

CHAPTER 4

THE INDIAN FOUNDING

a comparative perspective

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I. INTRODUCTION

THE making of the Indian Constitution offers a leading example of democratic constitution writing under conditions of deep ideational disagreement. The drafting process began in December 1946, seven months before Indian Independence, and ended with the enactment of the Constitution in January 1950. Despite grave challenges to the democratic nature of the process—beginning under conditions of limited sovereignty, partition of the country in the midst of the drafting process, great need for economic development, and immense internal diversity along ethnic, linguistic, religious, and socio-economic lines—the Indian Constituent Assembly managed to lay down the legal foundation for the largest and one of the most stable democracies in the world.

Indian society is characterised by immense religious, ethnic, linguistic, and social diversity. Before partition of British India, 20 per cent of India's Hindu-majority population were Muslim, while other religious minorities included Christians (2.5 per cent), Sikhs (almost 2 per cent), and Buddhists, Jains, and Parsis (together comprising about 2.5 per cent). Although they made up just 12 per cent of the national population after Independence, India's Muslims constituted the world's third largest Muslim community (after Indonesia and Pakistan). In addition, India is one of the world's most ethnically and linguistically diverse countries. At Independence, India was home to nearly twenty major languages, each of which was spoken by at least one million people. The total number of less represented languages and dialects exceeded 1,600. Hindi was spoken by no more than 40 per cent of the population.¹ In addition to this vast religious, cultural, and linguistic diversity, the Indian framers faced the challenge of incorporating under the Constitution the 562 Princely States, which for the most part had their own monarchic traditions.

How to forge a common national identity in the face of unparalleled social and cultural diversity was the great task that faced India's founding fathers. Following Independence and

¹ Census of India, *Paper No 1: Languages 1951 Census* (India [Republic] Census Commissioner 1954) 6–7.

the partition of the country, translating this goal into the legal language of constitutional formulations was one of the central challenges for the Indian Constitution drafters.

Exploring the making of the Indian Constitution from a comparative perspective, this chapter highlights some of the significant and innovative aspects of the drafting process. In particular, it focuses on the innovative strategies of constitutional incrementalism adopted by the Indian drafters, including the deferral of controversial decisions (eg, concerning Indian's national language), ambiguity (eg, with regard to religion) and non-justiciability (the Directive Principles of State Policy). These incrementalist strategies allowed the framers to reconcile the Indian public's deep disagreements regarding the religious, national, and linguistic identity of the State with the principles of democracy.

II. POST-COLONIAL/POST-WWII CONSTITUTION MAKING

Modern constitutions, it has been observed, tend to be written in waves.² Comparative accounts of constitutional transitions provide various forms of periodisation, usually clustering processes of constitution writing and rewriting around historical events and geopolitical trends.³ These observations have recently been supported by large-N empirical studies that show how regional and temporal clustering plays an important role in triggering constitutional transitions.⁴ Empirical research is still limited in discerning between cases where a constitutional transition in one country inspires constitutional reform in a neighbouring one, and other cases of geographical and temporal clusters which may be explained by simultaneous, yet independent, responses to a similar set of conditions.⁵ Nevertheless, a brief overview of the historical waves of constitutional transitions provides a comparative context to the drafting of the Indian Constitution, and highlights the constraints under which it occurred, as well as the innovative aspects of its process.

² Jon Elster, 'Forces and Mechanisms in the Constitution Making Process' (1995) 45 *Duke Law Journal* 364.

³ Elster (n 2); Bill Kissane and Nick Sitter, 'The Marriage of State and Nation in European Constitutions' (2010) 16(1) *Nations and Nationalism* 49; Tom Ginsburg, 'Introduction' in Tom Ginsburg (ed) *Comparative Constitutional Design* (Cambridge University Press 2013) 1–13.

⁴ Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) 134.

⁵ Geographical and temporal clustering by no means exhausts the factors that affect constitutional transitions. Other factors that have been documented or measured by recent comparative studies include, for example, regime change, interstate and intrastate conflicts, territorial change, economic crisis, foreign constitutional models, transnational legal and political trends, as well as factors internal to the constitutional document itself, such as its structure, length, or even specific provisions such as amendment rules and forms of government. For a few recent examples of this literature, see Ginsburg (n 3); Denis J Galligan and Mila Versteeg (eds) *Social and Political Foundations of Constitutions* (Cambridge University Press 2013); Elkins (n 4); Jennifer Widner, *Proceedings, Workshop on Constitution Building Processes* (Princeton University Press 2007).

The first wave of constitution writing is commonly attributed to the late-eighteenth-century drafting of the first modern constitutions in the American States, the United States (1787), France, and Poland (both in 1791). These constitutions are usually considered ‘revolutionary’,⁶ characterised by a liberal quest for representative and limited government.⁷ During the nineteenth century constitution making expanded, and included dozens of new constitutions written in Europe in the wake of the 1848 revolutions,⁸ as well as in the newly formed States in Latin America.⁹ The twentieth century has witnessed several waves of constitution making, following the two World Wars and the breakup of the colonial empires. In Europe, a wave of new constitutions occurred in the post-World-War-I newly created, or recreated States such as Poland and Czechoslovakia, or in defeated Germany (Weimer Constitution of 1919). In the 1940s, several new constitutions had been written in countries defeated in World War II, such as Japan, Austria, Italy, and Germany, while new constitutions had also been drafted under the emerging Soviet influence in Eastern and Central Europe. Across Africa and Asia, a large wave of new constitutions had been written during the 1940s–60s, accompanying the end of British and French colonial rule (see further elaboration below). The next wave of constitution making was connected with the third wave of democratisation, beginning in the 1970s with the drafting of new democratic constitutions in Greece, Portugal, and Spain. The perception of constitutions as an instrument for democratisation continued to characterise the wave of constitutional transitions in the 1990s, which followed the fall of communism in Eastern and Central Europe, as well as the end of Apartheid in South Africa. Regime change and post-conflict reconstruction was a central feature in the most recent wave of constitution writing in early-twenty-first-century Africa (eg, Kenya, South Sudan), Asia (eg, East Timor, Thailand), and the Middle East (eg, Iraq, Afghanistan, Egypt, Tunisia). Given the relatively participatory nature of the drafting process in these countries, many of them involved intensive disputes over core ideological questions concerning the shared norms and values that should underpin their State.

