The Doctrine of Necessity in *Ibrahim*, the Material Constitution of Cyprus, and Costantino Mortati

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Abstract

In Ibrahim (1964), the Supreme Court of Cyprus constructed a doctrine of necessity that allowed the Republic of Cyprus to survive without the participation of Turkish-Cypriots in State organs, even though the Constitution of 1960 was (and remains) based on such participation. The aim of this article is to critique the doctrine of necessity through the lens of the constitutional theory of Costantino Mortati, to whom Ibrahim refers. To do this, the essay first expounds Mortati's views on necessity as a source of law, on the material constitution, and on the constituent power, then offers an account of the material constitution of Cyprus as it evolved from the 1960s to the present day; finally, it offers a critique of Ibrahim. The main argument is that, not having paid close enough attention to Mortati's theory, the judges failed to make it clear that the fundamental objective of the Cyprus Constitution is the co-existence of the two communities on the island (Greek-Cypriots and Turkish-Cypriots) through a power-sharing regime that provides ironclad guarantees for the rights of the Turkish-Cypriots. This consideration would have led the judges in Ibrahim to express, clearly and unambiguously, their commitment to bicommunalism. The same consideration, in combination with their commitment to the cause of democratic constitution-making, could have motivated the judges of the Supreme Court to condition the justifiability of the doctrine of necessity on a future exercise of constituent power by both Cypriot communities on an equal footing.

Keywords: material constitution; doctrine of necessity; constituent power; Costantino Mortati; Cyprus Constitution

The Doctrine of Necessity in Cyprus

The judgment of the Supreme Court of Cyprus in *Ibrahim* was delivered in November 1964.[2] This marked the end of the coexistence of the Greek-Cypriots and Turkish-Cypriots in the constitutional institutions of the Republic of Cyprus, as the latter

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[2] *The Attorney-General of the Republic v. Mustafa Ibrahim & Ors* [1964] CLR 195.

was established in 1960. Such coexistence did not coincide with the original aspirations of either community. Greek-Cypriots had been fighting for *enosis*—the union of the island with Greece—since the 19th century, whereas in the years before independence, Turkish-Cypriots actively demanded *taksim*—the division of the island between the two motherlands.[3] The independent State of Cyprus was a precarious settlement based on a rather unstable equilibrium between the interests of external powers (including the UK, USA, Turkey, and Greece) in the Eastern Mediterranean and the Middle East. The Treaty of Guarantee, one of the documents that established the Republic by putting it under the tutelage of external powers, prohibited 'any activity likely to promote, directly or indirectly, either union with any other State or partition of the Island'.[4] However, this clause did little to supress the original nationalist aspirations.

Under conditions of mutual suspicion, aggravated by the continuous armament of paramilitary groups, the leaders of the two communities adopted intransigent positions on the constitutional problems that continued to arise.[5] In January 1963, these

[3] For accounts of that period, see, *inter alia*, Robert Holland, *Britain and the Revolt in Cyprus 1954–1959* (New York: Oxford University Press, 1998); David French, *Fighting EOKA: The British Counter-Insurgency Campaign on Cyprus, 1955–1959* (Oxford: Oxford University Press, 2015); Nancy Crawshaw, *The Cyprus Revolt: An Account of the Struggle for Union with Greece* (2nd edition, London: Routledge, 2022). For the long history of the *enosis* cause, see Robert Holland and Diana Markides, *The British and the Hellenes: Struggles for Mastery in the Eastern Mediterranean 1850–1960* (New York: Oxford University Press, 2006); Andrew R. Novo, *The EOKA Cause: Nationalism and the Failure of Cypriot Enosis* (London: I. B. Tauris, 2021).

[4] Treaty of Guarantee, Signed in Nicosia on 16 August 1960, (1960) *United Nations – Treaty Series* 3, Registration No 5475, Article I. See also Constitution of Cyprus, 1960, Art. 181 (assigning constitutional force to the Treaty of Guarantee), Art. 185 (declaring that the territory of the Republic is indivisible, prohibiting the integral or partial union of Cyprus with any other state or separatist independence).

[5] 'Each side was trying to interpret [the Constitution] in such a way as to suit its own ultimate objective: the Greeks so as to make of the republic a conventional unitary state, operating on traditional majority rule principles, the Turks so as to partition it and convert it into a federation or, preferably, a confederation': Stella Soulioti, *Fettered Independence: Cyprus, 1878-1964, Volume One: The Narrative* (Minneapolis: University of Minnesota Press, 2006), 133. Soulioti was a Minister of Justice of the Republic of Cyprus in that period. Her account of the constitutional crisis of 1960–1963 remains a very useful source of information. Other accounts of the crisis include Robert Stevens, *Cyprus: A Place of Arms* (New York: Frederick A. Praeger, 1966); Stanley Kyriakides, *Cyprus: Constitutionalism and Crisis Government* (Philadelphia Pennsylvania: University of Pennsylvania Press, 1968); Richard A. Patrick, *Political Geography and the Cyprus Conflict: 1963–1971* (Waterloo: University of Waterloo, 1976); Brendan O'Malley & Ian Craig, *The Cyprus Conspiracy: America, Espionage and the Turkish Invasion* (London: I. B. Tauris, 1999); Diana Weston Markides, *Cyprus 1957-1963 from Colonial Conflict to Constitutional Crisis: The Key Role of the Municipal Issue* (Minneapolis: University of Minnesota Press, 2001); Alan James, *Keeping the Peace in the Cyprus Crisis of 1963-64* (New York: Palgrave, 2002). For legal analysis of the events see Marios L.

problems brought the Republic of Cyprus to the brink of a financial and institutional collapse. In November 1963, President Makarios submitted to Vice-President Fazil Küçük his famous 'Thirteen Points',[6] a proposal for radical constitutional amendments which, if materialised, would have resolved the constitutional problems by depriving the Turkish-Cypriot community of their (unamendable) special veto powers under the Constitution of 1960. Turkey vehemently rejected these proposals. An armed conflict between the two communities soon broke out and led to the withdrawal of Turkish-Cypriot officials from State organs. UN Security Council Resolution 186 of 4 March 1964[7] called all States to refrain from action likely to worsen the situation; established the United Nations Peacekeeping Force in Cyprus (UNFICYP); recommended the appointment of a mediator towards an agreed settlement of the Cyprus problem; and, by asking the 'Government of Cyprus' to take all necessary measures to stop violence, indirectly recognised the legality of Makarios' government as operating at the time without the participation of Turkish-Cypriot ministers. In the absence of Turkish-Cypriot MPs, the House of Representatives started voting for laws that contravened basic articles of the Constitution,[8] inclusive of the creation of a National Guard to which only Greek-Cypriots could be conscribed under the leadership of officers who came from mainland Greece.

The Administration of Justice (Miscellaneous Provisions) Law 33/1964 attempted to address the problem that arose after the resignation of the neutral presidents of the Supreme Constitutional Court and the High Court. In July 1964, the Greek-Cypriot legislators decided to merge those courts into a new unified Supreme Court composed of the remaining members of the two courts—three Greek-Cypriot and two Turkish-Cypriot judges. The preamble of Law 33/64 appealed to the imperative that 'justice should continue to be administered'. It also vaguely mentioned a future exercise of popular constituent power: 'it has become necessary to make legislative pro-

Evriviades, 'The Legal Dimension of the Cyprus Conflict', (1975) 10(2) *Texas International Law Journal* 227; Thomas Ehrlich, *Cyprus, 1958–1967* (London: Oxford University Press, 1974); Zaim M. Necatigil, *The Cyprus Question and the Turkish Position in International Law* (2nd revised ed., Oxford: Oxford University Press, 1993), 33–75.

6 'Proposals Entitled "Suggested Measures for Facilitating the Smooth Functioning of the State and for the Removal of Certain Causes of Intercommunal Friction", Presented 30 November 1963' in Stella Soulioti (ed.), *Fettered Independence: Cyprus, 1878-1964, Volume Two: The Documents* (Minneapolis: University of Minnesota Press, 2006) 669–682.

7 S/5575. For an account, see Oliver P. Richmond, *Mediating in Cyprus: The Cyprus Communities and the United Nations* (London: Frank Cass Publishers, 1998) 90–99.

8 See Kyriakides (no 5) 113–115.

vision in this respect until such time as the people of Cyprus may determine such matters'. Law 33/64 was soon challenged before the new Supreme Court. In *Ibrahim*, a bench of the Court composed of the three Greek-Cypriots judges held that the law was constitutional, even though it was clearly repugnant of the constitutional rules that provided for the existence of the former two supreme courts (the law was also not published in the official Gazette in both languages, Greek and Turkish, as is required by the Cyprus Constitution).

