Constitution-writing in deeply divided societies: the incrementalist approach*

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ABSTRACT. The article addresses the puzzle of how societies still grappling over the common values and shared vision of their state draft a democratic constitution. It argues that an incrementalist approach to constitution-making enabled such deeply divided societies to enact either a written constitution or function with a material constitution by deferring controversial choices regarding the foundational aspects of the polity to future political institutions. It demonstrates how various types of incrementalist constitutional strategies – such as avoidance of clear decisions, the use of ambivalent and vague legal language, or the inclusion of contrasting provisions in the constitution – were deployed in the constitutional drafting of three deeply divided societies: India, Ireland and Israel. By importing the existing ideational conflicts into their constitutions, and by deviating from the common perception of constitution-making as a revolutionary moment, the framers in these three cases enabled their constitutions to reflect the divided identity of 'the people'.

KEYWORDS: Constitutions, Constitution-Making, Divided Societies, Israel, India, Ireland

Introduction: the puzzle

In recent years constitutions have become an important tool for mitigating conflicts and promoting democracy in deeply divided societies. From South Africa to Bosnia, great hope has been vested in the potential contribution of the process of constitution-making to postconflict peace and stability. However, under conditions of deep internal disagreement, enacting a formal constitution is a high-stakes game which can potentially undermine political stability and halt rather than promote democratisation. Where intense polarisation exists between competing visions of the state, the process of constitution-drafting – in which the state's commitments and credos are

entrenched for future generations – is fraught with great risk of political crisis. This risk has recently been in evidence in some postconflict societies, like Iraq and Afghanistan, where the debate over the constitution revealed deep divisions among the framers with regard to foundational norms and values that should underpin the state (Benomar 2004: 81–95).

Surprisingly, the challenge of crafting a formal constitution in polities still grappling with the definition of their collectivity has received limited theoretical and comparative attention. Little has been written on the relationship between the new or re-written constitution and the identity of 'the people' who are supposedly its authors. While the research on constitution-writing has experienced a resurgence following what Bill Kissane and Nick Sitter call 'time zone four' of constitution-making in postcommunist states (Kissane and Sitter 2010), it has generally focused on the institutional and procedural aspects of constitutions.[1] Most constitutional studies published after the fall of communism in Eastern and Central Europe and of apartheid in South Africa focus on the issue of public participation in the process of constitution-writing (Sunstein 2001; USIP 2005), or on the democratic institutions designed by this process (Elster, Offe and Preuss 1998; Greenberg et al. 1993; Howard 1993). Similarly, most of the work on divided societies focuses on the institutional and procedural aspects of the constitution, advocating various institutional arrangements – whether integrative or accommodational – for resolving ethnic conflicts (Choudhry 2008; Lijphart 2004; Reynolds 2002). In the multiculturalism literature, most theories say little about the dynamics of constitutional evolution. Instead, most discuss particular constitutional arrangements within an already existing constitutional order, or present a normative argument for constitutional pluralism (Tully 1995). Finally, while a rich literature exists on constitution-making and national identity in specific cases, emphasising the sociological, political and legal idiosyncrasies of a given case, few comparative studies have been done, and those that exist tend to remain within the institutional or procedural framework.

However, constitutions are not merely expected to establish the institutional structure of government and regulate the balance of power. Constitutions also play a foundational role by expressing the common identity and norms of the nation. Constitutions serve as the state's charter of identity. By delineating the commonly held core societal norms and aspirations of the people, constitutions provide the citizenry with a sense of ownership and authorship, a sense that 'We the People' includes me. While, as Kissane and Sitter demonstrate, the foundational elements may vary from constitution to constitution across time and geographical zones (Kissane and Sitter 2010), foundational constitutional provisions generally refer to the relationship between religion and state, the fundamental rights guaranteed to all citizens, the definition of those who belong to 'the people' and the symbols of the state.[2]

But how can a constitution be drafted, and what kind of a constitution can be adopted, when there is no consensus regarding the foundational framework the constitution is expected to represent? How can deeply divided societies that

lack a consensus regarding their ultimate goals and shared commitments successfully adopt a democratically legitimate constitution?

The category of 'deeply divided societies' is widely referenced by students of ethnic conflicts. Most definitions focus on the level of intensity of the conflict (Lijphart 1977; Lustick 1979; Nordlinger 1972). This article defines deeply divided societies in terms of the nature of the schism, and includes not only conflicts between various ethnic groups. In this article, societies will be considered deeply divided if the schism involves competing visions of the state as a whole. Usually, such conflicts revolve around issues of national and religious identity of 'the people', and thus cannot be resolved by division of power or resources. Such a divide exists, for example, between secular and religious perspectives of the State of Israel, and between chauvinist Hindu nationalist and moderate pragmatic Hindu perspectives of India. These are the kinds of conflict that are termed by Albert Hirschman as 'either/or' or 'non-divisible', as opposed to the 'divisible' or 'more-or-less' conflicts, which are easier to settle, as the warring parties can agree to 'split the difference' or compromise. Conversely, the former form of conflict is often characterised by an absolute unwillingness to compromise on the issues upon which the conflict is based (Hirschman 1994: 203).

The problem with deeply divided societies, I will argue in the next section, is that they cannot adopt either of the two ideal-type constitutions that rest on a widely accepted dichotomous understanding of the relationship between constitutions and identity: they clearly cannot adopt the essentialist constitutional model of the nation-state, as they lack any consensus on the fundamental goals and values of the state. Yet they also may not be able to subscribe to the liberal-proceduralist approach of 'constitutional patriotism', which divorces the private sphere of religious and ethnic identity from the public sphere of civic identity (Habermas 1996: 496; Muller 2007). Such an approach requires the preconstitutional acceptance of the principles of political liberalism – a requirement rarely fulfilled by deeply divided societies.

