

The Causes of the 1963 Constitutional Breakdown: Which Factors Affected the Short Life of the 1960 Cyprus Constitution?

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Abstract

The literature tends to attribute the constitutional failure in Cyprus to the constitutional design and the imposed character of the constitution-making process. Without ignoring the impact of such factors on the constitutional breakdown of 1963, the aim of this paper is to shed light on the other factors that contributed to constitutional paralysis, such as the perceptions of the constitutional actors about their institutional roles and the impact of constitutional narratives on the formation of these perceptions.

Keywords: constitutional breakdown; constitutional crisis; Cyprus Constitution; Greek-Cypriot community; Turkish-Cypriot community

1. Introduction²

Among the core components of the Cypriot Constitution is its complete lack of references to the concept of people. According to the Cypriot Constitution, the citizens of Cyprus are members of two separate communities (Greek and Turkish), membership to which is based on criteria such as origin, language, cultural traditions, and religion. Citizens who do not belong to one of the two communities must choose which community they would like to belong to.³ This dual structure also established the executive (the President of the Republic comes from the Greek community, the Vice President from the Turkish community), with their powers distinguished into those exercised jointly and those exercised separately (see Articles 47-49 of the Constitution). As regards the Council of Ministers, its composition is based on a 7:3 ratio from the communities. This dual structure is also apparent in the legislative function, as

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² Certain parts of section 1 have been presented in a modified form in an article by the same author entitled 'The Cypriot Doctrine of Necessity within the Context of Emergency Discourse' (2018) *Cyprus Review*, 32(1) 113.

³ See Cyprus Constitution Article 2(1) and (2) (1960).

Greek-Cypriot and Turkish-Cypriot Members of Parliament (MPs) are elected only by their respective communities. The Constitution contains similar provisions about the makeup of other key State bodies, such as the Supreme Court and the Constitutional Court, the staffing of the Attorney-General of the Republic, the Auditor General, the Governor of the Central Bank, and their assistants. Assistants must belong to a community other than that to which the head of a body belongs. A quantitative distribution also exists in the composition of the public sector (7:3). Further, the Constitution provides that the Presidents of the Supreme Court and the Supreme Constitutional Court should be foreigners, coming from 'neutral' countries. Thus, no majority can be formulated without the consent of the neutral judge. Nonetheless, while it establishes cooperation between the two political communities, the Constitution contains no safeguards should the system be unable to function due to the two communities refusing to work together.⁴ These conditions created the context for the constitutional breakdown of 1963, which was actually the result of three consecutive constitutional crises.

A constitutional crisis differs from, yet is related to, a state of emergency. Levinson and Balkin described the various types of constitutional crises: The first type is where institutional actors publicly state their intention to not apply the guarantees afforded by the constitution because an emergency has arisen that needs addressing, and faithful compliance with the constitution would result in an insufficient response. For such a situation to be considered a constitutional crisis, it must be impossible for the governance system to function as provided for in the constitution. Relying on the necessity to depart from the constitution and employing processes not envisaged in it must be the result either of failure to resolve disagreements by applying constitutional processes or of the actors' conviction that the constitution is unable to contain their disagreements within the bounds laid down in its provisions.⁵ The second type of crisis is when a conflict between political actors is not beyond the spectrum of actions the constitution provides for. In this case, the constitution is the problem and not the solution.⁶ The third type of crisis is where political actors disagree about constitutional precepts, which leads to the sides accusing each other of violating the constitution. Certainly, a simple political disagreement would not fall under this cat-

⁴ On the structure of governance that the Constitution provides, see Achilles Emilianides, *Constitutional Law in Cyprus* (3rd edn., Alphen aan den Rijn, NL: Kluwer, 2024) 24–26.

⁵ Sanford Levinson & Jack. M. Balkin, 'Constitutional Crises' (2009) 157(1) *Pennsylvania Law Review* 707, 721–728.

⁶ *Ibid*, 737.

egory. The means conflicting parties use to resolve their disagreements are crucial for determining the existence of a type-three crisis. This involves overstepping the boundaries established by the constitution for publicly expressing political disagreements. Each party believes that the other is taking steps not aligned with the constitution for the purpose of defeating it, and therefore, each relies on this argument to justify arbitrary actions.⁷

In Cyprus, there were three main issues where the inability of the two communities to cooperate gave rise to this belief: the creation of separate municipalities for Turkish-Cypriots; the establishment of an army; and the composition of the public service based on the Constitution's quantitative distribution of the population (the quota was 70:30). Three fundamental articles of the Constitution—Articles 173(1), 129, and 78(2)—were not applied from the outset, because their application presupposed cooperation between the two communities. While supportive, the Constitution did not mandate this cooperation. Non-application was due solely to the way in which the representatives of the two communities perceived the execution of their constitutional duties. However, it was not long before this practice led to a type-three constitutional crisis. In Cyprus, the two communities were unable to implement the constitutional precept of observing the quantitative distribution in the composition of the public service (70:30), disagreeing on the interpretation of the relevant provision and the reasons for not applying it. Greek-Cypriots stressed that the precept was subject to a condition: 'This quantitative distribution shall be applied, so far as this will be practically possible' (Article 123(2) of the Constitution), and Turkish-Cypriots insisted on its immediate application even if there were problems related to the efficient functioning of the public service (that is, they circumvented the condition set out in Article 123(2)). In reaction to their Greek-Cypriot compatriots' refusal to observe the quantitative distribution in the public service, the Turkish-Cypriots refused to vote for several tax laws, the adoption of which required a separate majority from both communities (Article 78(2)). This brought the implementation of the constitutional provision to a standstill, blocking tax legislation and collection mechanisms applicable to the entire territory. However, this failure did not *stricto sensu* contravene the Constitution. The matter was resolved via the adoption of separate tax laws by the two communities in line with Article 87(1)(f) of the Constitution, which provides that each communal chamber may impose personal taxes and fees on the members of their community to address their respective needs.

⁷ Ibid, 739–740.

The second case where a constitutional provision was rendered inactive due to non-cooperation between the two communities concerned the composition of the army (Article 129 of the Constitution). This provision did not envisage how the army would be established, but only its composition (2,000 men, 60% Greek-Cypriots and 40% Turkish-Cypriots). However, there was disagreement from the outset on the organisation of the army, namely whether it would be a single army or consist of separate parts based on ethnic origin. In August 1961, the Cabinet decided on a single army by majority (seven Greek-Cypriots for and three Turkish-Cypriots against). The Vice President disagreed and ultimately vetoed it, as was his right under Article 50(1)(b)(i), preventing the establishment of the army.

The third matter on which the two communities disagreed, and which provoked a constitutional crisis with both type one and type three characteristics, concerned the establishment of separate municipalities for Turkish-Cypriots. Under Article 173 of the Constitution, separate municipalities were to be created for Turkish-Cypriots in the five largest cities,⁸ provided the decision be reviewed by the President and the Vice President of the Republic within four years of the Constitution's ratification. However, Article 78(2) of the Constitution required a separate majority for the adoption of laws relating to the creation of municipalities, whereas the transitional provisions of Article 188 established that laws on municipalities, which pre-existed the Constitution, would cease to apply on 15 February 1961. In the end, the validity of the laws was extended to 31 December 1962. However, the Greek-Cypriot MPs voted against an attempt by their Turkish-Cypriot colleagues to extend the validity of the laws for an extra year. As a result, no decision was made because Article 78(2) of the Constitution required separate majorities. Greek-Cypriot MPs refused to vote for the proposed legislation, basing their arguments on their interpretation of Article 173(1), in particular as to whether the wording of the provision established that the creation of separate municipalities was mandatory or optional. On the other hand, the Turkish-Cypriot MPs proposed legislation to extend the validity of the previous laws, referring to the need to reach a solution that would not undermine the constitutional order.

⁸ According to Article 173(1) of the Cypriot Constitution: 'Separate municipalities shall be created in the five largest towns of the Republic, that is to say, Nicosia, Limassol, Famagusta, Larnaca and Paphos by the Turkish inhabitants thereof: Provided that the President and the Vice-President of the Republic shall within four years of the date of the coming into operation of this Constitution examine the question whether or not this separation of municipalities in the aforesaid towns shall continue'.

Finally, following a failed attempt at a revision of the Cypriot Constitution and the killing of two Turkish-Cypriots by police officers, riots broke out in December 1963, causing an intercommunal armed conflict with numerous casualties on both sides.⁹ The inability of the two communities to cooperate on the enactment of the laws that would activate the relevant constitutional provisions thus led to a constitutional breakdown. The Turkish-Cypriots would subsequently resign from all State bodies in January 1964, and, barricading themselves in the Turkish parts of towns and in small enclaves, established their own ‘Cyprus Turkish Authorities’ under the direction of Küçük and the Turkish Communal Chamber. Considering that the Presidents of the Constitutional Court and the Supreme Court had already resigned in May 1963, it thus became impossible for the executive, legislative, judiciary, and public administration to function in line with the Cypriot Constitution.

The literature tends to attribute the constitutional failure in Cyprus to the constitutional design and the imposed character of the constitution-making process. Without ignoring the impact of such factors on the constitutional breakdown of 1963, the aim of this paper is to shed light on the other factors that contributed to constitutional paralysis: the perceptions of the constitutional actors about their institutional roles and the impact of constitutional narratives on the formation of these perceptions.

2. Background on the Constitutional Crises of 1961–1963

The failure to reach an agreement on the issue of taxation and on separate majorities should be viewed within its context. The latter was heavily foreshadowed by the issue of separate municipalities. This was the thorniest problem that haunted the Republic, one inherited from the period before independence. The fear that separate municipalities would prepare the ground for a future partition of the island was the main—albeit not the only—reason why Greek-Cypriots stalled the application of this Zurich point. The *ad hoc* Greek-Cypriot and Turkish-Cypriot committees that President and Vice President of the Republic Makarios and Küçük (respectively) ap-

⁹ One hundred and thirty-six Turkish-Cypriots and 30 Greek-Cypriots were killed in the period between 21 December 1963 and 1 January 1964. Approximately 25,000 Turkish-Cypriots from 104 villages, amounting to a quarter of the Turkish-Cypriot population, fled their villages and were displaced into enclaves. On the number of victims, Patrick Richard Arthur, *Political Geography and the Cyprus Conflict 1963-1971* (Waterloo, CA: University of Waterloo, Department of Geography, 1976), 76. On the number of the displaced, see Report by the Secretary General of the United Nations operation in Cyprus, available at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Cyprus%20S%205950.pdf>.

pointed to examine the issue could not agree on a proposal drawing administrative boundaries. Evidently, this task was impossible to fulfil due to the absence of clearly demarcated districts in which one of the two communities could claim close to 100% inhabitancy or ownership.¹⁰ The task was further complicated by the Turkish-Cypriots' refusal to accept either the inclusion of Greek-Cypriots in their municipalities (propounding that this would be unconstitutional) or the right of citizens to choose to which municipality they would belong (out of fear that this would put the cohesion of their community at risk).¹¹ However, beyond the difficulty to define the demarcation lines that would separate the territory of Greek and Turkish municipalities in each of the five cities, there was a further and more basic reason why such a separation would not work: 'The five towns of the island were not at that time large enough to justify the economic management of more than one municipality'.¹² Besides, Turkish-Cypriot municipalities would hardly be financially viable, much less capable of improving the living standards of their inhabitants, given that the Turkish-Cypriot community was not as prosperous as their Greek-Cypriot compatriots. But this was precisely the first of the two reasons that explain the intransigence of the hardliners in the Turkish-Cypriot leadership on the geographical partition of municipalities: political control over their own community.¹³ The second reason was their more general and, to a great extent, reasonable though inconsequential fear that, if a constitutional provision was not implemented, this would set a precedent for the other provisions still pending (full) implementation.