The Indian Constitution was one of the first among what is commonly termed the post-colonial wave of constitution drafting. By contrast to the revolutionary constitutions of preceding centuries, post-colonial post-World-War-I constitutions were generally written under conditions of limited sovereignty. In many cases, the constitution was the outcome of negotiation between representatives of the colonial government and nationalist movements.¹⁰ Colonial rulers typically intervened in appointing the local drafters or in determining procedures for decision making or ratification of the constitution. This was the case, for example, in 1945 Indonesia, where Japanese rulers appointed the members of the Drafting Committee, and in 1947 in Sri Lanka and in 1957 in Malaysia, where a (British) colonial

⁶ Claude Klein and Andras Sajó, ‘Constitution-Making: Process and Substance’ in Michel Rosenfeld and Andra Sajó (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 419–41.

⁷ Kissane and Sitter (n 3) 50.

⁸ Priscilla Robertson, *Revolutions of 1848* (Princeton University Press 1968).

⁹ For a chronology of constitution writing around the world, see <<http://comparativeconstitution-project.org/chronology/>>, accessed October 2015.

¹⁰ Goran Hyden and Denis Venter, ‘Making in Africa: Political and Theoretical Challenges’ in Goran Hyden and Denis Venter (eds) *Constitution-Making and Democratization in Africa* (Africa Institute of South Africa 2002) 5–6; Sunil Khilnani, Vikram Raghavan, and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013).

constitutional committee reviewed and revised the draft constitutions. Constitutions of the post-colonial wave were rarely the result of open deliberation by freely elected representatives of 'the people'. To a large extent, post-colonial governments were modelled closely on those of the former colonial powers. Moreover, many of the independent constitutions led to the establishment of authoritarian regimes, and imposing economic and social reforms, as well as national unity, through non-democratic means.

India differed from these characteristics of its contemporaries in two important respects. First, although the drafting of the Indian Constitution was initiated under conditions of limited sovereignty, it resulted in a constitution that was perceived to express a high degree of sovereignty, both internally and externally. Like those of Indonesia and Sri Lanka, the Indian process of constitution drafting began before Independence. In March 1946, a British Cabinet Mission to India published a plan for a general framework of the soon-to-be-independent government, including a specific plan for the structure of the Constituent Assembly and its decision-making rules.¹¹ During July 1946, the representatives of the Constituent Assembly were elected according to the Cabinet Mission's plan. When convened in December 1946, the assembly was criticised by many as representing a 'revolution by consent'.¹² As Gandhi put it, 'it is no use declaring somebody else's creation a sovereign body'.¹³ However, the transfer of governmental power from British to Indian hands in June 1947 led to the removal of the procedural constraints that had been imposed on the assembly under the British Cabinet Mission plan. For the next two and a half years, the Indian Constituent Assembly was stronger, more confident in its status, and more united around the leadership of the Congress Party, which had increased its dominance in the assembly.

The second difference lies in the outcome of the drafting process, namely India's success in establishing a democratic order despite deep internal divisions. Like many other non-Western post-colonial or post-imperial constitutions, the Indian Constitution was written under conditions of intense disagreements concerning the religious and national vision of the newly independent State, as well as a grave need for economic development. Under such circumstances, many governments did not allow open and free deliberation or consensus-based decision making in constitutional processes. In Indonesia, for example, a democratically elected Constituent Assembly, which debated the country's permanent constitution for two and a half years, was dissolved in 1959 by a Presidential decree, which reinstated Indonesia's 1945 Constitution and established the authoritarian system of 'guided democracy'.¹⁴

Similar to the national leadership in Indonesia, Sri Lanka, and other post-colonial or post-imperial divided societies (eg, Turkey), the Indian leadership perceived national unity and legal uniformity as a necessary condition for fostering social and economic modernisation. For Nehru, India's modernisation, industrialisation, and social reconstruction depended on

¹¹ Members of the Constituent Assembly were to be appointed by the provincial legislative assemblies, which were elected in 1946 under the Government of India Act 1935. Due to various tax, property, and educational requirements, it is estimated that only 15–28% of the Indian population participated in these elections. Shibani Kinkar Chaube, *Constituent Assembly of India: Springboard of Revolution* (2nd edn, Manohar Publishers & Distributors 2000) 45.

¹² Dhirendranath Sen, *Revolution by Consent?* (Saraswati Library 1947).

¹³ Cited in Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 2000) 7.