Ibrahim was premised on the doctrine of necessity.[9] The three Greek-Cypriot judges (especially Triantafyllides) attempted to construct the doctrine not as an extra-constitutional source of legal authority, but as a legal principle that was inherent to the Cypriot constitutional order—specifically, as a principle that qualifies the supremacy clause of the Constitution (art 179). Triantafyllides argued that the survival of the State and the implicit constitutional obligation of State organs to fulfil their duties (in the case of Law 33/64, the duty of courts to deliver justice) have priority over strict compliance with specific constitutional rules—even those that determine the constitution of State organs—whenever exceptional circumstances, as the ones that the Republic was facing at the time, dictated so.[10] Interestingly, the Cypriot version of the doctrine of necessity empowered not the executive but the legislature (in its capacity as a representative of the people of Cyprus) to adopt necessary measures to meet the emergency. The deviations from the relevant constitutional provisions are

[9] For accounts of *Ibrahim* and of the Cypriot doctrine of necessity, see Constantinos Kombos, *The Doctrine of Necessity in Constitutional Law* (Athens-Thessaloniki: Sakkoulas Publications, 2015); 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(1) *Cyprus Review* 113; Polyvios G. Polyviou, *The Cyprus Experience: Constitutionalism, Fundamental Law and the Doctrine of Necessity* (Athens: Nomiki Vivliothiki, 2021); Achilles C. Emilianides, 'Cyprus' in André Alen & David Haljan (eds), *International Encyclopaedia of Laws: Constitutional Law* (Alphen aan den Rijn, NL: Kluwer Law International, 2024) 42–55. For critique of the Cypriot doctrine of necessity, reflecting the position of Turkish-Cypriots, see Kudret Özersay, 'The Excuse of State Necessity and Its Implications on the Cyprus Conflict' (2004) 9(4) *Perceptions: Journal of International Affairs* 31.

[10] See *Ibrahim*, 227 (Triantafyllides, J). For Triantafyllides, 'Article 179 [of the Constitution] is to be applied subject to the proposition that where it is not possible for a basic function of the State to be discharged properly, as provided for in the Constitution, or where a situation has arisen which cannot be adequately met under the provisions of the Constitution then the appropriate organ may take such steps within the nature of its competence as are required to meet the necessity. In such a case such steps, provided that they are what is reasonably required in the circumstances, cannot be deemed as being repugnant to or inconsistent with the Constitution, because to hold otherwise would amount to the absurd proposition that the Constitution itself ordains the destruction of the State which it has been destined to serve' (ibid 234).

considered justified, according to the doctrine, should they satisfy the following prerequisites: (a) 'an imperative and inevitable necessity or exceptional circumstances' are present; (b) 'no other remedy to apply' exists; (c) the measure taken is 'proportionate to the necessity'; and (d) the measure is 'of a temporary character limited to the duration of the exceptional circumstances'.[11] The Supreme Court supervises the application of the doctrine and has the power to strike down legislation that does not meet these criteria.

Greek-Cypriot jurists, journalists, and the public at large are generally aware that the survival of the Republic of Cyprus as a State is owed to the doctrine of necessity, as combined with UN Security Council Resolution 186 (which figured prominently in the reasoning of *Ibrahim*). What Greek-Cypriots often underestimate is the grave price: the Republic of Cyprus survived only because it effectively lost its constitutional identity, its bicommunal character,[12] as permeating virtually all constitutional arrangements (which render the Republic of Cyprus an early instance of 'consociational democracy'[13]). The doctrine of necessity permitted the functioning of State organs without the participation of the representatives of the Turkish-Cypriot community. Given its immense transformational effect, the doctrine of necessity has been read through the lens of the theory of juridical coups d'état.[14] Impressively, there are no traces of this fundamental transformation in the constitutional text. Indeed, when reading this text, one assumes that the Republic of Cyprus is unthinkable without the participation of Turkish-Cypriots across all aspects of public life. In reality, the doctrine of necessity permitted the functioning of the State without the participation of Turkish-Cypriots since 1963 (with the exception of Turkish-Cypriot judges, who abandoned their positions in 1965[15]). The gap that separates the constitutional text from constitutional reality is by definition a grave deficit in terms of the rule of law and functions as an enabling condition or as an alibi for the multiplication of several

[11] *Ibrahim*, 265 (Josephides, J).

[12] See e.g., Catherine D. Papastathopoulos, 'Constitutionalism and Communalism: The Case of Cyprus' (1965) 16(1) *The University of Toronto Law Journal* 118; Nikolas Kyriakou & Nikos Skoutaris, 'The Birth of a Republic, But Not of a Nation: The Case of State-Building in Cyprus' (2016) 22(4) *Nationalism and Ethnic Politics* 456.

[13] See Christalla Yakinthou, *Political Settlements in Divided Societies: Consociationalism and Cyprus* (Basingstone, UK: Palgrave Macmillan, 2009).

[14] Christos Papastylianos, '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' (2023) 17(3) *Vienna Journal on International Constitutional Law* 313.

[15] See Marilena Varnava, *Cyprus Before 1974: The Prelude to Crisis* (London: I. B. Tauris, 2020) 61–65.

states of exception on the island.[16] There is no such precedent for any other *democratic* regime.

The gap is so impressive, yet deeply entrenched in reality, that no one seems to be concerned about its perpetuation. This is so not least because the doctrine of necessity was good enough to save the existence of the Republic of Cyprus as a State but not good enough to exercise pressure on all actors for a gradual return to constitutional normality—either to the 1960 Constitution or to a new constitution that would be enacted through the exercise of democratic constituent power.[17] Judicial pressure towards constitutional normality could have taken the form of a strong recommendation, to be at some point inserted into the standard judicial formula of the doctrine of necessity, suggesting that, after so many years, the people or the peoples of Cyprus[18] should be afforded an opportunity to express their views on the continuation of the present state of affairs, the alternative being a new constitutional beginning, whatever it might be. Admittedly, this would be a bold move for a court and one that might have implications for Cyprus' international position. However, this exceptional situation warrants boldness. In addition, such a move would enhance the credibility of Cypriots in the eyes of international observers, given the stalemate of the negotiations for the resolution of the Cyprus problem. Finally, it would be only a recommendation, but one based on solid international practice and a complete understanding of the limitations of the doctrine of necessity.

Greek-Cypriot scholars emphasise that the Cypriot version of the doctrine of necessity is friendly to rule of law, bearing little resemblance to emergency doctrines

[16] See Costas M. Constantinou, 'On the Cypriot states of exception' (2008) 2(2) *International Political Sociology* 145; Nicos Trimikliniotis, 'The Proliferation of Cypriot States of Exception: The Erosion of Fundamental Rights as Collateral Damage of the Cyprus Problem' (2018) 30(2) *Cyprus Review* 43; Nikos Moudouros, *State of Exception in the Mediterranean: Turkey and the Turkish Cypriot Community* (Switzerland: Palgrave Macmillan/Springer Nature, 2021).

[17] See Costas Stratilatis, 'Stop Looking at the Moon: For a Democratic Constitution-making Process in Cyprus', Eastern Mediterranean Policy Note No 73, April 2022; cf. Costas Stratilatis, 'Avoidance of constitutional imposition and democratic constituent power in divided, conflict-ridden societies' (2018) 30(1) *Cyprus Review* 163.

[18] I shall not delve into the issue here other than to note that the Constitution of Cyprus makes no reference to a Cypriot people or to Cypriot peoples. The Turkish-Cypriot position has always been that there exist two peoples in Cyprus who may jointly or separately exercise their rights to self-determination. See Necatigil (no 5) 205–233. The Greek-Cypriot position, on the contrary, has always been that there exists one people of Cyprus, meaning that the right of self-determination may be exercised only collectively by all Cypriots. See e.g., Kypros Chrysostomides, *The Republic of Cyprus: A Study in International Law* (Athens/The Hague: Sakkoulas/Kluwer Law International, 2000) 50–51.

adopted in countries like Pakistan.[19] This is correct, to a certain extent. Still, by definition, the doctrine of necessity is an emergency doctrine, that is, a temporary measure. Thus, it should have been improved over time to become compatible with the democratic principle in order to pave the way for constitutional normalisation. In fact, this should be the purpose of all emergency doctrines that aspire to be legal and intra-constitutional.

The judges who served in the Supreme Court of Cyprus could have realised this if they had taken seriously an excerpt from an Italian textbook of public law that was cited in *Ibrahim* by Judge Josephides. The excerpt, translated into English at the very end of *Ibrahim*, is as follows:

> While necessity, in a third meaning, which is that considered here, presents itself as a fact of autonomous juridical product, when it operates outside or even contrary to law, appearing by itself capable of legalising the act, otherwise illegal. Naturally for the production of that effect, necessity must have an *institutional* character, that is to say it must be deduced from the exigencies of life, from the purposes the political institution of the state is aiming at, that is to say of the juridical order to which appertains the organ operating on the basis of such source (*fonte*).
>
> This function is justified by the fact that the existence of the institution is more important than the respect of the law, which is a mere instrument in the service of such institution (*fiat iustitia ne pereat mundus*).[20]

The author of this textbook is Costantino Mortati, an Italian constitutional theorist who was an influential member of the Italian Constituent Assembly after World War II.[21] Mortati's work, especially his theory of the material constitution, has recent-

[19] Kombos (no 9); Polyviou (no 9).

[20] *Ibrahim*, 273, with the reference being to page 174 of the 6th edition of Mortati's *Diritto Pubblico* (1962). The authors of *Ibrahim* meant the 6th edition of Mortati's *Istituzioni di Diritto Pubblico*. I was able to locate the same excerpt in Costantino Mortati, *Institutions of Public Law I (Istituzioni di Diritto Pubblico I)* (10th edition, re-elaborated and updated, edited by Franco Modugno, Antonio Baldassare & Carlo Mezzanotte, Padova: CEDAM, 1991) 322–323. The other two notions of necessity to which Mortati refers in those pages are: (a) necessity in a generic sense, as 'motivating inspiration and as raison d'être' of every juridical act or fact, and (b) necessity as a requirement for the activation of a power that is provided by law (as e.g. in the case of legislative decrees that the government may enact in cases of urgent need). Mortati's analysis of necessity is part of a wider analysis of the sources of law.

