Introduction: Constitutionalism for Divided Societies

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Abstract The commentary in this Part of the book focuses on a range of tensions that have developed from misjudged political meddling in fragile constitutional orders. The writers capture the extent to which the operation of constitutional settlements in divided, heterogeneous multinational European states can be affected by no small degree of political contingency. The timing of this thoughtful analysis is particularly auspicious given the development of a range of constitutional ruptures across Europe over the past few years. More specifically, the authors offer an account, through an eclectic and innovative array of methodological style, of how legal devices that often operate at the subterranean may in fact entrench communal division in a crisis. Read together, then, these chapters offer an innovative exploration of a range of legal responses to acute constitutional stress in several divided European nation states.

Constitutional stress may develop abruptly as the unintended, or unforeseen, result of ill-conceived political interference in constitutional ordering. This is the organising theme of the commentary in this Part, which brings into sharp relief the extent to which the operation of constitutional settlements in divided, heterogeneous multinational European states is characterised by no small degree of contingency.

The timing of this thoughtful analysis is auspicious. Three weeks before the international symposium at the University of Haifa that led to the development of this volume’s chapters, the United Kingdom’s (UK) uncodified and ancient constitution was subject to an unexpected and profound shock: the product of expedient political decision-making. Though many thought the result would be close, very few observers predicted that the country would vote, as it ultimately did, to leave the European Union (EU) in the 23 June 2016 referendum by 52–48%. The referendum had been called by the then Prime Minister, David Cameron, in an ill-judged attempt to manage division within his governing Conservative party: while the country’s relationship with the EU had been an emotive and fraught one since the UK’s accession to the

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organisation in 1973, it was far from the top of the British public’s list of political priorities.

It is too early to tell what the UK’s political settlement will look like over the next decades as a result of the referendum result: what is palpably clear, however, is that constitutional innovation of some degree will be required to prevent the break-up of the Union. The chapters in this Part provide us with a cogent and essential pan-European insight into how that change might occur, and, equally important, alert us to the possible dangers of fundamental structural change. The chapters’ authors offer an account, through an eclectic and innovative array of methodological style, of how, in the face of emergency, legal devices that often operate at the subterranean may, in fact, entrench communal division: or, at least, severely undercut the constructive capacity of institutional power–sharing structures in divided polities.

Before turning to the chapters in some more detail, it should be pointed out that, like the jurisdictions considered in this Part, it is clear that the UK’s post-Brexit constitutional pressure points will be shaped by unforeseen contingency. The UK is a multinational state with government power devolved, since the late 1990s, from Westminster to Northern Ireland, Scotland, and Wales (with varying degrees of autonomy). While England and Wales voted to leave the EU, Northern Ireland and Scotland, by contrast, voted to remain by clear margins. Beyond this level of sub-national disunion, the UK is, moreover, now a sharply divided society along ‘leave/remain’ lines: two obvious symptom being, first, the collapse of the centre ground of politics and a partial, but dramatic, reconfiguration of traditional support for its three leading political parties; and, secondly, the collapse of Northern Ireland’s power-sharing institutions. Remarkably, this fissure transcends class and ethnic divides. As Yaniv Roznai and Richard Albert note in this volume’s introductory chapter, multinational states often develop new arrangements in an effort to keep constituent parts together in the face of severe pressure.1 Constitutional instability can also arise in response to those novel arrangements or pressures. The UK is now at just such a moment that demands significant constitutional change.

Three years on and the magnitude of the shock to the UK’s constitutional order is only now being realised in light of the executive’s attempts to implement the 2016 vote through legal means in the teeth of, first, the Westminster parliament’s dogged rejection of those efforts, and, secondly, judicial review of its actions. The unexpected referendum result caused both foreseeable and unpredictable constitutional effects. The foreseeable outcomes relate to the now precarious position of Northern Ireland and Scotland within the Union. Less predictable, notwithstanding that the UK’s disentanglement from the EU’s quasi-federalist constitutional order was a calculable matter of complexity (to put it mildly), has been the capricious nature of the constitutional review cases the process triggered. Plebiscitary democracy is, we have now discovered, unsuited to the UK’s ultimate constitutional principle: the sovereignty

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1See in this volume Yaniv Roznai and Richard Albert, ‘The Depth and Diversity of Modern Pressures on Constitutionalism’.
of the Queen-in-Parliament. In two momentous UK Supreme Court decisions, executive power applied pursuant to the Brexit process has been ‘constitutionalised’ and, thus, made to accord with, and submit to, the principle of parliamentary sovereignty.  