¹⁰ On this issue, Glafkos Clerides, *Cyprus: My Deposition, Vol 1* (Nicosia, Cyprus: Alithia, 1989), 416–418, including full citation of the Vice President's proposals on drawing the administrative boundaries of separate municipalities. These proposals adopted the criterion of the total length of frontage of the property belonging to the members of the one or the other community on every street, with a series of exceptions and provisos, which overall made manifest the practical impossibility of drawing municipal boundaries without harming the interests of a considerable number of persons belonging to either community. Glafkos Clerides was the head of the Greek-Cypriot delegation to the Joint Commission. Following independence, he became the first Head of the House of Representatives. On many occasions after the crisis of 1963–1964, he was the chief negotiator on behalf of the Greek-Cypriot community. During the 1990s, he was elected twice as President of the Republic.

¹¹ Diana Weston Markides, *Cyprus 1957-1963, From Colonial Conflict to Constitutional Crisis: The Key Role of the Municipal Issue* (Minneapolis: Minnesota University Press, 2001), 74.

¹² See Clerides (no 10) 121 (with an example based on financial data, demonstrating beyond any doubt that it would be impossible for the Turkish municipalities in towns like Larnaca to provide proper municipal services).

¹³ Ibid, 74–75, 81.

The Greek-Cypriots, for their part, attempted to utilise the constitutional clause that provided for coordinating committees over and above separate municipalities, in conjunction with the provision empowering the President and the Vice President to reach a final decision on the issue within four years.¹⁴ In December 1962, after the historical visit of President of the Republic Makarios to Ankara,¹⁵ the two sides commenced serious negotiations, intending to settle the issue¹⁶ before the lapse of the temporary pre-independence municipal legislation on 31 December 1962. On 24 December 1962, the Turkish-Cypriot side accepted a plan that provided for a one-year trial of joint municipal councils, under strict safeguards that secured strong representation and very generous financial terms for Turkish-Cypriots—they would be able to spend, through their representatives alone, an amount considerably bigger than their ratio in the population.¹⁷ A joint communiqué was issued announcing that '[c]ommon ground was found for eventual agreement on the subject', and that a new meeting was arranged in order to 'work out the details'.¹⁸ Nevertheless, in the next meeting, Vice President Küçük read a statement that for all intents and purposes reversed the Turkish-Cypriot position expressed during the meeting.¹⁹ 'Both the British and the Americans believed [...] that the reversal of the Turkish Cypriot position had come after long meetings between the Turkish Cypriots and the new Turkish ambassador, Mazhar Ozkol'.²⁰ Two other attempts to solve the municipalities problem, with the aid of intense diplomatic activity of foreign powers—the last one in May 1963—failed.²¹

¹⁴ See Cyprus Constitution Art. 173(1) and (3) (1960).

¹⁵ On Makarios' visit in Ankara and its results, see Markides (no 11) 90. Archbishop Makarios was elected Cyprus' first President of the Republic in the wake of the post-colonial era but he did not resign from his office as Archbishop. Thus, he maintained both offices until his death in 1977.

¹⁶ For a full account of these negotiations, including citations from the relevant records, see Clerides (no 10) 415–432. See also Markides (no 11) 84–97; see also Stella Soulioti, *Fettered Independence- Cyprus, 1878-1964, Volume Two: The Documents*, (Minneapolis: Minnesota University Pres, 2006) 175–179.

¹⁷ See Markides (no 11) 92.

¹⁸ Ibid, 426.

¹⁹ Ibid, 94; and the statement of Küçük in Clerides (no 10) 426–427.

²⁰ See Markides (no 11) 94 (with her reference being a telegram from Nicosia to the Director of Greek, Turkish, and Iranian affairs of the State Department). See also the account provided by Robert Stephens, *Cyprus: A Place of Arms* (New York: Frederick A. Praeger, 1966) 176–177; and the *Record of Meeting in London between Sir Arthur Clark, Director Information Services and Cultural Relations, and Cyprus Minister of Justice, 6 July 1964*, both in Soulioti, (no 16) 539–542, 541.

²¹ The proposals exchanged between Makarios and Küçük are fully cited in Soulioti (no 16) 549–554.

On 29 December 1962, President Makarios declared that ‘the constitutional provision regarding separate Municipalities is not workable in practice’, and announced the abolition of the institution of self-administrated municipalities, as well as the transferal of the functions and properties of former municipalities to the government.²²

On 31 December 1962, the Greek-Cypriot majority in the House of Representatives voted down the Turkish-Cypriot proposal to extend the temporary legislation on municipalities.²³ As a result, as of 1 January 1963, no legal municipalities existed at all. On 2 January 1963, the Greek-Cypriot majority in the Council of Ministers decided to set up ‘development boards’, i.e. boards appointed by the government in accordance with an old law, to henceforth run municipal affairs.²⁴ The Greek municipalities surrendered their powers to these boards, but the Turkish municipalities refused to do so,²⁵ and the Turkish-Cypriot Communal Chamber enacted a law that legitimised the Turkish municipalities.²⁶

The Turkish-Cypriot leaders consulted the Turkish government and referred the dispute to the Cyprus Constitutional Court.²⁷ The judgments of the Supreme Constitutional Court, interesting as they might have been from a legal point of view, did little to overcome the constitutional deadlock.²⁸ In fact, the only tangible effect of the transferal of the conflict over separate municipalities to the Court was the collapse of the Court itself, confirming recent literature on the limited capacity of such courts to lead transitions in post-conflict settings.²⁹

More specifically, in the one of the cases brought before it, the Court held that the applicants—the Mayor and Members of the Turkish Municipal Council of Nic-

²² See *Statement by the President of the Republic, Archbishop Makarios, 29 December 1962*, in Soulioti (no 16) 543–544.

²³ Stanley Kyriakides, *Cyprus: Constitutionalism and Crisis Government* (Philadelphia: Pennsylvania University Press, 1968) 98–100.

²⁴ Ibid, 101; Also, Stella Soulioti, *Fettered Independence. Cyprus, 1878-1964, Volume One: The Narrative* (Minneapolis: Minnesota University Press, 2006) 181.

²⁵ Stephens (no 20) 177.

²⁶ Kyriakides (no 23) 100; Soulioti, (no 24) 181.

²⁷ Stephens (no 20) 177. See also Markides (no 11) 111 (noticing that the recourse to the Supreme Constitutional Court was the Turkish fallback position, after the failure to resolve the issue ‘through guarantor power involvement’).

²⁸ For an account of the judgments, see Costantinos Kombos, *The Doctrine of Necessity in Constitutional Law* (Athens-Thessaloniki: Sakkoulas Publications, 2015) 143–147.

²⁹ Tom Gerald Daly, ‘The alchemists: Courts as democracy-builders in contemporary thought’, (2017) 6(1) *Global Constitutionalism* 101, 104.

osia—had no legal standing under Article 139 of the Constitution, which empowers State organs to contest the exercise of competences by other State organs before the Court.³⁰ The complaint referred to the order of the Council of Ministers that set up development boards, on the grounds that the temporary legislation on Turkish municipalities, which had been enacted during the transition period by the British Governor, had ceased to be in force.³¹ Further, according to the complaint the provisions of Article 173 et seq. on separate municipalities were of a programmatic nature such that their implementation required the enactment of an organic law, which in this case did not exist after the expiry of Law 10/61 (temporarily extending the application of pre-independence legislation) on 31 December 1962.

Nevertheless, the Court annulled the order of the Council of Ministers that replaced municipalities with appointed development boards in another judgment delivered on the same date, after a recourse filed by the Turkish Communal Chamber. In this judgment, the Court held, by majority vote, that ‘the legislation to be enacted with regard to the municipal administration of such towns [as referred to in Article 173 paragraph 1 of the Constitution] must provide for separate municipalities for the Greek and Turkish inhabitants thereof’;³² that ‘the provisions, which are contained in Articles 173 to 177 in the interest of the Turkish inhabitants of certain towns [...] would be frustrated, if organs other than the legislative bodies would undertake to regulate the administration of towns’;³³ that the provisions of Articles 173 to 178 ‘contain a binding order of constitutional force, directed to all organs of the Republic’;³⁴ and that, therefore, ‘no action of any organ of the Republic, which is contrary to the said provisions, can be regarded as constitutional’.³⁵

On the other hand, the Court also annulled the Turkish Municipal Corporations Law, which had been passed by the Turkish Communal Chamber on 29 December 1962 and signed by the Vice President on 31 December 1962, legalising Turkish municipalities. In this case, the Court held that the law in question was void *ab initio* because it had not been published in the Official Gazette, as provided by Article 104

³⁰ Cyprus Constitution Art. 139 (1960).

³¹ *Fuat Celaeddin & Ors v. The Council of Ministers & Ors*, Case No. 11/63, judgment of 25 April 1963, 5 R.S.C.C. 102, 108–112 (1963).

³² See *The Turkish Communal Chamber, And/Through Its Social and Municipal Affairs Office v. The Council of Ministers*, Case No. 10/63, judgment of 25 April 1963, 5 R.S.C.C. 59, 72, Supreme Constitutional Court of Cyprus (1963). *Ibid*

³³ *Ibid*, 73.

³⁴ *Ibid*, 78.

³⁵ *Ibid*, 78.

of the Constitution, despite the fact that only the signature of the Vice President was required for such publication, since it was a law passed by the Communal Chamber,³⁶ and notwithstanding the fact that the Vice President had sent the law for publication; to no avail, as it turned out. Thus, the Supreme Constitutional Court's judgments reverted both the creation of appointed municipal boards by the Greek-Cypriot majority in the Council of Ministers and the legalisation of Turkish municipalities by the Turkish Communal Chamber. However, the judgments did not produce any useful tools to help overcome the constitutional impasse.³⁷

The same day as the delivery of the judgments, the two sides made a final, vain attempt to resolve the municipal issue. As usual, the President and Vice President exchanged bitter statements and counterstatements.³⁸ On 21 May 1963, with two identical letters to the President and the Vice President respectively, Professor Ernst Forsthoff, the neutral President of the Supreme Constitutional Court, resigned, allegedly irritated by Makarios' statement that he was not willing to follow the rulings of the Court.³⁹

³⁶ See Cyprus Constitution Art. 104(1) (1960).