[21] See Fulco Lanchester, 'Mortati and the "constituent Legislature"' ('Mortati e la "Legislatura costituente"') (2016) *Nomos: Le attualità nel diritto*, available at: https://www.nomos-leattualitaneldiritto.it/nomos/fulco-lanchester-mortati-e-la-legislatura-costituente/ (last accessed 3.4.2025); Lucia Rubinelli,

ly attracted great interest in Anglophone constitutional theory.[22] In the remainder of this article, I shall first read the excerpt cited above in light of Mortati's theory of the material constitution. Then, I shall use this analysis as a point of reference for my critique of *Ibrahim*. Before doing this, I shall proceed to a brief analysis of the material constitution of Cyprus, as it evolved from the 1960s onwards.

Overview of Mortati's Constitutional Theory

Mortati critically engaged with the thought of the great constitutional scholars of the Weimar Republic—Carl Schmitt, Rudolf Smend, Herman Heller, and (by way of constant antithesis) Hans Kelsen. The Italian scholar was also influenced by the work of Santi Romano, who is considered the main representative of legal institutionalism in Italy.[23] Accordingly, Mortati viewed the institutions that make up the legal order as 'taking shape internally to social development, and not outside of it'.[24]

This approach is central to his major work, *La costituzione in senso materiale*, which was published in 1940.[25] Although for some scholars the book indirectly favours fascism,[26] it is today commonly read as an anti-positivist, realist-institutionalist approach to constitutional law, bridging law and society and helping explain the normativity of constitutions in a non-formalistic way.

'Costantino Mortati and the Idea of the Material Constitution' (2019) 40(3) *History of Political Ideas* 515, 541–545.

[22] See *inter alia* Marco Goldoni & Michael A. Wilkinson, 'The Material Constitution' (2018) 81(4) *The Modern Law Review* 567; Rubinelli (no 21)'; Mario Croce & Marco Goldoni, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford California: Stanford University Press, 2020); and many of the essays in Marco Goldoni & Michael A. Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge: Cambridge University Press, 2023).

[23] See on this Croce & Goldoni (no 22) 141–154.

[24] ibid 142.

[25] Costantino Mortati, *The constitution in the material sense (La costituzione in senso materiale)* (Milano: A. Giuffrè Milano, 1998 [reprint of the original publication of 1940, with an introduction by Gustavo Zagrebelsky]). The translation of excerpts from Mortati's works is mine.

[26] See Massimo La Torre, 'The German Impact on Fascist Public Law Doctrine – Costantino Mortati's Material Constitution' in Christian Joerges & Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford: Hart Publishing, 2003) 305.

The Material Constitution

The concept of the material constitution, as Mortati constructed it, points to the organisational elements, social and political forces, and original juridical sources (*fonte giuridica primigenia*) that sustain the order in which the State takes its form and from which the constitution derives its normativity.[27] In particular, the material constitution comprises (a) the political force that propels the rise (*sorgere*) of the State in a concrete—republican or monarchical—form;[28] (b) the political party as organisational means of the modern State and as supplier of the contents of the 'fundamental constitution';[29] and (c) the 'political objective' (*fine politico*), i.e., the co-essentiality of the State with 'a relative orientation in the way to consider, within the State's completeness, the ensemble of social relations and its capacity to reduce into unity the variable attitude of state organs'.[30]

Importantly, neither the political objective nor the material constitution forms a part of a pre-juridical state of affairs.[31] Theorising the grey area between politics and law,[32] Mortati assigns to the political objective and to the material constitution an institutionalising function and, moreover, a normative and even juridical character so that the constitution becomes 'political law' (*diritto politico*).[33] The political objective 'forms the essence of the fundamental constitution, becoming the primary source of the law of the State'.[34]

Under regular circumstances, the material constitution guarantees the validity of the formal constitution, sets the unity of the legal order, and performs various juridical functions.[35] The formal constitution expresses a situation of equilibrium[36] that remains stabilised when a homogenous social force prevails. But when the equilibri-

[27] Mortati (no 25) chap. II.

[28] ibid 61–67.

[29] ibid 70 et seq.

[30] ibid 92–93. In their updated version of Mortati's theory, Goldoni & Wilkinson (no 22) identify the following four 'ordering forces' of the material constitution: (a) the production and reproduction of political unity; (b) the work of institutions and co-relevant societal practices and customs; (c) subjective social interaction as well as social conflicts (for them this is the most important material out of which constitutions are made); and (d) the fundamental political objectives which may hold the constitutional order together in spite of social conflict, political disunity, and/or institutional weakness.

[31] Mortati (no 25) 110.

[32] Rubinelli (no 21) 521.

[33] Mortati (no 25) 106.

[34] ibid 110.

[35] ibid 124ff.

[36] ibid 116.

um represents merely a compromise of conflicting forces (as was the case in Cyprus), discrepancy (*dissidio*) between the positive constitutional norms and those that are presupposed by them, i.e. the ones that are inscribed in the 'real constitution', cannot be precluded.[37]

Interestingly, Mortati employed the concept of material constitution to address constitutional change (*mutamento costituzionale*) and its material limits,[38] an issue that has become central to contemporary constitutional theory.[39] The Italian scholar dismisses the supposition that the material limits of constitutional change are those prescribed by the limitless will of the 'supreme constituent organ'. Mortati rejects this view on the grounds that the '*personal element of the State*' is incapable 'as such, i.e. outside of one specific organisation, to express appropriately its own will, to proffer its will as the subject of constituent activity'.[40] The material limits of constitutional change are connected with State continuity and point to 'an organisational principle, which persists and remains immutable even with the fluctuation of the single parts of its structure'.[41]

To identify that principle, we need to consider 'the political forces, which epitomise the fullness of power, and set themselves as immediate expression of the sovereignty of the state, [to be taken] as subjected to the law at the same time in which they lay down the constitutional order'.[42] We also need to consider the ensemble of the values (*complesso dei valori*) that are expressed by the dominant political force, and which form the 'essential nucleus' of State activity, coordinate State institutions, and justify the distinction between the constant and the changeable part of the constitution.[43] In any event, the continuity of the State is not coincidental with its population and its

[37] ibid.

[38] ibid 182–187.

[39] See *inter alia* Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (New York: Oxford University Press, 2017); Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (New York: Oxford University Press, 2021); Rehan Abeyratne & Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (New York: Routledge, 2022); Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019) 139–172; Richard Albert & Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Switzerland: Springer, 2018).

[40] Mortati (no 25) 187 (my emphasis).

[41] ibid 189.

[42] ibid 197.

[43] ibid 198–200.

territory, for these are 'purely material' entities, 'primitive social data', whereas the State does not have a physical subjectivity akin to that of natural persons.[44]

Rightful Necessity

It is in these pages of *La costituzione in senso materiale* that Mortati refers to necessity as a source of law. In alignment with institutionalism, the Italian scholar makes clear that 'necessity can be taken as source of law not in itself (*in se*), but with reference to other exigencies of a given order, as concretisation of an obligation that corresponds with the satisfaction of the proper interests (*interessi propri*) of the order itself'.[45]

Mortati's views on necessity become even clearer in an article published in 1973, which is dedicated to Carl Schmitt's constitutional and political thought.[46] Mortati first notices that derogations, suspensions, and temporary ruptures in the legal order are phenomena that we encounter in every State. When these phenomena make their appearance, it becomes 'inevitable that the means gives way to the end, *the law to the values in which the law finds its appropriate reasoning* (*la legge ai valori nei quali essa trova la propria ragione*)'.[47] Schmitt refers to such an exigency when he ascribes 'the essence of political power to the decision on the subsistence of the state of exception, of situations of necessity that justify the action *legibus solutus*'.[48] However, crucially, Mortati maintains that this:

> cannot signify an absence of the law, but the subordination of that [law], which is written to another that inspires it, and thus conditions it. Respect for the latter certifies the intimate unity of the socio-statal structure and leads us to contest the thesis that links the attribution of power to the absence of limits. This opinion omits the consideration of the essential distinction that one must make between the derogation from the laws that is inspired by the intention to

[44] ibid 188.

[45] ibid 193.

[46] Costantino Mortati, 'Brief notes on the relationship between constitution and politics in the thought of Carl Schmitt' ('Brevi note sul rapporto fra costituzione e politica nel pensiero di Carl Schmitt') (1973) 2(1) *Quaderni fiorentini per la storia del pensiero giuridico moderno* 511. For the points of convergence and of disagreement between Mortati and Schmitt, see Croce & Goldoni (no 22) 149, 167, 182; Rubinelli (no 21) 529–530; Alfonso Catania, 'Mortati and Schmitt (Mortati e Schmitt)' in Alessandro Catelani & Silvano Labriola (eds), *The material constitution: Cultural courses and actuality of an idea (La costituzione materiale: Percorsi culturali e attualità di un idea)* (Milano: Giuffrè, 2001) 109.

[47] Mortati (no 46) 516 (my emphasis).

[48] ibid 516–517.

> preserve the legal order and derogation that seeks the subversion of the legal order to achieve a revolution.[49]

The crucial phrase is: 'values in which the law finds its appropriate reasoning'. Which are those values? One may safely suppose that they coincide with the values to which Mortati refers in the last pages of *La costituzione in senso materiale*: the ensemble of values that are expressed by the dominant political forces, but which must serve the interests of the legal order as a whole, determining the fundamental political objective that animates the idiosyncratic—political, institutional, juridical, *and* factual—normativity of the material constitution. As Gustavo Zagrebelsky (an eminent judge, constitutional scholar, and reader of Mortati in Italy) wrote in his introduction to *La costituzione in senso materiale*:

> According to Mortati's doctrine, powers of exception are permitted insofar as they deviate from constitutional law, but not when they deviate from the material constitution. Thus, they result—differently from what Schmitt theorised—in being subordinated, if not to the laws (*legge*), then to the right (*diritto*).[50]

Hence, necessity becomes a source of objective law only insofar as it is oriented towards rightfulness. 'Right', in this sense, points to the values that express the fundamental political objective that sustains the normativity of a particular constitutional order. Only in this way is necessity capable of legitimising acts that would otherwise be illegitimate.

