Hard Questions, Still Unanswered

The Cyprus Experience: Constitutionalism, Fundamental Law and the Doctrine of Necessity

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Athens: Nomiki Bibliothiki, 2021
pp. 407
ISBN: 978-960-654-521-4

The case of Cyprus is an exceptional one in the field of comparative constitutional law. To address the most salient issue: A long distance between the capital-c Constitution, i.e. the constitutional requirements as they stand according to the text, and the small-c constitution, i.e. the political system as it actually operates, is a typical feature of authoritarian regimes. In Cyprus, the distance of the capital-c from the small-c constitution has been long for many decades, but it has been maintained in tandem with rule of law (*if* we leave out the discrepancy between the Constitution and the constitution) and democracy (*if* we leave out the non-participation of the representatives of the Turkish Cypriot community in state organs as per the fundamental principle of bi-communalism). To address another issue: Many constitutions contain 'eternity clauses', i.e. provisions that protect basic structures and values from being altered through constitutional amendments. Supreme courts are often given, or assume on their own initiative, the power to enforce eternity clauses by annulling constitutional amendments. But what about the sovereign Republic of Cyprus where the immutability of the basic structures, including the integrity of the eternity clause, is 'guaranteed' by three other states, the UK, Greece and Turkey –that is, neither by the international community nor by an international court, as could have been the case– due to the infamous Treaty of Guarantee? Is this kind of unamendability compatible with the principle of equal sovereignty as enshrined in the Charter of the United Nations? A third interesting issue, and one, which is treated extensively in the book under consideration, has as follows: Emergency doctrines are typically used by courts to excuse unconstitutional actions of a temporary character. The doctrine of necessity, as used by the Cypriot Supreme Court since 1964, has been condoning the permanent, as it came to be, deviations from the constitutional provisions, which require until today the participation of the representatives of the Turkish Cypriot community in all state organs.

These are just some of the idiosyncratic features of the Republic of Cyprus; and one may not find a better introduction to them than the latest book by P. G. Polyviou. This is not to say that *The Cyprus Experience* has an introductory character. On the contrary, Polyviou presents and develops views and arguments which he had expounded in his previous books[6]; and in doing so, he invites us to the theoretical depths of the issues at hand. *The Cyprus Experience* is a lengthy book, comprising five parts (A. Constitutional Perspectives and Developments, B. Cyprus and Europe, C. The International Dimension, D. Constitutionalism, E. Conclusion), addressing a wide variety of issues apart from the aforementioned ones (e.g. the legal framework of the Sovereign British Bases in Cyprus, the integration of EU law into the Cypriot legal order etc.), all united under a central theme: the constitutional survival of the Republic of Cyprus notwithstanding turbulences such as the conflict of 1963-1964 and the consequent departure of Turkish Cypriots from the constitutional organs of the Republic; the failed Greek coup d'état of July 1974, and the consequent Turkish invasion; the establishment and continuing de facto existence of the Turkish Republic of Northern Cyprus, posing numerous thorny legal issues (among them, ones having to do with the Namibia principle); and the accession of Cyprus to the EU in 2004 (provoking new constitutional challenges such as the suspension of the acquis communautaire in the occupied areas, and the re-organization of the hierarchy of the sources of law through a constitutional amendment that took place without the participation of the Turkish Cypriot representatives, as all other constitutional amendments did, in the part of the Republic which remains free).

In what follows I cannot but glean from the book some of Polyviou's views, taken mostly from the first and most extensive part, under the title 'Constitutional Perspectives and Development', also from the fourth part, under the title 'Constitutionalism'. My comments will necessarily be rather short.