This theoretical cul-de-sac has been addressed in several deeply divided societies by adopting what I will term an *incrementalist approach* to constitution-making. The incrementalist constitutional tool-box involves such strategies as avoidance of clear decisions, the use of ambivalent, vague legal language, or the inclusion of contrasting provisions in the constitution. These strategies, I will argue, enable deeply divided societies to either enact a written constitution, or function with a material constitution, by deferring controversial choices regarding the foundational aspects of the polity. Such a deferral allows the constitution to reflect the identity of 'the people' as it really is – a *divided* identity. In other words, the framers of these constitutions export the resolution of contentious foundational issues from the constitutional to the political arena. By recognising the limits of legal solutions, they deviate from the common perception of the moment of constitution-making as a revolutionary moment (Ackerman 1992: 46–68), introducing instead elements of gradualism into the process.

In what follows, I will discuss the opportunities and risks involved in adopting an incrementalist approach to constitution-making. I will also demonstrate how it has been implemented in three deeply divided societies which drafted their constitutions while still grappling over the identity of the state: Ireland in 1922, India in 1947–50, and Israel in 1948–50. Yet first, let me elaborate further and explain why deeply divided societies cannot adopt either of the two commonly held ideal-type constitutions – neither that of the nation-state constitution nor that of the liberal-procedural constitution – as both models carry with them a requirement of preconstitutional consensus.

Preconstitutional consensus

When it comes to the foundational component of democratic constitutions, the Western constitutional imagination usually consists of a dichotomous understanding of the relationship between constitutions and identity of 'the people'. This dichotomy is represented by two ideal-types of democratic constitutions: first, the *nation-state constitution* and second, the *liberal-procedural constitution*. The *nation-state* model reflects the national aspirations and shared vision of a prepolitical unity through explicit declarations included in the preamble and through a set of constitutional provisions that protect the national or religious characteristics of the state and other symbolic elements. Rooted in Sieyès's notion of constituent power as a necessary foundation for constitutional legitimacy (Sieyès 1964), the essentialist, or nation-state constitution, represents a *'thick'* identity of a presumably homogenous people.[3] It attempts to reflect unique cultural, national, religious and linguistic characteristics through symbolic features and other particularistic practices and institutions. Such homogenising foundational elements include, for example: the French constitutional establishment of a national language (Article 2); the Danish, Icelandic and Norwegian constitutional provisions, which establish the Evangelical Lutheran Church as the official state religion, based on the strong Lutheran majorities;[4] and Germany's privileged immigration laws for ethnic Germans (until 1999).

The opposite approach to constitutional identity is manifested in the ideal-type of the *liberal-procedural constitution*. According to this view 'the people' may come together through the drafting of the constitution itself, or following its enactment. In other words, the very act of constitution-making creates 'the people', in the sense that it constitutes the polity and unifies the political collectivity on the basis of a minimal procedural consensus. From a theoretical point of view, the Habermasean notion of *constitutional patriotism* is the most elaborate representation of this '*thin identity*' doctrine, suggesting shared democratic constitutional procedures as the common denominator of the polity. In practice, the American constitution is the most approximate to such a liberal-proceduralist ideal-type constitution. As Bruce Ackerman wrote, the core of the defining narrative of Americans revolves around what he terms

'constitutional self-determination': 'Because Americans differ so radically in other respects', he states, 'our constitutional narrative constitutes us as a people' (Ackerman 1991: 36–7).

Most Western democratic constitutions are neither strictly nation-state nor liberal-procedural archetypical constitutions. Rather, they generally represent a middle way, adopting elements from the two categories. Most European constitutions combine a particular national, religious and linguistic credo with adherence to liberal principles and human rights. Still, these constitutions rest on a wide societal consensus regarding the foundational elements of the constitution – whether the 'thicker' identity issues of religious practices and national symbolism or the 'thinner' questions of shared political culture.

Clearly, deeply divided societies do not share the 'thick' identity of cultural homogeneity, which could enable them to agree on the symbolic elements of a nation-state constitution. However, they also lack sufficient popular support for the principles which underlie the 'thin' identity of the liberal-proceduralist constitution. Even in the most minimalist sense, the adoption of a liberal constitution requires some societal consensus on political culture. 'Constitutional patriotism' can only be realised if all members of society share a commitment to the fundamental principles of political liberalism, including the separation between their own particular identities and the shared civic and proceduralist identity of the state. In liberal societies, citizens can hold what Alfred Stepan terms 'multiple and compatible identities' (Stepan 2001: 213–53). Only when the constitutional and public identity does not clash with the private identities – whether religious, ethnic or cultural – of the members of the polity, can the new civic identity facilitate the integration of the multitude of individuals into a united political collectivity.[5]

Constitutional conflicts

In societies deeply divided over their ultimate goals and values, the process of constitutional design generates new risks, which may undermine the already shaky political stability of these fragile states. It imports deeply rooted identity conflicts into the high-stakes arena of entrenched law, thus providing potent fuel for what may already be explosive issues. A constitution is higher entrenched law which, by its inherent rigidity, constrains future generations. The drafting of the constitution may thus be viewed as forcing unequivocal choices between competing systems of norms and identities. Hence, constitutional formalisation is perceived as a moment of fatal decision regarding the identity of the nation. In such circumstances, concessions are perceived as being all the more weighty because they may have permanent implications for the group who makes them.