Contrary to one reading of Carl Schmitt's analysis of the state of exception,[51] Mortati believes that necessity as a factor in constitutional law contains a predisposition towards normative values and towards institutionalisation in the strict sense. Therefore, necessity is oriented towards rightful, ultimately lawful, regulation of political and social affairs even as it excuses deviations from *positive* law. Under these conditions, necessity is adequate to justify deviations from positive constitutional law, but can never justify replacement of the formal constitution with a new one—unless there exists a grave and definite mutation of the material constitution such as to give rise to an exercise of original or primary constituent power. This observation brings us to another thematic area of Mortati's constitutional theory.

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[49] ibid 517.

[50] Gustavo Zagrebelsky, 'Prologue (Premessa)' in Mortati (no 25) vi, xv (my translation).

[51] But see Giorgio Agamben, *State of Exception* (Chicago: The University of Chicago Press, 2005) 33 (arguing that 'it is essential for Schmitt that in every case some relation to the juridical order be ensured').

The Constituent Power

Lucia Rubinelli has correctly argued that, after World War II, Mortati did not abandon the basic tenet of his theory of the material constitution, but substituted the concepts of the constituent power (meaning the political and social forces that create and invigorate the constitutional order) and of (legal) sovereignty (meaning the ultimate sources of legal authority) for the concepts of the material and of the formal or legal constitution respectively.[52] Indeed, in 1945, Mortati published a work relevant to the constitution-making process in Italy and, as part of this work, a long text entitled 'The theory of constituent power', which has been recently republished.[53] In this text, Mortati elaborated, in an authentic way, on the concept of the *pouvoir constituant*, which was originally constructed by Sieyès on the eve of the French Revolution to indicate the power of the nation to remake its constitution without being limited by previous fundamental laws and forms.[54]

In contrast to other constitutional scholars of his time who had claimed that the constituent power belongs to the realm of facticity, i.e., that it is an extra-juridical phenomenon,[55] Mortati conceives the constituent power as a normative fact (*fatto normativo*), which 'contains its own law and the guarantees of its persistence even in the future'.[56] For Mortati, if constituent power is to give life to a State, it 'must become capable of objectivising its will, remove itself from arbitrariness, be submitted to a norm, become susceptible to gathering in unity the infinite series of social rela-

[52] Rubinelli (no 21) 532–535.

[53] Costantino Mortati, *The theory of the constituent power (La teoria del potere costituente)* (edited by Marco Goldoni, Macerata: Quodlibet, 2020). For an analysis of Mortati's conception of the constituent power, see Rubinelli (no 21) 536–545; Lucia Rubinelli, *Constituent Power: A History* (Cambridge: Cambridge University Press, 2020) chap 4 (where the theory of Mortati on the constituent power is treated together with the corresponding theories of Georges Vedel and of Ernst-Wolfgang Böckenförde); Croce & Goldoni (no 22) 174–178; Giulia Maria Labriola, 'Reflections on Constituent Power in Costantino Mortati' ('Una riflessione sul potere costituente in Costantino Mortati)' (2022) 22(1) *Diritto e questioni pubbliche* 73.

[54] Emmanuel Joseph Sieyès, 'What is the Third Estate' (1789) in Sieyès, *Political Writings* (edited, introduced, and translated by Michael Sonenscher, Indianapolis: Hackett Publishing, 2003) 92, 136–138.

[55] The most prominent proponent of this view in interwar constitutional theory was Carré de Malberg. See Raymond Carré de Malberg, *Contribution to the General Theory of the State (Contribution à la Théorie générale de l'État)* Vol. 2 (Dalloz 2004[original 1920, 1922]) 489–497. Note that Malberg's long analysis of the *pouvoir constituant*, inclusive of his long treatment of the role of the French National Assembly as a constituent organ, indicates at several points that the concept of the constituent power has juridical dimension.

[56] Mortati (no 53) 38 (my translation).

tionships, [and] determine the relevance [...] of the various interests of the consociation'.[57] The constituent power is a 'force' (*forza*) when

> viewed in the moment in which it brings order; in the moment in which it makes a political will emerge from the fond of one consociation more or less homogenous, characterised by a certain tendency for common life; when it determines a differentiation of values and of positions between the members of the consociation, a superordination as well as a subordination of wishes; when it establishes relations of command and of obedience.[58]

In short, the constituent power is not purely factual but has a normative dimension that corresponds to the organisational principles, the evaluative horizon, and the political objective of the material constitution.[59]

For Mortati, the operation of the constituent power is not exhausted at the genesis of a constitutional order but continues to exist within that order by expressing the political vision of the social forces in which the order is ingrained. In this sense, the constituent power is the amalgamation of the social forces and organisational resources that stabilise the constitutional order by directing it towards realisation of the *fine politico*.[60] Therefore, as Mariano Croce and Marco Goldoni have aptly noticed, in Mortati's theory:

> the passage from constituent into constituted power comes about without any real discontinuity. The key point is that a constituent force is necessarily already an organised force, hence it contains important elements of constituted (or ordered) power [...] Constituent power is a normative fact because its factual existence contains in itself a norm (or a principle, understood as a normative principle) that unfolds while the organised constituent force shapes a new order.[61]

The subject of the constituent power is neither a singular person nor an abstract entity (like the nation in the classic French theory of national sovereignty) but a leading force within a concrete people whose members are reassembled around a basic idea.[62] After the constituent phase, the people should continue playing an active role

[57] ibid 37.
[58] ibid.
[59] Mortati (no 53) 37–38; Croce & Goldoni (no 22) 175; Labriola (no 53) 78.
[60] Rubinelli (no 21) 538–539.
[61] Croce & Goldoni (no 22), 176.
[62] Mortati (no 53) 94.

in politics—Mortati shares this belief with other important post-war European theorists who embraced the concept of constituent power, such as Georges Vedel and Ernst-Wolfgang Böckenförde.[63] To this end, the Italian scholar proposed to the Italian Constituent Assembly the adoption of a second legislative chamber that would offer representation to interests and groups, as opposed to individuals.[64] He called these groups intermediary communities and emphasised the role of the political party as their 'loudspeaker'.[65] Mortati also favoured practices of direct democracy that would 'guarantee the people's direct influence upon the formation and realisation of the *fine politico* via the right of petition, the right to initiate lawmaking processes and the right to organise referenda'.[66]

It should be stressed that neither Mortati's theory of material constitution nor his theory of constituent power implies the idea of a permanent revolution. On the contrary, once integrated into the constitution, the constituent power, being a factor that expresses the stabilising energies of the material constitution, protects the identity of the constitutional order (as connected with the *fine politico* of the dominant forces) vis-à-vis ephemeral changes in political attitudes. However, the constituent power remains a dynamic factor, at least as long as it is able to translate grave mutations in hegemonic dispositions into a new constitutional project. Mortati's theory underlines the view that the initiation of such a project, if it is to be genuinely legitimate, is not a matter of a momentary decision of some sovereign agent within exceptional factual circumstances, nor of the progress of history abstractly conceived, but a complex issue that concerns the concrete sociological and ideological resources of political power in a given State—an issue that should interest constitutional lawyers because it is closely intertwined with the normativity of the formal constitution.

[63] 'To counter what they perceived as positivism's anti-democratic implications, Mortati, Vedel and Böckenförde elaborated a series of institutional mechanisms aimed at guaranteeing the direct or semi-direct participation of the people in politics. These were inspired by three principles: the integration of the popular exercise of constituent power into ordinary politics, the downplaying of the distinction between constituent politics and constituted order, and the transformation of constituted citizenship into active constituent power. All three jurists claimed that these principles could be deduced from the very essence of the concept of constituent power': Rubinelli (no 53) 163.

[64] ibid 165.

[65] ibid 166. For robust analysis of the meaning and role of the political party in Mortati's theory, see Croce & Goldoni (no 22) 166–174.

[66] Rubinelli (no 53) 166.

The Evolution of the Material Constitution of Cyprus

Did Cyprus have a material constitution, in Mortati's terms, in the period before and after the conflict of 1963–1964? As mentioned in Section 1, the political objective of Greek-Cypriots when Cyprus became an independent State was fundamentally different from that of Turkish-Cypriots, and both differed from the fundamental political objective that gave shape to the Republic of Cyprus, that is, the intention to build a bicommunal, consociational State in which the numerical majority would not be able to have a dominant position over the minority. The Greek-Cypriots pursued the unification of the island with Greece, whereas the Turkish-Cypriots wanted to partition the island. In addition, the political forces that gave birth to the Republic of Cyprus were exogenous to the constitutional order: they were the three guarantor powers, and one could safely add the US and NATO. The presence of external powers in the daily operation of the constitutional order was considerable. Political parties, if we may speak of such during that period, were aligned with the two rival nationalisms. This clearly had a catalytic impact on their approach to constitutional problems. For the Greek-Cypriots, these problems were the product of an unjustly imposed constitutional arrangement, which, if fully implemented, would put them under the tutelage of Turkey. For the Turkish-Cypriots, the constitutional text expressed a partnership agreement whose terms should have been meticulously implemented if the agreement was to survive. Turkish-Cypriot leaders viewed each deviation from the letter of the Constitution as an indication of bad faith and as a dangerous precedent that, if accepted, would place their community at the mercy of the numerical majority.