Reassessing the 1960 Constitution

Polyviou does not deviate from the standard thesis regarding the complexity and the illiberal character of the Constitution of 1960 –this taken as a crucial factor for the constitutional collapse of 1963-1964. However, Polyviou also maintains that 'the

[6] Among others, *The Case of Ibrahim, the Doctrine of Necessity and the Republic of Cyprus* (Nicosia: Chryssafinis & Polyviou, 2015); *Cyprus on the Edge: A Study in Constitutional Survival* (Nicosia: Chryssafinis & Polyviou, 2013); *Cyprus: A Study in the Theory, Structure and Method of the Legal System of the Republic of Cyprus* (Nicosia: Chryssafinis & Polyviou, 2015). In what follows I shall be referring exclusively to *The Cyprus Experience*, through brackets in the main text.

1960 Constitution has much more to commend it than critics acknowledge' (27). He aptly suggests that 'one has to put up with constitutional and other arrangements that appear complex and illiberal, in order to avoid more serious and potentially irreversible developments at the time. The truth is that if it was not for the 1959-1960 arrangements, flawed though they may have been, Cyprus would have been partitioned, with no recourse to any international body at the time since Cyprus was after all a British Colony. The 1960 Constitution was indeed complex, illiberal and difficult to operate, but it was infinitely better than either the alternatives at the time or subsequent developments [...] Cooperation [of the two communities and their leaders] and economic prosperity could easily have led to a relaxation of attitudes in respect of the constitutional arrangements as well, provided that any proposed amendments did not detrimentally affect the bicommunal balance and the basic interests of the Turkish Cypriot Community. Regrettably, the Greek Cypriot side (led by Archbishop Makarios) misread the situation and embarked on its futile and dangerous attempt to amend the 1960 Constitution, with disastrous consequences' (27-28). Polyviou immediately proceeds to observe that, even under a positive light, the Constitution of 1960, with all the defects of communalism, was a factor for the degeneration of the co-existence of the two communities into the conflict of 1963-1964.

Apart from the historical judgments that Polyviou's assessment inevitably contains (I agree with most of them), there is a serious legal issue, which Polyviou could have recognised and treated explicitly: Can we speak of some kind of normative priority between the demand for preservation of international peace and the constitutional autonomy of states, both being fundamental values of the United Nations (the second may be derived from the principle of sovereign equality and from the right of peoples to self-determination)? I believe that this legal issue, arising when someone examines closely the constitutional history of Cyprus, deserves to be openly addressed in light of the relevant international law theory. Of course, here is not the place to do so.

On the Doctrine of Necessity, its Justification, Application, and Effects

In his extensive analysis of *Ibrahim*, the judgment of the Supreme Court that articulated the doctrine of necessity in 1964[7] (laying down the constitutional foundation for the survival of the Republic of Cyprus even without the participation of the Turkish Cypriot community), Polyviou does not miss an important, though rarely mentioned fact: the absence of any discussion in *Ibrahim* of the previous judgment of the

[7] *The Attorney-General of the Republic* v. *Mustafa Ibrahim and others* (1964) CLR 195.

Supreme Constitutional Court in the case *The Turkish Communal Chamber* v. *The Council of Ministers*[8] in which the invocation of the doctrine of necessity had been rejected on the grounds that such doctrine is not compatible with the normative concept of a (written) Constitution. Polyviou discusses this issue at some length (56-59). He concludes that the said case was 'easily distinguishable, both in terms of facts and in the light of its central issues' (59). In my view, such distinguishing would have been feasible, but it would be by no means easy. In any case, the absence of any reference to the aforementioned case is a grave error of the Greek Cypriot judges of *Ibrahim*, given that the principle of *stare decisis* applies in Cyprus (also, given that one of three judges, Triantafyllides, J., had been the one who suggested the application of the doctrine of necessity in *The Turkish Communal Chamber*).