Under intense conditions, constitutional debates risk turning into a political battleground, emphasising the differences between respective positions rather than serving as a bridge between them. Competing parties are

likely to import their political disputes into the constitutional debate and utilise the legal language to emphasise the ideological differences between their positions. In the worst-case scenario, the intensification of the ideational conflict caused by an attempt to formulate a written constitution could lead to outbreaks of violence, to civil war or to partition of the country. A good example of the latter scenario would be the failed attempt to craft a constitution for the united India, which ended in partition from Pakistan in June 1947, seven months after the beginning of the Constituent Assembly began drafting the constitution. The letters and protocols in the tripartite negotiations between the Congress, the League and the British government regarding the structure of the Constituent Assembly show how the conflicting parties used the debate over the Assembly's composition and procedures as a battering ram, rather than as a vehicle for compromise. Indeed, what were the direct causes of India's partition is a hotly debated question among historians (Philips and Wainwright 1970; Singh 1990). Nevertheless, while perhaps the preliminary constitutional negotiations and deliberations did not exacerbate the conflict, they certainly failed to mitigate it. Instead of tempering the political struggle, the opposing sides used constitutional procedures and legal documents as a weapon in their political conflict. Instead of bridging between the various positions in the conflict, the constitutional arena itself turned into a political battlefield and emphasised the differences between them.

Of course, partition is not a common outcome among deeply divided societies. In most cases, if a fundamental conflict exists regarding the vision of the state, then the constitutional solution is one of two; it could be achieved through forcible imposition of a 'liberal' or 'secular' perspective – as happened in Attaturk's Turkey – or it could be achieved through a compromise. The former solution is inherently undemocratic, since it does not involve open deliberation between competing perspectives of the state. As such, it is irrelevant for our article (Akan 2005). As to the latter solution, the twentieth century provides us with several examples of deeply divided societies which managed to adopt democratic constitutional arrangements that stood the test of time. The next section will present three cases of deeply divided societies that circumvented potentially explosive conflicts over the constitution by adopting what I term an *incrementalist constitutional approach*: India, Israel and Ireland.

The incrementalist tool-box

The constitutional framers in Ireland, Israel and India began the process of constitution-writing in the hope that it would mitigate existing internal conflicts and act to bridge the competing visions of the state. However, the inability to achieve consensus over the foundational and symbolic aspects of their constitutions led the framers to recognise the limitations of the constitutional arena for resolving ideational disputes. The drafters acknowledged that any unequivocal choice between the competing visions of the newly

founded state would destabilise its fragile democratic order. Consequently, they distinguished between the method they utilised in crafting the institutional aspects of the constitution and the method they employed concerning the constitution's foundational aspects. While adopting a decisive approach regarding the institutional structures established by the constitution, they opted for an indecisive approach concerning the constitution's symbolic and foundational facets, letting the constitution embrace rival perspectives of the shared norms and values that underpin the state. In India, the conflicts over the secular character of the state and over India's national language were circumvented by ambiguous constitutional arrangements; in Ireland disagreement over the meaning of Irish nationalism and Irish sovereignty vis-à-vis British control was reflected in various conflicting and contrasting provisions included in the 1922 constitution; and in Israel the deep divisions between religious and secular visions of the state led to avoidance of drafting a formal constitution altogether, while allowing for material establishment of government institutions.

By adopting these incrementalist constitutional strategies the framers deferred – explicitly or implicitly – the decision regarding those controversial issues to future political deliberation, in parliament or court. Such an incrementalist approach allowed for the adoption of a constitution reflecting the divisions which polarised the society in question while avoiding a clear-cut decision between competing visions of the state.

Despite some commonalities shared by the three cases discussed in the article – all have a British legal heritage and a parliamentary political system, and all countries were partitioned at time of independence – the Irish, Indian and Israeli constitutional arrangements were each formed under distinctive geo-political circumstances. Their unique constitutional stories help explain why they do not represent one definite model of constitutional writing but rather a creative constitutional tool-box. Before outlining the central features of the incrementalist constitutional approach, I will first briefly demonstrate the various constitutional strategies as they were developed in the three countries.

Informal consociationalism in Israel

Israel applied a strategy of avoidance by deciding, in June 1950, two years after independence, to postpone the enactment of a formal constitution altogether. Instead, the Israeli Knesset stipulated that the constitution would be constructed in a gradual manner, through individual Basic Laws, which would eventually be assembled into a single constitutional document (Knesset Records 1950: 1743). Over the years, Israel adopted eleven Basic Laws, most of them manifesting an already established institutional order.[6] However, the avoidance of drafting a formal constitution left the conflict over character of the Jewish state – which was the main ideational disagreement among the drafters of the constitution – unresolved.

There are various explanations for the decision of the first Knesset not to draft a constitution for the newly founded state (Strum 1995: 83–104; Shapira 1996: 31–3). Most agree, however, that it was the conflict between the religious and secular perceptions of the Jewish state that was the main issue of debate during the deliberations over the constitution. The non-Jewish minorities within Israel, despite comprising about twenty per cent of the population, did not participate in the constitutional debates during the first decades, as they were not considered part of the Israeli nation, which was understood in terms of 'the Jewish people'.[7] The constitutional debate was thus internal to the Jewish population, where the main dispute centered around the sources of Israeli law and the relation between the Jewish religious tradition and the state institutions. While the secular Zionist leadership aimed at separating religion and state, the religious parties wished to maintain a Jewish religious character to state regulations and institutions. The deep disagreement between the religious and secular visions of the Jewish state became particularly apparent during the 1950 Knesset discussions on the constitution, when Orthodox representatives in the Knesset warned that the writing of a secular constitution could lead to a dangerous *Kulturkampf* (Knesset Records 1950: 744; 812).

