them. Since the amendment function is an integral part of Parliament's competences, the earlier ruling was wrong.

The other five judges, who argued that invoking the Doctrine of Necessity could not lead to derogation from the constitutional provisions relating to constitutional revision, except for their disagreement over the possibility of derogation from the binding precedent of the earlier ruling, put forward one more reason in support of their reasoning. The Doctrine of Necessity was established on the inability to modify the Cypriot Constitution by the procedure of amendment so that the Constitution could become functional and applicable. However, the Doctrine of Necessity ceased to be necessary if it were to be accepted that the Constitution may be amended by the amendment procedure.[30]

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28 The Cypriot Legal System is a 'mixed' legal system, which follows the common law principles on the issue of precedent.

29 *Polykarpos Ioannides v Police* [1973] 2 CLR 125.

30 The opinion also refers to the dangers of such a twist in recognizing the legitimacy of the Cypriot Government insofar as the Doctrine of Necessity renders the exclusion of Turkish Cypriots from state institutions temporary and not permanent.

The matter was finally clarified a few years later, with a third ruling where the Court, by a clear majority, ruled in favor of the possibility of amending the constitution by invoking the Doctrine of Necessity without the participation of Turkish-Cypriot MPs.[31] The Court, based on the *Nicolaou v Nicolaou* ruling and the related reasoning, held that the revision of the Constitution functions as an integral part of the powers conferred on the Parliament by the Constitution and thus can be exercised despite the absence of Turkish-Cypriot MPs, as the Doctrine of Necessity allows state institutions to continue functioning and exercising all powers under the Constitution. Also notable is a single minority opinion that the possibility of revising the Constitution will undermine the foundations of the Doctrine of Necessity and the implementation of the Law of Necessity, given that it was invoked due to the unamendability of certain clauses of the Constitution.

In the wake of the Supreme Court's ruling in *Nicolaou v Nicolaou*, the Constitution has seen 18 amendments founded on the Doctrine of Necessity, whose opposition or non-opposition to the Constitution has not been considered in all cases by the Supreme Court. Only the constitutionality of the eighth amendment was considered, which relates to the establishment of an administrative court and the transfer of cases pending before the Supreme Court. In this case, too, the amendment of the Constitution based on the Doctrine of Necessity was found to be permissible in light of *Nicolaou*.

It should be noted, however, that although it has been 31 years since the Cypriot constitution was first amended according to Article 182, the Doctrine of Necessity still exists as a mechanism for constitutional change, along with the amendment, in cases where the constitutional change concerns fundamental and unamendable provisions of the Constitution that cannot be implemented due to the Turkish-Cypriots leaving the state institutions. When constitutional change concerns fundamental and non-amendable provisions of the Constitution, then the Doctrine of Necessity applies, allowing the derogation from constitutional requirements through ordinary laws enacted by a simple majority vote in Parliament.[32]

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31 See *Koulountis and other v House of Representatives* [1997] 1 CLR 1026. The amendment of the Constitution related to the amendment of art 66 par 2 with the addition of a provision to fill a parliamentary seat vacated for any reason by the candidate who is the first standby, instead of running a new election for the seat.

32 The case of the fifth amendment which added article 1A is trivial. Article 1 of the Cypriot Constitution, which states that '*The State of Cyprus is an independent and sovereign Republic with a presidential regime, the President being Greek and the Vice President being Turk elected by the Greek and the Turkish Communities of Cyprus respectively as hereinafter in this Constitution provided*' has been supplemented by article 1A which states that '*No provision of the Constitution shall be deemed to annul laws enacted, acts done or measures taken by the Republic which become necessary by reason of its obligations as a member state of the European Union*'. Article 1 is unamendable according to article

The different views expressed in the Supreme Court case law on the question of amending the amendment procedure by implementing the Law of Necessity are of interest to the contemporary debate on unamendability for the following reasons:

(a) In accordance with Article 182 C, only non-fundamental constitutional provisions may be amended. However, the revision of the amendment procedure essentially constitutes an amendment of the amendment provisions. It is, therefore, an amendment of a fundamental provision that is impermissible under the Constitution.[33]