¹⁴ MC Ricklefs, *A History of Modern Indonesia Since 1200* (4th edn, Stanford University Press 2008).

a strong Union government with the capacity to implement the required national reforms. As he wrote during the years of the struggle for Independence, India's feudal land system, its social services, and education 'can be tackled only on a nationally planned basis without vested interests to obstruct the planning'.¹⁵ Yet, in contrast to Turkey and Sri Lanka, democracy was a key element in the constitutional vision held by the Indian framers. The Western model of a nation-state, based on democratic institutions elected by universal suffrage, was the model to which the Congress leadership looked. In Nehru's words, 'national unity and democracy' were the two doctrines on which the Congress Party was founded and stood most firmly.¹⁶ These principles were expressed already in pre-Independence constitutional drafts and proposals such as the 1928 Nehru Report, which defined the goal of the future constitution in terms of advancing India's unity through democratic institutions based on universal suffrage and expansive individual rights.¹⁷

After Independence the Congress Party controlled not only the Constituent Assembly, but also the government at both provincial and national levels, which made it easier for its leadership to incorporate into the Constitution elements of the party's vision for a democratic and united India. Nevertheless, partition did not resolve intercommunal tensions. Rather, it created a new national trauma and amplified the uncertainties and fears of minority groups over future decisions by a Hindu-majority government. Furthermore, alongside Nehru's multiculturalist vision of a diverse India, central leaders of the Congress Party expressed more conservative views.¹⁸

Thus, even after partition, one of the most hotly debated questions in the Constituent Assembly remained: what does it mean to be an Indian? And how should the Constitution facilitate political unity based on shared commitments and values in a society characterised by immense cultural, religious, and national diversity? As the following sections demonstrate, the Indian framers developed innovative constitutional strategies to address these concerns.

III. CONSTITUTION WRITING IN DIVIDED SOCIETIES

Constitution drafters in many multi-ethnic, multicultural, and multinational societies have tackled the challenge of forging constitutional unity amidst internal ethnic, religious, and linguistic diversity. Scholarship on comparative constitutional design has documented a broad range of alternative institutional mechanisms intended to enhance democracy and stability in the context of deep ideational conflicts. These include various forms of federalism, devolution, consociationalism, power sharing, a variety of electoral systems, and

¹⁵ Jawaharlal Nehru, *The Unity of India: Collected Writings 1937–1940* (L Drummond 1948).

¹⁶ Jawaharlal Nehru, *The Discovery of India* (Oxford University Press 1989) 384.

¹⁷ Report of the Committee appointed by the All India Conference to Determine the Principles of the Constitution for India, 1928, in Ravinder Kumar and Hari Dev Sharma (eds) *Selected Works of Motilal Nehru*, vol 6 (Vikas Publishing 1995) 27.

¹⁸ Christophe Jaffrelot, *The Hindu Nationalist Movement in India* (Columbia University Press 1996).

special group rights.¹⁹ Many of these conflict resolution mechanisms have been useful tools in mitigating clashes between identity groups mostly defined along ethnic lines, and have been adopted by many post-conflict and ethnically divided societies.²⁰

However, these institutional solutions appear applicable only under particular geographical or societal circumstances, or when the conflict mostly concerns the resource distribution of the allocation of power among identity groups. They often fail to address divisions over the shared vision of the State *as a whole*, over the common norms and values for the entire population. Federal solutions, for example, have been effective when the various ethnic, national, or linguistic groups were territorially concentrated, as is the case in Belgium, Switzerland, or Canada.²¹ Indeed, in India federalism has been proven to be a successful tool in addressing linguistic diversity, when provincial borders were redrawn according to linguistic identity lines in the decade following Independence. Yet, federal arrangements have been less useful when the populations in question are geographically dispersed, for example when the division is between competing perspectives regarding the religious, national, or even linguistic identity of the State in toto. In such cases, the conflict is often over the fundamental norms and values that should guide State policies for the entire population. This is the case, for example, in Muslim-majority countries such as Egypt, Tunisia, Indonesia, and Turkey, where society is divided between people who define themselves as secular-liberal Muslims and those who define themselves as religious-conservative Muslims. Similarly, and in contrast to common scholarly views, advocates of liberal constitutionalism often fail to mitigate intense ideational disagreements over the religious or national character of the entire State.²² When society is divided between competing perceptions regarding the shared norms and values, liberal constitutionalism is not perceived by all drafters as a neutral ground for future democratic deliberation on controversial issues. Rather, it represents one side in the conflict over the values of the State—the liberal side. This is the case, for example, in the conflict over religion–State relations in Israel. Unlike religious minorities in liberal countries (eg, the Amish in the United States), the Orthodox camp in Israel does not wish to merely enjoy legal exemptions or the protection of special group rights within a liberal constitutional framework. Rather, it seeks to impose its religious views on the State as a whole. A similar schism cuts across the Muslim–Hindu divide in India, where tensions exist between fundamentalist-religious camps and moderate-liberal camps in both religious groups. Moreover, under unstable conditions of intense internal conflicts, clear-cut constitutional decisions risk exacerbating the conflict, and may even lead to violence. The partition of British India is an excellent example of such a scenario.

After partition, the Indian drafters recognised the need for an innovative approach in light of their deep disagreements over the vision of the State. In various ideational debates,

¹⁹ For an overview of the literature, see John McGarry, Brendan O’Leary, and Richard Simeon, ‘Integration or Accommodation? The Enduring Debate in Conflict Regulation’ in Sujit Choudhry (ed) *Constitutional Design for Divided Societies: Integration Or Accommodation?* (Oxford University Press 2008) 41–88.

²⁰ For case studies, see Choudhry (n 19).

²¹ James Tully and Alain G Gagnon (eds) *Multinational Democracies* (Cambridge University Press 2001).