The religious parties' forecast of a potentially destabilising 'war of cultures' was not taken lightly by Israel's largely secular leadership, who were cognisant of the fragility of the newly founded state. Israel was recovering from eighteen months of war against five neighboring counties. In addition to the external Arab threat, both preceding and following the establishment of the state, there were isolated instances of violence, or potential violence, by extreme religious or nationalist groups that acted against the Jewish secular leadership in an attempt to undermine its authority. In 1948, for example, the para-military organisation *Irgun* tried to ship its own arms and soldiers into Israel in order to maintain its autonomy from the Israeli Defense Force (IDF). To prevent the Irgun from developing into a parallel army, the IDF shot and sank the ship *Altalena* (Horowitz and Lissak 1978: 189). Another example of a threat to the stability of the state occurred in 1951, when the police arrested a group of young, zealous, Orthodox men (*Brit Kanaim*) who planned to bomb the Knesset in protest against the drafting of women into the army (Horowitz and Lissak 1978: 429).

The Knesset decision to avoid drafting a constitution helped circumvent a direct clash over the state's Jewish identity.[8] In the absence of a written constitution, the relationship between religious and secular camps in Israel has been governed by a set of consociational arrangements which were crystallised partly by ordinary legislation and partly by informal customs and practices during the formative years of the state (Don-Yehiya 1999: 44–5; Lijphart 1977: 118). The most notable of these is the vague concept of the *religious status quo*, which mandated the non-separation between religion and state in certain areas such as the observance of Sabbath and Jewish dietary rules (Kosher food) in public institutions, exclusive jurisdiction of religious

courts over issues of family law (marriage and divorce) and Orthodox monopoly on conversion to Judaism.

Today, six decades after independence, Israeli society remains far from bridging the gap between the religious and the secular-liberal visions of the state. Between 2003 and 2006 the Knesset Constitution, Law and Justice Committee conducted the most comprehensive attempt to draft a constitution 'by wide consent' for the State of Israel. Yet instead of proposing a coherent constitutional draft, it merely delineated the parameters of the existing disagreements (*Constitution in Broad Consent Report* 2006). Acknowledging that the desired broad consensus over the underlying shared norms and values of the state still does not exist, the Knesset continues to defer controversial constitutional decisions to the future, thus reaffirming its incrementalist approach to constitution-making.

Constructive ambiguity in India

Unlike Israel, that resolved its foundational dilemma by refraining from drafting a constitution altogether, India never considered the possibility of non-adoption of a written constitution. Instead, the drafters of the Indian constitution adopted a strategy of constructive ambiguity to circumvent unequivocal choices in some of the most intense controversies over foundational issues during the constitutional debates. Two particular disputes can be used to illustrate this strategy: the question of India's national language and that of a Uniform Civil Code. In both cases, the drafters avoided clear-cut decision and transferred the choice between these competing perspectives to future political institutions.

Forging a common national identity despite India's overwhelming social diversity was one of the major political goals of its leaders after independence in 1947 (Khilnani 1999). Translating this political goal into the legal language of constitutional formulations was the greatest challenge for the Indian Constituent Assembly when it drafted the constitution between December 1946 and December 1949. Even after partition with Pakistan, in June 1947, India remained one of the most ethnically, religiously, culturally, linguistically, and socio-economically diverse countries in the world. Linguistically, eighteen languages were spoken in India by more than one million people each, and no single language was spoken by the majority of the population. The number of dialects exceeded seven hundred (Austin 1999: 265).[9] Religiously, twelve per cent of its population was Muslim – the third largest Muslim population in the world. Moreover, during the years of the drafting process the leaders of the Indian Constituent Assembly continued to believe that partition was provisional and that the constitution they were crafting would be for a united India (Brecher 1959: 378).

The debate over India's national language lasted for the entire three years of constitutional deliberation. It represented the clash between the framers' nationalistic aspirations modeled after the single-linguistic European nation-

state, and the Indian reality of many vernacular languages. The ambiguous resolution of this tension is reflected in the decision to defer the choice of national language to future political institutions, without clearly defining criteria for the government's future course of action. Instead of declaring a national language for India, the Constituent Assembly labeled Hindi the 'official language of the Union' (Article 343), while English continued to be used 'for all official purposes' (Article 351). In addition, the constitution recognised fourteen other languages for official use.[10] It was decided that a Parliamentary committee would re-examine the issue after an 'interim period' of fifteen years (Article 344).

This 'interim' decision has since evolved into a permanent one. In the years after independence, English became more entrenched in the bureaucratic and private managerial echelons (Kaviraj 1992). But it was only after there were violent riots in non-Hindi speaking states in the 1960s that the parliament gave up the ideal of legal unification around an indigenous national language (Brass 2005).

A related debate in the Indian Constituent Assembly was centered around the issue of the status of the regional languages and the linguistic provinces. It was settled by Article 3, which determined that future parliaments would be able to decide – by simple majority – on a complete redrawing of state boundaries. In 1955 the parliament authorised a States Reorganisation Commission, and eventually reconfigured the boundaries of India's states in accordance with linguistic communities (Brass 2005).