Another remarkable point made by Polyviou, this time concerning the impact of the doctrine of necessity on the Cypriot constitutional order overall, is his conclusion that, especially after the Supreme Court reversed its earlier hesitation and decided to condone amendments of non-basic articles in the absence of the Turkish Cypriot representatives from the amending organ, i.e. the House of Representatives, the doctrine of necessity 'resulted not so much in the validation of specific exercises of state power but in a redefinition of the State, the Government and the Constitution, in a more or less permanent and irreversible way, so as to reflect the new realities which had come about with the passage of time' (111). If this is so (and in my view, it is), then it seems that we have lost nothing less than the justificatory grounds of the doctrine of necessity –at least those which may justify the view that it is not an extra-constitutional source of law, but part of Cypriot constitutional law. This situation is hardly compatible with constitutionalism, but it was perhaps inevitable. What *could* have been avoided, and was *not*, was another development which Polyviou mentions without fully exploring its consequences: 'despite ritual invocations of the concept of proportionality, once acknowledged to exist the power and competence resulting from the doctrine of necessity appear to be capable of use in most ways the governmental organs concerned might consider "necessary": with "necessity" here encompassing at times the notion of "desirability" in the modern social, political and economic context –something which of course considerably enlarges the powers and competences generated by the doctrine of necessity' (111). But if we accept such enlargement, then we have subverted the only requirement that makes the doctrine of necessity compatible with rule of law: proportionality as an inherent guarantee that deviations from

[8] 5 RSCC 59 (1963).

particular constitutional provisions shall be condoned only when they have become *really* necessary. And I am afraid that the few cases in which the Court has denied the (possible or actual) invocation of the doctrine of necessity, some presented by Polyviou (111-116), are not sufficient to support the view that 'the Supreme Court has never allowed the doctrine of necessity to be used either for the convenience of Government or in order to facilitate Government and Administration' (112).

In any case, the constitutional identity of Cyprus has changed after 1964, and the foundation of that change can be traced to the doctrine of necessity. This brings us to the lengthy parts of the book (128-161) in which Polyviou examines the construction of the doctrine of necessity in *Ibrahim* from the standpoint of the theory of the constituent power (of the people)[9]. Was *Ibrahim* an exercise of such power, that is, a constituent act ('constitutive act', in the terminology of Polyviou)? Polyviou's conclusion has as follows: 'Though in theory, and primarily as a result of its outcome, *Ibrahim* does not fall into the category of "constitutive acts", since it entailed neither adoption nor endorsement or approval of a Constitution, still it contains within itself what we might call "quasi-constitutive elements". At the end of the day, the invocation and development of the doctrine of necessity in Cyprus did not only deal with the immediate and severe crisis threatening the country, but also resulted in nothing less than the transformation and the metamorphosis of the 1960 Constitution, which would now operate (and of course still does) in a very different way than what was originally envisaged' (160).

The missing part of this constitutional narrative has to do with the democratic or other legitimacy of the agents of that 'metamorphosis'. From where (other than necessity) did the judges of the new Supreme Court derive the *power* to proceed into such quasi-constitutive acts as the ones which legitimized severe deviations from the

[9] Constitutional theory almost invariably assumes that the subject of constituent power is the people. See, e.g., E.-W. Böckenförde, Die verfassunggebende Gewalt des Volkes – Ein Grenzbegriff des Verfassungsrechts (1986), in: E.-W. Böckenförde, *Wissenschaft, Politik, Verfassungsgericht* (Berlin: Suhrkamp Verlag, 2011), 97-119; O. Beaud, *La puissance de l'État* (Paris: PUF, 1994), part II; A. Arato, *The Adventures of the Constituent Power. Beyond Revolutions?* (New York: Cambridge University Press, 2017); Y. Roznai, We the people", "oui, the people" and the collective body: perceptions of constituent power, in: G. Jacobsohn/M. Schor (eds), *Comparative Constitutional Theory* (Cheltenham: Edward Elgar Publishing, 2018) 295-316. But see also the historical approaches in J. Colón-Ríos, Five Conceptions of Constituent Power, Victoria University of Wellington Legal Research Paper No. 127/2017, at <https://ssrn.com/abstract=2319154>; J. Colón-Ríos, *Constituent Power and the Law* (New York: Oxford University Press, 2020); L. Rubinelli, *Constituent Power: A History* (UK: Cambridge University Press, 2020).

