

# Tulsa Law Review

---

Volume 48 | Number 2

---

Winter 2012

## Revolution or Evolution: The Challenges of Constitutional Design reviewing Hana Lerner, *Making Constitutions in Deeply Divided Societies*

Gary Jeffrey Jacobsohn

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Gary J. Jacobsohn, *Revolution or Evolution: The Challenges of Constitutional Design reviewing Hana Lerner, Making Constitutions in Deeply Divided Societies*, 48 *Tulsa L. Rev.* 235 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol48/iss2/8>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# REVOLUTION OR EVOLUTION: THE CHALLENGES OF CONSTITUTIONAL DESIGN

Gary Jeffrey Jacobsohn\*

HANNA LERNER, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* (2011). Pp. 262. Hardcover. \$76.60.

People rely on constitutions to order change. Such reliance can mean one of two things — or both. In the first meaning, the rules and principles that make up a constitution's content are used to influence the character of the changes that occur within a society committed to the rule of law. If the constitution is working well, then changes that flow from the choices made by individuals, groups, and institutions will be orderly, which is to say in conformity with the procedures set out in the governing document. In the second meaning, the constitution is not only committed to ensuring that change occurs in an orderly legal manner, but that the substance of the change is compatible with the document's aspirational content. Thus, constitutions may be viewed as instruments to order change in the sense of prescribing both type and degree of transformation in accordance with directives enshrined in key textual provisions.

Yet, however much they may wish to rely on it, people's confidence in the efficacy — or indeed the very existence — of this second type of constitutional ordering will not always be lofty. If the condition they find themselves in is one of profound discord as to the things that matter most, then their constitution may be unable to satisfy their yearning for purposeful direction. If the circumstance of deep division accompanies the moment of constitutional founding, then a decision to entrench an aspirational agenda within the folds of the new foundational document could prove to be counter-productive. It could further exacerbate the existing schisms to an altogether horrendous consequence. One possible consequence is that the people's reliance on the first understanding of constitutional order would be rendered problematic as the struggles over questions of identity and purpose would diminish the prospects for detached and dispassionate application of governing rules.

It is for this reason that constitutional scholars and political scientists must address these issues. How can deeply divided societies achieve constitutional success? What approach to constitutional design is likely to yield results that are not doomed by the toxic politics of intense disputation over regime identity? Or, as Hanna Lerner asks in her

---

\* H. Malcolm Macdonald Chair in Constitutional and Comparative Law, University of Texas at Austin.

insightful and significant book on this subject, “[h]ow can a constitution be drafted, . . . when there is no consensus on the foundational framework that the constitution is expected to represent?”<sup>1</sup>

Lerner’s answer suggests that by “reconceptualizing the moment of constitution-making [i]nstead of perceiving it as a moment of revolutionary transformation, elements of gradualism may be introduced into the constitution-making process.”<sup>2</sup> She asks us to look closely at “the relationship between constitution-making and time: whether the constitution represents a revolutionary moment or rather marks a beginning of an evolutionary process, linked to gradual social and political change.”<sup>3</sup> This is a profoundly interesting question, and in the pages to follow I want to consider it, both in relation to the specific argument she makes with respect to the challenge of constitution-making and in relation to the broader issue of how we might understand the phenomenon of constitutional change.

### I. THE INCREMENTALIST ALTERNATIVE

Any doubts one might have about the magnitude and pervasiveness of the problem represented by polarization over a polity’s fundamental principles and norms are likely to dissipate with even a casual acquaintance with contemporary developments pertaining to constitutional transitions and construction. Perhaps the most telling cases are to be found in the Middle East — Exhibit A: Egypt — but less familiar venues also offer vivid examples of the immense obstacles to the achievement of a constitutional settlement posed by the existence of alternative political visions of what ought to be. For example, Nepal’s Interim Constitution of 2007 has a Preamble that promises a permanent constitution that will “[i]nstitutionalize the achievements of the revolution.”<sup>4</sup> Yet the dissolution in May 2012 of Nepal’s Constituent Assembly, an event precipitated by intense division over constitutive questions concerning ethnicity, has stalled that country’s transition from monarchy to constitutional republicanism.<sup>5</sup> According to the Prime Minister, “[p]olitical consensus is still needed to move ahead.”<sup>6</sup>

Can one move ahead, however, in the absence of consensus? At the core of Hanna Lerner’s book is an affirmative response to this query, one that discerns in the various incrementalist solutions prominently adopted in Israel, India, and Ireland — an approach that addresses the daunting challenge of framing a governing document for a society with minimally shared norms and values. “The incrementalist constitutional toolbox include[s] such strategies as avoiding clear-cut decisions, using ambiguous legal language, and inserting internally contradictory provisions into the constitution.”<sup>7</sup>

---

1. HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 6 (2011).

2. *Id.* at 39.