A similarly ambiguous constitutional strategy was deployed to address the vociferous dispute in the Constituent Assembly over the question of the Uniform Civil Code and the secularisation of personal law. The immense uncertainty faced by Muslims who decided to remain in India after partition riots and the need to reassure them that the constitution would protect their cultural identity was among the central reasons for the ambiguous formulation finally adopted by the Constituent Assembly. The drafters decided to include the civic-secular Uniform Civil Code in the constitution (Article 44), yet without making the code legally binding. It was included in the non-justiciable section of the constitution, the Directive Principles for Social Policy. In contrast to all other constitutional sections, the articles included in this section are not enforceable by any court.

As a result, in 1955–6, the Lok Sabha (Indian parliament) passed three bills which established different rules for application of the Uniform Civil Code to different religious communities. While Hindu law was secularised by the state, Muslim law – which was by and large paternalistic in nature – remained in force for the Muslim population (Galanter 1989: 155).

Thus, in both linguistic and religious domains, the choices made by the framers of the Indian constitution reflect a coherent constitutional approach which rests on the principle of incrementalism rather than revolution in areas of intense ideational disagreement. The drafters preferred to circumvent unequivocal decisions on controversial issues by deferring them to future political institutions.

Ireland: symbolic ambivalence

The drafting of Ireland's 1922 constitution differed significantly from the previous two cases, as the political leaders of the Irish Free State did not have full autonomy in drafting the Irish constitution. Britain forcefully demanded the continued subordination of Ireland to their Commonwealth. Nevertheless, the constitution was ratified by a democratically elected *Dail Eireann* (Irish Parliament) and in many ways established Ireland's long-lasting democratic order.[11]

The complicated negotiations over the constitution that occurred during the Irish Civil War ended with an incoherent document, comprising contradictory provisions incorporating both Irish and British positions regarding Irish nationalism and sovereignty. This symbolic ambivalence enabled later crystallisation of a more coherent constitutional identity, in accordance with political developments, such as the weakening of the British Empire and the undermining of the institutions of the commonwealth.

The tripartite negotiations during the drafting process – between the Free State's provisional government, the extreme Republicans, and the British Cabinet – revolved around the question of sovereignty and over the meaning of Irish nationalism (Kissane 2005). The British insisted on provisions that would establish Irish loyalty to the crown. By contrast, the Irish Republicans demanded that the constitution clearly express Irish sovereignty and independence.

A year of intense negotiations led to an ambivalent constitution that incorporated the contradictory Irish and British positions. To be clear, the constitution-making process did not result in a compromise between the competing perspectives. Rather, it included the provisions that each side had insisted on, thereby including contradictory perspectives within the same constitutional document. Thus, for example, Article 2 of the constitution declares that 'all powers of government and all authority legislative, executive and judicial in Ireland are derived from the people of Ireland'. Yet, other provisions of the constitution referred to the British King as the Head of State. The preamble consisted of an amalgam of Irish nationalistic statements and British-imposed caveats that subordinated the constitution to the Anglo-Irish Treaty. As a result of these contradictory clauses, it was unclear whether the constitution was truly subordinate to the Anglo-Irish Treaty. Legal scholars at the time noted that the Irish constitution presented a 'puzzling problem', since it was 'both supreme and subordinate' (Saunders 1924: 340–5; Kohn 1932, 80).

The Irish constitution thus used a strategy of 'symbolic ambivalence' to enable the drafting of a constitution, incorporating competing perspectives which lent themselves to strongly divergent interpretations. Controversial choices and decisions on foundational issues were thus deferred, allowing political and social circumstances to evolve and to make these choices easier in the future. That was the core of Michael Collins' view of the Anglo-Irish Treaty, as well as the constitution, as a 'stepping stone' towards the

achievement of complete independence (Collins 1922: 37–8). Collins believed that constitutions represent the beginning of a process, not its final result. Thus, under constraining political conditions, a constitution should be constructed in an ambivalent enough way to facilitate, rather than obstruct, further political development.

Indeed history supported Collins' predictions. The constitution's symbolic and actual ambivalence enabled the political arena to play the decisive role in determining Ireland's future. Eventually, the formal statements about Irish independence and sovereignty included in the constitution became a political reality. Less than a year after the constitution was enacted, in September 1923, the Irish Free State joined the League of Nations as a fully sovereign state. Within a decade and a half of its enactment, all the monarchic symbolism in the constitution was eliminated.

The incrementalist approach

India, Ireland and Israel, all deeply divided societies, used incrementalist strategies to address foundational issues which arose in the process of drafting their constitutions. Instead of making unequivocal choices, the framers in India, Ireland and Israel transferred controversial decisions from the constitutional to the political arena. In each case, the type of strategy used was driven by distinct political realities. In the case of Israel, the inability to achieve agreement resulted in a decision to defer drafting the constitution to a later time. In India, a constitution was drafted, but it included provisions that explicitly deferred controversial decisions. In Ireland, it was not even possible to agree to defer decisions, as all sides insisted on inclusion of certain constitutional provisions. As a result, the Irish constitution was an ambivalent document, incorporating contradictory clauses that lent themselves to divergent interpretations.