Under these conditions, one option would be to consider that Cyprus did not have a material constitution after independence. Following Mortati's theory, this would mean that the 1960 Constitution lacked real normativity. A second option would be to speak of not one but of two material constitutions, respectively corresponding to the nationalist aspirations of the Greek-Cypriot and the Turkish-Cypriot communities. This approach would deprive the 1960 Constitution of any meaning. In my view, both approaches, although plausible to a certain extent, fail to capture the dynamics within the fundamental political objective(s) of the Greek-Cypriots and the corresponding dynamics in Turkish-Cypriots' attitude. The notion that both communities were unreservedly committed to their original nationalist aspirations, *enosis* and *taksim*, is rather formalist. It underestimates the fact that, after independence, the (bicommunal) State of Cyprus started becoming an inescapable reality for Cypriots

as well as for external powers.[67] From this standpoint, the fundamental objective of bicommunal cooperation had anchors in political and social reality.

True, in 1964, the US promoted a solution to the Cyprus problem that was, in theory, based on *enosis*, but which would in effect have entailed the partition of the island between Greece and Turkey.[68] However, the so-called Acheson Plan was rejected by both Turkey and Makarios, the Greek-Cypriot leader. More importantly, in the summer of 1964, it became apparent—or it should have become apparent—that *enosis*, if possible at all, would presuppose significant territorial concessions to Turkey—the so-called 'double *enosis*'. Despite this, Makarios and the Greek-Cypriot ministers kept paying lip service to the ideal of pure and unadulterated *enosis*. Many Greek-Cypriots did the same, but there are indications that support for *enosis* was neither unanimous nor unequivocal—and it became less so as time passed. In 1967, Sir Norman Costar, the British High Commissioner in Cyprus, estimated that 'for a variety of reasons support for *Enosis* within the Greek-Cypriot community had been reduced from 40 per cent in 1965 to 20 per cent in 1967'.[69] An earlier opinion survey, conducted by Stanley Kyriakides in 1965, showed that, when asked about the most realistic solution under present circumstances, 40.6 percent of Greek-Cypriots responded independence 'with no strings attached' (where 'strings' point to the unfair provisions of the 1960 settlement); 31.2 percent expressed their preference for self-determination; 18 percent for *enosis*; and 10.2 percent indicated 'other'.[70] Even when asked about the most justifiable solution, in an ideal world, only 53.4 percent opted for *enosis*, 30 percent preferred independence, 15.8 self-determination, and 8 percent 'other'.[71]

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[67] Cf. Alexis Heraclides, 'The 55 Year Cyprus Debacle: A Bird's Eye View' (2003), in Hubert Faustmann & Emilios Solomou (eds), *Independent Cyprus 1960–2010: Selected Readings* (Nicosia: University of Nicosia Press, 2011) 357, 363: 'Historically, the most decisive mutual suspicion that has [led] to an almost paranoiac attitude was the view that *Enosis* and *Taksim*, respectively, remain the respective cherished aspirations. This misperception – for misperception it is from the later part of the 1960s onwards – is probably more than any other belief responsible for the disturbing self-fulfilling quality of the conflict, from 1963 onwards'.

[68] See O'Malley & Craig (no 5) 108–119; Department of State, Foreign Relations of the United States, 1964–1968, Volume XVI, Cyprus; Greece; Turkey (James E. Miller editor, Washington: United States Government Printing Office, 2000), documents 78–155, available at: https://history.state.gov/historical-documents/frus1964-68v16/ch2 (last accessed 3.4.2025).

[69] Varnava (no 15) 92.

[70] Kyriakides (no 5) 126–127.

[71] ibid 130.

Kyriakides believed that the declining appeal of *enosis* was owed to a decline in the appeal of the old Pan-Hellenic ideal.[72] Other explanations include a growing 'sense of realism', a lack of faith in Greek political leadership, and the political instability in Greece at the time.[73] One might add that unification of Cyprus with Greece would most probably have incurred significant economic cost for Cypriots—all the more so given the rapid, and rather unexpected, growth of the economy of the island after the crisis of 1964—and 'other uncomfortable adjustments'.[74] At any rate, it seems certain that '[m]any Greek-Cypriots realized that achieving this national aim [i.e., *enosis*] and keeping Turkey off the island were two highly contrasting aims'.[75]

A split within the Greek-Cypriot community regarding their fundamental political objective emerged and gradually crystallised into a rift between the supporters of 'immediate *enosis*' (who were silencing or downgrading the grave concessions to Turkey that such a solution would presuppose) and those who, out of realism or genuine conviction, were willing to come to terms with an independent Cyprus, although they did not preclude that *enosis* might be sought in the future.[76] Said rift found its most vocal expression in the famous declaration of Makarios on 12 January 1968: 'Courageous decisions and important initiatives are required if we are to break the present deadlock. A solution, by necessity, must be sought within the limits of what is feasible, which does not always coincide with the limits of what is desirable'.[77] Shortly thereafter, Greek-Cypriots re-elected Makarios with an astonishing 95.45 percent of the vote over an opponent who had the support of the 'immediate *enosis*' front.[78] The election of Makarios legitimised the decision of the Greek-Cypriot leaders to participate in the intercommunal talks of 1968–1971 on a constitutional solution of the Cyprus issue.[79]

Even before the 1968 turn, in the context of the UN mediation efforts that resulted in the report of mediator Galo Plaza of 26 March 1965, the Greek-Cypriot leaders did not insist so much on *enosis* itself as on self-determination. Although the latter could be understood as opening the way to *enosis*, the official position of the Greek-Cypri-

[72] ibid 128.

[73] ibid 128–129.

[74] Varnava (no 15) 92.

[75] Varnava (no 15) 93.

[76] For an in-depth analysis, see Harry Anastasiou, *The Broken Olive Branch: Nationalism, Ethnic Conflict, and the Quest for Peace in Cyprus, volume one: The Impasse of Ethnonationalism* (Syracuse, New York: Syracuse University Press, 2008) 109–113.

[77] As cited in Varnava (no 15) 140.

[78] Varnava (no 15) 141.

[79] ibid 144.

ot leaders concentrated on the notion of a fully independent Cyprus, relieved of the shackles of the Treaty of Guarantee, taking the form of a unitary State in which the majority would be able to govern while the minorities would enjoy far-reaching human rights, inclusive of complete autonomy in religious matters and certain aspects of personal status such as marriage and divorce.[80] In the same process, Turkish-Cypriot leaders expressed their wish for an improved version of the 1960 Constitution that would provide more effective guarantees for their security, inclusive of geographical separation of the two communities through compulsory exchange of populations, that is, a federal State that would serve as a substitute for the aspired *taksim*.[81]

In 1965, Makarios announced his intention to have the Cyprus parliament vote for serious amendments to electoral laws, which would unite the electoral rolls and abolish the separate representation of Turkish-Cypriots. The Turkish-Cypriot MPs expressed their wish to return and participate in the debate. However, the President of the House of Representatives responded that Turkish-Cypriot MPs would have to accept that the constitutional requirement for separate majorities when voting for important legislation—one of the special powers of the Turkish-Cypriot community under the agreements of 1960—would no longer be applicable.[82] As expected, the Turkish-Cypriots refused to accept these terms.[83] Later, after the crisis of November 1967, the Turkish-Cypriots established the Turkish-Cypriot Provisional Administration (TCPA),[84] and though they insisted that this was a measure that did not mean to violate the 1960 Constitution but only to make possible organisational accommoda-

[80] See United Nations, S/6253, Report of the United Nations Mediator on Cyprus to the Secretary General, 26 March 1965 (henceforth, the 'Galo Plaza Report'), paras 62–69, 91–96, 133. At para. 142, Galo Plaza wished to 'make it clear that neither the President nor the Government of Cyprus, in their discussions with me as the Mediator, actually advocated *Enosis* as the final solution of the Cyprus problem. Archbishop Makarios and members of the Government acknowledged that *Enosis* had been the original aim of the uprising against British rule and that it remained a strong aspiration among the Greek-Cypriot community. They went so far as to express the opinion that if the choice between independence and *Enosis* were to be put to the people there would probably be a majority in favour of the latter. Some of the Ministers and other high officials of the Government have openly advocated it in public statements; but for the Government as a whole the formal objective is limited to unfettered independence, including the right of self-determination'. Only then Plaza acknowledged that this position of the Greek-Cypriot leaders did not 'preclude the possibility of Enosis, which would obviously be implied in the right of the people of Cyprus, once "fully independent", to choose whatever future course they wished'.

[81] Galo Plaza Report, paras 70–76, 97, 134, 149.

[82] See United Nations, S/6569, Report by the Secretary-General on Recent Development on Cyprus, 29 July 1965, para. 8.

[83] Varnava (no 15) 57.

[84] See Varnava (no 15) 135–140.

tions that were necessary for their survival, it is also true that this move 'could have strengthened their *de facto* separation and, thus, purport to justify their later demands for a *de jure* recognition of this separatism through a federal structure of the state'.[85] In the intercommunal negotiations of 1968–1971,[86] the Turkish-Cypriots appeared willing to accept some of Makarios' 'Thirteen Points' in exchange for constitutional recognition of local self-government formations for the Turkish-Cypriots with extensive (executive, legislative, and judicial) powers and separate security forces.