³⁷ In fact, the law had been forwarded to the Attorney-General for publication in the Official Gazette. 'The Attorney-General on the same day wrote to the Vice-President advising him that the making of the Law did not fall within the competence of a Communal Chamber, and asking the Vice-President to "reconsider the position in the light of this advice". Thereupon, again on the same day, the Vice-President, wrote back to the Attorney-General asking "for its immediate publication", and setting out, *inter alia*, his opinion, viz. that it was the right and responsibility of the Vice-President to publish in the official Gazette of the Republic a law made by the Turkish Communal Chamber. Thereupon the Attorney-General, by his letter dated the 2nd January, 1963, forwarded to the Government Printer the Law stating in such letter that the Vice-President required the publication of the Law in the official Gazette of the Republic, and that in the view of the Attorney-General the passing of the Law did not fall within the competence of a Communal Chamber. The Law has not, however, been published in the official Gazette of the Republic and for this reason, the Turkish Communal Chamber proceeded to publish the Law in the *Resmî Gazete* No. 1 of the 3rd of January, 1963'. See *The House of Representatives v. Turkish Communal Chamber And/Or the Executive Committee of the Turkish Communal Chamber*, Case No. 12/63, judgment of 25 April 1963, 5 R.S.C.C. 123, 125, Supreme Constitutional Court of Cyprus (1963).

³⁸ See Soulioti (no 24) 195–196.

³⁹ Zaim M. Necatigil, *The Cyprus Question and the Turkish Position in International Law* (2nd edn., Oxford: Oxford University Press, 2001) 23. For a different, well-documented account, see Soulioti (no 24) 215–219. In his resignation letter, Forsthoff did not mention Makarios' attitude, but he justified his decision on the grounds that his assistant 'had been shadowed by detectives everywhere'. Forsthoff's resignation letter is fully quoted in Soulioti (no 24) 215–216.

3. Future-oriented Formulas in the Constitutional Text: Regaining Autonomy in the Constitution-making Process? The Cyprus Case

The use of terms like ‘sui generis provisions’, as well as the complexity, rigidity, and ‘unworkability’ of the 1960 Constitution have been dominant themes among Greek and Greek-Cypriot historical literature and jurisprudence following independence.⁴⁰ Greek-Cypriot leaders felt ‘that the agreements of Zurich and London did not reflect the will of the Cypriots; rather they were imposed on Cyprus by external powers’.⁴¹ On the other hand, the Turkish-Cypriot community did not challenge the legitimacy of the Constitution due to its imposed origin, since taking into account the degree of influence of external agents on the drafting, enactment, and alteration of a constitution, the Cypriot Constitution is to a broad extent an imposed constitution.⁴² Yet, we should bear in mind that imposition is construed mainly by the way the constitution-making

⁴⁰ For a summary of the literature of the period after independence, with extensive references, see Evanthis Hatzivassiliou, *The Cyprus Question, 1878-1960: The Constitutional Aspect* (Minneapolis: Minesota University Press, 2002) 87–88. See furthermore Criton Tornaritis, *Cyprus and its constitutional and other legal problems* (2nd ed., Nicosia, Cyprus, 1980) 43, 54; Polyvios Polyviou, *Cyprus: Conflict and Negotiation 1960 – 1980* (New York: Holmes and Meir Publishers, 1980) 13–15; Emilianides (no 4) 19.

⁴¹ Kyriakides (no 23) 122. The London Agreement refers to the approval of the Zurich Agreements by the leaders of the two communities, Archbishop Makarios and Dr Fazıl Küçük, at the Conference of Lancaster House in February 1959. The London Agreement assigned the drafting of the Constitution to a Joint Commission with a quadripartite composition (Greece, Turkey, the Greek-Cypriots, and the Turkish-Cypriots each sent a representative at the head of a small delegation). The most interesting feature of the Joint Commission was, of course, its Zurich straitjacket, i.e. the obligation of the drafters of the Constitution to strictly abide by the letter of the Basic Structure points, as agreed upon in Zurich. Thus, one could speak of a constitution-making procedure in two parts, with the second subordinate to the first.

⁴² Considering that Makarios and Küçük signed the Agreements in London in their capacities as de facto leaders of the respective communities, and that in Nicosia, on Independence Day, they signed the Agreements, as well as the Constitution, acting in concert under the heading ‘President and Vice President (elected) of the Republic of Cyprus’, the consent of the two communities to the Constitution and the Treaties that are part of the Cypriot constitution according to the provision of Article 181, cannot be disputed. However, ex-post consensus cannot replace the lack of public participation during the drafting process. The drafting of the Constitution, or at least of those sections that had been assigned to the drafting committee, was a completely elite-driven process in which Greece and Turkey participated on equal footing with the local agents (the two communities). Furthermore, it should be noted that the consent of Makarios and Küçük to the Zurich Agreement, which determined in advance the core of the Cypriot Constitution, as de facto leaders of the two communities, a consent, which was expressed at the Lancaster Conference, when they were still not elected, cannot be considered even remotely as an act self-governance. Thus, their consent did not decrease the extent of imposition upon those to whom the Constitution was addressed.

process is perceived by the people to whom the constitution is addressed.⁴³ Additionally, deeply divided societies might not possess a collective perception regarding the imposed character of a constitution. In Cyprus, what was perceived as imposed by Greek-Cypriots, was considered by Turkish-Cypriots as safeguarding their status. Any other structure of governance than the one provided by the Cypriot Constitution would be considered a form of an internal imposition.⁴⁴

It should be noted though that the Cypriot Constitution was not imposed in its entirety. Specifically, the section on human rights was drafted without any external intervention. Also, Article 1, which establishes the nature of the State, was drafted by the Joint Committee. Nevertheless, external actors played a major role in the drafting and enactment of the Constitution, while, regarding amendment, internal agents were relegated to the sidelines. The structure of governance, as already mentioned, was determined entirely by the Zurich Agreement, an international treaty designed and signed by Greece, Turkey, and the UK, who rendered it (the structure of governance) unamendable. However, some formulas the Constitution provided for the distribution of power between the two communities had a future-oriented character, leaving the final resolution of certain issues to a consensus between the two communities. Such formulas, if properly implemented, could have potentially allowed Cypriots to regain a degree of autochthony in the constitution-making process, in the sense that the relevant issues would be regulated by Cypriots themselves without any external intervention.

Such choices include sunset clauses, deferrals, or avoidance. These are choices that facilitate flexibility, enabling the adjustment of a constitution to changing cir-

⁴³ Xenophon Contiades & Alkmene Fotiadou, 'Imposed Constitutions: Heteronomy and Unamendability', in Richard Albert, Xenophon Contiades & Alkmene Fotiadou (eds), *The Law and Legitimacy of Imposed Constitutions* (London: Routledge, 2018) 16.

⁴⁴ Imposition is not always attributed to external factors. A constitution may be internally imposed in various ways (a part of the people imposes each own perception about the constitution to others), or imposed with the consent of the people subject to it. In the latter case, the influence of external actors lacks a hallmark of imposition, that of coercion. Turkish-Cypriots consented to the external imposition in order to avoid what they considered an internal imposition by Greek-Cypriots, namely a constitution-making process that would reflect the ethnic majority's perceptions about the structure of governance. On internally imposed constitutions, see Janiv Roznai, 'Internally Imposed Constitutions' in Albert, Contiades & Fotiadou (no 43) 58, and on imposition with consent, see Richard Albert, 'Constitutions Imposed with Consent', in Albert, Contiades, Fotiadou (no 43) 103. However, even if a constitution is imposed with consent, it lacks to a certain extent features of self-government and self-determination, *ibid*, 118.

cumstances.⁴⁵ Nevertheless, it was precisely these choices that led to the above constitutional crises.

Article 129, which provides for the composition of the army, was not explicit on structure (whether military units would be manned exclusively by members of each community or would be of mixed composition). In other words, the provision had a certain ambiguity. In other contexts, such a choice had been an effective strategy in mediating the differences among competing perceptions and values.⁴⁶ In Cyprus, however, it failed to produce such a result. One of the main presuppositions that enable ambiguity to succeed is the establishment of a 'robust' Supreme Court as a final arbiter on their resolution. However, the Cypriot Supreme Constitutional Court bears not only the deficiencies typical of supreme courts in deeply divided societies,⁴⁷ but also those linked to the unique peculiarities of the Cypriot Constitution. According to Article 180(3): 'In case of ambiguity any interpretation of the Constitution shall be made by the Supreme Constitutional Court due regard being had to the letter and spirit of the Zurich Agreement'.

The constitutional provisions regarding the separate municipalities are an example of deferral. Despite the definitive wording—'separate municipalities shall be created'—Article 173(1) goes on to provide for the re-examination of the issue by the

⁴⁵ Sylvia Suteu, 'Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making: Promise and Limits' (2017) 6(1) *Global Constitutionalism* 63. 'Ambiguities can provide a compromise framework within which [...] inconsistent claims can co-exist', Nicolas Barber, 'Against a Written Constitution' (2018) 11 *Public Law* 11, 17. Nevertheless, the fact that constitutions cannot and should not settle any disagreement, does not mean that constitutions can be used by constitutional agents as sites for disagreement for the sake of disagreement. Constitutions should be sites of constructive disagreement if they are meant to play the constitutive role of a framework of action of the constitutional agents, which allows co-existence despite disagreements.

⁴⁶ One such example is the deferral provisions of the South African Constitution regarding the distribution of land; see Rosalin Dixon & Tom Ginsburg, 'Deciding not to Decide: Deferral in Constitutional Design' (2011) 9(3–4), *International Journal of Constitutional Law* 637, 647–648.

⁴⁷ In deeply divided societies, the enshrinement of a list of rights through the constitution is not sufficient to create conditions for overcoming partiality and creating a framework for resolving conflicts by reference to claims of a universal nature for two main reasons: a) the violation of rights and its review by authorities constitutes a form of persistent review of acts or omissions that may affect minority demographic groups; and b) an important part of this review is based on the way in which courts interpret abstract concepts in the specific context, which is charged by established relations between communities, and therefore the recipients of judicial decisions have no confidence that these interpretations are impartial and not biased by the communal background of the judges. Sujit Choudhry & Richard Stacey, 'Independent or Dependent? Constitutional Courts in Divided Societies', in Collin Harvey & Alex Schwartz (eds), *Rights in Divided Societies*, (Oxford, Portland: Hart, 2012) 87.

President and Vice President within four years. In other words, the final decision can be deferred for four years. The main advantage of a deferral is that it allows for the gradual development of consensus on issues that fuel tension between communities. Nevertheless, in deeply divided societies, the consensus on which the constitutional settlement relies sometimes represents the limit of said settlement. As such, there is no room for wider consensus in the near future and a deferral leaves controversial issues unanswered for the duration of the dispute.

