CONSTITUTIONAL DESIGN DEFERRED

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8. Constitutional design deferred

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Constitutions around the world address an increasingly broad range of issues.[1] Yet they also leave many issues undecided: they leave political decision-makers broad freedom to resolve a range of social, political and economic questions unconstrained by constitutional restrictions or requirements. For some issues, they adopt a hybrid approach: they make clear that particular issues are a matter of constitutional concern, but give later decision-makers the task of giving concrete content to particular constitutional requirements.

This strategy of express or implied 'constitutional *deferral*', Tom Ginsburg and I have argued, is an increasingly common feature of constitutional design worldwide.[2] Deferral of this kind can take two broad forms: it can involve the adoption of abstract constitutional provisions that implicitly delegate a range of questions of constitutional 'implementation' either to later constitutional *judges* or legislators. Or it can involve the adoption of 'by-law' clauses that expressly permit or require legislators to address certain topics in the future. In more recent work, we have noticed the rise of a third mode of deferral: the adoption of specific constitutional provisions that directly conflict with one another, thereby requiring courts or legislators to make substantive choices resolving the conflict.[3] We also see evidence of all three types of design deferral in recent instances of democratic constitutional design.

Abstract constitutional language has long been a feature of constitutional design. Indeed for early constitutions such as the US Constitution, it was often thought that abstraction in constitutional design was more or less a logical requirement of constitution-making.[4] More recent instances of constitution-making, however, involve the frequent use of by-law clauses and specific but conflicting provisions as tools of constitutional deferral. Both by-law clauses and specific but conflicting provisions, as well as more abstract constitutional provisions, are thus now a key part of the toolkit of constitutional design worldwide.

What are the relative advantages and disadvantages of this trend in constitutional design? As Ginsburg and I noted in earlier work, deferral has two key advantages: it helps

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[1] *See, e.g.,* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

[2] Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636 (2011).

[3] Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as "Insurance Swaps"*, 4 CONST. CT. REV. 1 (2011).

[4] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 407 (1819) (Marshall CJ) ("A Constitution [which] would partake of the prolixity of a legal code, … could scarcely be embraced by the human mind").

reduce both 'decision' and 'error' costs in processes of constitutional design.[5] This can also often facilitate socially productive forms of constitutional agreement. Deferral, however, can potentially overtax the capacity of later political decision-making processes in some cases, or lead to ongoing delay, or '*burdens of inertia'*, in the resolution of important constitutional issues.[6] How the relative benefits and costs to deferral cash-out in a particular case will thus be deeply contingent on a range of context-specific factors.

The chapter, however, also considers ways in which current approaches to constitutional design could be refined so as to promote a more limited form of deferral of various constitutional questions. One option it considers in this context is the adoption of specific time-frames for the legislative implementation of the mandate created by a by-law clause. Another is the idea of mandatory by-law clauses enforced by constitutional courts. Neither design solution, it suggests, is likely to provide a failsafe answer to the danger of permanent or prolonged, as opposed to temporary, constitutional deferral. But it also has some promise as a tool for refining, or deepening, the current global constitutional design toolkit.

To illustrate these dynamics, the chapter considers a range of instances of constitutional deferral in relatively recent constitution-making processes, including in South Africa, Kenya, Iraq and Tunisia, as well in older constitutional systems such as the US and India. It also gives detailed attention to two well-known instances of deferral by drafters not previously explored in my joint work with Ginsburg on this topic: Art 44 of the Indian Constitution requiring the Indian Parliament to take steps toward the adoption of a uniform personal code; and Art 28 of the Kenyan Constitution requiring a minimum level of gender diversity in the national parliament.

The remainder of the chapter following this introduction is divided into four parts. Part II outlines the idea of constitutional deferral, and its various forms, as well as examples of deferral in recent constitutional drafting processes. Part III canvases the advantages and disadvantages of deferral as a design strategy, and illustrate this by reference to debates over a uniform personal code, gender diversity in parliament and land reform in India, Kenya and South Africa. Part IV considers potential design solutions to the problem of ongoing or recurrent deferral, particularly in the legislative domain, and their respective advantages and disadvantages. Part V offers a brief conclusion on the relationship between constitutional drafters and judges in the process of constitutional design.

1. CONSTITUTIONAL DEFERRAL – MODES AND EXAMPLES

[5] Dixon & Ginsburg, *supra* note 2.

[6] On this concept, *see, e.g.,* Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Revisited*, 5 INT'L J. CONST. L. 391 (2007); Rosalind Dixon, *A New Theory of Charter Dialogue: The Supreme Court of Canada, Charter Dialogue and Deference*, 47 OSGOODE HALL L.J. 235 (2009); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008). *Compare also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); William N. Eskridge, *Foreword: The Marriage Cases – Reversing the Burden of Inertia in a Pluralist Constitutionalist Democracy*, 97 CAL. L. REV. 1785 (2009).

Not every form of constitutional silence, or decision not to address a particular issue, is necessarily a form of deferral: in some cases it may simply reflect a decision on the part of drafters to leave a particular question to ordinary political decision-making. Defining the line between constitutional and ordinary politics is notoriously difficult, but the line nonetheless exists according to most understandings of what it means to have 'a constitution': there is clearly some difference between questions of basic principle, or the founding values of a society, and more routine questions of social and economic policy.[7] There is also a difference between legal norms that have a relatively enduring, or stable, quality, and those with a more constantly evolving or fluid content.[8] Leaving a question to ordinary political resolution is also not the same as deferring it to later constitutional decision-makers. Delegation to ordinary politics involves the non-constitutionalization of an issue; whereas deferral involves a deliberate decision to place an issue within the constitutional domain – of basic or enduring principle – but also to leave aspects of its concrete meaning or application to later processes of judicial or legislative decision-making.