(b) The amendment of an unamendable provision constitutes a change that removes the boundaries between constituent and amendment power, as the unamendability of certain provisions is the ratio of the distinction between constituent and constituted powers. The amendment of a constitution must be differentiated from its complete replacement, which is only possible by exercising constituent power.[34] This view has been endorsed by constitutional courts when considering the constitutionality of constitutional amendments around the world. For example, the Constitutional Courts of Thailand, Colombia, and Belize have ruled that constitutional amendments cannot be used to change or replace the entire Constitution.[35] In Cyprus, the argument in favor of not modifying the amendment procedure based on the Doctrine of Necessity, in the first case where the Supreme Court addressed the matter, was based on the distinction between constituent and amendment power, as adopting the view that would allow amendments would essentially mean amending an unamendable provision (Art 182), an action equivalent to exercising constituent power.

However, in the *Nicolaou* ruling, which indicates a shift in the relevant case law, unamendability was seen as a barrier to democracy, an element of which is the adaptation of the Constitution to changing circumstances. It should also be noted that, in Cyprus, the amendment process concerns only the non-fundamental

182, which states that '*The Articles or parts of Articles of this Constitution set out in Annex III hereto which have been incorporated from the Zurich Agreement dated 11th February, 1959, are the basic Articles of this Constitution and cannot, in any way, be amended, whether by way of variation, addition or repeal*'. However, the addition of a new article after article 1 cannot be considered as a variation, repeal or addition to the text of article 1, which is prohibited by article 182, since it leaves intact the wording of article 1.

33 The fundamental and thus unamendable articles are listed in Annex III of the Constitution. These are articles included in the Zurich Treaty, and article 182 is one of these.

34 Roznai (n 2) 126.

35 Decision 17–22/2555 (13 July 2012) of the Thai Constitutional Court, Decision C-551/03 of the Colombian Constitutional Court and Decision 597/2011 of the Supreme Court of Belize.

provisions of the Constitution, so the modification of the amendment procedure to the extent that it does not affect this parameter, that is, to limit modification only to the procedure and not to the content of the amendment, could not lead to a total change or replacement of the Constitution.

(c) A third element of the case law of the Supreme Court of Cyprus concerning the current debate on unamendability is the relation between the amendment of a constitution and the international protection of human rights.[36] While such debate usually concerns whether an amendment can adversely affect a country's international obligations as to the 'threshold' of protecting the rights, it is noted that international obligations can act as a threshold to amendment, rendering a part of the constitution unamendable. Yet, in Cyprus, the implicit revision of Article 182 and the concluding revision of other constitutional provisions has been accepted by case law on the basis of the need to adapt the Constitution to the obligations arising from the ECHR or to widen the field of their application (lowering the voting age).[37] In the case of Cyprus, the underlying reasoning of the proposed amendment was the non-compatibility of certain constitutional provisions with the European Convention on Human Rights. The constitutional revision[38] was necessary to

36 On this relation, Roznai (n 2) 82–102.

37 A typical case which has a lot in common with Cyprus and concerns the relation between the amendment of a constitution and the ECHR, is *Sedjić and Finci v Bosnia and Herzegovina* [2009], applications No 27996/06 and 34836/06, in which the ECtHR found provisions of the Bosnian Constitution which exclude people from participating as candidates in the elections for the Presidency due to their ethnic origin, to be incompatible with the ECHR. The issue of revising the Bosnian constitution was raised in the wake of this ruling, though no definitive solution has been effected as of yet. The ruling in this case is a strong indication that compliance with International Human Rights Law might be a reason for easing the unamendability of constitutional provisions which are incompatible with the international standards of human rights protection.

38 I use the general term 'constitutional revision' as a term which includes both amendment and changes to the meaning of the constitutional text due to the implementation of the Doctrine of Necessity. In the latter case such changes affect the normative content of constitutional provisions which are unamendable since they refer to the bi-communal structure of governance. It is worth noting that the invocation of the Doctrine of Necessity has at times been based on the need to adapt the Constitution to obligations arising from international treaties. There are two relevant cases: The first is about the right of Turkish Cypriots to marry, which is enshrined in Article 22 of the Constitution for all citizens of Cyprus. However, exercising this right requires a law to be passed which, pursuant to Article 87(1)(c) C, the Turkish Cypriot Communal Chamber had to vote on for their community, but the Chamber had ceased to exist after 1963. The second case is about the right to vote of Turkish Cypriots who remained in free areas of the island and could not exercise that right because they needed to be registered in separate electoral lists of their community [Article 63 of the Constitution], which no longer existed as of 1974. The parties concerned appealed to the ECtHR, which found that, in both cases (*Selim v Cyprus*, [2002] application No 47293/99 and *Aziz v Cyprus*, [2004),

make the Constitution compatible with the ECHR. Thus, the relevant amendment did not pose any threat to human rights but instead aimed to strengthen their protection.