In the final part of his report, Galo Plaza analysed the positions of the parties to the Cyprus problem and concluded that, differing as these positions were, it was still possible 'to read into' them 'an objective which, so long as it is stated in very broad terms, would seem acceptable to them both: namely, an independent Cyprus with adequate safeguards for the safety and the rights of all its people'.[87] Plaza suggested that the Cyprus government should regard self-determination as an issue concerning both the wellbeing of the people and international peace and security; therefore, it would be wiser to put to the people, at a referendum, not *enosis*, but the whole of any proposed settlement based on continued independence.[88] Having interpreted the norm of self-determination in a democratic way, and in accordance with the fundamental principle of international peace and security, Plaza stated a possible common objective of the two sides as follows: 'a "fully independent" state which would undertake to remain independent and to refrain from any action leading to union with any other State'.[89]

On the other hand, Plaza was adamant that compulsory movement of populations so as to satisfy the Turkish-Cypriot proposal for geographical separation of the two communities would have been 'a desperate step in the wrong direction'. He considered this not only because of the danger of opening the way to partitioning the island (which would endanger international peace and security by bringing Greece and Turkey into a state of permanent conflict) but also because such a step would not really provide a final solution to the problem, as any line of separation in the big

[85] ibid 148.

[86] See Varnava (no 15) 155–202; Polyvios G. Polyviou, *Cyprus: Conflict and Negotiation 1960 – 1980* (London: Duckworth, 1980) 62-101; Şevki Kıralp, 'Cyprus between Enosis, Partition and Independence: Domestic Politics, Diplomacy and External Interventions (1967–74)' (2017) 19(6) *Journal of Balkan and Near Eastern Studies* 561.

[87] Galo Plaza Report, para. 135.

[88] ibid para. 146.

[89] ibid para. 147.

towns would have been artificial and a constant cause of friction.[90] Instead of physical separation, Plaza suggested the adoption of exceptionally strong safeguards for the fundamental freedoms of Turkish-Cypriots, including international guarantees (such as a UN commissioner with his own staff to supervise the implementation of human rights safeguards, and a UN resolution obliging future complaints to be brought only before UN organs), autonomy in the fields of religion, personal status, and education, and a fair share of Turkish-Cypriot voice in the political life of the State (by securing proportional representation of the Turkish-Cypriot community across institutions).[91]

If Cyprus had a material constitution, in Mortati's terms, during the 1960s, then this could only have been based on the suggestions of Galo Plaza or suggestions similar to them. If both sides wished to live in one State, as was their official position in the context of UN mediation, then this should have been a State whose constitution provided ironclad guarantees for the rights of the Turkish-Cypriot community, a State that would further undertake not to seek its union with any other State in the future. This was the only fundamental objective that could help the survival of the Republic of Cyprus.

The events that followed, that is, the Turkish invasion of the island in 1974, as a result of the fateful coup against Makarios' government that was orchestrated by the Greek dictator, and then the unilateral declaration of independence on the part of the Turkish-Cypriot entity in 1983, made the materialisation of the said objective even more difficult. However, negotiations continued,[92] resulting in further shifts in Cyprus' material constitution. In 1977, Makarios and the Turkish-Cypriot leader Rauf Denktash agreed that the objective was an independent, non-aligned, bicommunal federal Republic; that the territory under the administration of each community would be determined on the basis of economic viability or productivity and land ownership; that the powers of the central federal government would be such as to safeguard the unity of the country having regard to the bicommunal character of the State; and that questions such as freedom of settlement and property rights would take into consideration the fundamental basis of a bicommunal federal system and certain practical difficulties that could arise for the Turkish-Cypriot community.[93]

[90] ibid paras 151–156.

[91] ibid paras 158–168.

[92] See Polyviou (no 86) 154–217; Michalis S. Michael, 'The Road to Vienna: Intercommunal Talks 1974-1977' in Faustmann & Solomou (no 67) 161.

[93] High-Level Agreement of 12 February 1977, available at https://www.pio.gov.cy/en/agreements-high-level-agreement-of-12-february-1977.html (last accessed 13.6.2024).

This agreement was confirmed by Denktash and Spyros Kyprianou (Makarios' successor) in the Ten-Point Agreement of 19 May 1979.[94]

The negotiations under the auspices of the UN continued in the next decades[95] and in 2004, the two sides agreed to put to the respective electorates the Annan Plan, which sought to establish a United Cyprus Republic that consisted of two constituent States, namely the Greek-Cypriot State and the Turkish-Cypriot State, but the plan was rejected by the Greek-Cypriots.[96] In the same year, Cyprus became a Member State of the EU (another shift in the material constitution of Cyprus, which has the unambiguous support of most Cypriots on both sides). In 2006, President Tassos Papadopoulos and Mehmet Ali Talat, the president of the so-called 'Turkish Republic of Northern Cyprus', expressed their 'commitment to the unification of Cyprus based on a bi-zonal, bicommunal federation and political equality, as set out in the relevant Security Council resolutions'.[97] The next most significant attempt to solve the Cyprus problem was the summit meeting at Crans-Montana in 2017, which failed.[98] Be that as it may, a bi-zonal, bicommunal federation based on the political equality of the two communities is the only political objective that could attract the agreement of both communities. This objective remains the only basis for Cyprus' material constitution, if Cyprus is ever to have one. The fulfilment of this fundamental objective remains elusive, since the Turkish-Cypriot leader, together with Turkey, demands recognition of the Turkish-Cypriot entity as a prerequisite for their participation in negotiations.

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[94] Available at https://www.pio.gov.cy/en/agreements-the-10-point-agreement-of-19-may-1979.html (last accessed 13.6.2024).

[95] See Oliver Richmond, 'Peacekeeping and Peacemaking in Cyprus' in Faustmann & Solomou (no 67) 191. A significant moment in these decades was the 'Set of ideas on an overall framework agreement on Cyprus', submitted by UN Secretary General, Boutros Boutros-Ghali in August 1992. See United Nations, Security Council, S/24472, Report of the Secretary-General on his mission of good offices in Cyprus, 21 August 1992.

[96] See *inter alia* the essays in Andrekos Varnava & Hubert Faustmann (eds), *Reunifying Cyprus: The Annan Plan and Beyond* (London: I. B. Tauris, 2009). The plan is available at https://web.archive.org/web/20120328062304/http://www.zypern.cc/extras/annan-plan-for-cyprus-2004.pdf (last accessed 13.6.2024).

[97] See https://www.pio.gov.cy/en/agreements-papadopoulos-talat-agreement-(8-july-2006).html (last accessed 13.6.2004).

[98] See United Nations, Security Council, S/2017/814, Report of the Secretary General on his mission of good offices in Cyprus, 27 September 2017. See also International Crisis Group, An Island Divided: Next Steps for Troubled Cyprus, 17 April 2023, available at https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/cyprus/268-island-divided-next-steps-troubled-cyprus (last accessed 13.6.2024).

Let us now return to the 1960s. As I argued above, if Cyprus had a material constitution at the time, this could only be one providing ironclad guarantees for the rights of the Turkish-Cypriot community, prohibiting both *enosis* and *taksim*, and recognising that the Turkish-Cypriot community was a constituent agent of the Republic of Cyprus. If this was so, then the only way for the Supreme Court of Cyprus to legitimately invoke Mortati's theory to justify its emergency doctrine could have been by conditioning the legal force of the doctrine upon the need to preserve this fundamental objective.

This would have required a strong judicial recommendation for either a return to normality under the constitutional arrangements of 1960 or to bring into life a new constitution of a fully independent State that would have undertaken not to pursue its unification with any other State—a State that would have furthermore accorded to the Turkish-Cypriot community the status of a constituent agent, as well as exceptionally strong guarantees of their security, autonomy, and welfare. As explained in Section 1, it would not be excessive to ask this from a court in an unusual constitutional situation such as that of Cyprus. Other courts in the Global South have more recently made bolder moves under less exceptional circumstances.[99]

However, there is no indication of such recommendation in *Ibrahim*. Even worse, there is little in that judgment to suggest the unreserved commitment of the Cypriot justices to the cause of a bicommunal, consociational Republic, which was, after all, the fundamental objective of the 1960 Constitution.

A Critique of *Ibrahim* Through the Lens of Mortati's Theory

It goes without saying that the three judges in the case of *Ibrahim* wanted to preserve the existence of the State that was named 'Republic of Cyprus'. To do this, they cited UN Security Council Resolution 186 of 4 March 1964.[100] They also maintained that

[99] See e.g. Daniel Bonilla Maldonaldo (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (New York: Cambridge University Press, 2013); Sandra Botero, *Courts that Matter: Activists, Judges, and the Politics of Rights Enforcement* (Cambridge: Cambridge University Press, 2024).