Constitutional deferral of this latter kind, as Ginsburg and I noted in 2011, can take two broad forms.[9] First, constitutional drafters may choose to adopt abstract constitutional language, which implicitly delegates to later judges (and sometimes legislators[10]) the task of giving concrete content to relevant guarantees. No constitution can ever fully specify how it is to apply in all concrete cases or contexts. However, it can go a significant way toward guiding or informing the implementation of constitutional norms in concrete settings, so that the choice between more abstract and specific language offers a clear choice over the *degree* of deferral by drafters.

Second, drafters may choose to adopt express 'by-law' clauses that either permit or require legislators to address certain constitutional issues, or flesh out the concrete content of a particular constitutional mandate. 'Weak', or permissive, by-law clauses simply make clear that it is open to a later parliament to adopt legislation addressing a particular issue; whereas 'strong' or mandatory by-law clauses expressly require legislators to address an issue at some point in the future, often subject to a range of express constitutional constraints.[11] There is also often variation in the degree to which stronger mandatory by-law clauses attempt to constrain, or limit, the discretion of legislators in enacting relevant forms of legislation.[12]

A third form of deferral involves a hybrid of these two approaches – i.e. the adoption of quite specific constitutional language, which directly conflicts with language found elsewhere in a constitution, so that the task of resolving relevant conflicts is

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[7] For an exploration of these issues, *see, e.g.,* Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399 (2010).
[8] *Id*. *Compare* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).
[9] Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2.
[10] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000).
[11] Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2.
[12] *Id*.

implicitly delegated to later judges or legislators. We first noticed this dynamic in the context of elite driven constitutional bargains – or apparent 'insurance swaps' among political elites.[13] The basic technique, however, has broad application. It applies wherever constitutional drafters adopt specific but conflicting provisions that implicitly delegate the task of resolving the constitutional conflict thereby created to later judicial or legislative actors (specific-conflict deferral).

Deferral, in the form of by-law clauses and specific but conflicting provisions, is now also a common tool of constitutional design worldwide. Abstract institutional language, as already noted, has long been a hallmark of democratic constitutional design. If one thinks of the US Constitution, as an example, the text of the Constitution clearly contains a range of quite short, abstract statements: perhaps the best known example is the First Amendment, which simply provides that 'Congress shall make no law … abridging the freedom of speech'. More recent constitutions, such as the South African Constitution, in contrast, provide that protected speech includes freedom of the press, freedom to receive or impart information or ideas, artistic creativity and academic freedom and freedom of scientific research, but does not extend to propaganda for war; incitement of imminent violence; and advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.[14] Section 36(1) further sets out a range of specific provisions governing the circumstances in which the government may limit the freedom of expression. Thus, where the SA Constitution contains relatively detailed and specific provisions, the US Constitution implicitly defers to later judges and legislators the task of determining what constitutes protected speech, or when or under what circumstances limitations on speech might be legitimate or permissible.[15]

Some theories of democratic constitutional deign in fact treat abstraction as more or less a necessary requirement for a foundational legal document to count as 'constitutional' in status. In *McCulloch v. Maryland*, for instance, Chief Justice Marshall suggested that a defining character of the US Constitution was its relatively short and sparse quality: Constitutions, he argued, by definition simply do not permit of "the prolixity of a legal code".[16] One reason for this could also be that in order to endure, constitutions must be capable of being understood – and thus defended –by ordinary citizens.[17] More

[13] Dixon & Ginsburg, *The South African Constitutional Court*, *supra* note 3.
[14] South African Constitution s. 16.
[15] Initially the delegation was solely to judges and members of Congress, but after the incorporation of the First Amendment into the Fourteenth Amendment, also implicitly to state legislatures. *See, e.g.,* Adamson v. California, 332 U.S. 46 (1947) (incorporating the First Amendment free speech clause).
[16] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 407 (1819) (Marshall CJ). *See also* discussion in Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection, in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW (David Dyzenhaus & Malcolm Thorburn eds., 2016).
[17] *Compare* Nicholas O. Stephanopolous & Mila Versteeg, *The Contours of Constitutional Approval*, 94 WASH. U.L. REV. 113 (2016) (finding that constitutional identification is statistically correlated with the degree of understanding of a constitution). For a broader exploration of the issue of endurance, and an argument that specificity rather than abstraction

modern constitutions, however, are far longer and more specific in character, in ways that challenge this understanding of parsimony or abstraction as a *necessary* condition to the creation of a constitutional document. Rather, parsimony or abstraction of this kind represents an important choice by drafters to defer the resolution of certain constitutional issues to the future.

Recent processes of constitutional design have also seen the frequent use by drafters of both this form of abstraction – and other modes of deferral, including by-law clauses and specific but conflicting provisions. Take the 1996 South African Constitution, 2005 Iraqi Constitution, 2010 Kenyan Constitution and 2014 Tunisian Constitution as examples. Where early constitutions often tended to be silent on the scope for limiting rights, these constitutions all contain a range of provisions either authorizing, or requiring, legislation imposing limits on rights.[18] Most of these provisions are weak or permissive by-law clauses, which simply recognise the permissibility of the legislature imposing limits on other express constitutional guarantees. But others are stronger forms of deferral, and explicitly require legislatures to define limits on the enjoyment of certain rights. Each constitution also contains a range of mandatory by-law clauses, which impose mandatory but relatively open-ended duties on the state to take the steps necessary to implement a range of positive rights, or positive duties on the state to provide for an adequate standard of living, or public welfare and security.[19] Generally, positive duties of this kind are also understood to require a range of legislative and executive measures.[20] Finally, each constitution contains a set of by-law clauses requiring, or else 'nudging', the legislature to adopt legislation providing for the more detailed regulation of various governmental institutions, or addressing particular complex or controversial areas of social and economic policy.[21]

The 1996 South African Constitution, for example, in addition to the general provision for the limitation on rights in s. 36, explicitly permits legislation regulating rights to collective bargaining (s. 23), but requires legislation regulating the respective rights of private property holders, and the rights of persons whose tenure of land is legally secure as a result of past racially discriminatory laws and practices (s. 25(9)). It requires the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of rights of access to adequate housing, health-care services, sufficient food and water and social security (ss. 26-27), and reasonable legislative and other measures to protect the environment (s. 24). It also requires the National Assembly to adopt legislation guaranteeing a right of access to information, and just administrative action, which in most modern administrative states will entail a complex set of procedural provisions (ss. 32-33).