3 The Juridical *Coup d' État* as a Means for Constitutional Revision

The judgment of the Supreme Court in *Ibrahim* exhibits the main characteristics of a juridical *Coup d' État* [39] as the term was coined by *Alec Stone Sweet*, namely, 'a fundamental transformation in the normative foundations of a legal order through the constitutional law-making of a court'.[40] The Doctrine of Necessity in the form implemented by the Court introduces a drastic change in the function of the state organs, which is contrary to the will of the drafters of the Constitution.[41] It is not a mere change in the process of operation of the state organs but a change in the fundamental features of the Cypriot Constitution. Bi-communality, which was the basic characteristic of the whole structure of governance, was also a safety valve or at least considered to be one by the drafters of the Constitution, as far as the rights of Turkish Cypriots towards the majority of Greek Cypriots were concerned. Bi-communality defined the drafters' perception about democracy and the rule of law in the context of Cyprus at the time of independence. The judgment in *Ibrahim* also shares another characteristic of a juridical *Coup d' État*: it changes the power-sharing defined by the Constitution among the state organs since the fundamental transformation of the Constitution by a court judgment is not in keeping with the constitutionally delegated form of the authority of a court. Any such transformation via judgment blurs the distinction between constituted and constituent power, as the case of the revision of the Cypriot Constitution indicates since such revision can be achieved through a combination of informal and formal changes.

application No 69049/01, the position of the Cypriot authorities was in violation of rights enshrined in the ECHR. Then, Parliament relied on the Doctrine of Necessity to pass two laws that came to fill the legal gap which prevented Turkish-Cypriots from exercising the rights concerned (the right to marry and the right to vote).

39 A juridical coup can be considered a form of a constitutional revolution since it shares the main characteristics of a constitutional revolution, Gary J Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press 2020) 236–251.

40 Alec Stone Sweet, 'The Juridical Coup d'État and the Problem of Authority' (2007) 8 German L J 915.

41 The implementation of the Doctrine of Necessity could also be seen as a form of constitutional revolution through adjudication according to the criteria proposed by Gary J Jacobsohn and Yaniv Roznai. Besides, according to the relevant criteria a juridical coup d'état is a form of constitutional revolution, ibid 236–251.

The implementation of the Doctrine of Necessity through *Ibrahim* ultimately results in the revision of the amendment rules of the Cypriot Constitution or the revision, through the inapplicability of the provisions about the bi-communal structure of government, even of unamendable provisions through direct application of the Doctrine of Necessity.[42]

Yet, a closer and more thorough look at the case indicates that the aforementioned juridical *Coup d'État*, as far as its implications on the revision of a Constitution are concerned, raises some questions which make clear that the responses on the relation between democracy and constitutional change are far from being definite, and that they are, to a certain degree, context-based.[43]

First, unamendability is considered to be compatible with democracy since it blocks substantively and procedurally the range of changes to the constitution but not the replacement of the constitution through the exercise of primary constituent power by the people.[44] However, in cases where the constitution does not rely on the exercise of primary constituent power, such as in the case of Cyprus, unamendability cannot be considered a guardian of the primary constituent power, which has never been exercised.[45] Besides, the exercise of primary constituent power is currently only possible in the areas controlled by the Republic of Cyprus. Thus, it would be exercised only by people who belong to the Greek community with minor exceptions, and its exercise would definitely transform the Republic of Cyprus into a unitary state and put an end to the constant negotiations for the re-unification of the state on a bi-communal basis. The revision of the Constitution, even of its unamendable provisions, through the application of the Doctrine of Necessity allows for the effective function of the state organs,

42 The Doctrine of Necessity does not affect the formal constitution. Yet, it affects the so-called material constitution, ie, the set of principles and rules which constitute at any given time the actual source of validity and interpretation of the Constitution irrespective of whether they are reflected in the formal Constitution. On the concept of the material Constitution, Marco Goldoni, 'The Material Constitution' (2018) 81 Modern L R 567. In essence, the material constitution of Cyprus in 1963 indicates total inability to function of the part of the formal constitution which provided for the system of governance.