It is in these types of extreme conditions, following many decades of relative stability within the UK’s constitutional settlement, where, as Roznai and Albert note, the complexity of managing constitutionalism is most apparent. It is also where fissures in the UK’s delicate constitutional arrangements—based, as they are, on an intricate web of ‘constitutional’ statutes, common law principles, residual executive prerogative powers, unwritten conventions, and operating in the context of devolved powers—have emerged.

How should the UK proceed in developing its post-Brexit constitutional settlement in light of these existential challenges and the divided society—particularly with rekindled nationalist sentiment across the Union—that the referendum helped to congeal? The chapters in this Part offer compelling and innovative accounts as to what the future could hold: they also highlight the dangers that may lie ahead.

Political conflict and emergencies are invariably met with innovative designs and judicial articulations that, in turn, catalyse fateful but unforeseen results. This is the case in respect of the UK’s recent constitutional terrain: it is also a recurrent feature of the work of Nasia Hadjigeorgiou and Nikolas Kyriakou in their paper on the use (or, on occasion, lack thereof) of the doctrine of necessity in the Republic of Cyprus. The authors argue that the principle of necessity has, since the formation of the Cypriot state in 1960, been employed inconsistently as an instrument of ultimate expedience by both the legislative and judicial branches of state. The result is a dilution of the Republic’s non–Greek Cypriot minority groups’ legal rights and civil liberties.

The doctrine of necessity is, as Hadjigeorgiou and Kyriakou cogently assert, now the ‘unwritten cornerstone of the Cypriot legal order’: one that heightens and further entrenches the hegemony of the island’s majority community. This pattern of the normalisation of the exception—or the ‘exceptionless exception’  

The innate but abstract standard of common law ‘reasonable’ or ‘immediate’ necessity—which would later come to be conceived as a distinctly Diceyan construct—has decisively forged Britain’s emergency power regime over several centuries. Similarly, in the judicial conception of emergency as developed by the Cypriot courts, which Hadjigeorgiou and Kyriakou closely consider, necessity is then employed as both conditions.

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2See R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, and R (Miller) v The Minister; Cherry v Advocate General for Scotland [2019] UKSC 41. See also, e.g., Ewing K (2017) Brexit and Parliamentary Sovereignty. Mod L R 80(4):711–726.
3Roznai and Albert, n 1.
4Gross O (2000) The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy’. Cardozo L. Rev. 21:1825–1868.
5de Wilde M (2010) Locke and the State of Exception: Towards a Modern Understanding of Emergency Government. 6 Eur. Con. L. Rev. 249–267.
legal justification for derogation from the constitutional order and a space within which then to act: until, at least, the relevant crisis passes.

Necessity has become the ‘unwritten cornerstone of the Cypriot legal order’, as Hadjigeorgiou and Kyriakou show, while the Cypriot Constitution and its bi-communal features were soon subordinate to the survival of the young state. The authors argue that the flaws or ‘corrosive effects’ of the doctrine of necessity, as in the case of Cyprus, are revealed not as a matter of inherent principle. Rather, they relate to the doctrine’s application: necessity has invariably been employed in a disproportionate manner and in a way that affords considerable discretionary authority to the executive. In turn, it acts as a licence for departure from constitutional tenets that, ultimately, have the scope to limit the operation of fundamental rights. The doctrine of necessity is, then, used as both sword and protective shield in the act of preservation of both the constitution and, ultimately, because of the particular demographic movements that exist on the island, the Greek Cypriot community’s interests within the Republic.

While this jurisprudential sleight of hand, to put it crudely, continues to serve a highly expedient purpose in the Cypriot context, perhaps a more coherent, stable constitutional dispensation for the island—particularly given its stark post-1974 partition—may lie in the concept of asymmetric autonomy. This form of political settlement in response to disputes over national self-determination has grown in use since the fall of the Soviet Union. Maja Sahadžić challenges existing federalist theory by taking a pioneering and comparative look at the interplay between constitutional asymmetries in federal states and multinationalism. The latter term here is defined as ‘territorially based differences’ anchored in one or more claims for political autonomy. This opens up the space, Sahadžić argues, for a more holistic view of contemporary strains on federal systems that are not, by contrast, adequately revealed by a prevalent emphasis on federal uninational symmetries.

Constitutional asymmetries arise when ‘variations in practices and relationships’ that stem from, for example, linguistic, religious, or ethnic differences between, on the one hand, subnational entities and, on the other, the political centre are then ‘embedded in legal texts’. This is very apparent in disparities in the distribution of legal competences between regions. One particular area of weakness that Sahadžić identifies as arising from federal theory scholarship’s focus on uninational federalism is its capacity to lead to the neglect of the constitutional asymmetry that surfaces when a process of federalisation arises from emergency.