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in fact promotes endurance, *see* ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009).

[18] *See, e.g.,* Colombian Constitution Arts. 23, 26, 42, 56, 58, 61-66; SA Constitution ss. 9, 23 25; Iraq Constitution Arts. 18-24, 36, 27, 39, 41. *See also* Tunisia Constitution Arts. 6, 22, 26, 34, 40, 41; Nepal Constitution Arts. 17, 19, 27, 30, Kenyan Constitution ss. 14(3), 26.

[19] *See, e.g.,* Colombian Constitution Arts. 13, 48; Kenyan Constitution s. 21. Nepalese Constitution Arts. 50(1), 51(b)(1).

[20] *See, e.g.,* discussion in *South Africa v Grootboom*, 2001 (1) SA 46 (interpreting s. 26(2) of the SA Constitution).

[21] *See, e.g.,* Colombian Constitution Art. 57

The 2010 Kenyan Constitution contains similar provisions permitting various limitations on rights, and requiring the state to adopt measures for the 'progressive realisation' of the rights to healthcare, education, social security, food and water guaranteed in s. 43 (s. 21), and the fulfilment of guarantees of equality via appropriate affirmative action policies for young people and those with disabilities (ss. 55-56). As Part III explores in more detail, it further imposes quite specific obligations on the state in respect of the adoption of 'legislative and other measures' to achieve a form of gender-parity in governmental institutions (art. 27(8)), and legislation promoting the legislative representation of women, persons with disability, young people, ethic and other minorities and marginalised communities (art. 100). Similarly, it requires Parliament to enact legislation facilitating administrative review of government action (art. 47), and regulating citizenship and residency (art. 14). It also imposes seemingly quite novel duties on Parliament, by means of a strong by-law clause, requiring Parliament to enact legislation providing communities 'compensation or royalties for the use of their cultures and cultural heritage', and 'protecting the ownership of indigenous seeds and plants' and their use by Kenyan communities (s. 11).

The 2005 Iraqi Constitution permits limitations on a range of rights, including the rights of nationals, but requires the legislature to adopt measures regulating access to citizenship and political asylum, both subject to certain conditions (art. 18). It also mandates legislation addressing complex questions such as 'economic modernization' and public and private investment, and controversial topics such as language rights (art 4), the terms of national service (art 9), the national flag and national anthem, the stipulation of religious and national holidays (art 12), the distribution of valuable oil, gas and water resources (Art 109, 110) and the location of the national capital (Art 120). Even more notably, it defers to later legislative decision-making the task of regulating the composition powers and procedures of a vast range of core institution – including Parliament and the Federal Council, ministries, the courts, monetary and financial institutions, independent and audit commissions (Arts. 49, 62, 83, 93, 99, 100, 102-3).

The 2014 Tunisian Constitution contains an even longer list of provisions explicitly deferring various questions to the legislature. Like earlier constitutions, it contains a range of rights and other guarantees that may be explicitly limited 'by law';[22] and in some cases requires legislation regulating the scope of relevant rights or guarantees.[23] It also imposes a range of positive obligations on the state, such as a duty to promote regional unity (art. 5), decentralisation (art. 14), efficient resource exploitation (art. 12), academic freedom and freedom of scientific research (art. 33), gender equality (arts. 34, 40, 46), rights to culture and cultural heritage (art. 42), sport and leisure (art. 43), rights to water (art. 44), health (art. 38) and education (art. 39), and to protect the family (art. 7), children (47) and the disabled (art 48), which implicitly require legislation as well as executive action for their implementation. Article 65 of the Constitution contains a list of 15 'ordinary' and 'organic' (i.e. a total of 30) laws that the Assembly of Representatives is *required* by art. 64 to adopt in draft form according to various procedures. These lists also overlap with the

[22] *See, e.g.,* arts 22, 24 , 40 [dennis please add to this list if applicable]
[23] *See, e.g.,* arts 26, 29, 34 [dennis please add to this list if applicable]

duty on Parliament found in other parts of the Constitution, to enact laws regulating legislative procedure (art. 52), the structure of legislative committees (art. 59), requirements for voting and officeholding (arts. 53-54), the conduct of elections (art. 55), the creation of local authorities (art. 131), the regulation of civilian-military relations and the terms of national service (art. 9), the system of tax collection (art. 10), and the composition and jurisdiction of the judiciary (arts. 106, 110, 112, 115), including aspects of the constitutional and administrative judiciary (arts. 116, 124), military tribunals (art. 11) and a special 'court of audit' (art. 117), and a range of other independent constitutional bodies to support democracy and accountability (Title XI).