43 On the relation between constitutional amendments and democracy, Albert (n 2) 194–202.

44 Roznai (n 2) 124–126.

45 As Richard Albert points out, constitutional change in the context of an imposed constitution belongs to the spectrum of non-democratic means of enacting a Constitution. The crucial question then is whether or not amendment rules which are tainted by their non-democratic origin are the proper means for constitutional change, or if other, more democratic and inclusive forms of change should not be excluded in advance, even if they are not in conformity with the amendment formula of the Constitution, Richard Albert, 'The Traditions of Constitutional Change', in Richard Albert, *Revolutionary Constitutionalism: Law, Legitimacy, Power*, (Hart 2020) 195, 205.

the protection of human rights, and the implementation of EU and international human rights law[46] while, at the same time, it does not imply a definite transformation to the form of the state that would finalize the partition of the island.

Second, as already mentioned, the judgment in *Ibrahim* blurs the limits between constituent and constituted powers. Yet, the Court still acts as a holder of delegated power since the fundamental transformation of the constitutional order is presented as being achieved according to the rules prescribed by the very same Constitution that is being transformed drastically. The Doctrine of Necessity is part of the constitutional order based on Article 179 of the Constitution, which positions it as the Supreme Law of the state and mandates that all state organs act according to it. The Court preserves the constitutional order by asserting that the transformation does not overstep the established meaning of Article 179.[47] The implied meaning of the provision is presented by the Court as an established meaning. Yet, the Court has the mandate, according to the Constitution, to judge legal disputes based on the interpretation of constitutional provisions. Thus, the constituent act of the Court, an act that is constitutive of a new constitutional order, is being presented as a constituted act.[48] A juridical coup d'état indicates that the exercise of a primary constituent power creates a new legal order, but this act does not take place in a legal vacuum.[49]

Third, if it is true that the amendment provisions should not act as a suicide pact, then this should be equally true for unamendable provisions.[50] The 1960 Constitution of Cyprus envisaged a bi-communal system of governance based on unamendable provisions of the Constitution where both communities would share power on equal terms, regardless of their size. The Constitution contains 31 Articles prohibiting

46 Two of the amendments (the fifth and the seventh), which have been introduced to the Cypriot Constitution after *Nicolaou*, refer to the relations between the Cypriot Constitution and EU law. As far as the amendments which relate to international human rights law are concerned, except for the amendment which introduced the family courts and was the motive for *Nicolaou*, the 10th amendment removed all references in the Constitution to the death penalty in compliance with International Treaties signed and ratified by Cyprus.

47 When applying the relevant constitutional provision, it should not be overlooked that Article 179(2) imposes on authorities exercising administrative functions or executive power the obligation to refrain from acting in a way repugnant to or inconsistent with the Constitution. Performance of this obligation must be verified by the Judge while reviewing the constitutionality of laws. Applying this provision rigidly without due consideration of these factors would indeed cause the state to collapse, as it would be impossible for certain essential state institutions to function in the name of the formal constitution.

48 See Luigi Corias, 'The Legal Theory of Juridical Coup d' État: Constituent Power Now' (2017) 8 German L J 1553, 1565.

49 Ibid 1571.

50 Roznai (n 2) 141–142.

decision-making or processes without the consent of both communities. Sixteen of these provisions give veto power to officers from each community, and the remaining ones require the involvement of members from both communities in decision-making or to complete a process. These provisions apply to the composition of almost all state bodies. However, this provision causes paralysis in government institutions because they do not have the consent of both communities, and there is no provision for overriding the veto. Furthermore, the Constitution of Cyprus does not envisage an effective mechanism to resolve disputes between state bodies. Besides, the Constitutional Court could not be used for such purpose, as it had jurisdiction to judge whether the actions of state bodies are within the limits set by the Constitution; however, it cannot guide state bodies on how to perform their duties if they remain within the constitutional limits. Given that the Constitution itself allows vetoing on specific matters but does not establish mechanisms for resolving the resultant impasses and that it does not foresee any consequences in the event that the two communities refuse to cooperate when they are required to make decisions or to complete processes—should the Constitutional Court find this practice to be contrary to the Constitution—it would be outside the limits of its jurisdiction to try to settle the issue. *Jon Elster* correctly observed that a 'constitution should be a framework for action not an instrument of action'.[51] Although non-cooperation is a form of strategic action, it could only entail political sanctions and could hardly be evaluated by the Court. The Doctrine of Necessity rescued the Constitution from complete destruction, making the exercise of the basic functions a Constitution should perform, ie, limiting government and the rule of law, feasible.