[100] See e.g. *Ibrahim*, 226–227 (Triantafyllides, J) ('It cannot, of course, be argued that, because of such an emergency, constitutional deadlock or other internal difficulties, it is possible to question the existence of Cyprus as an independent State. The existence of a State cannot be deemed to be dependent on the fate or operation of its constitution; otherwise, every time that any constitution were upset in a country then such State would have ceased to exist, and this is not so. The existence of a State is a matter governed by accepted criteria of international law and in particular it is related to the application of the principle of recognition by other States. In the particular case of Cyprus there can be no question in this respect, because

the validity of the 1960 Constitution was not in question.[101] On the other hand, nowhere in the judgment can one find indication that the justices wanted to keep alive *this particular* Republic: the bicommunal, consociational Republic that the Constitution of 1960 had established. On the contrary, Judges Vassiliades and Triantafyllides undermined the normative bindingness of this Constitution by arguing that it suffered from serious flaws: it had been imposed on Cypriots by foreign powers, it was unworkable in practice and, on top of this, its basic articles were unamendable, depriving Cypriots of their fundamental right to determine the terms of their political co-existence. For instance, Vassiliades, wrote:

> the present difficulties of the people of Cyprus, and of their Republic, originate to a considerable extent, in the sin of ignoring time and human nature in the making of our constitution. Time moves on continuously; man is, by nature, a creature of evolution and change, as time moves on. The Constitution was, basically, made fixed and immovable. Article 182 provides that the basic articles thereof 'cannot, in any way, be amended, whether by way of variation, addition or repeal'. As time and man moved on, while the Constitution remained fixed, the inevitable crack came—(perhaps a good deal sooner than some people may have thought)—with grave and far reaching consequences.[102]

Triantafyllides emphasised the 'original right' of the people to frame their constitution (he read such right into the lines of Marschall in *Marbury v. Madison*)[103] with the view to highlight that the 1960 Constitution had not been the outcome of a democratic constitution-making process. For Triantafyllides, the 1960 Constitution was not the expression of the 'sovereign will' of 'the people of Cyprus', but had been imposed on them.[104] The Cypriot judge employed this evaluation, in combination with a negative appraisal of the unamendability of the basic articles of the Constitution,

in spite of the current internal anomalous situation, the existence, not only of Cyprus as a State, but also of its Government, has been emphatically affirmed, for also purposes of international law, by the Security Council of the United Nations, of which Cyprus became a member after it had become independent'); 267 (Josephides, J) ('The Republic of Cyprus is an independent and sovereign State and the Government of the Republic has, inter alia, the responsibility for the maintenance and restoration of

[l]aw and order (cf. U.N. Security Council Resolution of 4th March, 1964), and the normal functioning of the courts').

[101] See *Ibrahim*, 209 and 211 (Vassiliades, J), 223 and 242 (Triantafyllides, J).

[102] *Ibrahim*, 208 (Vassiliades, J). At another point, Vassiliades expressed his strong disagreement with the design of the judicial system on communal basis; ibid 212.

[103] *Ibrahim*, 219–221 (Triantafyllides, J).

[104] *Ibrahim*, 221–223, 233-235 (Triantafyllides, J).

as justification for the doctrine of necessity, on the understanding that '[t]he less a constitution represents in fact the exercise of the original right of the people [to frame their constitution] the more the Legislature ought to be treated as free to meet necessities'.[105] Triantafyllides had previously premised his argumentation on the opinion that 'the concept of the inviolability of a supreme law is by its very nature inseparably related to the premise that the constitution embodies the sovereign will of the people which can be exercised at any time, even though seldom, in order to amend it'.[106]

These were core arguments for Triantafyllides' attempt to read the doctrine of necessity into Article 179 of the Constitution and construct the doctrine as an *intra-constitutional* principle. The argument was in essence the following: When an unamendable and unworkable constitution is imposed, its clauses should not be treated as inviolable, but as permitting suspension in exceptional circumstances. The problem with this argument is that the same constitution had to remain valid, which was required if the State of Cyprus were to survive—survival of the State was the major point of the doctrine of necessity, after all. However, can a constitution endure when its normativity is doubted to such an extent as to be labelled 'imposed', when it ultimately permits deviations from very specific constitutional clauses that concern its basic structure?

At any rate, Triantafyllides' argument can hardly coexist with understanding the doctrine of necessity as an intra-constitutional principle. For one thing, the argument is premised on the view that the constitution suffers from serious flaws—flaws that do not deprive it of legal validity but corrode its normative bindingness. Hence, how can one insist on the supremacy of *this* constitution in order to then qualify supremacy on the basis of the doctrine of necessity? The only answer could be that what is supreme is not the 1960 Constitution but a new constitution. However, the judges of *Ibrahim* rejected this supposition.

The sincere belief of the Cypriot justices that constitutions must be the outcome of democratic constituent power goes a long way in explaining their ambivalence toward the 1960 Constitution. A pragmatic reason for this ambivalence could have been the stance of Greek-Cypriot leaders at the time, who kept disavowing the agreements of 1960, including the bicommunal constitution, in pursuit of a solution that did not include the consociational terms of the 1960 agreements. Such prospect ran contrary to the (equally sincere) belief of the Cypriot justices that the doctrine of necessity was

[105] *Ibrahim*, 234 (Triantafyllides, J)
[106] ibid 221.

part of Cypriot constitutional law, under the 1960 Constitution. If this was so, then the Cypriot justices should have openly repudiated the possibility that a sound juridical solution to the constitutional impasses of 1964 could be sought outside the 1960 Constitution—or at least, outside the fundamental parameters of this Constitution.

They did not do so, not only because of their belief in the cause of democratic constitutions but also, in my view, because such statement would have sent a clear message that the 1960 Constitution would have been fully applicable, that the doctrine of necessity would have become obsolete, and that the changes that the Greek-Cypriot legislators had enacted would have been reversed, if Turkish-Cypriots returned to their positions (as they wished to do one year later). The Cypriot justices, adopting the stance of positivist lawyers in this respect, declined to express their views on this issue.[107] In my view, they would have done so if they wished to be convincing when claiming that the application of the doctrine of necessity was temporary.

To make things worse, Judges Triantafyllides and Josephides, in their attempt to provide support for the doctrine of necessity through juridical sources, cited highly problematic judgments of the Supreme Administrative Court of Greece, which had approved the *extra-constitutional* power of the *executive* to issue constitution-making acts and thereby *exercise primary constituent power*.[108] This approach to emergencies is completely different from Mortati's understanding of necessity as a source of law. It is also opposite to the wish of the Cypriot judges to construct the doctrine of necessity as an intra-constitutional principle. Josephides seemed to have been aware of this problem when he wrote the following:

> it is true that some of the Continental cases refer to instances where the executive acted beyond the limits of administrative law, but there are many cases where legislative action was taken. And, needless to say, if the executive has the power in exceptional circumstances to take all measures necessary for the accomplishment of the aim entrusted to it, even outside the limits of administrative law, *a fortiori* the legislature has both the power and the duty to do likewise, especially in Cyprus where the executive power is divided between the President, Vice-President and the Council of Ministers, and the legislative pow-

[107] As Judge Triantafyllides wrote: 'The exact fate of the constitutional structure, or any part thereof, has not been pronounced upon as it was not in issue in these cases' (*Ibrahim*, 242). The same Justice had previously refused to opine on the Turkish-Cypriots' 'right of return' (to their positions), on the grounds that 'there can be no claim to the right of return by an organ not participating, at the time, in the discharge of the functions to which such right of return relates' (*Ibrahim*, 240).

[108] See *Ibrahim*, 231, 235, 237–240 (Triantafyllides, J), 261-–264 (Josephides, J)

> er of the Republic is exercised by the House of Representatives in all matters except those reserved to the Communal Chambers (Article 61).[109]

Josephides' argument was in essence the following: If the law permits even constitution-making action on the part of the executive, then it should certainly be ready to permit simple deviations from the letter of the constitution on the part of the legislative body (which represents the people and acts in a legislative manner, that is, it lays down general norms, not decrees), especially when this body does not attempt to change the constitutional text.

The first serious problem with this argumentative line is that, from January 1964 onwards, the legislative body of the Republic of Cyprus did not actually represent the Turkish-Cypriots, and one of the aims of the doctrine of necessity was precisely to excuse such under-representation. Hence, the legislative body could not claim that it represented the real people of Cyprus. A second problem was that the deviations from the Constitution that the doctrine of necessity excused concerned structural provisions, indeed those that were directly relevant to the fundamental theme of the Constitution: the co-operation of the two communities. The doctrine of necessity aimed to justify a radical change in the fundamental constitutional structures of the Republic of Cyprus, as it had been established in 1960. From this standpoint, the doctrine of necessity did not substantially differ from an exercise of constituent power,[110] but the legitimate bearer of such power in a democratic regime should be the people, as the judges of *Ibrahim* acknowledged,[111] not courts—even less so, courts whose existence and legitimacy is owed to an emergency doctrine.

A third, more subtle but crucial problem with Josephides' argument is the following: One should not attempt to justify the doctrine of necessity as an intra-constitutional principle on the same grounds on which necessity as an extra-constitutional authority is justified. The logic of the *a fortiori* argument that Josephides employs (arguing that if extra-constitutional doctrines of necessity can be justified, so can intra-constitutional ones) is counterproductive because it evades an answer to the question of how an intra-constitutional doctrine of necessity is justified and why this

[109] *Ibrahim*, 266 (Josephides, J).

[110] For a reading of the doctrine of necessity through the lens of the theory of constituent power, see Polyvios G. Polyviou, *The Case of Ibrahim, the Doctrine of Necessity and the Republic of Cyprus* (Nicosia: Chryssafinis & Polyviou, 2015) 187–192; Polyviou (no 9) 148–161.

[111] See especially *Ibrahim*, 209–211 (Triantafyllides, J).

justification equips it with superior legitimacy compared to that of extra-constitutional doctrines of necessity.