basic articles that required the participation of Turkish Cypriot representatives in all state organs? More generally, can we afford stipulating into existence and keeping in place a subject of constituent power who is other than the people(s)? Who could be this people, or these peoples, and how can we sustain a constitutional narrative about their constituent power in Cyprus? How precisely were Turkish Cypriots represented in the process of the making of the new constitution of Cyprus in 1964 and afterwards? Is it sufficient to say that the new Supreme Court included two Turkish Cypriot judges, even though they did not participate in *Ibrahim*?

If we suppose that the judges of the Supreme Court have been exercising quasi-constituent power, then we might also ask: Would not juristocracy at the level of constituent power necessarily lead to a situation in which judges upset the balances of a liberal-democratic state in their favour, asserting a greater portion of legislative power than is their due (through a disproportional intensification of judicial review), asserting even the power to amend the Constitution (in the form of indicating to the amending organ which amendments –other than ones that touch the basic articles– are permissible and which are not, even in the form of allowing constitutional amendments in contravention of the procedural requirements of the Constitution)? This last question brings me to the third and final part of this review.

On the Arrival of the Basic Structure Doctrine to Cyprus

One of the most intriguing issues which Polyviou expounds in his book (324-344) arose after the recent judgment of the Supreme Court (acting as the Electoral Court) in *Michailides* which held that (at least some part of) the Law on the Twelfth Amendment of the Constitution of 2019, Law 128(I)/2019, is unconstitutional, on the grounds that it is repugnant to the democratic principle (by introducing an unacceptable method of by-election) and to the principle of the separation of powers (by surpassing previous judgments of the Court that had found the legislative attempt to implement the alternative method of by-elections contrary to the Constitution), both principles taken as forming part of the basic, unalterable structure of the Constitution of Cyprus[10]. Polyviou first proceeds into a general analysis of the doctrine of implicit unamendability (i.e. non-explicit limitations of the amendment power), bearing in

[10] Electoral Court of Cyprus, *Andreas Michailides and Dimos Diamantis* v. *General Commissioner for the Elections et al.*, Election Petition No. 1/2019, judgment of 29 October 2020 (in Greek) (hereinafter: *Election Petition 1/2019*).

mind mainly an article of Yaniv Roznai, who has written extensively on that topic, and the famous judgment of the Supreme Court of India in the case *Kesavananda Bharati v State of Kerala*[11], which is the usual starting point of every analysis of implicit unamendability. Then, Polyviou deploys a series of critical remarks focusing on the question of whether the judiciary can identify the exact provisions which make up the basic structure of a constitution in an objective way, without substituting their own policy preferences for those which are incorporated in the constitutional provisions that are supposed to be unamendable. 'Surely, the basic structure theory goes well beyond traditional methods of interpretation and cannot be disguised merely as textual analysis. It is rather closer to reality to say that this approach *purports to begin* with the constitutional provisions and the text of the Constitution, but that the basic features and structure thereof *only emerge and are finally formulated* when one takes into account history, tradition, context and indeed desirable social and political objectives which a majority of the particular Court regards as worth pursuing' (337).

Taking stock of these critical remarks (with which I generally agree), Polyviou proceeds to an assessment of the arrival of the basic structure doctrine to Cyprus. He first observes that the 'central pillar' of the Constitution of 1960, and thus the most basic feature thereof, had been the principle of bi-communalism. And it was a feature that was 'eliminated' in 1964 from the Constitution, based on the doctrine of necessity. According to Polyviou (and in contradiction to his remarks about the 'metamorphosis' of the Constitution in previous parts of the book), such elimination took place 'without changing the identity or continuity of the 1960 Constitution, at least in the context of the doctrine of necessity' (340). Polyviou then proceeds into a critique of the *Michailides* judgement of the Supreme Court, i.e. the judgment that introduced the basic structure doctrine to the Cypriot constitutional order. Polyviou finds this judgment 'unsatisfactory … in both result and reasoning' (340-341). Interestingly, he attempts here to specify which features of the constitution should be considered as forming part of its basic structure if one were to follow the reasoning of the Court. Alluding to a possible inconsistency in the ruling of the Court, Polyviou points out that some of these features (e.g. the principle of popular sovereignty) would be considerably broader than others (e.g. the demand for respect of the principles of *res*