3. *Id.* at 198.

4. INTERIM CONST. OF NEPAL, 2063 (2007), pmbi.

5. Kiran Chapagain & Jim Yardley, *Legislature in Nepal Disbands in Failure*, N.Y. TIMES, May 28, 2012, at A4.

6. *Id.*

7. LERNER, *supra* note 1, at 7.

Accepting the competing visions of the state as impediments to the attainment of workable constitutional arrangements, the approach does not ignore them or choose to minimize their significance. Rather, it embraces them, for to do otherwise, so the argument goes, would be to wrongly disregard the identity of the people at the time of constitutional drafting, a devastating — perhaps fatal — mistake given the divided nature of that identity.

Indeed, the issue of identity is at the center of Lerner's treatment of these questions. As vigorously contested as it is in the countries she writes about, "any unequivocal choice regarding the identity of the state could have potentially destabilizing effects."<sup>8</sup> She conceptualizes the identity dilemma in light of "the opposing constitutional views of Carl Schmitt and Jürgen Habermas,"<sup>9</sup> the first envisioning the constitution as the manifestation of a unified political will, with its enactment representing confirmation of the people's thickly embodied constituent power.<sup>10</sup> In contrast with this essentialist view, the second, more proceduralist account re-focuses the relevant identity issue from a culturally or ethnically homogeneous people to individuals collectively resolving political issues on the basis of a consensus, respecting decision-making rules and principles. To achieve the triumph of constitutionalism, this "'thin' civic identity,"<sup>11</sup> otherwise known as constitutional patriotism, exalts democratic procedures over cultural attachments.

For Lerner, a deeply divided society does not conform to one or the other of these models. "[I]deological rifts . . . prevent the emergence of the pre-constitutional consensus that is necessary for the crafting of either of the two paradigms of constitutions."<sup>12</sup> Her "third paradigm"<sup>13</sup> — the incrementalist approach<sup>14</sup> — is premised upon the idea that where the identity of the nation is an impossibly vexed and fraught question, constitutions should not seek to resolve it through their very enactment.<sup>15</sup> Instead, these creative moments "may be seen as one stage in a long-term evolutionary process of collective redefinition."<sup>16</sup> As her three case studies reveal, there are various strategies through which this process might proceed, but they all embody the same basic idea: constitution-drafters should avoid unequivocal choices about foundational issues, preferring a transference of the most divisive identity-related issues from the constitutional to the political arena.

Lerner's depiction of these incrementalist strategies lies at the heart of her book, and it is done exceedingly well, making insightful connections between the special characteristics of her three cases and the constitutional choices made in each instance. What she accentuates, however, in relation to deeply divided societies is actually a rather

8. *Id.* at 10.

9. *Id.* at 19.

10. *Id.* at 19–29.

11. *Id.* at 23–24 n.33.

12. *Id.* at 26.

13. *Id.* at 29.

14. *Id.* at 39.

15. *Id.* at 6.

16. *Id.* at 39.

common phenomenon. As Rosalind Dixon and Tom Ginsburg have argued, “constitutional drafters often face constraints that cause them to leave things ‘undecided’ — or to defer decision-making on certain constitutional issues to the future.”<sup>17</sup> Frequently they do this through specific language — with so-called “by law” clauses<sup>18</sup> — and sometimes in the less explicit ways elaborated upon by Lerner. For a variety of reasons, these designers choose not to bind their successors, occasionally because the stakes are very high; but the strategy of deferral may also commend itself in instances where much less is at stake. Indeed, Dixon and Ginsburg demonstrate that there is “a positive relationship between constitutional deferral and endurance,” even if — echoing a concern smartly elaborated by Lerner — it can also lead to the failure by political and judicial actors to decide key constitutional questions.<sup>19</sup> This is a failure that can express itself through a diminution in support for the existing constitutional order.<sup>20</sup> Or as Lerner puts it, “incrementalist constitutional formulations open the door to a material entrenchment of the status quo, and, consequentially, to entrenched conservatism.”<sup>21</sup>