²² Nathan Brown, ‘Reason, Interest, Rationality, and Passion in Constitution Drafting’ (2008) 6(4) *Perspectives on Politics* 675.

the framers refrained from making unequivocal choices. Rather, they acknowledged that the gaps between rival perspectives were unbridgeable and addressed their difficulties by adopting an incrementalist approach based on creative use of constitutional language.

IV. STRATEGIES OF CONSTITUTIONAL INCREMENTALISM

Constitutional incrementalism allowed the Constituent Assembly to circumvent potentially explosive conflicts by shifting the burden of resolving—or at least further discussing—contentious debates to the new political institutions it created. The inclusion of incrementalist arrangements in the Constitution was meant to afford the political system greater flexibility for future decisions about controversial questions, for example concerning the unification of personal law or India's national language. Constitutional flexibility, in this context, does not refer to amendment rules or to the level of entrenchment or rigidity of the written constitutional provisions. Rather, flexibility relates to the degree to which the formal constitution limits the range of political possibilities to be decided by ordinary legislation. In other words, incrementalist constitutional formulations in the areas of religious, linguistic, or national identity defer controversial decisions on these divisive issues and thus avert fierce and even violent conflict. Further, in accommodating the competing views of 'the people', such formulations promote Consensual, rather than majoritarian, democracy.

Some observers have criticised such an incrementalist constitutional approach as an ideological compromise, or even a failure to achieve a more liberal constitution.²³ In contrast, this chapter contends that the permissive Indian Constitution should be viewed as a viable alternative to the paradigm of liberal constitutionalism, which dominates contemporary constitutional and political scholarship.²⁴ The alternative model presented by the Indian framers may facilitate the adoption of democratic constitutions in emerging democracies, where conflicts over national identity or religion–State relations are at the heart of the constitutional debate.

The rest of the chapter demonstrates how the Indian framers applied three incrementalist strategies: (a) deferral of controversial decisions about the national language; (b) use of ambiguous and vague constitutional formulations concerning personal law; and (c) the inclusion of non-justiciable provision in the Constitution (the Directive Principles of State Policy). The discussion below focuses on incrementalist constitutional arrangements adopted to address controversies concerning India's religious and linguistic identity, as well as the State's economic policy. However, it is important to note that in other discussions on the role of the Constitution as a vehicle for social reconstruction, the Indian drafters adopted a more restrictive approach. The reformist function of the Constitution was most notably expressed in the context of caste inequality, as BR Ambedkar, himself a member of the untouchable caste, pushed for the inclusion of radical provisions such as the abolishment

²³ Anuradha Dingwaney Needham and Rajeswari Sunder Rajan (eds) *The Crisis of Secularism in India* (Duke University Press 2007).

²⁴ Keith E Whittington, 'Constitutionalism' in Keith E Whittington, R Daniel Kelemen, and Georgy A Caldeira (eds) *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 281.

of untouchability. During the debate over the Uniform Civil Code, for example, a similarly reformist demand for the secularisation of all traditional personal law coincided with the nationalist objective of legal uniformity. However, while there was broad consensus in the assembly on the need to reduce caste inequality, there was considerable disagreement over the role of the Constitution as a vehicle for reform when it came to issues of religious or linguistic diversity. As far as these issues were concerned, using the legal powers of the Constitution to promote major social reform was more contentious, and many felt that it was necessary to wait for the gradual emergence of a broader consensus.

V. DEFERRAL

The constitutional provisions concerning the question of India's national language offer a clear example of the drafters' use of deferral as an incrementalist strategy.

The complexity of the language problem in India stems from the fact that nearly twenty major languages were spoken in India at the time of Independence.²⁵ Moreover, many of the major languages were mutually unintelligible and written in different scripts, grouped into the Dravidian languages in South India and the Indo-European (or Aryan) languages in the North of the subcontinent. Less than 40 per cent of the population spoke Hindi, the most widespread language in the sub continent. The only language commonly used throughout India for administrative and educational purposes was English. However, opposition to the language of the ruler had been at the heart of the struggle for national Independence, and it was unthinkable that the Constituent Assembly would agree to its adoption as India's primary language. As Nehru stated during the constitutional debates, 'no nation can become great on the basis of a foreign language.'²⁶

The two main factions in the assembly debate over the national language were the representatives of the Hindi-speaking areas, mostly from north-central India, and the representatives of non-Hindi-speaking regions, particularly from the south, as well as the moderate leaders of the Congress Party. The Hindi-speaking representatives demanded that Hindi be declared the national language and that it should replace English immediately.²⁷ They claimed that a multilingual society was incompatible with Indian unity. Seth Govind Das, a Congress representative of the Central Provinces and Berar, stated, 'we want one language and one script for the whole country. We do not want it to be said that there are two cultures here.'²⁸

Representatives of non-Hindi-speaking regions contested the necessity of national linguistic homogeneity. 'Not uniformity but unity in diversity', asserted Shri Shankarrao Deo from Bombay, who was the General Secretary of the Congress.²⁹

²⁵ In comparison, other multilingual federations presented much less complicated problems. Pakistan and Switzerland have only three major languages, while in Canada there are only two. On multilingual democracies, see Ugo M Amoretti and Nancy Bermeo (eds) *Federalism and Territorial Cleavages* (Johns Hopkins University Press 2004).

²⁶ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1410, 13 September 1949.

²⁷ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1328, 12 September 1949.

²⁸ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1328, 12 September 1949.

²⁹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1433, 14 September 1949.

The moderate Congress leaders, headed by Nehru himself, recognised the practical difficulties in adopting Hindi as the national language.³⁰ The majority of the population did not speak the language, and imposing Hindi on a non-Hindi-speaking, largely illiterate population was virtually impossible. It was even argued that Hindi lacked the appropriate modern vocabulary required to govern a modern State.³¹ During the assembly debate, Maulana Azad, the Muslim President of the Congress Party, and a Minister of Education in Nehru's government, stressed the central role of English as the *de facto* language of law and government.