Fourth, while 'amendment power cannot be used in order to destroy the basic principles of a constitution', it is not very clear what amendment power should perform when the basic principles of the Constitution are not compatible with supranational law, especially international human rights law. One crucial issue is whether and to what extent the exercise of amendment power is dependent upon constraints imposed by international law.[52] According to the jurisprudence of the ECtHR and other mechanisms of implementation of International Human Rights Law, human rights law can be considered a source of constraints upon the amendment power, even if the enforcement of the relevant judgments relies solely on the national institutions.[53] One option is that any amendment deemed not compatible with the standards of international human rights law should be declared void. When one considers that most contemporary Constitutions include such standards and that the national courts usually follow the jurisprudence of

51 Jon Elster, *Ulysses Unbound* (Cambridge University Press 2000) 101.

52 Roznai (n 2) 83.

53 Ibid 80–94.

international courts when interpreting constitutional provisions on human rights, this appears to be a case of implicit unamendability.[54] Yet the reverse option, namely the imposition of an obligation on the states to amend provisions in their Constitutions which are not compatible with such standards, does not impose a constraint in negative terms but a positive obligation for the state organs for the fulfillment of which they are exclusively responsible.[55] The crucial issue in the latter case is whether or not an amendment which aims to make a Constitution compatible with standards of international human rights law can be viewed as an amendment which destroys the basic principles of the Constitution. On this issue, the distinction made by *Rosalind Dixon* and *David Landau* between the use of unconstitutional constitutional amendment doctrine as a guardian of democracy and its use in unnecessary cases is a crucial one.[56]

Thus, a juridical coup d'état could be a motive and a factor for the revision of a Constitution (including its amendment) only under certain presuppositions. The first is that the exercise of primary constituent power is either not possible due to a collapse of the state or not desirable due to a potential partition of the state. The second is that the revision does not destroy the basic elements of constitutionalism, democracy, or the rule of law. Such revision does not constitute the exercise of primary constituent power.[57] Yet, even if it destroys the basic principles of a Constitution, it does not destroy the Constitution as a means of securing constitutionalism, democracy, and the rule of law.[58] Thus, such a revision does not fit the form of abusive constitutionalism.

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54 Ibid 141–154.

55 The case of Bosnia and Herzegovina is indicative. Bosnia and Herzegovina has not yet amended its constitution, 10 years after the ruling of the EctHR on the *Sedij* case. I use the term 'national state organs' to distinguish between state organs which, under some presuppositions, can act as organs of the transnational legal order, such as courts, and state organs which act exclusively as organs of a national legal order (such as Parliament, when exercising amendment power).

56 See Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendments' (2015), 13 ICON 606.

57 Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021), 52 Connecticut Law Review 1381, 1402–1404.

58 In conformity to what the ruling of the ECtHR in the Bosniak cases indicates, bi-communality or, generally speaking, shared power between different communities is not the only model for handling the tension between democracy and human rights. As far as constitutionalism and the rule of law in Cyprus are concerned, the confrontation of the emergency did not demand derogation from the rule of law and the principles of constitutionalism. On the contrary, the source of the emergency in Cyprus was the inability of the institutions, which are necessary for the implementation of the fundamental values of the constitutional order, to operate. The Doctrine of Necessity, as enshrined in *Ibrahim*, is complementary and not competitive to the rule of law and constitutionalism. Under the Doctrine of Necessity, the separation of powers is still an operative principle of a system of governance based on checks and balances. Furthermore, the Doctrine of Necessity does not derogate from rights