If, then, we place the high stakes cases of constitutional deferral within a broader context of deliberate transference of constitutive issues to the political arena, the identity question may be viewed more expansively. As I have argued elsewhere, disharmony — within the constitutional document and between it and the surrounding social order — is endemic to the constitutional condition and is the engine behind the ongoing development and refinement of constitutional identity.<sup>22</sup> It generates a dialogical process which involves multiple interactions over time among multiple political actors, all of which contribute to an incremental accretion of constitutional meaning. In this regard, Lerner provides one of the best accounts we have of the Israeli First Knesset’s postponement of constitution-making — a postponement partially in response to the unresolved contradiction in the nation’s Declaration of Independence between the Particularist (the commitment to a Jewish state) and Universalist (the commitment to a liberal democratic polity) filaments in the existent constitutional constellation.<sup>23</sup> This “strategy of avoidance”<sup>24</sup> was replicated in the 1992 adoption of two important Basic Laws, whose ambiguous language followed the same path of compromise adopted by the First Knesset.<sup>25</sup> Upholding “the values . . . of Israel as a Jewish and democratic state,” as is required under these Basic Laws, entails multiple dialogic interactions, with, as Ran Hirschl has argued, the Supreme Court serving as the main (but not exclusive) recipient “of core collective identity questions.”<sup>26</sup>

---

17. Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. DESIGN 636, 636 (2011).

18. *Id.*

19. *Id.* at 648.

20. *Id.* at 648–50.

21. LERNER, *supra* note 1, at 210.

22. GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY (2010).

23. LERNER, *supra* note 1, at 51–108.

24. *Id.* at 51.

25. *See id.* at 80.

26. Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1836, 1858 (2004).

The Israeli case is Lerner's most powerful instance of illustrating the "third paradigm." The disharmony internal to a constitutional text will not ordinarily be as prominent as it is in Israel. In many polities its existence will be deftly obscured in the mists of language of compromise authored by determined constitution-makers. But for the comparative constitutional theorist, Israel's evolving formal constitution only renders it more transparent than elsewhere, which is a process that is unusual in that nation mainly for the quality of its translucence. The same dynamic, however, is in place — if in less bold relief — wherever competing commitments or aspirations internal to a constitution engage each other while concurrently being deployed in a dialectical relationship with energized forces in the larger social order. This is, in fact, likely to be the case wherever we look, with the development of constitutional identity varying to the extent that internal and external disharmonies are weighted differently from country to country. In other words, the constitutional disharmony present in the most intensely divided societies — where strong disharmony complicates the establishment and ascertainment of a constitutional identity — only highlights the workings of a political dynamic that is present in all regimes. The actual playing out of this dynamic will of course vary considerably in accordance with the intensity and configuration of disharmonic constitutional politics in different places, but this variation ought not to obscure a fundamental ubiquity in the unfolding of constitutional development in regimes of disparate character. Thus, we find in societies less rifted than those we normally associate with the dysfunctional politics of deep division that the manner in which constitutional identity evolves is in its essentials consistent with polities of the latter type. In particular, the dialogical engagement of the judiciary with other institutional actors is common in the determination of this identity.

The Indian example, which, unlike Israel, involves not only a formal written document but the world's longest, is another exemplar of the incrementalist thesis. Here, as Lerner painstakingly details, the avoidance of difficult choices was channeled into a strategy of "constructive ambiguity."<sup>27</sup> Constitutional mechanisms were created to avoid "the hard choice between the inclusivist and exclusivist perceptions of India's religious identity."<sup>28</sup> In contrast with the Israelis, India's framers embraced disharmony and incorporated it directly into the constitution so as to ensure that core issues of identity would be resolved at some time in the future after further contestation and consideration in the political domain.

Appropriately, the principal focus is on the Constituent Assembly's decision to address the matter of a uniform civil code in its directive principles section, which included provisions that were non-justiciable and thus enforceable only when circumstances might render such implementation politically propitious. "The Assembly transferred the decision regarding the secular identity of the state from the legal back to the political arena, leaving the decision on whether and how to implement its recommendation to future parliamentarians."<sup>29</sup> This determination to deny entrenchment

---

27. See LERNER, *supra* note 1, at 109–51.

28. *Id.* at 140.

29. *Id.* at 142.

to an extremely sensitive area of vital concern to both the Hindu majority and the many minorities in the newly independent nation does indeed advance Lerner's "third paradigm" argument, but it may also be seen as somewhat less significant than might be suggested by this categorization. A different take on this decision — one that I have pursued elsewhere<sup>30</sup> — holds that, unlike in Israel, the essential secular identity of the state represented a fairly unambiguous founding commitment, even if the details concerning it required more extensive consideration and refinement. If one scrutinizes, for example, how the debate over the uniform civil code has unfolded, it is revealing that both sides of the dispute have adopted and/or appropriated the discourse of secularism associated with the more inclusive ameliorative view that was largely ascendant at the Assembly.