This change [from English] should be ushered in only when a national language can be read and written in every part of the country and becomes mature enough for the expression of highly technical subjects . . . Languages are never made; they evolve. They are never given a shape; they shape themselves. You cannot shut the mouths of people by artificial locks. If you do that, you will fail. Your locks would drop down. The law of language is beyond your reach; you can legislate for every other thing but not for ordering its natural evolution. That takes its own course, and only through that course it would reach its culmination.³²

The dispute between extremists and moderates also touched upon the procedural question of how the decision on a national language should be reached. The proponents of Hindi demanded a simple majority decision, while its opponents emphasised the importance of a consensual, preferably unanimous, decision. Seth Govind Das represented the Hindi-speaking position:

We have accepted democracy and democracy can only function when majority opinion is honoured. If we differ on any issue, that can only be decided by votes. Whatever decision is arrived at the majority must be accepted by the minority respectfully and without any bitterness.³³

By contrast, SP Mookerjee (Christian Congress representative from Bengal, who later became the Governor of Bengal), pointed to the difficulty of imposing a majoritarian decision on the minority: 'If it is claimed by anyone that by passing an article in the Constitution of India one language is going to be accepted by all by a process of coercion, I say, Sir, that that will not be possible to achieve.'³⁴ Similarly, Prasad, the President of the Constituent Assembly, alerted the members to the tight link between consensus and the legitimacy of the Constitution:

Whatever decision is taken with regard to the question of language, it will have to be carried out by the country as a whole . . . The decision of the House should be acceptable to the country as a whole. Even if we succeed in getting a particular proposition passed by majority, if it does not meet with the approval of any considerable section of people in the country . . . the implementation of the Constitution will become a most difficult problem.³⁵

Ultimately, it was the pragmatic consensus-seeking approach that triumphed. On 14 September 1949, after three years of debate, the assembly overwhelmingly approved a compromise resolution, known as the Munshi–Ayyangar formula, which later became

³⁰ For a comprehensive study of Nehru's approach to India's linguistic conflicts, see Robert D King, *Nehru and the Language Politics of India* (Oxford University Press 1997).

³¹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1433, 14 September 1949.

³² *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1457, 14 September 1949.

³³ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1327, 12 September 1949.

³⁴ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1389, 13 September 1949.

³⁵ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1312, 12 September 1949.

Articles 434–51 of the Indian Constitution. Instead of declaring a ‘national language,’ Hindi was labelled the ‘official language of the Union,’³⁶ while English was to continue to be used ‘for all official purposes.’³⁷ It was decided that this arrangement would apply for a period of fifteen years, during which time Hindi was to be progressively introduced into official use. What would happen at the end of this interim period was left undetermined, with the Constitution providing for the establishment of a parliamentary committee to examine the issue in the future.³⁸ In addition, the Constitution recognised fourteen other languages for official use (listed in the Eighth Schedule of the Constitution). The provincial governments were permitted to choose one of the regional languages or English for the conduct of their internal affairs, while English (unless Parliament would replace it with Hindi) remained the language of inter-provincial communication.³⁹

The inability of the assembly to reach broad agreement on the language issue led the framers to postpone the contentious decision. In this way, the Constituent Assembly sustained the balance between its nationalist aspirations and their pragmatic realisation.⁴⁰ On the one hand, the Indian Constitution gave formal expression to the ideal of an Indian national language. On the other hand, the final decision on how to realise this ideal was deferred. The assembly recognised that such a fundamental choice regarding the identity of the State could not be made simply by drafting a constitutional provision. But as the issue could not be ignored, the assembly opted for an ambiguous formulation that avoided making a clear pronouncement and preserved the conflicting opinions of the members within the Constitution itself. In other words, their solution was to adopt an incrementalist strategy in the hope that the issue could be resolved in the future.

Fifteen years after the enactment of the Constitution, Hindi was still not widely used by the Union government. Following a series of violent riots in non-Hindi-speaking States in the 1960s, Parliament renounced the ideal of an Indian national language. In 1965, when the fifteen-year interim period prescribed by the Constitution elapsed, the government announced that English would remain the de facto formal language of India.⁴¹

VI. AMBIGUITY

Ambiguous constitutional formulations were adopted by the drafters to address one of the most intense conflicts in the Constituent Assembly: India’s religious identity. From the very beginning, the debate was twofold. It revolved around interreligious issues between

³⁶ Constitution of India 1950, art 343.

³⁷ Constitution of India 1950, art 343.

³⁸ Constitution of India 1950, art 343.

³⁹ A related debate, concerning the reorganisation of the provinces along linguistic border lines, was settled by Article 3, which provided that Parliament would be able to redraw state boundaries by a simple majority vote. In 1955, Parliament established a States Reorganisation Commission, and the boundaries of India’s States were eventually redrawn in conformity with linguistic lines. Paul R Brass, *Language, Religion and Politics in North India* (Cambridge University Press 1974); Juan L Linz, Alfred Stepan, and Yogendra Yadav, ‘Nation-State’ or ‘State-Nation’? *Comparative Reflections on Indian Democracy* (Johns Hopkins University Press 2011) ch 3.

⁴⁰ Sunil Khilnani, *The Idea of India* (Farrar, Straus and Giroux 1999) 175.