A number of constitutions worldwide also adopt specific but conflicting provisions, which reflect complex bargains between parties to constitutional negotiations. Ginsburg and I, for example, have shown in prior work how the rights to property and adequate housing in the 1996 South Africa Constitution can be seen as representing conflicting commitments, which provide a form of insurance to both the National Party and African National Congress (ANC) right *and* more left-wing factions of the ANC. In Tunisia, there are likewise a range of relatively specific but conflicting provisions in the 2014 Constitution: Art 6 guarantees a right of free exercise, but then requires the state to 'disseminate values of moderation and toleration'. Article 12 requires the state to exploit natural resources in the most efficient way, but also to achieve or guarantee 'sustainable development', a 'healthy and balanced environment', protection of the climate, and the eradication of pollution (arts. 12, 45). Article 44 likewise guarantees a right to water, but imposes a duty on the state to ensure its 'conservation and rational use' (art. 44). Dawood and Ginsburg have further shown how, in the Islamic world, there is clear correlation between the adoption in a constitution of an Islamic 'supremacy clause' and other potentially conflicting human rights guarantees.[24]

These examples are also far from exhaustive: each of these constitutions contains an even longer list of express and implied forms of constitutional deferral, or delegation to later judicial and legislative decision-makers.[25] There are also many other constitutions, worldwide, that have been adopted or amended in recent decades in ways that reflect the logic of constitutional deferral.

2. THE ADVANTAGES AND DISADVANTAGES OF DEFERRAL

This trend in constitutional design raises a range of important questions about the potential advantages and disadvantages of deferral as a strategy, as well as the factors underpinning deferral as a strategy.

A. The Advantages of Deferral: Decision and Error Costs

For scholars, questions of constitutional design often have a somewhat abstract quality. They involve debates about optimal institutional design and structure, divorced

[24] Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 VI. J. INT'L L. 1 (2013).
[25] *See, e.g.,* Ecuador Constitution [section numbers].

from the messy realities of particular real-world settings and political controversies. They also draw on a wide range of information about current global best practices, and historical experiences. Actual constitutional design, in contrast, almost always takes place against the backdrop of some real degree of political disagreement, and limits on constitution-makers access to information.

Modern constitution-making processes clearly vary in the degree to which they attempt 'transformative' versus preservative forms of constitutional change.[26] But almost all forms of constitution-making will involve the risk of bargaining breakdown: existing political and economic elites will often resist change, or 'hold out' for more favourable terms, before agreeing to a new constitutional bargain.[27] Many constitutions are also adopted against the backdrop of a recent history of political conflict, violence or serious injustice: the impetus for constitution-making processes will often come from these sources,[28] but conditions of this kind also create a variety of obstacles to successful constitutional bargaining. They reduce the degree of social and political trust necessary among different groups to support concrete constitutional agreement.[29] They may also increase the level of constitutional 'insurance' both sides demand, before being willing to surrender the right to rely on extra-legal means (including violence or self-help) to protect their interests.[30]

Constitutional drafters are also subject to a range of time and information constraints: they must adopt a new constitution within a given timeframe, and thus simply do not have time to engage with the full range of information on constitutional design options, or consequences. Further, they have limits on their own individual knowledge and expertise, which make processes of real-world constitutional design an inherently constrained exercise. It is also against this background that real-world constitutional drafters often turn to 'deferral' as a strategy for constitutional design.

Deferral, as Ginsburg and I have previously noted, has two major advantages for drafters.[31] First, it can reduce the time and political capital necessary for parties to reach agreement over certain controversial constitutional issues. This, in turn, can reduce the overall bargaining or 'decision' costs – or in Coase's language 'transaction costs' – of successful processes of constitutional negotiation.[32] This can lead to both more socially

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[26] *Compare* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); David Fontana, *Refined Comparativism in Constitutional Law*, 49 U.C.L.A. L. REV. 539 (2001).

[27] Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2.

[28] *See, e.g.,* Jennifer Widner, *Constitution Writing and Conflict Resolution*, UNU-WIDER (Research Paper No. 2005/51) (2005).

[29] Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2.

[30] On insurance generally, *see* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003); Rosalind Dixon & Tom Ginsburg, *Political Insurance: A Typology, in* COMPARATIVE JUDICIAL REVIEW (Rosalind Dixon & Erin Delaney eds., Forthcoming 2017).

[31] Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2.

[32] *Id*. *See further* Ronald H. Coase, *The Problem of Social Cost*, 56 J. L. & ECON. 837 (2013).

productive forms of constitutional agreement,[33] and a greater willingness on the part of drafters to constitutionalize a broader range of issues, and thus more 'complete' forms of constitutional justice according to some accounts.[34]

Second, by leaving certain concrete decisions to a later date, deferral can help reduce the risk of 'error' by drafters in certain settings.[35] The less constitutional drafters decide now, the more scope they allow for constitutional decisions to be informed by emerging knowledge about actual political and constitutional dynamics in a society, or prevailing social, political and technological conditions. This, by itself, does not *guarantee* that later decision-makers will rely on relevant information in making their decisions. But it provides them with greater flexibility to do so, in ways that may reduce the overall rate of 'error' – or the mismatch between means and ends – in processes of constitutional drafting.[36]

This is particularly true where the issues facing drafters are relatively new, or subject to rapid social political or technological change, and thus where at the initial moment of constitutional design, drafters lack access to adequate information about the likely downstream consequences of constitutional choices.[37] But is true more generally: constitutional amendment processes are often an important functional substitute for deferral, but they are also far from a perfect substitute. As Ginsburg and I have shown elsewhere, both formal hurdles to amendment, and informal cultural understandings about the appropriateness of amendment, can create significant practical obstacles to adapting a constitution to changing social circumstances.[38]

Deferral may of course also be used for democratically less attractive reasons: in some cases, a majority of drafters may exert sufficient control over the legislature that a decision to defer is in fact simply a decision to delegate certain questions to a sub-constitutional level. Delegation of this kind may also reduce the salience or visibility of

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[33] This may also be particularly valuable where constitutional bargaining is taking place in the context of a potential and hoped-for transition from civil war to a peaceful constitutional order, or from constitutional non-democracy to democracy. *See, e.g.,* Widner, *supra* note 28; TOM GINSBURG & ALBERTO SIMPSER (EDS.), CONSTITUTIONS IN AUTHORITARIAN REGIMES (2013).