Again, the perfectly harmonious constitutional settlement is a theoretical possibility, not a practical one. This leaves a broad spectrum of disharmony upon which a nation's constitutional condition can be situated. The degree of irresolution prevailing in any given instance will determine the extent of, and approach to, the deferral of constitutional questions to post-foundational ordinary politics. Along such a spectrum, Israel is surely the most deeply divided polity with regard to questions of constitutional identity, with India somewhat less so, and Ireland even less than India. The variety that Lerner so ably depicts under the rubric of design incrementalism corresponds to the character and severity of the division associated with each of the polities under consideration. For comparative constitutional scholars, the challenge posed by her work is to match up the question of design strategy with the degree of division manifest in any given framing context.

## II. THE REVOLUTION QUESTION

In delineating the incrementalist approach, Lerner makes a related claim concerning the significance of the transformations embodied in the activity of constitution-making. She maintains that the revolutionary rhetoric that often accompanies constitutional foundings is seriously miscast, particularly for the deeply divided societies discussed in her book.

By deferring controversial choices to future political institutions, the incrementalist constitutional arrangements broke the link so common in modern politics between constitution and revolution . . . [I]nstead of seeing the making of the constitution as a moment of radical transformation, the framers [in Israel, India, and Ireland] preferred to view the process . . . as one of gradual adjustment.<sup>31</sup>

Rarely is the debate over the revolutionary nature of constitutional change as explicit as it was in Ireland in 1922. The Constitution for the Irish Free State was adopted

---

30. See GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* (2003).

31. LERNER, *supra* note 1, at 194–95.

in the midst of a bloody civil war, involving a process resembling the Israeli and Indian cases in the intense polarization that prevailed with respect to vital questions of identity, but played out differently because of the impositions of an external power — Great Britain — in the constitutional affirmation of Irish independence.<sup>32</sup> That looming presence configured the deep divisions over constitutional framing, resulting in a document featuring “symbolic ambivalence”<sup>33</sup> in provisions concerning the meaning of Irish nationalism and sovereignty.<sup>34</sup> As Lerner tells it, the opponents of the proposed constitution viewed the moment of constitutional creation as an occasion for revolutionary change, whereas the constitution’s supporters argued for an incremental approach that accepted the continuing role of Great Britain in Irish affairs as an imperfection that would be put on the path of gradual disappearance.<sup>35</sup> A document that included both an acknowledgement of the British monarch as the head of state and a provision affirming the doctrine of popular sovereignty — that all governing power is derived from the people of Ireland — was surely one whose revolutionary significance was very much shrouded in “symbolic ambivalence.” In Israel and India, too, the new departures in constitutional experience could be cast in very different ways. The proponents of an immediate drafting of an Israeli constitution viewed such a document as a salutary revolutionary instrument, whereas the opponents, who ultimately prevailed with their insistence on an accretion of Basic Laws, called for “evolution not revolution.”<sup>36</sup> Similarly, in India the role of the constitution as an instrument of social reconstruction was arguably denuded of its revolutionary significance by all of the compromises required to adopt it, including the aforementioned treatment of a uniform civil code.<sup>37</sup> The demands associated with religious, ethnic, and linguistic diversity were such as to make gradualism and consensus-building the watchwords of constitutional meaning and development. In all three instances, “the dispute was between competing perceptions of the relationship between constitution-making and time: whether the constitution represents a revolutionary movement or rather marks a beginning of an evolutionary process, linked to gradual social and political change.”<sup>38</sup>

There may, however, be a third possibility, which is that a constitution can be both a revolutionary moment *and* the commencement of measured and continuing change. Lerner’s either-or representation is understandable as a way of characterizing the choice from the perspective of the political actors involved in the actual debates over constitutional design. Yet, from an external perspective, the distinction between revolution and evolution is not so easy to delineate. As Bruce Ackerman has noted, “[revolution is] one of the slipperiest words in the modern political vocabulary.”<sup>39</sup> Increasingly, though, it is one that has achieved a certain ubiquity as applied to

---

32. See generally JACOBSON, *supra* note 22.

33. LERNER, *supra* note 1, at 152.

34. *Id.* at 172–80.

35. *Id.* at 182–84.

36. *Id.* at 199 (citation omitted).