[11] (1973) AIR 1461.

judicata and of *ratio decidendi*). But the core of Polyviou's criticism lies elsewhere: He (correctly) observes that, by activating the basic structure doctrine, the Supreme Court disallows constitutional amendments, in contrast to what the same Court had done when it took recourse to the doctrine of necessity to allow the amendment of the Constitution in the absence of the Turkish Cypriot members of the Parliament, thus in contravention of the constitutional requirement that constitutional amendments of non-basic articles shall be effected through separate two thirds majorities in the House of Representatives. An additional difficulty has to do with the fact that, 'as things now stand, "basic structure" refers to the Constitution *as it has become* as a result of the successful use of the doctrine of necessity and not the Constitution *as adopted and accepted in 1960*, whose basic pillar was not constitutionalism but communalism' (344).

Two points are missing from Polyviou's critique, both related to the justificatory grounds of the doctrine of implicit unamendability. First, this doctrine is supplemented by, and in many cases presupposes, the theory of the constituent power *of the people*. This observation applies to significant proponents of implicit unamendability today (Yaniv Roznai[12], Joel Colón-Ríos[13], and Olivier Beaud[14]), and to the formulation of the doctrine by various courts[15], among others the Constitutional Court of Colombia with its famous 'non-replacement' or 'non-substitution' doctrine[16], and (strongly enough in several opinions) the Supreme Court of India in *Kesavananda Bharati*[17]. In Cyprus the basic structure doctrine cannot be justified as a means of protecting the constituent power of the people (both in the sense of protecting the products of such power in the past and its exclusive competence to re-draft basic articles in the future),

[12] See Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (New York: Oxford University Press, 2017), 105-134.

[13] See J. Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Abingdon: Routledge, 2012), 126-156.

[14] O. Beaud, *La puissance,* 329-402.

[15] See the review in Roznai, *Unconstitutional*, 42-70.

[16] See Corte Costitucional de Colombia, Sentencias C-551/03, C-1200/03, C-970/04, C-1040/05, C-180/07, C-757/08, C-588/09, C-141/10, C-1056/12, C-010/13, C-579/13, C-577/14, C-084/16, C-285/16, C-332/17, all available at: <http://www.corteconstitucional.gov.co/relatoria/>. See also C. Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 2013, 339-357.

[17] See Roznai, *Unconstitutional*, 42-47.

since such power was never exercised, and it is still certain whether it will ever be able to do so. The basic structure of the Constitution of Cyprus was decided by the governments of Greece and of Turkey in the Zurich Conference (5-11 February 1959), and the people(s) of Cyprus did not participate in the drafting of their Constitution in any way other than having first their (not elected at the time, but undisputed) political leaders endorsing (without any room for discussion) the long list of the basic articles of Zurich in the London Conference (17-19 February 1959), and then by having their (not elected) representatives participating in a fourpartite Constitutional Commission which in no way could be assimilated to a constituent assembly.

Of course, the basic structure doctrine *can* be justified on grounds other than the constituent power of the people (e.g. the proper meaning of the term 'amendment', the stipulation of some hierarchy of constitutional values)[18], and Polyviou alludes to some of them in the first pages of his chapter on amendment and constitutional transformation. But given that the prevalent theoretical justification of the doctrine of implicit unamendability is today connected with the theory of the constituent power of the people and given that such theory is not available in Cyprus (unless we stipulate that the constituent power of the two communities is active, but in this case the basic structure doctrine should refer to the Constitution of 1960 as it originally has), one must be very thorough in constructing the relevant argumentative basis. This cannot be done here.