Article 188 of the Cypriot Constitution is a sunset clause. Sunset clauses allow successive political regimes to temporarily overlap, bypassing the strict application of constitutional superiority, which requires compatibility between laws and the constitution. However, Article 188 splits the transition between the colonial regime and the new constitutional order into two parts. According to Articles 188(1) and (2), all laws in force on the date of enactment of the Cypriot Constitution would remain in force until amended, except for laws referring to issues that require separate majorities under Article 78. The latter category of laws would become invalid as of the date of enactment of the new Constitution. Furthermore, according to Article 188(2)(b), 'any law imposing duties or taxes may continue to be in force until the 31st day of December 1960'. The unamendability of Article 78(2), which provided for the separate majorities, and the short period within which tax laws continued to be in force, weakened the capacity of this sunset clause to decrease tension between the communities on the issue of taxation.

The main goal of these choices is to allow a re-evaluation of certain issues when passions subside. However, the Cypriot case indicates that this strategy is not always viable. Instead of enabling local actors to regain autonomy in the constitution-making process (in the broad sense, which also includes constitutional amendment), the choices provided by the Constitution of Cyprus intensified intercommunal tension and resulted in the constitutional breakdown. Nevertheless, the description of the problem does not, on its own merits, offer a response regarding the sources of the problem. Why did the choices provided by the Constitution prove unviable in practice? One possible source could be the constitutional text. For instance, the Constitution could have included a clause mandating referral to the Supreme Court any time a disagreement would arise between the two communities concerning the meaning of a constitutional provision. The Court would issue a preliminary ruling that would be binding on the two communities. Another example could be the issue of separate municipalities. A clearly stated sunset clause, after which the re-examination of the

issue would be obligatory, with any disagreements resolved by decision of the neutral Presidents of the two Courts (Supreme and Constitutional) acting jointly, as the two communities had agreed at some point during the negotiations, would have potentially been a much more appropriate constitutional solution. However, the emphasis on the quality of a constitutional text ignores the fact that sometimes the constitutional text reflects the broadest consensus between those involved in a conflict. The crucial aspect in Cyprus' case is how the Constitution has been perceived by the two communities: Greek-Cypriots perceived it as an imposed Constitution while Turkish-Cypriots considered it as a safeguard for their status as a community—as opposed to a minority.

Several instances verify this assertion. For the Greek-Cypriots' perception regarding the imposed character of the Constitution, the preamble of Makarios' 13 points for its revision is quite salient.⁴⁸ He first propounded that the Constitution, with its *sui generis* provisions, which run contrary to 'internationally accepted democratic principles', engenders many difficulties in the 'the smooth government of the State and impede[d] the development and progress of the country'⁴⁹, provoking friction between Greek-Cypriots and Turkish-Cypriots. Then, Makarios emphatically recounted the conditions at the London Conference, i.e. the fact that—as he alleged—he was confronted with 'the dilemma either of signing the Agreement as it stood or of rejecting it with all the grave consequences which would have ensued'.⁵⁰ At this point, Makarios emphasised the widespread sense of constitutional imposition that prevailed among the Greek-Cypriot leadership and community at large. Given no viable options, he characterised the constitutional settlement of Zurich as one imposed on him and the (Greek-)Cypriots. The imposition concerned more than just the constitution-making process. It also extended to the Treaty of Guarantee that established the guarantor powers as 'guardians' of the Constitution. In this context, Makarios also considered the Treaty of Guarantee an instrument of external imposition, since the three powers essentially imposed themselves as guarantors without any prior deliberation with

⁴⁸ President Makarios submitted to Vice President Küçük his '13-point proposal' for a constitutional revision on 30 November 1963.

⁴⁹ See proposal 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 Soulioti (no 16) 679.

⁵⁰ Ibid. It is worth noted that same arguments were raised also in different contexts. For instance, in Japan the Conservatives after the second world war tried to depict the Japanese Constitution and propose for its revision due to its imposed character and therefore its lack of legitimacy. David Law, 'Imposed Constitutions and Romantic Constitutions' in Albert, Contiades & Fotiadou (no 48), 34, 36.

the two communities,⁵¹ and the treaty made any constitutional change ultimately dependent upon the consent of the guarantor powers.⁵² On 1 January 1964, Makarios communicated his intention to abrogate the Treaty of Guarantee, which he wished to terminate unilaterally on 4 April of the same year.⁵³

On the other hand, the enactment of the Cypriot Constitution itself and the drafting of Article 1 by the Joint Commission were indicative of the fears of the Turkish-Cypriots. The Cypriot Constitution was enacted by an Act of the British Parliament (Cyprus Act 1960, Republic of Cyprus Order in Council 1960 S.I. 1960 No. 136)⁵⁴ due to the disagreement of the two communities upon other forms of enactment involving popular participation, such as a referendum or ratification by the Cypriot Parliament.⁵⁵ The complete absence of ‘the people’ from the Cypriot constitutional imaginary is also reflected in the first clause of the Constitution, which states: ‘The state of Cyprus is an independent and sovereign republic’.⁵⁶ While both communities agreed on

⁵¹ The Treaty of Guarantee was signed on 16 August 1960 between Cyprus, Greece, Turkey, and the UK. However, the Republic of Cyprus was not involved in the drafting process. The text of the Treaty was part of the Zurich Agreements signed between Greece, Turkey, and the UK a year and a half before the island’s independence. The consent of the leaders of the two communities to the Treaties at the London Conference could hardly make up for their absence in the drafting, see *supra* footnote 40 above. It should be noted also that the Treaty of Guarantee was assigned constitutional and unamendable status according to Article 181 of the Constitution.

⁵² Greece, Turkey, and the UK signed this Treaty, which granted them the right to station troops in Cyprus and intervene without any prior consultation with the Cypriots any time there was an attempt to change the fundamental articles of the Constitution. It is quite questionable whether the non-implementation of some constitutional provisions is equivalent to an attempt to change these provisions. On this issue, see the opinion of Sir Frank Soskice, *Opinion by Sir Frank Soskice Requested by Glafkos Clerides, President of the Cyprus House of Representatives, in Relation to the Implementation of Certain Articles of the Cyprus Constitution, 1 November 1963*, in Soulioti, *supra* note, 261–266, at 261–262. Sir Frank Soskice was a British lawyer and politician who also served as General Solicitor and handed down several opinions on legal issues related to the constitutional crises on President Makarios’ request during the first three years after Cyprus’ independence.

⁵³ Nevertheless, his attempt failed, see footnote no 111.

⁵⁴ The Cyprus Act not only transferred sovereignty to the new State but also enacted the Cypriot Constitution. In other former colonies, the enactment of their constitution had the form of an act of the British Parliament, too. However, in the Cypriot case, the underlying reasoning for such a choice was, among other reasons, the fear of an enactment that would include popular participation, see next footnote.

⁵⁵ These methods of ratification had been proposed during the drafting of the Constitution but were both rejected due to their potential to derail ratification, Achilles C. Emilianides, *The Secret Negotiations: The Birth of the Republic of Cyprus* (in Greek), (Athens: Papazisis, 2022) 163.

⁵⁶ Article 1 of the Cypriot Constitution embodies the fictional narrative that underpins the Constitution, namely that ‘which expresses the foundational goals and contextual reasons’ that declare ‘why the Constitution has been adopted’. On the role of fictional narratives in constitutional discourse, see Paul Blokker,

the inclusion of the term ‘republic’ in the text of the Constitution, they disagreed on whether or not the republic should be not only independent and sovereign but also ‘democratic’. Ultimately, the term ‘democratic’ was omitted due its potential link to the majority principle, which presented a possible threat to the bi-communality principle.⁵⁷ Thus, it was not externality/imposition per se that led to the constitutional deadlock, but the diverging perceptions of the two communities regarding the role of externality. Far from disagreeing about the interpretation of individual constitutional provisions, the communities disagreed on the very essence of the Constitution itself. In fact, disagreement about the role of imposition is essentially disagreement regarding the legitimation itself of the Constitution. Such perceptions made impossible the distinction between constitutional and ordinary politics, a defining element for the success of incremental formulas that aim to leave enough room to constitutional actors to fill the gaps of the initial constitutional design through their mutual collaboration.⁵⁸

4. The Constitutional Text, the Material Constitution, and the Underlying Principles for a Resilient Constitutional Order

The above discussion demonstrates that the constitutional breakdown was caused by the design of the Constitution coupled with the different perceptions about the Constitution between the two communities. The 1960 Constitution of Cyprus envisages a bi-communal system of governance, where both communities, regardless of size, would share power on equal terms.⁵⁹ Its 31 articles mandate the consent of both communities to make a decision or complete a process; 16 of these provisions give veto power to officials from each community and 15 require members of both commu-

‘Political and Constitutional Imaginaries’, in Suzi Adams & Jeremy C. A. Smith (eds), *Social Imaginaries, Critical Interventions* (Lanham, Maryland: Rowman & Littlefield Publishers, 2019) 111, 123.

⁵⁷ Emilianides (no 55) 232–234.

⁵⁸ Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011) 45.

⁵⁹ The Constitution of Cyprus provides a structure of governance equivalent to a ‘constitutional partition’ (which reflects the main goal of the Turks and Turkish-Cypriots during the constitution-making process) within the structure of unitary State (the respective goal of the Greeks and Greek-Cypriots). Thus, the constitutional framework allowed both communities to develop opposed ‘constitutive constitutional politics, [politics] which concern existential questions that go to the very identity of the political community as a multinational political entity’. On the constitutive constitutional politics in multi-ethnic polities, see Sujit Choudry, ‘Old Imperial Dilemmas and the new Nation Building: Constitutive Constitutional Politics in Multinational Polities’ (2005) 37 *Connecticut Law Review* 933, 936–938.

nities to be involved in decision-making or to complete a process. These provisions apply to the composition of almost all State bodies.

The Cypriot Constitution does not provide veto power within the logic of checks and balances, as is the case in most constitutions that provide for a veto between State organs. In the Cypriot case, the veto prevents decision-making on issues of vital interest to both communities. It is not a means aiming to control each of the three branches of governance (legislative, executive, and judiciary) by the other two. Instead, the underlying rationale of the veto in the Cypriot Constitution is to enshrine the bi-communal structure of governance that cuts across all three branches. In addition, the Constitution enshrines a system of presidential governance, which, according to the relevant literature, favours zero-sum logic more than parliamentary governance.⁶⁰ In Cyprus, this logic is enhanced by giving both the President and Vice President the power of veto without any mechanism to resolve the deadlock that mutual vetoing could provoke. Combined with the fact that the Constitution provides no incentive for cooperation, the veto, intended to mitigate the impact of disagreements between the two communities, instead intensifies it.⁶¹

Furthermore, the Constitution does not envisage an effective mechanism to resolve disputes between State bodies, and the Constitutional Court cannot be used for such a purpose.⁶² The latter has jurisdiction on 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 constitutional limits. Given that the

⁶⁰ Juan Linz, 'Presidential or Parliamentary Democracy: Does it make a Difference?' in Juan Linz & Arturo Valenzuela (eds), *The Failure of Presidential Democracy* (Baltimore: John Hopkins University Press, 1994) 18.

⁶¹ On the issue of mechanisms that incentivise cooperation as a factor for the successful implementation of consociational models of government, see George Tsebelis, 'Elite Interaction and Constitution Building in Consociational Democracies' (1990) 2(1) *Journal of Theoretical Politics* 5, 22.