At another point in his judgment, Josephides stated four prerequisites reflecting the principle of proportionality that would have to be satisfied if the House of Representatives were to legitimately enact laws on the basis of the doctrine of necessity.[112] However, Josephides left the following crucial questions unanswered: *Why* should we understand the doctrine of necessity as being subject to these requirements? Why should State authorities remain committed to respecting these prerequisites in the future? Is it simply a matter of *stare decisis*? However, why should *stare decisis* matter under these exceptional circumstances? Josephides' appeal to Greek courts' justification of necessity as an extra-constitutional principle offers nothing to answer these questions; in fact, this reference undermines any possible answer. The same holds true for justifications of the doctrine of necessity based on the Latin maxim '*salus populi suprema lex*' (all three judges appealed to this maxim at some point).[113]

One way to construct the doctrine as an intra-constitutional principle would have been to take Mortati's theory seriously and stipulate that necessity, if it is to become a source of law, should be treated as *already* containing the seed of its normatisation and juridification. This would have prompted the Cypriot judges to identify the fundamental normative values that animate the institutionalisation of the Cyprus Republic—the value of intercommunal cooperation being paramount amongst them, complemented by the values of international peace and security, and respect for human rights.

It should be stressed that the judges in *Ibrahim* were perfectly aware that the foundational political objective underlying the 1960 Constitution was the participation of both communities across institutions and cooperation among them in all public affairs.[114] However, they said nothing to approve of the normative value of this fundamental principle, nor did they insist upon its implementation in the future; that is, they did not make any statement to the effect that this fundamental objective should remain in place in the future, when the emergency situation would be over.

[112] See text accompanying no 11 infra.

[113] *Ibrahim*, 210 (Vassiliades, J), 231 (Triantafyllides, J), 257 (Josephides, J).

[114] *Ibrahim*, 226 (Triantafyllides, J) ('Even a cursory glance through the Constitution of Cyprus will show that its fundamental theme and an indispensable prerequisite for its operation is the participation and co-operation in Government of Greek and Turkish-Cypriots: this appears to have been assumed and taken for granted as a sine qua non premise'), 254 (Josephides, J) ('It is, I think, generally accepted that our Constitution is a very *sui generis* Constitution. It has a bicommunal basis and presupposes bona fide co-operation of the two communities and organs of State elected or appointed on a communal basis').

Cooperation was brought up only to emphasise its absence from reality and to stress that the circumstances in 1964 were so anomalous as to necessitate deviations from the Constitution.

The question now is: If the judges in *Ibrahim* were sincere in their belief that constitutions must be democratically drafted and enacted, and if they were equally sincere when stating that the doctrine of necessity was (by definition) a temporary measure, then why did they not condition their doctrine upon a future exercise of democratic constituent power? The answer to this question might be simple: The judges could not have known whether the exceptional circumstances would continue to be in place for long, whether the sides to the conflict would agree to return to the 1960 Constitution or draft a new constitution, and whether the people of Cyprus would be called to express their views on this matter. Alternatively, the answer might not be so simple: They did not wish to express their faith in the fundamental political objective that underpinned not only the normativity of the 1960 Constitution but also that of any future Constitution of a reunited Cyprus—that is, in short, the normativity of a bicommunal, consociational Constitution.

Be that as it may, pressing juridical questions remain. When does a regime under the doctrine of necessity cease to be justified? What is the ultimate purpose of this regime in Cyprus—the preservation of constitutional normality under the 1960 Constitution or the achievement of a solution through democratic means?

The preamble of the law that was examined in *Ibrahim* gave a hint to an answer: 'until such time as the people of Cyprus determine such matters'. The answer was not as simple as it appears at first glance. By mentioning the people of Cyprus, the Greek-Cypriot legislators left open the possibility of a future exercise of democratic constituent power that would take place based on the majority principle implemented in the population of Cyprus as a whole. I leave aside the issue of whether this approach to democratic constituent powers in a deeply divided society is credible. The major problem with this approach is that it sustained, if not the dream of *enosis*, the prospect of a unitary State with no special guarantees for the security, autonomy, and welfare of the Turkish-Cypriot community. This approach was unrealistic, not only because it did not correspond with the material constitution of Cyprus, as explained in the previous part of this article, but also because, as now widely accepted, the decision for a future Cyprus will be made by two separate electorates.

In fact, the only realistic option for the justices of the Supreme Court (if not those in *Ibrahim*, then their successors) and the only option that would have been consist-

ent with Mortati's theory would be to express their commitment to bicommunalism and condition the justifiability of the doctrine of necessity on a future exercise of constituent power by both communities *on an equal footing*. The Supreme Court of Cyprus diachronically did everything but move in this direction.

An opportunity to reconsider the doctrine of necessity on a new basis was lost in the mid-1980s and early 1990s, when the Court considered whether the doctrine permitted the amendment of non-basic articles of the Constitution.[115] Evaluation of these judgments is beyond the scope of this study. Suffice it to state that, if considered from the standpoint of Mortati's theory, amendment of non-basic articles of the 1960 Constitution would be justifiable (on the condition that it does not alter the provisions that enshrine the basic features of the 1960 Constitution), but subject to a reminder that the normative justification and bindingness of the regime of necessity is inching towards its expiry date. If the Cypriot justices wished to claim a greater role in the constitutional evolution of the Republic of Cyprus, as they did in various other circumstances, then they should have reconsidered the justifiability of the doctrine of necessity in the long term, and by mentioning the expiry date of the doctrine, they should have exercised pressure upon the political actors to reconsider their own views regarding the procedural aspects of the Cyprus problem. Such a reconsideration remains elusive.

Conclusion

If Mortati's theory teaches us anything in contemporary terms, it is that although necessity may justify extraordinary legal arrangements, these must have an anchor in social and normative values, must acquire institutional form, and serve an objective that is consistent with the foundation of the constitutional order. Such arrangements must also be temporary, as they offer no basis for life in a democratic society in the long term. If the lawfulness of the regime under the doctrine of necessity matters, then this regime must have an expiry date, after which the people(s) will assume the responsibility of enacting a new constitution, one that either corroborates their original fundamental political objectives or puts forward new objectives.

[115] See *President of the Republic v. House of Representatives* (1986) 3 CLR 1439; *President of the Republic v. House of Representatives* (1985) 3 CLR 2224; *Nicolaou v. Nicolaou* (1992) 1 CLR 1338 (in Greek). For a presentation and analysis, see Constantinos Kombos & Athena Herodotou, '(Un-)Constitutional Amendments: The Cypriot Paradigm' (2019) 25(3) *European Public Law* 305; Papastylianos (no 14); Emilianides (no 9) 52–55; Polyviou (no 9) 103–110.

Ibrahim gave legal expression to a radical constitutional transformation, one that normally could be brought about legitimately only by the people(s) themselves, exercising their democratic constituent power. In Cyprus, no such power has ever been formed. Actually, no one has ever asked for it, or almost no one,[116] despite the fact that the major complaint of Greek-Cypriots for the 1960 Constitution was that it did not express the 'sovereign will' of the 'people of Cyprus'. It is highly doubtful whether democratic constituent power should be understood in terms of some 'sovereign will' of some homogenous entity called 'the people'.[117] Today, *democratic* constitution-making (which is not the same as constitution-making by 'the people') has become an international norm, frequently promoted by the UN.[118] However, when it comes to the Cyprus problem, everyone seems to be satisfied with the old recipe of assigning the re-constituent task to leaders, that is, letting them connect their views on the future of Cyprus with their interests, but also letting citizens blame the leaders without assuming any responsibility.

What is exceptional in the case of Cyprus is not the mode of enactment of its original constitution, nor the circumstances that threaten the survival of the State, but the way in which the drafting and enactment of its future constitution has been designed. Elite negotiations coupled with referendums do not suffice to create conditions for constitutional ownership.[119] Such ownership is required if an institutional solution to the Cyprus problem is to be workable. The supporters of legal institutionalism in

[116] But see the discussion in Andreas Auer & Vicky Triga (eds), *A Constitutional Convention for Cyprus* (Berlin: Wissenschaftlicher Verlag, 2009).

[117] For the negative answer, see *inter alia* Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (New York: Cambridge University Press, 2017); Rubinelli (no 53); Joel Colón- Ríos, *Constituent Power and the Law* (New York: Oxford University Press, 2020).

[118] See Vijayashri Sripati, *Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands* (New York: Oxford University Press, 2020); United Nations, Guidance Note of the Secretary-General 'United Nations Assistance to Constitution-making Processes', April 2009.

[119] See on this, *inter alia*, Zachary Elkins, Tom Ginsburg & James Melton, 'Baghdad, Tokyo, Kabul …: Constitution Making in Occupied States' (2008) 49(4) *Williams & Mary Law Review* 1139. For the effects of popular participation in constitution-making, see Devra C. Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making* (Ann Arbor: The University of Michigan Press, 2008); Abrak Saati, *The Participation Myth: Outcomes of participatory constitution building processes on democracy* (Sweden: Umeå University, 2015); Todd A. Eisenstadt, A. Carl Levan & Tofigh Maboudi, *Constituents before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions* (New York: Cambridge University Press, 2017); Gabriel L. Negretto, 'Constitution-making and liberal democracy: The role of citizens and representative elites' (2020) 18(1) *International Journal of Constitutional Law* 206; Alexander Hudson, *The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes* (New York: Cambridge University Press, 2021).

the past, Mortati being one, taught us that what matters in law and what sustains its normativity is political hegemony (not imposition) that communicates with societal values and motivates political agonism. I am not sure whether the protagonists of the quest for a workable solution to the Cyprus problem have been aware of this basic constitutionalist truth. Rather, I am convinced that the doctrine of necessity, having lost any links with sociopolitical concerns, has become a formalist shell that permits political complacency and apraxia.

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