Second, the Constitution of the Republic of Cyprus does not include any reference to the democratic principle, or to *popular* sovereignty, or to the people of Cyprus, in any way whatsoever. This omission was not accidental. The Constitution of 1960 provides for the election of all state organs by the two ethnic communities *through separate electoral rolls*. The Republic of Cyprus has been characterized as 'sovereign' in the first article of its Constitution only after the insistence of the Greek and of the Greek Cypriot representatives to the Joint Constitutional Commission[19]. However, the Turkish and the Turkish Cypriot delegates to the Joint Commission managed to avert any reference to the democratic principle (which could be interpreted as entailing majority rule), or to one, instead of two, people of Cyprus (the reference to one people would entail that Turkish Cypriots would not be entitled to exercise separately their own right to self-determination in the future, a right which the Turkish view continues vindicating until today). In *Michailides*, the Supreme Court derived

[18] For some of them see Roznai, *Unconstitutional*, 141-156.

[19] See S. G. Xydis, *Cyprus: Reluctant Republic* (The Hague: Mouton, 1973), 493-494.

the principle of popular sovereignty from the constitutional provisions that refer to the election of the members of the House of Representatives. However, these provisions, as they still stand in the Constitution, provide for the election not only of Greek Cypriot but also of Turkish Cypriot representatives; and such elections shall be held *through separate electoral rolls*. One could thus argue that the bearer of popular sovereignty, that is, the people of Cyprus, if any (and if one puts aside the different view of many, if not all, Turkish Cypriots about the non-existence of such a people), expresses its will, as regards the election of their representatives in the legislature, by means of two separate elections. And the same people can express its all-important amendment power, *qua* derivative constituent power, only through a bi-communal House of Representatives that has been elected in this particular and unusual way.

One may retort here that, notwithstanding the absence of Turkish Cypriot representatives, the use of the democratic principle as an interpretative tool when the Supreme Court decides hard cases is legitimate, insofar as the opposite view would amount to depriving the Greek Cypriots of their democratic rights when it comes to judicial review, i.e. the control of constitutionality of ordinary legislation through the interpretation of the Constitution in accordance with, or in the light of, the democratic principle. However, the same does not necessarily hold true when the interpretative act leads to the invalidation of a constitutional amendment on the grounds that it is repugnant to popular sovereignty as a matter of the basic structure of the Constitution of Cyprus. Here, in the field of secondary constituent power, one is obliged to presuppose the constituent people(s) of Cyprus in toto, at least when the major premise of the judicial syllogism includes the democratic principle. I am afraid that the invocation of popular sovereignty in *Michailides* fails to do much else than remind us of the absence of an indispensable component of the Cypriot peoplehood, that is, the Turkish Cypriots. Or are we perhaps supposed to assume that the bearer of constituent power in Cyprus now comprises only the members of the Greek Cypriot community? But how can this be so when, at the same time, Greek Cypriot leaders participate in bi-communal negotiations with the Turkish Cypriot leader (under the auspices of the UN and on the premise that any agreement must be endorsed by three other states) with the aim to arrive at an agreed solution of the Cyprus problem whose main element will be a new Constitution of the Republic of Cyprus? Apart from being internationalised, the constituent power in Cyprus cannot be exercised by the Greek Cypriots alone. From this standpoint, the judgment of the Supreme Court which activated the basic structure doctrine in Cyprus is a perplexing factor –and one

which, to make things worse, was entirely unnecessary in the case in which the issue of unamendability arose.

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Reading again some of the pages of *The Cyprus Experience*, I think that one of the merits of the book lies in the ability of Polyviou to present nuances to his original positions, after he has exposed different views and arguments on any given issue. After all, this is the most demanding, and at the same time the most important, methodological aspiration that one may have in the field of constitutional theory.

Costas Stratilatis