Despite the differences between them, all three strategies have in common an incrementalist approach to constitution-making. When institutional issues were at stake, decisions were clear, firm and mostly majoritarian. For example, the constitutions (or in the case of Israel, the Basic Laws) were explicit and direct regarding the structure of government and regulation of power. By contrast, an incrementalist approach was adopted by the framers in order to circumvent dangerous conflicts over foundational issues, such as the relations between religion and state or the definition of national identity. This approach deviates from the common perception of constitution-making in four principal respects:

1 Non-majoritarianism

Despite the differences in the nuances of the debates, in all three cases the drafters recognised that majoritarianism was limited in its ability to resolve

disputes over the most fundamental norms and ultimate goals of the state. Under such conflictual conditions, the framers acknowledged, constitutional decision-making should not rely on majoritarian but rather on consensual methods.

Two arguments were raised against majoritarian decision-making during the Israeli and Indian constitutional debates – a pragmatic and a consensual argument. Acknowledging the zealousness with which the competing positions were held, the pragmatic argument against majority-vote rested on the assumption that any imposition of majoritarian decision on the minorities would result in unavoidable exacerbation of the conflict and destabilisation of the democratic order (Knesset Records 1950: 812; India's *Constituent Assembly Debates* (CAD) *CAD* vol. IX: 1315). The consensual argument was that a legitimate constitution should rest on wide popular support for the ideals and norms entrenched in the document and not merely the majority's opinion or interest (Knesset Records 1950: 1267; *CAD* vol. VII: 543).

In Ireland, the debate over majoritarianism as a basis for constitution-making was different since it was intertwined with the conflict over the Anglo-Irish Treaty (Bourke 2003).

Ultimately, in all three cases, the framers recognised that democracy cannot exist as only majority rule, and that decisions over the very definition of the collectivity, its ultimate values and commitments, should rest on a wide consensus. When a wide consensus does not exist at the time of constitutional drafting, a longer timeframe is required for a gradual formulation of national identity.

2 Non-revolutionary conception of constitution-making

By deferring controversial choices to future political institutions, the framers broke the link between constitutions and revolutions. They introduced an innovative understanding of the relationship between constitutions and time, attempting to rein in the radical change usually associated with a moment of constitutional adoption.

The framers in Ireland, Israel and India addressed the question of the pace of constitutional construction directly and explicitly. The issue at stake was not merely that of the optimal timing for the enactment of a constitution under conditions of intense fragmentation. More accurately, the dispute was over the question of whether the constitution represents a revolutionary moment or rather marks the beginning of an evolutionary process, linked to gradual social and political change. The framers in all three cases adopted an incrementalist and gradual, rather than a revolutionary and radical, perception of constitutional emergence. Not a 'once in two millennia opportunity' but a 'stepping stone'. Not 'forcing the issue' at this 'time of fermentation' (Knesset Records 1950; 736, 742), but waiting patiently for the desired conditions to evolve (Knesset Records 1950: 1277; *CAD* vol. IX: 1457), proceeding 'not with haste but with wisdom' (*CAD* vol. VII: 543.). The introduction of a longer-term perspective into the equation of constitution-making allowed deeply divided

societies to defer controversial decisions regarding the foundational elements of their constitutions to future political institutions.

3 We the divided people: representing the existing disagreements

The incrementalist constitutional approach overcomes the difficulties of writing a constitution under conditions of deep internal division over the character of the state by embracing the competing visions and beliefs of the various factions. Instead of resolving the tensions, the incrementalist constitution encompasses all sides of the conflict. Instead of ending the dispute over the ultimate goals and underlying commitments of the state by a clear-cut decision, incrementalist constitutional arrangements contain the contradictory perspectives and principles, deferring their slow and gradual resolution to the future.

Meanwhile, by embracing the competing visions of the state, the incrementalist constitution maintains the general rule regarding the constitution's foundational role: constitutions do not merely establish the structure of governmental institutions but also serve as the charter of the polity's identity. To be regarded as legitimate in the eyes of the public, constitutions are expected to reflect a societal consensus regarding the ultimate goals and underlying principles of the state. This foundational role of the constitution is easily achieved in nation-states, where 'we the people' represents the national or cultural commonalities of a homogeneous population. Similarly, in liberal multi-national or multicultural states, a procedural constitution expresses the shared commitment of 'we' the citizenry to the principles of political liberalism. Short of neither the 'thick' nor the 'thin' type of shared identity, one may question what kind of national consensus such a constitution represents.

The Israeli, Indian and Irish constitutions have illustrated that the general rule regarding the constitution's foundational aspect remains valid even in contexts of intense ideational schisms: constitutions adopted by deeply divided societies indeed reflect the identity of 'the people' who wrote the constitution, just as in any other case. They do so by simply representing the existing identity of 'the people' at time of constitution-making, which is a *divided identity*.

We learn that complex and segmented societies may adopt complex and segmented constitutions. Where there are no shared norms and values, the accommodational incrementalist constitution represents the very minimal common denominator that can guarantee popular support in the government: 'we the divided people' agree over the fact that the polity is polarised, and the core issues around which the disagreements revolve.

4 Transferring decisions to the political sphere

By refraining from making unequivocal choices between the competing visions of the state, the incrementalist constitutional arrangements transfer

the decisions regarding foundational issues into the hands of future political institutions. In other words, the framers in deeply divided societies export the divisive issues from the constitutional arena back into the realm of ordinary politics.

The deferral of controversial issues from the constitution-drafting moment by no means implies the perpetual repression of divisive topics in the postconstitution-making period. On the contrary, the framers of the incrementalist constitutions discussed here recognised the dangers of what Stephan Holmes terms 'gag-rules' in the realm of ordinary legislation (Holmes 1993: 56–8). They did not wish to narrow the political agenda, but only to avoid the entrenchment of unequivocal choices with regard to overly sensitive issues. Recognising that these issues require long-term public and political discussions, they channeled them into the ostensibly more flexible arena of ordinary parliamentary power. Yet one may wonder whether indeed such a deferral to future political deliberation enables greater flexibility.