37. *Id.* at 135–42.

38. *Id.* at 198.

39. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 201 (1991).



constitutional matters. Thus, the terminology of revolution is frequently used to describe significant changes in the constitutional predicaments of polities of widely disparate circumstance.

There is a discernible common thread in these applications that can be formulated quite simply: the existence of a constitutional revolution is marked by a paradigmatic displacement in the conceptual prism through which constitutionalism is experienced in a given polity. To be sure, this understanding can easily fall victim to promiscuous application, but if we are careful it can also be useful in securing analytical purchase over the events surrounding moments of constitutional deliberation and design.

Consider India. The design experience may be considered a constitutional revolution in several respects, not the least of which was that the document itself was constructed in large measure as a potentially subversive presence in the social order.<sup>40</sup> The intentions behind the constitution were confrontational, which is to say that its identity was importantly defined by a commitment to reshape key structures of the social order. In this sense, it assumed a stance of militancy analogous to the post-Civil War amendments in the United States, which, unlike the predominantly acquiescent features of the latter's broader document, were directed at the eradication of entrenched inequities in the surrounding society.<sup>41</sup> Yet, the very notion of a confrontational constitution hints at the magnitude and daunting nature of the challenge of reconstruction; what an Indian jurist once called a "militant environment"<sup>42</sup> is unlikely to passively submit to the transformative designs of a hostile constitution. For that reason, the success of such a constitution in delivering on its promise of radical change is by no means assured. Indeed, the one explicit mention of revolution in the Indian Constitution is quite revealing in this respect. It appears in the Statement of Objects and Reasons that serves as a preamble to the Forty-Second Amendment adopted in 1976. "The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution . . . has been engaging the active attention of Government and the public for some years now."<sup>43</sup>

The examples of India, Israel, and Ireland suggest a larger point about constitutional revolutions, in that their distinctively aspirational character — at least in the case of those not connected to certifiable revolutionary upheavals — necessarily entails a high measure of uncertainty in establishing their ultimate transformative significance. The compromises and ambiguities of the framing process may indeed lead to constitutional politics of incrementalism; nevertheless, if we step back from the prudential and strategic moves associated with achieving a fresh constitutional beginning, a larger picture of paradigmatic replacement may come into view. What is

40. See generally Gary Jeffrey Jacobsohn, *The Sounds of Silence: Militant and Acquiescent Constitutionalism*, in *THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM* 131 (Steven Kautz, Arthur Melzer, Jerry Weinberger, & M. Richard Zinman eds., 2009).

41. See U.S. CONST. amends. XIII–XV.

42. V. R. Krishna Iyer, *Towards an Indian Jurisprudence of Social Action and Public Interest Litigation*, in *SOCIOLOGY OF LAW* 292, 308 (Indra Deva ed., 2d ed. 2009).

43. INDIA CONST., amended by The Constitution (Forty-Second Amendment) Act, 1976, available at <http://www.india.gov.in/govt/documents/amendment/amend42.htm>.

currently occurring in the United Kingdom, for example, can appear as incrementalism in action or potentially revolutionary.<sup>44</sup> It is too early to say if the ongoing devolution of power away from the British Parliament will culminate in a fundamental alteration in constitutional identity.<sup>45</sup> Some observers are concerned — or heartened — that the adoption of the Human Rights Act in 1997 “will cause ‘a paradigm shift in the foundations of British constitutional law.’”<sup>46</sup> Just how seriously this development might ultimately threaten the foundational principle of British constitutionalism — Parliamentary sovereignty — is subsumed in mists of uncertainty.<sup>47</sup> More certain perhaps is that the tension between the logics of the “historic” constitution and an incipient codified alternative<sup>48</sup> — a tension that reflects a long-standing dissonance in British legal thought and experience<sup>49</sup> — will unfold in protracted and unpredictable ways that will determine the validity of early pronouncements of a constitutional revolution.

Of course, standing back may also confirm the non-revolutionary character of what contemporaneous constitutional actors insist is a revolutionary moment. Precisely because the Israeli example is the most divisive of Lerner’s cases, it should induce greater skepticism of such declarations of radical change. And so Chief Justice Aharon Barak’s insistent invocations of a “constitutional revolution” in connection with the enactment in 1992 of two Basic Laws and the subsequent judicial assertion of a judicial review power require just the sort of critical scrutiny that Lerner brings to the subject.<sup>50</sup> The formal re-conceptualization of the status of rights in Israel, which according to the Justice means that they now “enjoy normative superiority,”<sup>51</sup> renders the attribution of revolutionary significance to the developments eminently plausible. Lerner, however, as well as other commentators, is correct to question whether the purported constitutional revolution was sufficiently innovative to justify being so described. Was it too tethered to preservative aspirations to be seen as revolutionary, particularly as they related to threatened economic interests?<sup>52</sup> And even if this were shown not to be the case, could

44. See *UK and Scottish Governments Agree Terms of Independence Referendum*, STV (Oct. 12, 2012, 9:25 PM), <http://news.stv.tv/politics/194647-uk-and-scottish-governments-agree-terms-of-independence-referendum/>.