An asymmetrical constitutional accommodation within a multinational polity, Sahadžić argues, offers a stable path towards ‘diversity recognition’ and, ultimately, in peacefully holding the state together in the context of competing claims to power. The legal asymmetries that arise from multi-tiered multinationalism paradoxically serve to both fragment and stabilise the constitutional framework: when such ‘differences become considerable, asymmetry has a destabilizing potential on the central

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6Wolff S (2010) Cases of Asymmetrical Territorial Autonomy. In: Weller M, Nobbs K (eds) Asymmetric Autonomy and the Settlement of Ethnic Conflicts, University of Pennsylvanian Press, 17–47.
level.’ Here, again, the resonance with the work of Hadjigeorgiou and Kyriakou on Cyprus is clear. On one reading it is possible to identify a process of constitutional asymmetry as having unfolded over the past half-century on the island republic: but, this time, imposed juridically—and by stealth—as the aberrant, inadvertent offshoot of a forlorn attempt to hold the polity together in a state of crisis.

An additional example of the potentially destabilizing—though unintended—effects of constitutional measures imposed in a time of political crisis is neatly advanced in the work of Skoutaris and Dinas. The authors work through the implications of a very particular form of response to secessionist preferences—the devolution of legislative power to autonomous regions—on the constitutional order. The authors explore, through the use of empirical evidence from Spain, how the grant of significant legislative competence as an ostensible weapon in the accommodation of ‘centrifugal tendencies’ can incubate or sharpen those secessionist tendencies in the plurinational state. The nature of competitive politicking means that, at election time, secessionist character is fostered with the potential, ultimately, to result in a heightened sense of ‘subnational identity’. Skoutaris and Dinas argue that political actors are incentivised to place that identity at the heart of electoral campaigns so as to prompt higher participation in those contests, as well as employing it as a means of shifting the responsibility—sometimes, perhaps, disingenuously through a blurring of competencies—for the negative consequences of public policy decisions back to the national level.

This hypothesis is then tested. The abstract turns to the particular in the form of a focus on Catalonia: an autonomous region in north-eastern Spain that is, at the time of writing, now at the sharp end of a political struggle with central authorities in Madrid. The twin ‘pillars of substantial identity socialization’ in the form of education and family, Skoutaris and Dinas argue, serve only to indirectly reinforce the process of ‘endogenous decentralization’: those factors are, rather, subservient to the role of electoral politics in which actors ‘outbid each other along identity lines’. Crucially, then, regional elections ‘strengthen subnational identities and shape decentralisation preferences accordingly’, while the impact of elections increases each time, too. It is, the authors argue, through the means of institutional devices (and engagement) that the formation of subnational identity is most sharply propagated.

Skoutaris and Dinas employ a sophisticated method of analysis of the behaviour of first-time eligible voters in Catalonia in order to further strengthen their claim. There is some evidence that these dynamics work in similar vein in other regions, too, such as Scotland following the UK’s devolution settlement in the late 1990s: indeed, the post-UK referendum fallout provides further evidence of these forces at work. Skoutaris and Dinas argue that the devolution of legislative autonomy to subnational regions is a strong break on the potential for civil unrest. A potential—albeit paradoxical—equipoise to the inadvertent results that may stem from a grant of territorial autonomy is the related grant of stronger powers of redistributive competences. This, in the authors’ view, may serve to stymie subnational political actors from looking to greater clarity of expression or formation of a more assertive, overt self-identity as, instead, political preoccupations and debate focus on the more quotidian pressures of self-governance.
Read together, then, the chapters in this Part offer an innovative exploration of a range of legal responses to acute constitutional stress in several heterogeneous European nation states. The root of those pressures invariably lies in contested assertions of political autonomy and claims to national self-determination. The lesson that we should readily take from the diligent analysis undertaken the contributors is that, in designing or reshaping those constitutional frontiers in response to political emergency, the instruments used to assuage those pressures and accommodate competing constitutional claims may well lead to equally unexpected and unpalatable outcomes. We would do well to be alert to those dangers in constructing future, innovative constitutional designs in exigency given the potential for (further) balkanisation. This is, at time of writing, no doubt of ultimate significance to the UK, too, as its society unexpectedly works out the ruminations of both the process of disentanglement from the EU, and, further down the line, its post-Brexit constitutional order.

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