Potential risks

The incrementalist approach may sometimes be necessary for a democratic constitution to be a viable possibility where unresolved foundational issues exist. However, there are several dangers inherent in using this approach in deeply divided societies. In the concluding section I will discuss three such potential risks.

1 Risk of potential over-rigidity

By refraining from making an entrenched decision on controversial ideational issues, the constitutional framers in Israel, India and Ireland might have believed that decisions on these issues were transferred to the more flexible arena of ordinary politics. During the constitutional debates, leaders argued that in the political sphere, choices would evolve gradually in accordance with the changing societal consensus. However, as a retrospective study of the Israeli and Indian constitutional arrangements reveals, while their framers believed they had exported disputed issues to the more flexible political arena, in fact they allowed the emergence of a material constitution, which in many ways appears to be more rigid than a formal constitution.

A standard criticism against consociational arrangements points to its tendency to build 'systemic constraints' to rapid societal change (Stepan 1986: 80). However, when accommodational arrangements are informal, the question of rigidity seems to be even more acute. The inability to enact a Bill of Rights in Israel as well as the failure to implement a Uniform Civil Code in India over half a century after their first constitutional debates reveals the inherent rigidity that can result from the incrementalist approach. Similarly,

in Ireland, the division of the island became a determined fact after independence.

This problem raises an interesting question with regard to the rigidity of material constitutions, which, unlike formal ones, do not include clear mechanisms of amendment. Ambiguous constitutional formulations thus open the door for a material entrenchment of the status quo. The lack of formal procedure for its alteration can result in an entrenched conservatism.

2 Potential non-liberal consequences

Another difficulty inherent to incrementalist constitutions is that posed to liberal principles. Ambiguous constitutional provisions, particularly in the religious sphere, may compromise the liberal values and basic rights which constitutions are supposed to protect. This is particularly unfortunate from a feminist point of view. Accommodational constitutions that protect religious and cultural traditions tend to infringe upon women's fundamental rights and legal personhood.

In India, the non-justiciability of the Uniform Civil Code and the decision not to apply it to all religious communities meant that issues of family law (such as marriage, divorce, maintenance, succession to property, inheritance, custody and adoption) remained in the hands of traditional – and often inegalitarian – religious authorities. Despite the constitutional mandate to secularise and universalise the family laws under Article 44, the state moved further away from this declared objective, and patriarchal and community interests superseded the rights of women and children (Agnes 2004: 95). In 1985, the *Shahbano* case concerning the status of secular personal law provoked a public, political and judicial controversy that continued for over two decades. The Supreme Court ruling in this case affirmed the rights of a divorced Muslim woman for maintenance, based on section 125 of the 1973 Code of Criminal Procedures. In addition, the judgment also called for the implementation of a Uniform Civil Code and commented upon Muslim Personal Law. The ruling was perceived by Islamic religious authorities as a Hindu attempt to impose Indian homogeneity to lead to the assimilation and destruction of Muslim identity. The decision triggered a national crisis. In an effort to pacify Muslim sentiments, the government introduced regressive legislation, which excluded divorced Muslim women from the purview of section 125 Cr.Pc. The Muslim Women (Protection of Rights on Divorce) Bill was passed in 1986, but its interpretation has remained among the more vigorous and divisive debates in contemporary Indian politics.

Similarly, in Israel, women are more likely to be discriminated against by the traditional patriarchal legal system. For example, Jewish law awards men the power to deny or grant their wives a divorce. Thereby, the courts prohibit thousands of Israeli women from remarrying and allow men to use the threat of withholding divorce to force sympathetic divorce terms or avoid payment of alimony (Raday, Shalev and Liban-Kooby 1995). Furthermore, the

existing religious legal arrangements violate the freedom *from* religion of those who define themselves as secular in Israel.[12] Hundreds of thousands of Israelis cannot legally marry or divorce due to the absence of a civil system for family law. For example, immigrants from the former Soviet Union, who are not considered Jews by the Halacha yet are not associated with any other religion, are defined as 'barred from marriage' by the Jewish rabbinical authorities (Shiffman 2001).

3 Polarising effect on inter-institutional relations

Political controversies over foundational issues, such as secular or religious personal law, demonstrate another danger entailed by ambiguous constitutional arrangements: their possible polarising effect on the relationship between the legislative and the judicial branches of government. The indecisiveness of a constitution on highly contentious issues may dangerously inflame the tensions between the various branches of government that are inherent to every democratic order. Parliamentary systems like those of Israel and India are characterised by a delicate balance of power between the Supreme Court, which tends to prefer the protection of individual rights, and the legislature, which is influenced by the political demands of various sectors of society. Increasing politicisation of the relations between these two branches as a result of constitutional ambiguity may result in direct conflict between them, thereby potentially undermining both their legitimacy and effectiveness. This problem was illustrated in the Indian reactionary legislation following the *Shahbano* case. Similarly, it was demonstrated in Israel in 1996 when the Knesset overruled the Court's decision in the *Mitrael* case and amended Basic Law: Freedom of Occupation (Lerner 2004: 237–57).