4 Can a 'Juridical Coup d'État' Legitimize any Constitutional Change?

The amendment of the Cypriot Constitution via the Doctrine of Necessity raises the issue of whether or not a 'juridical coup' d'état' could be acceptable not only from a descriptive but also from a normative point of view. The transformation of the Cypriot Constitution is based upon a doctrine which, according to the judgment in *Ibrahim*, is derived from the Constitution itself, namely through the interpretation of Article 179, which dictates that the Constitution is the Supreme Law of the state and all state organs should act in accordance to it. According to the reasoning in *Ibrahim*, given that accepting the view that a Constitution both establishes and contributes to the collapse of the state is a legal paradox or a performative contradiction,[59] the Doctrine of Necessity needs to be applied insofar as it is necessary for Cyprus to continue to function as a state under a Constitution. Yet, such reasoning is based upon the implied presupposition that the drafters of the Constitution have not foreseen the practical inefficacy of some provision, and the gap should be filled by the judge.[60] According to the reasoning in *Ibrahim*, the necessity of maintaining the state acquires characteristics of a meta-rule for the interpretation of the individual constitutional provisions which are relevant to the system of governance. However, while a gap in law/Constitution is an indication of the existence of an error, it is not an indication of who is going to fill the gap and correct the error.[61] Yet, it does not follow that any discovery of implicit assumptions in the text of the constitution by judges is not allowed from a normative point of view. There is a difference between implications which rely on an assumption about the practical efficiency of constitutional provisions and assumptions that complete the text with a meaning which has been omitted due to its apparent logical obviousness, which has made its

protection, similarly to the derogation which is established under the emergency law context. In fact, through the application of the Doctrine of Necessity, Cypriot citizens who reside in the areas controlled by the Republic of Cyprus are entitled to the same level of protection of their rights on the basis of their citizenship and not on that of their ethnic origin.

59 The term 'performative contradiction' means that the propositional content of a speech act contradicts the presuppositions of asserting it. An example would be a judgment handed down by a Greek court whose operative part would indicate that, although rule X is not in line with the Constitution, it is, however, applied in the case at hand, although Article 93(4) of the Constitution of Greece provides that courts shall be bound not to apply a statute whose content is contrary to the Constitution. On the concept of performative contradiction, see Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (OUP 2010) 35.

60 Jeffrey Goldsworthy, 'The Implicit and Implied in a Written constitution' in Rosalind Dixon and Andrienne Stone, '*The Invisible Constitution*' (Cambridge University Press 2018) 109, 138.

61 Ibid 138.

reference unnecessary.[62] The analysis of the Constitutional Structure of Governance in the Cypriot Constitution is indicative.

Mechanisms of checks and balances—in particular, the right of agents of one power to veto agents from the other two—are intended to set limits on, and not to neutralize, the principle of majority. Their objective is to prevent impulsive majorities from making decisions and not to render the principle of the majority itself inactive.[63] For this reason, vetoing cannot, in the end, totally prevent a decision based on the principle of majority from being made, even if a qualified majority is needed to curb a veto.

The veto power in the Constitution of Cyprus does not fall within the logic of checks and balances because it prevents majorities from making decisions on issues which are of vital interest to both communities. In addition, the Constitution of Cyprus provides a presidential system of governance, which favors zero-sum logic more than parliamentary governance does.[64] The relevant logic is enhanced by giving both the President and Vice President the veto without any mechanism to resolve the resultant impasses from mutual vetoing. As a consequence, a mechanism intended to limit the impact of disagreement between the two communities instead had the opposite effect, as the Constitution of Cyprus fails to provide incentives for cooperation.[65]

As mentioned previously, the Constitution of Cyprus does not envisage an effective mechanism to resolve disputes between state bodies. Meanwhile, the Constitutional Court could not be used for such purpose as it lacked the jurisdiction to judge whether the actions of state bodies within the limits set by the Constitution constitute a targeted, strategic application of the relevant provisions.

It should also be pointed out that the Constitution of Cyprus lacks mechanisms to facilitate expressions of dissatisfaction with uncooperative actors on a political level. The system of governance is presidential,[66] with a fixed term of office for the President and Vice President, and Parliament does not possess the right to initiate a

62 Ibid 139.

63 Elster *Ulysses Unbound* (n 51) 131, 137.

64 Juan J Linz, 'Presidential or Parliamentary Democracy: Does it make a Difference?' in Juan J Linz and Arturo Valenzuela, *The Failure of Presidential Democracy* (John Hopkins University Press 1994) 18.