[34] *Compare* Alec Stone Sweet & Eric Palmer, *A Kantian System of Constitutional Justice: Rights, Trusteeship, Balancing* (Working paper, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2919724; Rosalind Dixon, *Partial Bills of Rights*, 63 AM. J. COMP. L. 403 (2015).

[35] Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2.

[36] For the connection between an institution's adaptive capacity and broader notions of efficiency, *see, e.g.,* DOUGLAS C. NORTH, THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT (1995); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985).

[37] Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2.

[38] Rosalind Dixon & Tom Ginsburg, *Constitutional Amendment: A Comparative Perspective, in* COMPARATIVE CONSTITUTIONAL LAW (2012); Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PENN. J. CONST. L. 643 (2010); Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686 (2015).

that decision, in ways that make it easier to achieve certain illiberal or anti-democratic ends, so that deferral effectively becomes a tool of abusive constitutional change.[39]

Advantages of this kind, however, do seem to explain how and why deferral occurs in many real-world constitutional settings: time-constraints on drafters, or intractable political differences, can often make deferral a more or less necessary response to the problems of democratic bargaining. The complex nature of certain questions, and limited information available to drafters in certain settings, can also make a concern about error highly salient, and deferral both a common and logical response. This is also especially true where drafters choose, or are politically required, to adopt quite demanding requirements for future constitutional amendment.

B. Deferral and Legislative Inertia

What, if any, downsides are there to deferral as a strategy? As Ginsburg and I noted in our earlier work, there are clearly some topics or areas of constitutional design where deferral is an extremely dangerous, if not illogical, design strategy: a democratic constitution, in particular, clearly needs to specify some of the basic procedural rules for democracy, or else core democratic institutions cannot come into existence.[40] At the very least, failure to resolve these issues will mean that democratic legislatures are consumed early on with questions around their own procedures and composition, and can make little progress in addressing the substantive challenges of a country – and thereby establishing their basic claim to democratic legitimacy. Indeed, we suggest that this is arguably one of the dangers that arose in Iraq, in 2005, with the extensive deferral of questions of basic democratic procedure to later legislative decision-making.[41]

There are also potentially issues where, by virtue of their controversial nature, the act of deferral is likely to impose significant downstream stress on democratic processes. As Hanna Lerner notes, in exploring the idea of 'incrementalism' – or multistage processes of constitutional design – if some constitutional issues are too fraught for constitutional drafters to address at an initial constitutional moment, it may be beyond the capacity of later political actors to agree on these questions.[42] If a constitution commits a polity to addressing those questions, despite this disagreement, this may itself also impose serious strain on a new or otherwise fragile constitutional system: it may force to the surface underlying political divisions that have the capacity to undermine even the most minimal degree of political stability.

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[39] This was arguably the case in Hungary and Poland for example.

[40] Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2; ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL (2007).

[41] *See, e.g.,* Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2 (discussing this example, and the example of the 1964 Afghan Constitution and its deferral on the question of political parties as a potential example).

[42] Hanna Lerner, *Interpreting Constitutions in Divided Societies, in* COMPARATIVE JUDICIAL REVIEW (Rosalind Dixon & Erin Delaney eds., Forthcoming 2017). *See also* HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011) .

Another, distinct danger is that later actors may *repeatedly* choose not to address an issue, or defer its consideration, so that an initial decision to defer action on a constitutional question effectively leads to *long-term* inaction in an area. The whole idea of deferral, as Samuel Issacharoff and I have noted in the context of judicial deferral, is also that it is temporary rather than permanent in nature: indefinite deferral effectively amounts to abdication or deference, rather than postponement, by a decision-maker, and thus has quite different normative advantages and disadvantages to more limited or temporary forms of delay.[43]

Sometimes, in a design context, this may not be particularly problematic, as drafters themselves may have contemplated that legislators would have the choice as to whether or not to take action on a particular topic. Deferral, in other words, may have been weak rather than strong, or permissive rather than mandatory in nature. In other cases, however, drafters may have had good reason for making legislative action on a topic mandatory rather than permissive. The repeated failure by legislators to address an issue, or give effect to the terms of a strong by-law clause, will thus present a far greater danger to the realization of important substantive constitutional commitments.[44]

Blockages – or legislative 'burdens of inertia' – of this kind are a relatively common feature of legislative processes even in well-functioning democracies.[45] They often arise simply because of time and capacity constraints in the legislative process, which cause legislators to give lesser priority to issues of concern to a small sub-section of the population.[46] In other cases, they may arise from the ordinary dynamics of political competition: where an issue divides a political party, party leaders may be reluctant to put the issue on the legislative agenda, lest it lead to public forms of division that can weaken the party's electoral competitiveness.[47] In new or otherwise fragile democracies, weaknesses in general political accountability structures can also mean that blockages of this kind are even more likely to arise.[48]

Further, there are several reasons why in certain cases it may become more, rather than less, difficult for legislators to address a particular issue over time. First, political

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[43] Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, WIS. L. REV. 683 (2016).

[44] Of course, courts may have also repeatedly failed to address an issue in ways that can create similar difficulties or dangers. One difference, however, is that abstract forms of deferral generally involve permissive rather than mandatory forms of deferral. The dynamics that lead to repeated delay or avoidance of judicial consideration of an issue will also tend to be somewhat different than for legislative inaction.

[45] Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, CARDOZO L. REV. 2193 (2017); Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong- v. Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007);; Dixon, *A Democratic Theory*, *supra* note 6; Dixon, *A New Theory of Charter Dialogue*, *supra* note 2.

[46] Elsewhere I have referred to this as the problem of 'priority driven inertia': *see, e.g.,* Dixon, *The Core Case*, *supra* note 45.

[47] Elsewhere have referred to this as the problem of 'coalition driven inertia': *see, e.g., id*.