⁴¹ Brass (n 39) 123.

the Hindu majority and Muslim and other minorities, and around intra-religious issues regarding the question of interference in religious practice. What is India's identity and to what extent is it exclusively Hindu? Should the State intervene in the religious practices of either majority or minority religions that conflict with the basic principles of equality and liberty? The Constituent Assembly vigorously debated these questions. Personal law became a focal point for both the intra-religious and interreligious debates. At the intra-religious level, the Constituent Assembly debated whether Hindu family laws should be secularised by the State or maintain their traditional and often inegalitarian practices. While Nehru viewed the reform of Hindu traditional family laws as essential to India's development and modernisation, conservative hard-liners and Hindu fundamentalists within the Congress Party objected to such reforms.⁴² At the interreligious level, the assembly was harshly divided over the question of the Uniform Civil Code, namely whether personal law should be unified for all citizens, regardless of the individual's religious affiliation.⁴³

The debate over the Uniform Civil Code was among the most heated debates in the Constituent Assembly. The positions in the assembly were divided into two camps. On one side were members who wished to use the legal power and status of the Constitution to modify religious customs and advance secularisation and legal uniformity among all religious groups.⁴⁴ KM Munshi, for example, who later became the Minister of Food and Agriculture, called for the restriction of religion to the private sphere and the promotion of unity and societal integration on the basis of civic national identity.⁴⁵ On the other side were those who believed that a constitution should reflect the spirit of the nation as it currently was and should not impose deep social and cultural changes. Naziruddin Ahmad, a Muslim representative from West Bengal, expressed this view when he warned against radical constitutional provisions:

I have no doubt that a stage would come when the civil law would be uniform. But then that time has not yet come. We believe that the power that has been given to the state to make the Civil Code uniform is in advance of the time . . . What the British in 175 years failed to do or were afraid to do, what the Muslims in the course of 500 years refrained from doing, we should not give power to the state to do all at once. I submit, sir, that we should proceed not in haste but with caution, with experience, with statesmanship and with sympathy.⁴⁶

Ahmad supported uniformity in principle but argued against pervasive State interference in the internal affairs of religious communities. 'This is not a matter of mere idealism,' he stated. 'It is a question of stern reality which we must not refuse to face and I believe it will lead to a considerable amount of misunderstanding and resentment amongst the various sections of the country.'⁴⁷ Emphasising pragmatism, Ahmad indicated the difficulty the State would face 'at this stage of our society' in asking people to give up their conception of marriage,

⁴² Reba Som, 'Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?' (1994) 28 *Modern Asian Studies* 165.

⁴³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 540–52, 23 November 1948.

⁴⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 548–49, 23 November 1948.

⁴⁵ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 548, 23 November 1948.

⁴⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 542–43, 23 November 1948.

⁴⁷ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 543, 23 November 1948.

for example, which was associated with religious institutions in many communities. He called for patience: 'I submit that the interference with these matters should be gradual and must progress with the advance of time.'⁴⁸ Ahmad stressed the importance of obtaining the consent of the communities whose religious laws would be affected by the new code: 'The goal should be towards a Uniform Civil Code but it should be gradual and with the consent of the people concerned.'⁴⁹

Ultimately, the Constituent Assembly did not make clear-cut decisions on either the intra-religious or the interreligious debates. On the intra-religious front, it avoided the constitutionalisation of a Hindu Code and transferred decision to parliamentary legislation.⁵⁰ In the question of the Uniform Civil Code, in order to pacify India's Muslim minority, the assembly inserted an ambiguous formulation into the Constitution as part of the Directive Principles of State Policy, which were defined as non-justiciable.⁵¹ The drafters, who preferred an evolutionary rather than a revolutionary constitutional approach, passed the power to rule on the secular identity of the State back to the political arena, leaving future parliamentarians to decide whether and how to implement the recommendations set forth in the Constitution.⁵² Indeed, in the 1950s the legislature continued debating the Hindu Code and eventually split the law into four different pieces of legislation that were passed between 1955 and 1961, introducing reforms regarding issues such as marriage and divorce, inheritance laws, and adoption. By contrast, the Uniform Civil Code was never implemented. The result was the maintenance of a separate personal law system in India for each religious group and the implementation of only minor reforms in the traditional Muslim and Christian personal laws.⁵³

In addition, the Constitution is often criticised as including contradictory provisions concerning Indian religious/secular identity. For example, Article 25, which permits extensive State intervention in religious matters in the interest of social reform, conflicts with the principle of autonomy for religious institution which is one of the tenets of secularism. Similarly, alongside reformist provisions such as the abolition of the practice of untouchability,⁵⁴ the Constitution also includes recommendations for the prohibition of alcohol⁵⁵ and of cow slaughter,⁵⁶ which are 'indigenous' Hindu laws.

Yet the set of ambiguous and ambivalent provisions included in the Indian Constitution with regard to religion-State relations is valued by legal and political scholars, who claim that it should be seen as a successful attempt to craft a multidimensional system of values and principles corresponding to the intricate needs of Indian society.⁵⁷ According to Rajeev Bhargava's model of 'political secularism' or 'contextual secularism', the State is not

⁴⁸ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 542, 23 November 1948.

⁴⁹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 542, 23 November 1948.

⁵⁰ Som (n 42).

⁵¹ Constitution of India 1950, art 44: 'The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.'

⁵² Jaffrelet (n 18) 102–04.

⁵³ Narendra Subramanian, 'Making Family and Nation: Hindu Marriage Law in Early Postcolonial India' (2010) 69(3) *Journal of Asian Studies* 771–98.

⁵⁴ Constitution of India 1950, art 17.

⁵⁵ Constitution of India 1950, art 47.