65 On the issue of mechanisms which make the lack of cooperation unattractive, as a factor for the successful implication of consociational models of government, George Tsebelis, 'Elite Interaction and Constitution Building in Consociational Democracies' (1990) 2 Journal of Theoretical Politics, 22.

66 However, Vice Presidential powers in Cyprus do not correspond to those envisaged in a presidential governance system. Polyvios Polyviou quotes De Smith [*Constitutions of Commonwealth*] on the Constitution of Cyprus when referring to a Vice Presidential system, in Polyvios Polyviou, *Cyprus on the Edge: A Study on Constitutional Survival* (Cryssafis and Polyviou Publications 2013) 16.

vote of no confidence to both of them. In addition, under the Constitution of Cyprus, the President and the Vice President can remove ministers, but only those coming from their respective communities. This effectively ensures the loyalty of ministers not to the unitary state but to their communities, personified by the President and the Vice President. This allocation of power intensified the rigidity of the institutional actors.[67] Yet, this dual structure proved ineffective in practice, while it is not clear whether the drafters of the Constitution—even had they been aware of the problems that could arise—considered that fear of a potential constitutional breakdown would act as a motive for cooperation between the two communities. However, when the inability of state bodies representing the two communities to cooperate is founded on the belief that their stance is aligned with their constitutional duties, it is unsound to rely on the practical ineffectiveness of some provisions to acquire a meaning that will make them practically effective.[68]

This is not the case in the *Ibrahim* judgment. The reasoning of the Court does not rely on the constitutional provisions which refer to bi-communality and their practical inefficacy. Instead, it relies on Article 179, which dictates that the Constitution is the supreme law of the Republic of Cyprus and imposes upon authorities exercising administrative functions or executive power the obligation to refrain from acting in a way repugnant to or inconsistent with the Constitution (Art 179 par 2). The non-cooperation between the two communities, as mentioned previously, could not fall clearly within the scope of 'acting in a way repugnant to or inconsistent with the Constitution'. Thus, the judges could not rely on the practical inefficacy of the relevant provisions and use alleged implications to make them efficient by completing the meaning of the constitutional text. Nevertheless, the withdrawal of the Turkish-Cypriots from all state organs changed the landscape. The drafters of the Constitution omitted any references to the withdrawal of the members of one community—as a case in which the Constitution effectively

67 According to Lijphart, the consociational form of governance should be accompanied by means that mitigate actors' rigidity in enabling the governance system to be functional. These mechanisms also include avoiding the presidential system as a form of governance, as it intensifies the problems generated by the absence of a mechanism for solving impasses. Arendt Lijphart, 'Constitutional Design for Divided Societies' (2004) 15 Journal of Democracy 96. According to Lijphart, it was the absence of properly designed institutions, and not the adoption of the principles of the consociational model, that caused the systems of governance in Cyprus and Lebanon to paralyze. Ibid 99.

68 Goldsworthy (n 60) 138–139. In his view, the practical inefficacy of a provision is not clear proof that the omission which makes it inefficient, is based upon a clear lawmakers' motivation that can be discovered by judges beyond any reasonable doubt. Thus, such omissions can be the foundation of judicial reasoning only in cases where it is clear that the omission has occurred as a result of the lawmaker considering something as self-evident and therefore unnecessary to include explicitly.

ceases to function—based on the self-evident character of such ascertainment.[69] Withdrawal from state organs falls within the meaning of 'acting in a way repugnant to or inconsistent with the Constitution', since it paralyzes the whole Constitution. After the withdrawal of the Turkish-Cypriots, the Cypriot Constitution could not perform any of its fundamental functions due to the characteristics of bi-communality as described above.

5 Concluding Remarks

The Cypriot case indicates that the limits between informal and formal constitutional change might be unclear. Informal change can alter the function of the Constitution without amending it. Such changes affect the content and functions of the laws that constitute the structure of state governance despite not changing the text of the Constitution itself. They change the 'c' constitution without changing the 'C' Constitution. Thus, they do not affect the status of the constitution as the higher law of the state.[70] On the other hand, the new rules of governance (not only laws but also judicially enforceable standards such as the Doctrine of Necessity) may allow changes of the master-text constitution through the procedure of formal change. As the Cypriot case makes clear, informal change may alter the operation of the amendment rules of the constitution and consequently allow its change through the formal procedure.[71]

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69 According to Goldsworthy ibid 138–139, such an omission can be considered legitimate grounds for judges to rely on fabricated implications.