[48] Rosalind Dixon & Mark Tushnet, *Weak-Form Review and its Constitutional Relatives: An Asian Perspective, in* COMPARATIVE CONSTITUTIONAL LAW IN ASIA (Rosalind Dixon & Tom Ginsburg eds. 2014); Dixon and McManus.

choices, as Ozan Varol has shown, can often become 'sticky' or difficult to change simply because of behavioural biases on the part of citizens, which lead them to prefer the *status quo* over equivalent forms of legislative change.[49] Interest group dynamics can also mean that the winners from political *in*action on an issue become a powerful source of opposition to attempts at legislative change.

Second, in some cases, ordinary legislative processes may make it more difficult for political leaders to achieve necessary forms of compromise. Constitutional drafting processes, unlike legislative processes, are often conducted at least partially behind closed doors.[50] This, as Jon Elster notes, can also create increased space for compromise among political leaders or representatives.[51] Similarly, constitutional processes, as Bruce Ackerman notes, often take place at a 'moment' of heightened public deliberation and commitment to change, and thus openness to political compromise.[52] As this moment ends, and ordinary political dynamics take over, it can thus be far more difficult for political elites to obtain the necessary degree of majority support for relevant legal change. Ordinary political dynamics can also create new, additional hurdles to legislative action in particular contexts.

Take the experience of constitutional deferral in Kenya in the context of gender diversity in parliament, or the earlier instance of deferral in India, in respect of the adoption of a uniform personal code. In Kenya, the 2010 Constitution reflected a broad commitment on the part of the Constitution's drafters to greater gender equality. The Constitution was adopted against the backdrop of an increasingly widespread commitment in Africa to constitutional guarantees of gender equality. [53] Kenyan women also played a prominent role in the drafting of the Constitution, and in lobbying for the inclusion in the Constitution of commitments to gender equality.[54] Section 27(3) and (4) of the 2010 Constitution thus provide that "Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres", and that "the State

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[49] Ozan O. Varol, *Temporary Constitutions*, 102 CAL. L. REV. 409 (2014).

[50] Jon Elster, *The Optimal Design of a Constituent Assembly* (Paper presented at the colloquium on Collective Wisdom, College de France, May 2008), *available at* http://download2.cerimes.fr/canalu/documents/cerimes/UPL55488_Elster.pdf.

[51] Id.

[52] BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS (1991); BRUCE ACKERMAN, VOLUME 2: TRANSFORMATIONS (2000). . *See also* Sujit Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, 6 INT'L J. CONST. L. 193 (2008); Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate* (Unpublished manuscript) (On file with author).

[53] *See, e.g.,* South African Constitution ss. 1, 15; Rwandan Constitution Art. 10(4); Tanzanian Constitution Art. 12; Ugandan Constitution Ar. 21. *See also* discussion in National Women's Steering Committee, *Implementing the Constitutional Two-Thirds Principles: The Cost of Representation* 12 (May 2015). On the influence of the South African Constitution on the Kenyan Constitution generally, *see, e.g.,* Jill Cottrell & Yash Ghai, *Constitution Making and Democratization in Kenya (2000-2005)*, 14 DEMOCRATISATION 1 (2007).

[54] *See, e.g.,* Alicia L. Bannon, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE L.J. 1824 (2006); Grace Maingi, *The Kenyan Constitutional Reform Process: A Case Study on the Work of FIDA Kenya in Securing Women's Rights*, 15 FEMINIST AFRICA (2011).]

may not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy [or] marital status". Section 97 also provides specifically for the reservation of 47 (out of 290) parliamentary seats for women, "each elected by the registered voters of the counties, each county constituting a single member constituency", and s 98 for the reservation of 18 (out 47) seats in the Senate for women; 16 nominated by political parties, and two as representatives of young people and people with disabilities.[55]

A number of drafters, however, opposed the adoption of more demanding gender-based quotas in parliamentary elections. The resulting compromise was thus the adoption of Art 27(8), a mandatory by-law clause, requiring the state to adopt "legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies must be of the same gender". Art 100 also specifies that Parliament is subject to the obligation to adopt legislation fulfilling this obligation.[56]

To date, however, the Kenyan Parliament is yet to fulfil this obligation. After the first elections under the new Constitution, in 2010, Parliament took almost no steps to implement Art 27(8). This led the Attorney-General, in 2013, to bring a referral to the Supreme Court, asking them to address the nature of the obligation under Art 27(8), and whether non-fulfilment of the obligation could affect the validity of the 2013 national parliamentary elections.[57] In accepting this referral, the Court further held that the obligation in Art 27(8) was not immediately realisable, and rather subject to a duty of progressive realisation under the Constitution, but that Art 100 and associated provisions set August 27 2015 as the outer timeframe for realising this duty. August 2015, however, passed without the Parliament enacting any legislation, or constitutional amendment, altering the composition or system for electing Parliament.[58] So too did the one year extension of the deadline by Parliament, to 27 August 2016.[59] Indeed at the time of writing, the Kenyan Parliament continues to debate the issue, so that there is now a significant question as to whether the 2017 parliamentary elections could be jeopardised by failure to enact a relevant law.[60]

This ongoing legislative inertia also clearly reflects the difficulties of achieving the necessary degree of legislative compromise on certain issues, after the initial constitutional drafting moment. While many legislators in Kenya cite cost as a concern associated with complying with Art 27(8), independent studies have shown that the likely costs of compliance are quite modest: compliance could in fact be achieved without adding any

[55] Kenyan Constitution Art. 98(1)(B), (c) (d).

[56] Art 100 further provides that: Parliament enacts legislation to promote the representation in Parliament of (a) women."

[57] Advisory Opinion No 2 of 2012, [2012] at [2].