⁵⁶ Constitution of India 1950, art 48.

⁵⁷ Marc Galanter, 'Secularism, East and West' in Rajeev Bhargava (ed) *Secularism and Its Critics* (Oxford: Oxford University Press 1998) 234–67.

separated from religion but rather keeps a ‘principled distance’ from all religions by providing equal protection and support to all religions and selectively interfering in religious practices that conflict with the State’s goals of promoting equality, liberty, and socioeconomic development.⁵⁸ While supporters of this approach have emphasised the advantage of such ambiguous arrangements for the purpose of maintaining stability and democracy at the foundational stage of the State,⁵⁹ its critics have pointed to the tendency of such arrangements to perpetuate—rather than mitigate—conflicts over issues of religion and secularism, which ultimately resulted in overburdening India’s political and judicial institutions.⁶⁰

VII. NON-JUSTICIABILITY

The Directive Principles of State Policy (Part IV of the Indian Constitution) is one of the most innovative aspects of the Indian Constitution. Most of the sixteen provisions included in the Directive Principles (Articles 36–51) concern social and economic issues, usually defined in terms of positive rights, demanding action by the State, as opposed to the negative individual rights that are included in the fundamental rights part of the Constitution.⁶¹ Inspired by Article 45 of Ireland’s 1937 Constitution, the provisions under the Directive Principles received a special status, defined as non-justiciable, namely these provisions are unenforceable by court.⁶²

During the discussions of the draft constitution, many in the Constituent Assembly criticised the Directive Principles as merely ‘pious expressions’ or ‘pious superfluities.’⁶³

⁵⁸ Rajeev Bhargava (ed), *Secularism and Its Critics* (Oxford University Press 1998); Rajeev Bhargava, ‘What is Indian Secularism and What is it For?’ (2002) 1(1) *India Review* 1.

⁵⁹ Gary Jacobsohn, *The Wheel of Law: India’s Secularism in Comparative Constitutional Perspective* (Princeton, NJ: Princeton University Press 2006). Robert L Hardgrave, ‘India: The Dilemmas of Diversity’ (1993) 4(4) *Journal of Democracy* 54.

⁶⁰ Needham and Rajan (n 23).

⁶¹ In addition, the Directive Principles included one provision that concerned a religious issue—art 44 on the Uniform Civil Code—as discussed above.

⁶² While both the Irish art 45 and the Indian Part IV are defined as non-justiciable and concern mainly social and economic issues, there are some significant differences between the two constitutional arrangements. First, the Irish Directives were included in one Article, compared with sixteen Articles in the Indian case, generally characterised by greater detail and specification. Second, the Irish Directives are defined in rather narrow terms, as ‘general guidance of the Oireachtas’, while in the Indian case the Directives are defined in art 37 in more foundational terms as ‘fundamental in the governance of the country.’ Third, in the Irish case a specific State organ is explicitly in charge of implementing the Directives: The Oireachtas (‘The application of those principles in the making of laws shall be the care of the Oireachtas exclusively’), while in the Indian case the duty to apply the principles included in the Directives are generally assigned to the State.

⁶³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 225, 5 November 1948 (Naziruddin Ahmad); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 473, 19 November 1948 (Kazi Syed Karimuddin); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 478, 19 November 1948 (KT Shah); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 539, 23 November 1948 (B Das).

Others argued that the provisions included in the Directive Principles were too vague,⁶⁴ or too abstract,⁶⁵ and that they were ‘inoperative’⁶⁶ or even simply ‘meaningless’, due to their unbinding character.⁶⁷ As one assembly member argued:

All the directive principles can be ignored by the state governments and there is no remedy for it. Even the President of the Union cannot do anything to see that the Directive Principles are observed. The Central Legislature cannot bring forward any motion for the Government which ignores these directive principles to be dismissed or some alternative being adopted.⁶⁸

While critics of the non-justiciable Directive Principles viewed them as either redundant or requiring greater enforceability mechanisms,⁶⁹ many others in the Constituent Assembly recognised the importance of Part IV as it was proposed by the Drafting Committee. Although lacking binding force, it was argued, the Directive Principles still represented the ‘essence of this constitution.’⁷⁰ Members of the assembly emphasised the educational role of the Directives, which, they believed, gave India a guiding vision: ‘They give us target, they place before us our aim and we shall do all that we can to have this aim satisfied.’⁷¹

In a speech defending the non-justiciable character of the Directive Principles, M Ananthasayanam Ayyangar contended that ‘we incorporated them in the Constitution itself because we attach importance to them.’⁷² At the same time, he recognised the need for wide political support in order to implement the social vision expressed by the Directive Principles and admitted the limited role of the Constitution, and of courts, in enforcing principles that do not receive wide popular support:

We cannot go on introducing various provisions here which any Government, if it is indifferent to public opinion, can ignore. It is not a court that can enforce these provisions or rights. It is the public opinion and the strength of public opinion that is behind a demand that can enforce these provisions. Once in four years elections will take place, and then it is open to the

⁶⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 244, 5 November 1948 (Kazi Syed Karimuddin).

⁶⁵ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 251, 5 November 1948 (PS Deshmukh).

⁶⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 491, 19 November 1948 (Hussain Imam).

⁶⁷ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 473, 19 November 1948 (Kazi Syed Karimuddin); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 418, 15 November 1948 (KT Shah): ‘The “Directives” are, in my opinion, the vaguest, loosest, thickest smoke-screen that could be drawn against the eyes of the people, and may be used to make them believe what the draftsmen never intended or meant perhaps.’