The extraordinary pressures that incrementalist constitutions place on governmental institutions can have formidable consequences in failed, failing or fragile states (Inbal and Lerner 2007). The relative success of Israel's, India's and Ireland's constitutional solutions rested on the fact that all three countries developed strong democratic governmental institutions. They constructed vibrant, professional legislatures and judicial systems that were able to absorb contentious issues without seriously threatening the stability of the government or the democratic order. However, in fragile or failing states, the court system and the parliament may be ill-equipped to deal with these issues. In these contexts, unresolved disputes can act like a live grenade, quickly tossed from the constitutional arena to the political or judicial domains, and from there to the explosion of renewed hostilities.

Conclusion

This article has attempted to contribute to the evolving field of constitutional design by widening the range of options for dealing with conflict over the

shared values and ultimate goals of the state. It has demonstrated how, by deferring controversial choices regarding the foundational aspects of the polity, an *incrementalist* constitutional approach enables deeply divided societies to either enact a written constitution or function with a material constitution.

Aiming at circumventing the potential destabilising effects of constitution-drafting in the context of deep internal disagreements, the constitutional architects in the three deeply divided societies studied here exported the task of defining the normative and symbolic basis of the state to future political institutions. Instead of conceiving the moment of constitution-making in revolutionary terms, they introduced elements of gradualism into the process. The constitutional arrangements they constructed included strict institutional and procedural provisions. Yet, when it came to contested foundational topics touching upon the definition of the polity, the framers preferred to postpone unequivocal choices. By deploying such constitutional strategies of avoidance, legal ambiguity and symbolic ambivalence, the drafters exported contentious decisions from the formally entrenched constitutional arena to the realm of ordinary politics.

The incrementalist approach of constitution-writing may facilitate the writing or re-writing of new democratic constitutions in other deeply divided societies, where intense disagreements exist over the shared norms and values that should underpin the state. The embrace of conflicting visions of the state within the constitution may enable these arrangements to ensure constitutional legitimacy based on broad consent.

Consent, a necessary condition for meaningful and legitimate constitutions, is achieved by giving the polity a sense of authorship and ownership, a sense that they are included in the constitutional *'We the People'*. In deeply divided societies, incrementalist constitutions achieve legitimacy and consent by representing the identity of *the people* as it really is – a *deeply divided* one. In this way, the incrementalist constitutional approach goes beyond both essentialist and proceduralist models of constitution – identity relations. On the one hand, the incrementalist constitution does not endeavor to present a homogenous unity and recognises the internal segmentation of the society. On the other hand, it does not attempt to 'privatise' issues of identity, and take them 'off the agenda' by ignoring them and expurgating them from the constitutional arena (Rawls 1996: 151). Rather, it acknowledges the internal tensions and uses ambiguous and vague language in an attempt to defer – not ignore – decisions regarding the fundamental norms and values underpinning the constitution.

Notes

1 Jon Elster refers to this period as the 'seventh wave of constitution writing' and includes in it the writing of the constitution of South Africa (Elster 1995).

2 The distinction between the foundational and the institutional aspects of the constitution is hardly a clear-cut one. Clearly the identity of the people affects the structure of the democratic institutions.

3 For the sake of simplicity, the attempted homogeneity reflected in the 'nation-state constitution' could be based on both 'imagined' national identity or on primordial ethnic origin.

4 Section 4 in the constitution of Denmark; Article 62 in the Constitution of Republic of Iceland; and Article 2(2) in the constitution of Norway. See Blaustein and Flanz 1985 (updated annually).

5 This required liberal precondition was acknowledged by Habermas (1996: 500).

6 Eight basic laws, enacted between 1958 and 1992, concern governmental issues, such as the Knesset, the government, the judiciary, the president, etc. In addition, one Basic Law determines that Jerusalem is the capital of Israel (1980), and two later Basic Laws concern fundamental rights: Human Dignity and Liberty and Freedom of Occupation (both adopted in 1992).

7 For critical discussion of Israeli citizenship, see Shafir and Peled (2002). In recent years Israeli-Palestinians have demanded greater participation in decision-making on the character of the Israeli collectivity and have published several constitutional proposals. For discussion of these proposals see Jamal (2008).

8 While only sixteen out of 120 Knesset Members represented religious parties, fifty MKs voted for the Harari Resolution, thirty-eight against, three were absent and sixteen abstained.

9 In comparison, other multi-lingual federations presented much less complicated problems. Pakistan and Switzerland have only three major languages, while in Canada there are only two. But the scope of the population also makes a difference. The Swiss population of six million is more or less similar to that of Kerala, India's smallest state. In addition, most of the Swiss cantons are mono-lingual. Therefore, the Swiss solution of giving all the major languages the status of official languages would have been impossible in India. Austin 1999: 269.

10 For comparison, in Sri Lanka the opposite decision of Sinhalese politicians that eliminated English as a link language for government posts, led to destructive consequences. It is commonly claimed that this decision was one of the choices 'that contributed to turning the non-issue of Tamil separatism in the 1940s into one of the world's most intractable and bloody conflicts'. Linz unpublished manuscript: 94.

11 In the words of the Irish legal scholar and author of the most important study of the Irish constitution, J. M. Kelly, 'while all branches of our law depend for their formal validity on the 1937 Constitution, this enactment was very largely a re-bottling of wine most of which was by then quite old and of familiar vintage' (referring to the 1922 constitution). Hogan and Whyte 2003: ix.

12 According to a January 2008 poll, fifty-one per cent of Jewish Israelis define themselves as secular, thirty per cent traditional, ten per cent religious and nine per cent orthodox. Ventura, Pipilov and Arian (2008).

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