[58] John Njagi, *Kenyan Senate Fails to Vote on Constitutional Amendment Bill on Gender Balance*, CONSTITUTIONNET, Aug. 15, 2016, *available at* http://www.constitutionnet.org/news/kenyan-senate-fails-vote-constitutional-amendment-bill-gender-balance.

[59] *Id.*

[60] *See, e.g., 'Kenyan Women Organisations to Petition Courts Over the 2/3 Gender Rule*, CONSTITUTONNET, Sep. 5, 2016, *available at* http://www.constitutionnet.org/news/kenyan-women-organisations-petition-courts-over-23-gender-rule.

additional seats to the current Parliament, and even proposals that involve increasing the size of the legislature would only add quite modest expenditure, compared to other African countries, and other areas of budgetary expenditure.[61] The bigger obstacle to implementation thus seems to be the resistance of many current legislators to losing their seats, and the proliferation of proposals to achieve compliance – which creates a major obstacle to any stable political agreement over a single proposal.[62]

Similarly, in India in the drafting of the 1950 Constitution, there was significant debate about the need to adopt a uniform personal law, in ways that now have a close connection to the realization of commitments to gender equality. Leading members of the constituent assembly (CA) charged with drafting India's Constitution, such as Ambedkar, argued strongly for a uniform personal code, as a means of creating greater consistency in personal and family law across India.[63] But there was also strong opposition to the proposal, on the grounds that it would constitute an unreasonable limitation on minority (i.e. non-Hindu) religious practices.[64] The CA as a whole thus ultimately decided to resolve this disagreement via a form of express constitutional deferral: they adopted language in article 44 of the Constitution requiring the state to 'endeavour to secure for the citizens a uniform civil code throughout the territory of India'.[65] This compromise not only reduced the bargaining costs for drafters over questions of personal law.[66] It further helped promote agreement on broader questions of Muslim representation, by serving as a reciprocal concession for the decision *not* to create special reserved seats for Muslims in parliament.[67]

This form of deferral by the CA in India, however, has also led to more or less *permanent* inaction on the question of personal law reform in India: while it was never

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[61] IEA Kenya, *The Cost of Implementing the Two-Thirds Gender Principle*, at 10-11.

[62] *Id*. (detailing various possible proposals); *Realisation of the Two Thirds Gender Rule*, EACLJ, May 3, 2016, *available at* http://eaclj.org/constitution/20-constitution-feature-articles/203-realisation-of-the-two-thirds-gender-rule.html; *As Kenya Election Approaches, Two-Thirds Gender Rule Hangs over Parliament*, THE EAST AFRICAN, Apr. 28, 2017, *available at* http://www.theeastafrican.co.ke/news/Two-thirds-gender-rule-hangs-over-Kenya-parliament--/2558-3907756-1t1dumz/index.html; Lilian Aluanga-Delvaux & Alphonce Shiundu, *Kenya's Two-Third Constitutional Gender Rule Could be Implemented by June 2016*, CONSTITUTIONNET, Apr. 4, 2016, *available at* http://www.constitutionnet.org/news/kenyas-two-third-constitutional-gender-rule-could-be-implemented-june-2016; *Kenya's Parliament Continues to Stall on the Two-Thirds Gender Rule*, THE CONVERSATION, Jul. 11, 2017, *available at* https://theconversation.com/kenyas-parliament-continues-to-stall-on-the-two-thirds-gender-rule-79221.

[63] *See, e.g.,* discussion in Shantanu Pachauri, *Uniform Civil Code in India: A Socio-Legal Perspective*, 3 INT'L J. L. & LEGAL JURISPRUDENCE STUD. 341, 342-3. (2016).

[64] D.C. Manooja, *Uniform Civil Code: A Suggestion*, 24 J. INDIAN L. INSTITUTE 448, 452-53 (2000).

[65] *See* discussion in *id*. at 453; Tanja Herklotz, *Dead Letters? The Uniform Civil Code Through the Eyes of the Indian Women's Movement and the Indian Supreme Court*, 49 VRU 148, 151-3 (2016).

[66] *Compare, e.g.,* Herklotz, *supra* note 65, at 152 (describing Art 44 as a form of 'intricate compromise'); Werner Menski, *The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda*, 9 GERMAN L.J. 211, at 217.

[67] Shalina A. Chibber, *Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code*, 83 IND. L.J. 695, 699-700 (2008).

contemplated that Art 44 would lead to radical change in the short-term (in part for that reason the clause is expressed in relatively weak, permissive terms), many of its proponents envisaged that it *would* be implemented within a relatively short timeframe.[68] In the more than 60 years since art 44 was adopted, there has also been almost no meaningful legislative change to the system of personal laws in India.[69] The sole change has been to situations of inter-faith marriage, and provisions of the criminal code providing for minimal levels of maintenance or support upon divorce.[70] This is also despite several attempts in Parliament to address the issue,[71] and repeated injunctions from the Supreme Court of India.[72] The result, as many commentators have noted, is both ongoing inconsistency in the personal laws governing Indian citizens in different parts of India, and across different religions, and a persistent source of gender-based inequality.[73]

While clearly complex, the reasons for this ongoing inertia are also similar to those outlined above: Indian citizens have been accustomed to having their family law issues adjudicated under systems of religious rather than secular law, and many express resistance to seeing this change.[74] The Muslim minority in India has also become increasingly opposed to any change to personal laws, in ways that have created a major obstacle to successful legislative change.[75] Perhaps even more important, the rise of the Hindu right has created a further obstacle to legislative change to the system of personal laws – in part because the BJP and its supporters have sought to link such change to a broader project of Hindu dominance.[76]

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[68] Ambedkar, for instance, pushed hard for the general codification of personal laws in the mid-1950s, and cited roadblocks to this effort as one of several reasons for his resignation from Nehru's cabinet: *see* Manooja, *supra* note 64, at 453-4.

[69] *Id*.