⁶⁸ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 491, 19 November 1948 (Hussain Imam).

⁶⁹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 305, 8 November 1948 (Begum Aizaz Rasul).

⁷⁰ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 277, 6 November 1948 (Thakur Das Bhargava).

⁷¹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 277, 6 November 1948 (Thakur Das Bhargava). See also speech by SV Krishnamurthy Rao, suggesting that the Directive Principles should appear immediately after the preamble, as they represent ‘the objective principles of the Union.’ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 382, 9 November 1948.

⁷² *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 475, 19 November 1948.

electorate not to send the very same persons who are indifferent to public opinion. That is the real sanction, and not the sanction of any court of law.⁷³

One of the most vocal advocates of non-justiciability was BR Ambedkar, the Chairman of the Drafting Committee. In several speeches throughout the debates on the Directive Principles, he argued that the Constitution was a legal tool for promoting social, economic, and religious reform. The Constitution, he stated, has two major roles. First, it has an institutional role in establishing the governmental mechanisms of the federal State: 'Our constitution as a piece of mechanism lays down what is called parliamentary democracy.'⁷⁴ Second, the Constitution has also a foundational and educational role in presenting the vision, and core norms and values, which should underpin the State. In Ambedkar's words: 'The constitution also wishes to lay down an ideal before those who would be forming the government.'⁷⁵ While the Directive Principles are thus included in the Constitution as an 'ideal' that any government should 'strive to bring about', the Directives remained non-justiciable in order to allow greater flexibility for future legislatures. As Ambedkar explains:

[W]e have deliberately introduced in the language that we have used in the Directive Principles something which is not fixed or rigid . . . It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing. It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of Government to be instituted through the various mechanisms provided in the Constitution, without any direction as to what our economic ideal, as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution.⁷⁶

VIII. CONCLUSION

The Indian Constitution has been criticised by many as lacking theoretical consistency and a coherent system of values and beliefs. The Constitution, it has been claimed, contains internal contradictions between various provisions which represent competing principles and perspectives, such as modernity and traditionalism, social reform and social conservatism, church-State separation versus State intervention in religious affairs, and liberalism and individual rights versus communitarianism and special group rights. More generally, from a liberal constitutionalist perspective, incrementalist, or permissive constitutional arrangements are seen as normatively inferior, as they allow for the endurance of conservative and non-egalitarian policies, particularly in the religious sphere. Moreover, by blurring the distinction between higher law-making and normal law-making, to use Bruce Ackerman's terminology,⁷⁷ ambiguous constitutional arrangements

⁷³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 475, 19 November 1948.

⁷⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 494, 19 November 1948.

⁷⁵ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 494, 19 November 1948.

⁷⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 494, 19 November 1948.

⁷⁷ Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991).

forgo the educative role that constitutions are usually expected to play at both the judicial and the societal levels.

However, the adoption of incrementalist constitutional formulations in India in areas such as personal law and national language should not be seen as a failure. Rather, it was a conscious strategy of the Constituent Assembly in light of contemporary social and political circumstances. BN Rau, the key legal advisor of the Constituent Assembly, expressed this view when he stated, 'we have to bear in mind that conditions in India are rapidly changing; the country is in a state of flux politically and economically; and the constitution should not be too rigid in its initial years.'⁷⁸ As such, the framers' choices reflect a constitutional approach that rejected a cohesive value system (such as the one proposed by the advocates of a uniform Indian identity) and refrained from imposing one specific set of values or traditions on minority cultural communities.

Incrementalist constitutional arrangements were adopted by constitutional drafters not only in India but also in other countries deeply divided along religious or national lines. The 1945 Constitution of Indonesia, for example, included a religious permissive formula known as *pancasila*, which defined the religious identity of the State in vague terms and included the principle of 'belief in God' without specifying any particular religion. Similarly, in Israel, the decision to refrain from drafting a formal constitution in 1950—which was repeated in the early 2000s—may be seen as a type of an informal permissive constitution, allowing future politicians to define State identity.⁷⁹ Most recently, ambiguous constitutional arrangements were adopted concerning issues of religious identity and gender equality in the new Constitution of Tunisia.⁸⁰

Such incrementalist constitutional arrangements reflect their authors' understanding of the need for a consensus-based approach to questions of national identity and the State's underlying commitments. The debates in all these cases demonstrated the framers' realisation that in the context of a deeply fragmented polity, the expectation that the Constitution could provide a sense of unity or common identity based on clear-cut formulations was unrealistic. As this chapter illustrates, the Indian Constitution preserved within itself the competing beliefs and values of the various factions that vied to leave an imprint on the formal document. It demonstrates, in sum, how complex and segmented societies may adopt complex and segmented constitutions. In other words, the constitution of a deeply divided society may end up reflecting the conflicted identity of 'the people' in whose name it is written. While the consequences of constitutional incrementalism continue to stir public, political, and legal debates, the innovative model developed by the Indian framers should be considered a potential solution for contemporary and future constitutional debates in societies deeply divided over their national, religious, or cultural vision.

⁷⁸ BN Rau, *India's Constitution in the Making* (Orient Longman 1960) 360–66.

⁷⁹ Hanna Lerner, 'Permissive Constitutions, Democracy and Religious Freedom in India, Indonesia, Israel and Turkey' (2013) 65(4) *World Politics* 609.

⁸⁰ Nadia Marzouki, 'Dancing by the Cliff: Constitution Writing in Post-Revolutionary Tunisia 2011–2014' in Asli Bali and Hanna Lerner (eds) *Constitution Writing, Religion and Democracy* (Cambridge University Press, forthcoming).