⁶² The UN mediator Galo Plaza, who was appointed after the intercommunal conflicts of 1963–1964, points out in his Report to the General Secretary, 'recourse to the Supreme Constitutional Court did not necessarily provide a way out of such impasse'. *Report of the United Nations Mediator to the Secretary-General, 26 March 1965*, U.N. Document S/6253, 30. The core issue in deeply divided societies is the distrust between the different communities, which sometimes takes the form of litigation, as exemplified by Cyprus. However, court decisions cannot tackle the roots of the mistrust. There are other, far more crucial factors that could potentially eliminate mistrust, such as, 'the nature of current leadership elites; the nature of the prior regime; the nature of any indigenous preparatory work on a new constitution; and the presence or absence of deep cleavages in society not resolved by the prior conflict', Vicky Jackson, 'What's in a name? Reflections on Naming, Timing and Constitution Making' (2008) 49 *William and Mary Law Review* 1249–1271. On the factors that contribute to the avoidance of a constitutional failure, see, also Tom Ginsburg & Aziz Huq, 'Democracy's Near Misses' (2018) 29(4) *Journal of Democracy* 16.

Constitution allows vetoing on specific matters, but does not establish mechanisms for resolving the impasses that vetoing could lead to, nor does it 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, attempts to settle the issue would be outside its jurisdiction.⁶³ Elster correctly observed that a ‘constitution should be a framework for action not an instrument of action’.⁶⁴ Although this practice of non-cooperation is a form of strategic action, it could only entail political sanctions and could not be verified in court.⁶⁵

Nevertheless, the text does not prejudge the attitude of the constitutional agents, since the provisions tend to offer a range of options concerning their behaviour. Bob Cover’s remarks on the role of narratives in the creation of legal meaning might be helpful at this juncture. Legal meaning requires more than a personal commitment to projecting an understanding of law by the agents who are entitled to interpret and implement the law. Instead, it demands the ‘objectification of that to which one is committed’.⁶⁶ The role of narratives is crucial to such objectification—they provide resources of justification, which make it possible for a piece of legislation to be considered one’s own constitution.⁶⁷

In Cyprus, however, from the very beginning, even before the enactment of the Constitution, two narratives competed regarding its essence. The required objectification was never achieved, as each community had its own perception of the Constitution. However, it would be unfair to attribute such a development solely to externality/imposition. Instead, one could claim that externality/imposition was internalised through memory and thus affected the attitudes of local actors. The enactment of

⁶³ Article 179(2) of the Constitution 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. Nevertheless, since any Constitutional Court is competent to review only whether or not the actions of the constitutional agents lie within the limits prescribed by the relevant constitutional provisions and not the motives of the agents when implement the provisions, the use of veto power cannot be reviewed. Furthermore, Article 179 does not provide a mechanism to deliver a judgment on the inconsistency of an action to the Constitution and how it may be revoked. It appears to be more like an appeal to the self-restraint of the constitutional agents than a self-executed rule.

⁶⁴ Jon Elster, *Ulysses Unbound* (Cambridge: Cambridge University Press, 2009) 101.

⁶⁵ At this point, the constitutional design did not help the Constitution to act as an enabling condition for stability.

⁶⁶ Robert M. Cover, ‘Foreword: Nomos and Narrative’ (1983) 97(4) *Harvard Law Review* 45.

⁶⁷ *Ibid.*

constitutions constructs memory, which fuels their symbolic power.⁶⁸ However, in Cyprus, the construction of memory concerning the constitution-making process was to a certain extent bi-communal rather than collective from the outset.⁶⁹

The crucial issue, then, is how such a social fact affects the functionality of a constitution. To provide an answer, we must shift focus to the material study of the constitution. This field views the objectives of a constitutional order as intertwined with the social facts that 'ground the constitutional order'.⁷⁰ In the material study of the constitution,⁷¹ the formal constitution is part of a wider constitutional order that includes fundamental objectives and norms. However, what is fundamental is not external to the social organisation. Thus, 'institutions are always organized around the pursuing of what are fundamental objectives'.⁷² Nevertheless, the fundamentality of certain objectives is not defined by institutions, but by the perceptions of the social organisation; objectives are norms in the sense that they reveal commitment to certain features of a constitutional order, which can fuel the imagination any constitutional order requires to pursue its fundamental goals.⁷³ They cannot be viewed separately from the social facts thanks to which they emerged; at the same time, they form part of the content of legal norms, since they influence perceptions of these norms by constitutional actors as sources of authoritative meaning.⁷⁴ The way that such construction takes place depends both on the constitutional arrangements on

⁶⁸ Contiades & Fotiadou (no 43) 28.

⁶⁹ In Cyprus, differing perceptions regarding the imposed and non-imposed character of the Constitution defined the competing views of the two communities about its symbolic power. The Turkish-Cypriots viewed the Constitution as a sort of 'Holy Grail', which should remain unaltered, while the Greek-Cypriots believed it should be changed due to its imposed character, in an act of self-determination.

⁷⁰ Marko Goldoni, *The Material Study of a Constitutional Order* (2020), available at <https://ssrn.com/abstract=3727474> or <http://dx.doi.org/10.2139/ssrn.3727474>.

⁷¹ Ibid, 1. Marco Goldoni develops his theory about the material constitution in two papers. The first is Marco Goldoni & Michael A. Wilkinson, 'The material Constitution' (2018) 81(4) *Modern Law Review* 567. The second is *The Material Study of...*, (no 70). In the latter article, his approach relies more on the anthropological dimension of any constitutional order, while in the former his analysis is closer to a Marxian approach to the material component of a given order. In this article, I will rely more on the latter approach since it is a better fit for a peasant society like 1960s Cyprus.

⁷² Goldoni (no 70) 3.

⁷³ Ibid, 3, 6.

⁷⁴ What is accepted as law does not involve only the acceptance of rules as an authoritative source of action. It also entails that these rules are an authoritative source of meaning for all those involved in legal and institutional practices, Dennis Patterson, 'Explicating the Internal Point of View' (1999) 52(1) *Southern Methodist University Law Review* 67, 73.

the function of key State organs provided by the formal constitution and on the way these arrangements are perceived by the bearers of the constitutional order.⁷⁵

In my analysis, I rely on the anthropological approach of the material constitution as a better fit to Cyprus and its particularities. For instance, this approach discusses constitutional bearers as a crucial factor in any constitutional order while in the other approach, the concept of constitutional bearers is absent and the analysis relies, among others, on institutions as a basic—though not the only—component of the material constitution. However, Cypriot institutions were notably weak in the early years following independence. Of course, the formal Constitution provided for certain institutions, but the individuals who served these institutions did not employ the impersonal attitude that is the hallmark of institutions in modern States. They acted more as representatives of their communities than as institutional (impersonal) agents. Indeed, in Cyprus, the communities, not the institutions, formulated the material constitution. Thus, the concept of the bearer of a constitutional order better fits the case of Cyprus, where institutions at that time did not have the gravity to be considered components of the material constitution. Furthermore, it should be noted that the formal constitution of a peasant society might be similar to the formal constitution of a contemporary society. However, their material constitution cannot be similar even if they provide for the same form of institutions. This is due to the different perceptions of belonging and bonding in peasant societies, which lead to different perceptions of the institutional agents on what counts as a legitimate source of authoritative meaning for their actions.⁷⁶

At this point, two further clarifications are necessary. The first concerns the question of what kind of norms these are. The second concerns the relation between the formal and the material constitution. Norms are pre-constitutional rules, in the sense

⁷⁵ Goldoni (no 70) 15. The bearers of a constitutional order are those agents who can link the social and the constitutional order in practice due not only to the formal constitution but also to their gravity in the formation of social imaginaries that are necessary for pursuing the vital goals of any constitutional order. Such gravity might be the product of history, social structure, or even of the affiliation with external actors, or a combination of the three. In Cyprus, the bearers of the constitutional order were the two communities in both the formal constitution and in the material sense of the constitution.

⁷⁶ On peasant societies and their cultural characteristics, see, among others, Robert Redfield, *Peasant Society and Culture: An Anthropological approach to Civilization*, (Chicago: University of Chicago Press, 1956). According to Paul Sant Cassia, who analysed the rhetoric of Makarios as a political agent, Makarios was ‘a village politician’, that is, a politician who ‘distrusts institutionalized politics [...] and relies on an immense network of contacts, preferably kinsmen to pursue his strategies’, Paul Sant Cassia, ‘The Archbishop in the Beleaguered City: An Analysis of the Conflicting Roles and Political Oratory of Makarios’, (1982-1983) 8(1) *Byzantine and Modern Greek Studies* 191, 203–204.

that they express pre-constitutional understandings of the constitution. Nevertheless, such assumptions and understandings situate what we think of as the ‘Constitution’.⁷⁷ Yet, as Richard Kay indicates, ‘to be a pre-constitutional rule it must be accepted from the internal viewpoint’.⁷⁸ A pre-constitutional rule cannot be considered as a source of validity of the actions of constitutional actors. It should be considered only as an inquiry about what could count as a source of validity for the bearers of the constitutional order.⁷⁹ Different perceptions about the content of such pre-constitutional rules affect what could be seen as a valid action on behalf of the constitutional actors in exercising the duties. The problem becomes even thornier if we include in the pool of bearers of these rules the people or even those agents who might be the ultimate repositories of coercive power in a constitutional order.⁸⁰

In the case of Cyprus, it is doubtful whether such pre-constitutional rules had even been formulated. This is due both to the different perceptions of the two communities about what constitutes an action within or beyond the constitutional framework, and the absence of intermediate institutions, such as political parties, which could formulate the direction of a constitutional order through their activities.⁸¹ Both communi-

⁷⁷ Frederick Schauer, ‘The Unwritten Foundations of all written Constitutions’, in Richard Albert, Ryan C. Williams & Yaniv Roznai (eds), *Amending America’s Unwritten Constitution*, (Cambridge: Cambridge University Press, 2022) 217, 230.

⁷⁸ Richard Kay, ‘Preconstitutional Rules’, (1981) 42(1) *Ohio State Law Journal* 188, 193.

⁷⁹ Ibid. Kay restricts his analysis to the judiciary. However, his remarks could also be applied to the concept of the constitutional bearer in the material study of the constitution, since the subjects bearing the constitutional order formulate the connection between social and constitutional order through their actions, Goldoni (no 70) 14.

⁸⁰ Schauer (no 77) 225. On the issue that people, and not only officials, should be considered as the bearers of such rules, see also Francesco Bilancia & Stefano Civitarese Matteucci, ‘The Material Constitution and the Rule of Recognition’, in Marco Goldoni & Michael A. Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge: Cambridge University Press, 2023) 233. In Cyprus though, the bearers of such rules include also the two ‘motherlands’, which, through the Treaty of Guarantee, have the right to intervene in any attempt of constitutional change that affects the core components of the constitutional structure of governance. They can be considered, then, as the ultimate repositories of coercive power.