70 Oran Doyle, 'Informal Constitutional Change' (2017), 65 Buffalo L R 1021, 1024–1025.

71 However, the Cypriot case indicates that the relation between small and big 'c' Constitutions is quite complex. Any change to constitution, which results in a change of the master text Constitution (formal and informal), subverts the status of the latter as the higher law of the land. The *Ibrahim* judgement is quite indicative of this; according to the opinion of Judge *Triantafillides* in *Ibrahim*, the lack of supremacy of the Cypriot constitution due to the constitution-making process and the strict rules of its revision justifies the implementation of the Doctrine of Necessity, permitting constitutional change through the common legislative process. '*Even though the Constitution is deemed to be a supreme law limiting the sovereignty of the legislature, nevertheless, where the constitution itself cannot measure up to a situation which has arisen, especially where such situation is contrary to its fundamental theme, or where an organ set up under the constitution cannot function and where, furthermore, in view of the nature of the Constitution it is not possible for the sovereign will of the people to manifest itself, through an amendment of the Constitution, in redressing the position then, in my opinion, according to the doctrine of necessity the legislative power, under article 61, remains unhindered by article 179, and it not only can, but must, be exercised for the benefit of the people* (permitting the change of the constitution through the ordinary legislative process).' *Ibrahim* (n 7) 222.

Another crucial issue related to the merging of informal and informal constitutional change through a '*juridical coup d' état*' is that of the distinction between constituent and constituted power. Any informal change of a constitution which alters drastically the operation of one of its basic parts amounts to constitutional revolution even if the text itself of the Constitution remains unchanged. In Cyprus, the part of the constitution which provides for the bi-communal structure of governance has not changed literally. However, the Doctrine of Necessity has all but voided it in practice. All state organs operate according to the standards set by the Doctrine of Necessity and not according to the standards of the constitutional text. Yet, the organ that instigated the revolution (the judiciary) is a constituted organ. As already mentioned, the Court in *Ibrahim* claimed that it operated within the framework set by the Cypriot Constitution. Nevertheless, when engaged in such a major constitutional transformation, it operates as an agent of constituent power.[72] In such cases, grasping constituent power not only as an entity but also as a capacity might be helpful. Constituent power as a capacity places emphasis on the addressees of the Constitution and not on its founders.[73] It focuses on the operation of a constitution and not on its enactment, and on its operation in relation to the actual political community that is the addressee of the constitution and within the geographical boundaries which determine the actual control of the state organs, despite the expressive claims to territory and people made by the master-text Constitution. According to the perception of constituent power as a capacity, any constitution acquires legitimate constitutional authority if it is the only constitution that can perform the '*coordinating function of law in a certain geographic area*'.[74] The crucial issue then is not who made the constitution but whether or not those who are subjects to the constitution consider it to be a legitimate constitution because it performs the functions that are ascribed to a constitution, which is not a 'sham'.[75]

In conclusion, we should bear in mind that court judgments might introduce changes to the constitution to prevent the constitutional order from collapsing. These kinds of judgments create conditions which may allow a new political

72 Jacobsohn and Roznai (n 39) 242–243.

73 Oran Doyle, 'Populist Constitutionalism and Constituent Power' (2019), 20 German L J 161, 170–171.

74 Ibid 171.

75 Ibid 171. On what counts as a constitution and as a sham constitution, see David S Law, Mila Versteeg, 'Sham Constitutions' (2013), 101 California L R 863 872–882.

consensus to emerge by resetting the framework within which the main actors can still act inside the law; however, judgments are unable to create the political consensus on their own.[76]

76 On this issue, Nicholas W Barber and Adrian Vermuele, 'The Exceptional Role of Courts in the Constitutional Order' (2017) 92 Notre Dame L R 817, 850–854. However, effectiveness should not be equated to stability. As Barber and Vermuele indicate, North Korea is a stable but not a constitutional state in substantial terms. Effectiveness aims to preserve the essential aspects of constitutionalism and the rule of law and not override them. Ibid 855. Yet, the implementation of the Doctrine of Necessity in Cyprus did not create a new political consensus; it created a transitional constitutional order enabling the operation of the Constitution until a new consensus between the two communities establishes a new constitutional order.