45. See *Johann Lamont: Future Devolution of Powers Should Include Councils*, STV (Oct. 9, 2012, 5:24 PM), <http://local.stv.tv/edinburgh/194093-johann-lamont-future-devolution-of-powers-should-include-councils/>.

46. Vernon Bogdanor, *Constitutional Reform in Britain: The Quiet Revolution*, 8 ANN. REV. POL. SCI. 73, 90 (2005) (citation omitted).

47. The question is being hotly debated. Those who question the revolutionary significance of such changes as occurred through the Human Rights Act contend that the enactment has not transformed the polity from one of “political constitutionalism” to a regime of “legal constitutionalism.” See Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT’L J. CONST. L. 86, 89 (2011) (“[T]he HRA need not, as a matter of either logical or practical necessity, replace [political constitutionalism] with legal constitutionalism — indeed, potentially it buttresses the role of Parliament.”).

48. See LERNER, *supra* note 1, at 15–16.

49. See generally *What is the UK Constitution?*, UNIV. COLL. LONDON (Sept. 12, 2012, 6:01 PM), <http://www.ucl.ac.uk/constitution-unit/research/uk-constitution>.

50. LERNER, *supra* note 1, at 81.

51. Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581, 584 (2001).

52. See, e.g., Aeyal Gross, *The Politics of Rights in Israeli Constitutional Law*, 3 ISR. STUD. 80 (1998); Ran

the changed role of the judiciary be viewed simply as a natural progression in democratic political development — i.e., transformation of an evolutionary rather than revolutionary kind?

The same may be said of Ireland — or not. The enactment in 1937 of a new Republican constitution to replace the 1922 document, with its ties to the controversial Anglo-Irish Treaty, can surely be described as the fulfillment of Éamon De Valera's revolutionary ambitions.<sup>53</sup> Both the break in legal continuity and the unambiguous mooring of the nation's foundational charter in the doctrine of popular sovereignty represent a critical turning point in Irish constitutional development. Still, consistent with her main thesis, Lerner contends "the two documents should be regarded as existing on a continuum."<sup>54</sup> Thus, she sees the new constitution as the culmination of the pragmatic, incremental "stepping stone" approach of the champion of the Free State Constitution, Michael Collins, who believed that constitutions "could be crafted over time, and did [sic] not require a dramatic, revolutionary moment for their creation."<sup>55</sup>

Collins was right. Indeed, all constitutions are crafted over time in the sense that their meaning and identity evolve gradually in ways determined by a dynamic fueled by their internal tensions and contradictions and their confrontations with a social order over which they have limited influence. Whether the Irish constitution can be described as a revolutionary achievement may in the end depend less on the incrementalist commitments of its founders than on the subsequent emergence of a constitutional vision — one perhaps marked by a serious natural law jurisprudence — that represents a more than symbolic re-direction in constitutional priorities. Similarly, in retrospect, the glare of the revolutionary moment that instantiated the Turkish secular republic has subsided as the gap between inscribed commitments, and external realities have incrementally shaped the constitutional identity of that nation in a direction that more accurately reflects its sociological and demographic circumstances.<sup>56</sup> Whether in Turkey, Ireland, India, Israel, or any other country, a constitution is a large piece of a nation's constitutional identity, but it is not coterminous with it. It lays down markers of that identity that are then adapted to changing political and social realities that modify, clarify, or reinforce it through the dialogical engagement of various public and private sources of influence and power. In helping us to gain valuable insight into the constitutional politics of this activity, Hanna Lerner has provided us with an extremely important interpretive analysis that should become a staple of the literature of constitutional design.

---

Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427 (1998); Doron Navit & Yoav Peled, *Towards a Constitutional Counter-Revolution*, 16 CONSTELLATIONS 429 (2009).

53. See LERNER, *supra* note 1, at 183.

54. *Id.* at 184.

55. *Id.* at 182–83.

56. See *id.* at 36–37.