⁸¹ Goldoni (no 70) 13-14. In Cyprus, apart from AKEL, which was established in 1941, all other political parties were born in the late 60s. Following independence, AKEL did not challenge the dominant narratives in the Greek-Cypriot community, supporting *enosis* (unification with Greece) and then self-determination as the main principles upon which any viable solution of the Cyprus issue should be founded. Furthermore, the lack of competition between political parties based on different political strategies created a political environment where there could be no losers. Thus, each part (in fact each community) considered itself as a winner. This left no room for the development of consensual politics, which is crucial to the stability and continuing functioning of the political system, since the consent of the loser is vital to contain disagreement within limits that do not overthrow the system. The consent of the loser indicates

ties acted and were recognised as the ultimate repository of power by the members of each community, with no intermediate political actors to mediate this relationship. Furthermore, it is also doubtful whether the ultimate repository of power was limited only to the Cypriot polity. According to the Treaty of Guarantee, the guarantor powers could intervene to restore the constitutional order in case of a breach of any of the articles of the Constitution that constituted its basic structure (Articles 3 and 4 of the Treaty). Thus, the structure of the Constitution and its sustainability were guaranteed by three completely external agents. Consequently, this removed the latter's burden to formulate the pre-constitutional rules required to make the constitutional order sustainable.

The relationship between the formal and the material constitution described by Goldoni and Wilkinson is notably salient for the latter issue. Analysing this relationship, the authors maintain that the material constitution is not merely the 'content' of the formal constitution; rather, 'the formal constitution is a feature, an instance, *of* the material constitution, part of the wider constitutional order'.⁸² In this sense, 'the metaphor of gap or distance is misleading to the extent that it suggests a dichotomy, whereas the relationship between the "formal constitution" and the "material constitution" is better characterized as internal'.⁸³ What we might speak of instead of a gap is social or political conflict, which may strengthen the constitution, but which may just as likely threaten it. 'A first type of conflict, if properly institutionalized, can lead to further consolidation of the constitutional order'.⁸⁴ On the other hand, 'when there is no longer coalescence around the same political aims or when there are internal contradictions among these aims and a compromise cannot be found', a second type of conflict emerges; one which 'cease[s] to be productive for the constitution and a far-reaching change of the material (and formal) order becomes pressing'.⁸⁵ The divergence of the political-constitutional objectives of the leaders of the two Cypriot communities, in combination with the relative weakness of civil society institutions

the willingness of political agents to abide by the rules of the game and accept the outcome regardless of winning or losing. The absence of winners or losers thus leaves as the only choice a zero-sum game. On the role of losers' consent on the stability of a political system, see Christopher J. Anderson & al., *The Loser's Consent: Elections and Democratic Legitimacy* (Oxford: Oxford University Press, 2007).

⁸² Goldoni & Wilkinson (no 71) 567.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

and interactions that might have supported intercommunal cooperation on the constitutional level, drove the Cypriot polity towards a conflict of this second type.⁸⁶

5. Constitutional Time in Cyprus between 1960 and 1963: How the Three Temporal Dimensions are Reflected in the Formal and Material Constitution of Cyprus⁸⁷

The above analysis demonstrates the importance of time (past, present, or future) for the construction of viable constitutional settlements. If the objectification of norms to which someone is committed presupposes a narrative on how these norms have become one's own,⁸⁸ then the external origin of those norms might affect the commitment, but not exclusively. For instance, if those who are supposed to be committed to the norms already possess a 'meaningful identity as people', the role of the constitution is to give a form to this entity, not to create this entity *ex nihilo*.⁸⁹ In these cases, narratives may be based upon a preconception of what unifies those individuals under an identity that shares certain core elements.⁹⁰ Thus, the past determines to a certain extent the stability of the new constitutional order.

On the other hand, countries that do not share such preconditions are not doomed to face a constitutional breakdown. In this case, the future dimension of time is more important. Thus, the constitutional settlement should allow the subjects bearing a

⁸⁶ Nevertheless, if we shift focus to what the relevant literature views as the hallmark of a material constitution, namely the governing activity, an activity that steers all functions of key State institutions to work in a way that does not 'pull toward radical directions', then the most prominent conclusion would be that even if a material constitution existed at the time of enactment of the Cypriot Constitution, it proved rather short-lived.

⁸⁷ As Kim Lane Scheppele correctly points out: 'The First requirement of any functional constitutional system is that Constitutions become capable of separating the rules of the game from the game'. Then, the perceptions of the constitutional actors about the past, present, and future of constitutional settlements determine what they consider to be the rules of the game and the game itself, and whether or not they separate or conflate these elements. See Kim Lane Scheppele, 'The Social Lives of Constitutions' in Paul Blokker & Chris Thornhill (eds), *Sociological Constitutionalism* (Cambridge: Cambridge University Press, 2017) 35, 53.

⁸⁸ Cover (no 66) 45.

⁸⁹ Vivien Hart, 'Constitution Making and the Transformation of Conflict' (2001) 26(2) *Peace and Change* 153–154.

⁹⁰ This is why we cannot compare constitutions that have been 'imposed' upon countries the citizens of which already possess a meaningful identity, with those imposed upon countries without any pre-existing collective identity. Externality/imposition affects constitutional functions differently, depending on the types of divisions the constitution aims to supersede.

constitutional order to develop a dynamic approach towards the future of said order. Institutional design is crucial at this stage. The main question, then, focuses on the core elements that should be included in a constitution which has been imposed upon a society without a meaningful identity of peoplehood. Giovanni Sartori correctly points out: 'Constitutions establish how norms are to be created. They should not decide what is to be established by the norms'.⁹¹ However, even constitutional tenets are norms, the meaning of which is developed through the practice of those who implement them, especially when practice refers to State organs that reflect a representational conception of legitimacy. Representational legitimacy means that justification for an action or omission of a State organ should reflect, at least marginally, the will of the people(s) this organ represents. By contrast, reason-based legitimacy refers to the reasons that may justify an act or omission.⁹² In the former case, memory and the interwoven narratives capture agents' unfiltered perceptions of reality, since passions cannot be excluded from the spectrum of options that determine their actions as institutional agents in the same way that such demands exist for judges. Consequently, the normative expectations we might have regarding how different State organs exercise their duties depends on which kind of legitimacy their function resembles. Expectations of the President and Vice President as well as MPs, who are elected solely by the members of their own community and whose political will they represent, differ from expectations from a court, which should act impartially and ground all its judgments in reason.⁹³ In fact, in the three years following in-

⁹¹ Giovanni Sartori, *Comparative Constitutional Engineering*, (New York: New York University Press, 1994) 202. In Cyprus, this distinction was blurred in the three years following independence, since the Constitution was wholly subsumed by politics as usual.

⁹² On the distinction between representational legitimacy and reason-based legitimacy, see Alon Harel & Adam Shinar, 'Two Concepts of Constitutional Legitimacy' (2023) 12(1) *Global Constitutionalism* 80. The authors use this distinction regarding the legitimacy of constitutions. However, the distinction is based on the different logic of these two types of legitimacy. This distinction can be useful regarding the underlying principles that should determine the action of different State organs, depending on the type of legitimacy that befits their operation.

⁹³ The two communities were objectified from a constitutional point of view, and they did not allow their members to develop a commitment other than to their respective community. Namely, they did not allow the development of a commitment that would allow the members of each community to perceive the 'other' as a part of themselves. However, such a commitment is the main presupposition for the development of a collective selfhood. Far from a single collective selfhood, in Cyprus there were two, and thus the unity of the State envisaged under Article 1 of the Constitution remained a dead letter. This is a crucial parameter for the longevity of a constitutional order, since a form of political unity enables constitutional order to regulate social interactions instead of letting social interactions 'regulate' the constitutional form. In addition to political unity, the State itself should be given consideration. Article 1 establishes Cyprus

dependence, the President and Vice President were simultaneously and indisputably the leaders of the two respective communities. Their institutional roles failed to absorb their communal identities; indeed, the opposite seems to have happened. Thus, the way that the individuals who served in different State bodies perceived their role rendered them unable to view their activities impartially. However, such depersonalisation is necessary for the development of shared narratives that can establish common perceptions on what constitutes a proper action for institutional agents.⁹⁴

Furthermore, issues that refer to the system of governance are much more context-oriented than issues referring to rights. The constitutional essence of democracy contains a wide spectrum of options. What might be a convenient constitutional settlement at a given time, due to the exceptional circumstances within which a constitution was founded, is not necessarily the best constitutional settlement in perpetuity.⁹⁵ Views of the fundamental ‘law of the land’ may change depending on whether the question deals with rights or the system of governance. In the first case, the range of possible responses is much more limited than the latter given that normative issues regarding rights are less context-oriented.⁹⁶ Nevertheless, the efficient parts of constitutions, namely those which make them workable,⁹⁷ in the sense of fulfilling the fundamentals of a constitutional order, are vital for the maintenance of a constitutional order. The reason is that the practices of the State organs, which are responsible for the function of the constitution, fuel constitutional imaginaries with shared meanings. Thus, a constitution’s endurance hinges on the implementation of the clauses that belong to its organisational part by the relevant constitutional agents in a way that creates shared meaning.

as a unitary State. However, taking into consideration that the main characteristic of the modern State is not its recourse to coercion but the fact that the State has the overall control of the means of coercion, it is rather doubtful whether this was the case in Cyprus in 1963–1964 where paramilitary groups from each community were very active. On the characteristics of the modern State, see Gianfranco Poggi, *The State: Its Nature, Development and Prospects*, (Cambridge: Polity Press, 1990) 518–526.

⁹⁴ Alexander Latham-Gambi, ‘The Constitutional Imaginary: Shared Meanings in Constitutional Practice and Implications for Constitutional Theory’ *ICL Journal* (2021) 15(1) 21, 46. It should also be noted that the modern State presupposes the depersonalisation of power relations. Thus, power does not stand with specific individuals who have a role but with institutions. Poggi (no 93) 18.

⁹⁵ On this issue, see Steven Wheatly, ‘The Construction of Constitutional Essentials of Democratic Politics by the European Court of Justice Following *Sedić and Finčič*’ in Rob Dickinson & al. (eds), *Examining Critical Perspectives on Human Rights* (Cambridge: Cambridge University Press, 2012) 153.

⁹⁶ Fundamental norms have an existential relationship with any constitutional order, since they identify its nature, Goldoni (no 70) 15.

⁹⁷ Walter Bagehot, *The English Constitution*, (Fontana, 1993) 44, quoted by Latham-Gambi, (no 94) 45.

With the above in mind, the main goal of constitutional design in deeply divided societies should be the elimination of passions. This is why the gag rules that operate as enabling conditions for the smooth function of a constitution should be adapted to the peculiarities of said societies.⁹⁸ According to Lijphart, the main goal of such rules in deeply divided societies should be the ‘removal of divisive issues from the national agenda’.⁹⁹ Indeed, the latter should be narrowed to the extent that the employment of rules can lead to a final decision that excludes violence as an option. It favours a multiparty parliamentary system of governance accompanied with sectarian autonomy on religious and cultural issues, the smooth function of which is based on a ‘co-alescent’ style of decision-making. Secret negotiations among the political elites are fundamental to this form of decision-making.

The making of a constitution for Cyprus demonstrates the value of secret negotiations as a means of achieving goals related to constitutional settlements in the context of deeply divided societies. As mentioned above, the Cypriot Constitution was drafted through secret negotiations between Greece, Turkey, and the UK, which formulated the basic structure of the Constitution, and of a Joint Commission, which completed the drafting under conditions of non-public negotiations based on a decision-making process that demanded unanimity. Thus, it was an elite-driven process that rose successfully to a monumental task. Nevertheless, the outcome, namely the Constitution of Cyprus, did not envisage such a decision-making scheme. It also failed to provide other mechanisms for the depolarisation of political conflict, such as allowing each community to request a preliminary ruling of the Constitutional Court on matters in which the President or the Vice President had exercised their veto powers and blocked a decision-making process.

In fact, with its mutual vetoes, requirements for separate majorities for the enactment of certain laws, separate electoral bodies, and separate jurisdictions for the judiciary depending on the community to which the litigants belonged,¹⁰⁰ the Cypriot

⁹⁸ ‘Gag rules’ shift attention away from areas of discord towards areas of agreement. See Stephen Holmes, *Passions and Constraint* (Chicago: University of Chicago Press, 1997) 203.

⁹⁹ Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, (New Haven: Yale University Press, 1977) 28, 53, 159, 161 and Arend Lijphart ‘Constitutional Design for Divided Societies’ (2004) 15(2) *Journal of Democracy* 96. According to Lijphart, it was the absence of properly designed institutions that caused the systems of governance in Cyprus and Lebanon to become non-functional, and not the adoption of the principles of the consociational model as such (Ibid, 99). Also, Holmes (no 98) 212–213.

¹⁰⁰ Cases beyond the jurisdiction of the Supreme and the Constitutional Court were heard only by courts composed of members of each community separately, if the parties belonged to the same community, or

Constitution established a 'constitutional partition'. This could evolve into a real partition at any time, unless there were effective conflict-resolution mechanisms. Naturally, such mechanisms did not exist.

The gag rules provided by the Cypriot Constitution were drafted in a way that favoured suffocating conflict instead of postponing it.¹⁰¹ However, if a constitutional order is to endure, its essentials cannot remain divided in perpetuity.¹⁰² Thus, the constitutional settlement in divided societies must leave open channels of discussion to avoid or eliminate the likelihood of renewed conflict.¹⁰³ The main channels are either the process of constitutional amendment or future-oriented formulas that provide space for overcoming past deficiencies that affect the function of the constitution. However, the formal and material Cyprus Constitution precluded these options.

As to the formal Constitution, the basic structure of the power-sharing system of governance it provided was unamendable. It is also worth noting that this unamendability was imposed on the Cypriots by the guarantor powers through the Zurich Agreement and was secured by the Treaty of Guarantee, which permitted the intervention of each guarantor power in case of any attempt to change the basic structure. Thus, the Constitution could not be formally altered by local agents.¹⁰⁴ The second option was subverted by the fact that the material constitution, which had been developed in the early years following independence, objectified the two

by courts composed of judges from both communities if persons from both communities were involved in the dispute to be settled (Constitution, Art. 159). For the competence of courts under the Constitution of Cyprus, see Achilles C. Emilianides, *Beyond the Constitution of Cyprus* (Athens - Thessaloniki: Sakkoulas, 2006) (in Greek) 45.

¹⁰¹ Democracy entails a perception of 'waiting time' that does not exclude minorities from politics but establishes a burden on them to wait for future possibilities to become the majority. Stephen Kirste, 'The Temporality of Law and the Plurality of Social Times: The Problem of Synchronizing Different Time Concepts through Law' in Michel Troper & Annalisa Verza (eds), *Legal Philosophy: General Aspects (Concepts, Rights, and Doctrines)* (SW: Franz Steiner Verlag, 1999) 23, 39–40.

¹⁰² Holmes uses the example of slavery laws in the USA to point out that the division of a nation regarding the essentials of a constitutional order cannot last perpetually, Holmes (no 98) 220.

¹⁰³ Simon Chambers, 'Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis' (1998) 26(1) *Politics and Society* 143–144.

¹⁰⁴ Heteronomy decreases the possibilities for the development of a constitutional imaginary by local agents, Paul Blokker, 'The Imaginary Constitution of Constitutions' (2017) 3(1) *Social Imaginaries* 167, 183. Regarding the issue of the relationship between the capability of local agents to change the constitution of a state without the participation of external actors and the autochthonous or not character of a constitutional order, Canada deserves special mention as up until 1982, amendments to its constitution required an Act of the British Parliament, Brian Slattery 'The Independence of Canada' (1983) 5 *Supreme Court Law Review*, 369, 389–401.

communities as the major constitutional bearing subjects through their uncontested symbolic power, instead of individuals/citizens or other intermediate entities such as political parties.¹⁰⁵ The lack of such entities meant that the two communities and their different perceptions about the fundamental goals envisaged under the Constitution formulated the future constitutional expectations of the members of each community in an unfiltered way.¹⁰⁶ Finally, the cooperation of the two communities, either voluntarily or enforced by the fear of a constitutional breakdown, which the formal constitution took for granted, was not taken for granted by the two major bearers of the constitutional order.

What, then, could be the solution? We should shift our attention to a rather neglected aspect of time in the constitution-making process (including both the drafting and amendment of the Constitution), that of the present (meaning the time of the constitutional breakdown). A tool of constitution-making that resembles the present dimension of time is peace agreements. More specifically, peace agreements between communities in conflict, the so-called infra-State peace agreements. Agreements of this kind, even if they have a past and future dimension, aim to change the landscape in real time through negotiations that touch upon the perceptions of the participants regarding the core elements of a new settlement while concurrently calling for a change of these perceptions.¹⁰⁷ In post-conflict situations, conflicting groups

¹⁰⁵ On the role of political parties as intermediary actors that mitigate political conflict, see Jan Werner Muller, 'Democracy's Critical Infrastructure. Rethinking Intermediary Powers' (2021) 47(3) *Philosophy and Social Criticism* 268.

¹⁰⁶ Political parties are not established by constitutional rules; though sometimes constitutional rules recognise their significance for democracy. Nevertheless, they have a constitutional nature in the sense of being crucial intermediaries—they contribute to the endurance of the constitutional order since they create collateral repositories of constitutional meaning. Such repositories are developed by the activities of constitutional actors, which build up an institutional memory based on a shared history. On the concept of the repository of constitutional meaning, Latham-Gambi (no 94) 44–47. Latham-Gambi uses the example of the US Supreme Court. At first glance, the facts of *Marbury v. Madison*, *Brown v. Board of Education* and *Roe v. Wade* have little in common. However, they all demonstrate, at different points in time, that the Supreme Court has a significant role in the constitutional structure of the US, even if such a role is not prescribed explicitly by the formal constitution and must be extracted by the implied meaning of the constitutional provisions. The doctrine that underlies all these instances, even if not part of the codified constitution, is part of the US Constitution, since the given instances situate the perceptions and understandings of what we think as the Constitution of the US. On the role of perceptions and understandings in the formulation of constitutions, see Schauer (no 77) 231.

¹⁰⁷ Peace Agreements 'are symbolically important because they encode, albeit in embryo, a vision of the polity to emerge from the conflict', Soujit Choudry, 'Civil War, Ceasefire, Constitution: Some Preliminary Notes' (2008) 33(5) *Cardozo Law Review* 1,907, 1,918.

have very little confidence in each other or the existing constitutional order. A peace agreement may thus act as a framework for reestablishing the necessary confidence. Provisions for constitutional amendments in peace agreements usually follow two modalities: making a new constitution or amending the existing constitution. In certain cases, the peace agreement itself takes the form of a constitution, and thus a text that is a constitution in form approximates a peace agreement in nature and function. In other cases, the peace agreement establishes the procedural and substantive framework for the making of a new constitution. In the latter case, the parties agree or promise to amend the existing constitution through a peace agreement.¹⁰⁸

In Cyprus, the intercommunal conflict of 1963–1964 did not result in a peace agreement. The option was not even on the table for the parties involved in the resolution of the conflict. Makarios pressed for UN intervention but limited his request to the deployment of a UN peacekeeping force that would act as a shield against a Turkish military intervention.¹⁰⁹ His request was in response to an Anglo-American NATO plan (supported by Greece, Turkey, and the Turkish-Cypriots) that envisaged a NATO peacekeeping force—to reinforce the British forces already stationed on the island and to help observe the ceasefire—and a mediator who would seek a settlement within the NATO framework and, therefore, in line with American and Turkish interests.¹¹⁰ Makarios was successful in derailing this plan and involving the UN through the deployment of UN forces and the appointment of a special mediator, Sakari Tuomioja. Nevertheless, during debate sessions at the Security Council, the US succeeded in passing a resolution preventing Soviet participation in the force and

¹⁰⁸ Asli Ozelik & Tarik Olkay, '(Un)constitutional Change Rooted in Peace Agreements' (2020) 18(4) *International Journal of Constitutional Law* 1,373, 1,380. Of course, the changes to a constitution via replacement through a peace agreement presuppose a break in legality. However, the justification of the new constitutional order cannot rely on the criteria of the order that was broken. A justification like this entails a self-reference that is not possible after the breaking of legality, since any such break is a break of authorisation. The concept of extra-constitutionality instead of the constitutionality/unconstitutionality dipole might be more helpful. On the break of legality as a break of authorisation, Alessandro Ferrara, 'Unconventional Adaption and the Authenticity of the Constitution' in Richard Albert (ed.) *Revolutionary Constitutionalism* (Oxford: Hart, 2020) 155. On the concept of extra-constitutionality, Richard Albert, 'Non-Constitutional Amendments' (2009) 22 *Canadian Journal of Law and Jurisprudence* 5.

¹⁰⁹ In fact, the UN intervention was read by Greek-Cypriots as an instrument of national policy. On this issue, Joseph S. Joseph, 'The UN as an Instrument of National Policy: The Case of Cyprus' in Emiliou Solomou & Hubert Faustmann (eds), *Independent Cyprus 1960-2010, selected Readings from Cyprus Review* (Nicosia, University of Nicosia Press, 2011) 245. On the other hand, the Turkish-Cypriots focused on the 'safety' of NATO and the guarantor powers.

¹¹⁰ Joana Amaral, 'Multiparty Mediation in Cyprus 1963-1965' (2013) 25(1) *Cyprus Review* 73, 81.

leaving intact the guarantors' right of intervention.¹¹¹ Furthermore, although the Geneva negotiations in the wake of Resolution 186/1964 of the Security Council were conducted under UN auspices, the American diplomat Dean Acheson, formally an aide of Tuomioja, in fact led the talks to circumvent Tuomioja and thus keep the UN at arm's length and, by extension, avoid Soviet influence over Cyprus.¹¹² As a result, although Tuomioja was the 'official' mediator in Geneva, the proposals discussed at the negotiations were Acheson's.¹¹³ Put simply, the geostrategic interests of the external agents determined the aims and the content of the peace-making process.

However, it should be noted that the local agents continued to view the issue of peace-making through the lens of their own perceptions regarding the settlements of the 1960 Constitution. Greek-Cypriots viewed the peace-making process as a means of protection against external imposition, i.e. a resolution under NATO auspices, without including a peace-making formula that would force the conflicting parties into direct negotiations as an item on the agenda. In fact, they accepted that the resolution of the conflict was not an issue primarily in the interest of those living in Cyprus but rather an issue that could be resolved through the intervention of external actors. Nevertheless, such intervention was not necessary to exert external pressure and bring the two communities together to hammer out a viable solution to the conflict, but rather to protect them from each other. On the other hand, the Turkish-Cypriots viewed a resolution within the NATO framework as a guarantee of their security, since the three guarantor powers were members of NATO and had to consider the interests of the alliance in exercising policy vis a vis the Cyprus issue. In other words, neither of the two communities viewed the conflict as an issue to be resolved by themselves.

¹¹¹ Among the main aims of Makarios' appeal to the UN was to render at least the Treaty of Guarantee inoperative. However, Security Council Resolution 186/1964 was ambiguous regarding intervention rights to the extent of allowing the parties to interpret it in opposite ways, with Makarios regarding it as an end to Turkish rights of intervention and Turkey as a preservation of those rights, see George W. Ball, 'Cyprus', in his *The Past Has Another Pattern*. (New York: Norton, 1982) 337, 348. Ball served in the US State Department from 1961 to 1966.

¹¹² Cynthia Nicolet, 'The Development of US Plans for the Resolution of the Cyprus Conflict in 1964: "The Limits of American Power"' (2010) 3(1) *Cold War History* 95, 105.

¹¹³ On Acheson's plan see Amaral (no 110).

6. Concluding Remarks: Can a Timeless Constitution Ultimately Last?

The above analysis shows that the future- and present-oriented formulas that could have been used to make the Constitution functional failed. In fact, these formulas did not enable the creation of constitutional constructions, i.e. processes that give a legal text a legal effect.¹¹⁴ The reason for such failure was to a certain extent that these formulas were externally context-oriented. However, even where this dimension was absent, local agents were reluctant to rely on procedures that could be internally context-oriented, due to the different perceptions of the two communities regarding the past constitutional settlements and their significance. A timeless constitution, namely a constitution that constructed the past as an absence of the past, remains timeless because the memory of that past defines the way that constitutional actors perceive their institutional roles.¹¹⁵ Thus, the drafting, enactment, and implementation of the Cypriot Constitution failed to create constituent moments, instances where ‘the being of the social vanishes’ and is replaced by a perpetual investigation of the ‘elements of social life and their translation in a legal order’.¹¹⁶

As Kim Scheppele correctly points out, the way that people experience constitutional life is vital for understanding how a constitution is perceived by those to whom it is addressed. Through constitutional experience, we can realise how social action is effectuated within the context of a constitutional order.¹¹⁷ In Cyprus, the way that the two communities (the Cypriot Constitution does not mention the concept of people, as already mentioned) experienced their constitutional life through the lens of a

¹¹⁴ On the essential characteristics of constitutional construction and their difference in interpretation, Lawrence B. Solum, ‘The Interpretation-Construction Distinction’ (2010) 27(1) *Constitutional Commentary* 95, and Laura Kisneros, ‘The Constitutional Interpretation/Construction Distinction: A Useful Fiction’ (2010) 27(1) *Constitutional Commentary* 71. The concept of ‘constitutional construction’ has been used in the context of the originalism debate in the USA. However, I consider it vital to the present analysis since it links the text of a constitution with legal efficacy.

¹¹⁵ The enactment of the Cypriot Constitution does not entail any reference to the past. Nevertheless, such an omission might alienate the people in the name of whom the Constitution has been adopted. Recognition of the past, even of the wrongs of the past, contributes to ‘the quality of the present and to the projection of the future’, Catherine Duprè & Jiunn-rong Yeh, ‘Constitutions and Legitimacy over Time’, in Mark Tushnet, Thomas Fleiner & Cheryl Saunders (eds), *Handbook of Constitutional Law* (London, New York: Routledge, 2013) 45–47.

¹¹⁶ Claude Lefort, *Democracy and Political Theory* (Minneapolis: Minnesota University Press, 1988) 228.

¹¹⁷ Scheppele (no 87) 53.

past determined how they interacted within the constitutional context. Even if from a formal point of view, the enactment of the Constitution constitutes a transcendence of the past, the past nevertheless remains intact and freezes the present and future of the Cypriot constitutional order through the rigidity of the formal constitution and the biased perceptions of the two communities about the potential of the material constitution in the Cypriot constitutional order. If the past prevails, then it is not the starting point of the present, but rather the context within which the present is shaped. Instead of producing a dynamic perception of constitutional time, it leads to constitutional paralysis: 'It can delay the beginning of the present and thus dramatize it'.¹¹⁸

Another crucial issue is that subjective rights 'give the individual a free temporal space to counter public influence'.¹¹⁹ The future of individuals should be free from State intervention.¹²⁰ However, an enabling condition of this function of liberties is that individuals should be able to influence the decisions of public authorities mainly through the exercise of their rights to political participation. The underlying presupposition for successful influence is that each individual must correspond to one vote. The power of individual votes should be equal. Yet, in the power-sharing system of governance in Cyprus, the equality of the vote is guaranteed by the formal constitution but does not affect the whole range of decisions that must be taken, since mutual vetoes exclude the decisions that affect the vital interests of both communities from majority rule, which is the counterpart of vote equality.

Thus, in cases like Cyprus, the effective exercise of such influence presupposes a right of 'negative self-determination' of individuals regarding the community to which they belong. Otherwise, the temporal space of each individual to counter the public influence is curtailed. Such a right must be in the form of a community member's ability to abandon the community to which they belong or the ability not to belong to any community.¹²¹ However, according to the Cypriot Constitution, the citizens of

¹¹⁸ Kirste (no 101) 39–40; Georges Gurvitch, *The Spectrum of Social Time* (Cham, Switzerland: Springer, 1964) 32–38.

¹¹⁹ Kirste (no 101) 39–40.

¹²⁰ Ibid.

¹²¹ The possibility to 'exit' can, under certain circumstances, provide incentives for cooperation and can contribute to constitutional stability. However, in order to be efficient in a constitutional order such as that of Cyprus, it should be possible for persons disagreeing with the choices of the community to leave it to exert pressure on the representatives of the community in State bodies and to express dissatisfaction with their choices. The Constitution of Cyprus, however, provided no such option. On the role of the possibility of exit as a mechanism contributing to the efficiency of the Constitution and, therefore, to constitutional

Cyprus are not part of the Cypriot people but members of two separate communities (Greek and Turkish), membership in which is based on specific criteria, such as origin, language, cultural traditions, and religion. It must be noted that citizens who do not belong to one of the two communities based on the above criteria must choose the community to which they would like to belong.¹²² Thus, people who do not belong to one of the two communities possess no formal ability to express political will authentically and are thus determined by the political will of others.¹²³ They are deprived of a key right that allows for political participation—that of self-determination. Indeed, the constitutional structure of belonging provided by the Cypriot Constitution does not allow the bearers of political rights to formulate their own temporal space, which is crucial for both their private self-determination and collective self-determination as participants in the formulation of the public domain.¹²⁴

The ‘fear’ of the individual dimension of the political identity of the members of each community is also reflected on the agreement of the members of the two communities in the committee that drafted the Cypriot Constitution to exclude *actio pop-*

stability, see Anton D. Lowenberg & Ben T. Yu, (1992) ‘Efficient Constitution Formation and Maintenance: The role of “Exit”’ (1992) 3(1) *Constitutional Political Economy* 51. Another parameter, pointed out in the relevant literature regarding the possibility of ‘exit’ to provide an incentive for conflicting sides to cooperate and to not mutually annihilate each other, is efficiency: the ‘exit’ is efficient when the design of the constitution allows minorities to make decisions relevant to their members, thus affecting State policy, and not when it affords them control of all State functions, that is, when it is impossible to make a decision or implement a policy without their consent, see Heather Gerken, ‘Exit, Voice and Disloyalty’ (2013) 62(7) *Duke Law Journal* 1,361.

¹²² Article 2(1) and (2) of the Constitution of Cyprus.

¹²³ In fact, according to the relevant constitutional provision, (Art 2) individuals can shift from one community to another following a decision by the Communal Chamber of the community they belong. Yet, they cannot escape from the identification to one of the two communities. They remain entrapped to their communal identity which makes them eligible to acts as agents of the political rights the formal constitution provides for.

¹²⁴ The identity of the people is both private and public. It is private because through identity, individuals ‘understand themselves as autonomous agents’ and public because their individual identity is ‘constructed through interaction with others’. N.W. Barber, ‘What is constitutional ideology?’ (2024) 22(3) *International Journal of Constitutional Law* 653, 661. In Cyprus though, the architecture of the formal constitution did not allow for such interaction between the two communities. Furthermore, the material constitution as described above did not allow such interchange among the members of each community. Thus, the only public identity existing at the time of the constitutional breakdown was the communal identities of the two communities, which were anchored in the past in such a way that the past ‘colonised’ the present and the future.

ularis as a means of legal recourse to the courts.¹²⁵ Further, it is worth mentioning that only the President and Vice President of the Republic acting jointly can:

at any time prior to the promulgation of any law or decision of the House of Representatives, refer to the Supreme Constitutional Court for its opinion the question as to whether such law or decision or any specified provision thereof is repugnant to or inconsistent with any provision of this Constitution. (Art 140 of the Cypriot Constitution)

Thus, a group of individuals could not challenge the constitutionality of a law to the Supreme Constitutional Court on grounds that exceed their strictly personal interests and the recourse to the courts regarding issues related to the interpretation and application of the Constitution, could not operate as a joint action among people from different communities. Such joint action is permitted only to the President and Vice President of the Republic who represent in full each community respectively. Only the two key constitutional agents that grant their legitimacy to the communal distribution of power could filter the issues on which the Supreme Constitutional Court could act as a guardian of the constitution to its full extent, e.g. affecting the outcomes of all important constitutional and political issues.

Thus, the formal constitution that reflects how a political community should ‘structure itself through constitutional mechanisms’ soon after Cyprus independence was surpassed by the ‘existential question on whether or not a multiethnic polity’, like Cyprus, ‘should exist as a unified political community’.¹²⁶ Instead of regulating the actions of its agents, the Constitution was therefore considered an instrument to justify their actions.¹²⁷ In this way, constitutional politics found itself in a suffocating embrace with everyday politics, which finally proved fatal for the longevity of the formal constitution.

¹²⁵ Emilianides (no 55) 380–381.

¹²⁶ On the distinction between normal and existential constitutional politics in multi-ethnic polities, see Choudry (no 59) 936–938.

¹²⁷ While the formal constitution set the framework of constitutional bearers’ action, the perceptions of the bearers about the constitutional essentials considered the formal constitution not as a framework but as an instrument of action. Thus, the complete mismatch between the formal and the material constitution resulted in the breakdown of 1963. On the use of constitutions as instruments, see Elster (no 64) 101.

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