[70] *See* Special Marriage Act 1954 (providing for interfaith marriage); Muslim Women (Protection of Rights on Divorce) Act 1986. Other piecemeal changes were also made in the 1950s to certain aspects of Hindu personal law, via the adoption of the Hindu Marriage Act 1955, Hindu Adoption and Maintenance Act 1956, Hindu Minority and Guardianship Act 1956 and Hindu Succession Act 1956. *See* discussion in Manooja, *supra* note 64, at 453-54.

[71] *See, e.g.,* debate over a Uniform Adoption Act in 1972, as discussed in *id.* at 454.

[72] *See, e.g.,* Mohd. Ahmed Kahn v. Shah Bano Begum, 1985 S.C.R. (3) 844; Mudgal v. Union of India, A.I.R. 1995 S.C. 1531; Vallamattom v. Union of India, A.I.R 2003 S.C. 2902, 2906. *See also* discussion in Manooja, *supra* note 64, at 455; Herklotz, *supra* note 65; Siobhan Mullaly, *Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bando Case*, 24 OX. J. LEG. STUD. 671 (2004); Chibber, *supra* note 67, at 706-7.

[73] *See* Chibber, *supra* note 67; Herklotz, *supra* note 65.

[74] *See, e.g.,* S.P. Sathe, *Uniform Civil Code: Implications of Supreme Court Intervention*, ECONOMICS AND POLITICAL WEEKLY 2165 (1995) (emphasising the degree to which distinct personal laws have become part of different religious communities traditions in India).

[75] Manooja, *supra* note 65, at 455; Prakash Nanda, *Supreme Court is the Door to Uniform Civil Code, Not Parliament*, FIRSTPOST, Jul. 5, 2016, *available at* http://www.firstpost.com/india/supreme-court-is-the-door-to-uniform-civil-code-not-parliament-2873682.html (noting the rise of Wahabism within the Indian Muslim community, and its greater opposition to change in respect of the personal laws).

[76] *See, e.g.,* Raghav Ohri, *Modi Government Takes Big Step Towards Implementing Uniform Civil Code; Move Likely to Trigger Heated Political Debate*, THE ECONOMIC TIMES, Jul. 1, 2016, *available at* http://economictimes.indiatimes.com/news/politics-and-nation/modi-government-takes-big-step-towards-implementing-uniform-civil-code-move-likely-to-trigger-heated-

3. Legislative Inertia and Possible Design Solutions

What, if anything, can constitutional designers do to address this danger of ongoing legislative inertia? Logic suggests there are two broad options open to designers in this context: they may adopt by-law clauses with an express timeframe or deadline for implementation, or empower courts to enforce the terms of a mandatory by-law clause.

Each approach has certain potential advantages. The premise behind by-law clauses, as compared to a more abstract form of constitutional deferral, is generally that the legislature is better placed than a court to implement the relevant constitutional obligation. Adopting an explicit time limit is also fully consistent with this judgment on the part of drafters about the optimal allocation of constitutional competency. Further, the effectiveness of such a mechanism depends entirely on a form of political logic: legislators subject to priority-driven burdens of inertia will often have difficulty coordinating on when and how best to implement relevant constitutional obligations. By making a particular date or period of time *focal* for legislators, an express time limit can also help induce the degree of coordination among legislators needed to produce a majority in favour of legislative change.[77]

At the same time, an express timeframe may be both too weak and too strong in certain circumstances: where political inertia is particularly powerful, as in the Indian personal law or Kenyan gender parity examples, it may ultimately be too weak to induce coordinated action among legislators. And in other cases, where there are distinct dangers to a polity addressing an issue – e.g. because of heightened sectarian tensions between Hindus and Muslims at various times in India – an express timeframe may simply be too strong, or inflexible, in requiring immediate attention to a question.

Judicial enforcement, in this context, also has the advantage of both potential strength and flexibility: courts with strong powers of review can exert pressure on legislators to address an issue, even where it is not in their immediate interest to do so. In enforcing a by-law clause, courts can also assess the wisdom, or appropriateness, of requiring the legislature to address an issue at a given historical moment: courts themselves always have the option of deferring a decision on a particular question, including the question of whether or not to enforce a mandatory by-law clause.[78] They can also craft

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political-debate/articleshow/52998700.cms; Bhadra Sinha, *Supreme Court Refuses to Direct Government on Uniform Civil Code*, Hindustan Times, Dec. 7, 2015, *available at* http://www.hindustantimes.com/india/supreme-court-refuses-to-direct-government-on-uniform-civil-code/story-4mY3qvnz6NFonBypcaywPO.html (noting petition by the Hindu-right BJP party seeking a judicially-mandated uniform code)

[77] Thomas C. Schelling, The Strategy of Conflict (1980). *See also* Richard H. McAdams, The Expressive Powers of Law: Theories and Limits (2015).

[78] *Compare* Dixon & Issacharoff, *supra* note 43. *See also, e.g.,* Pannalal Bansilal v. State of Andhra Pradesh, A.I.R. 1996 S.C. 1023 (noting the desirability of adopting a uniform personal code, but declining to endorse an immediate duty on the part of Parliament to enact one, given the potential defensive nature of such action at the relevant time). *See also* discussion in N.

remedies that implicitly or explicitly defer the need for legislative action on a question, to a time at which it may be more feasible, and less likely to inflame political divisions or tensions.[79]

Few examples exist of the full implementation of these models, and thus of actual constitutional design 'success' based on these mechanisms. But there is clearly some precedent for both mechanisms.[80] The 2010 Kenyan Constitution in fact picks up the idea of an express time limit for legislative action under Art 100. The Fifth Schedule to the Constitution expressly provides for a range of explicit deadlines, from one to five years, for the enactment of legislation provided for in earlier by-law clauses. For gender parity norms, the difficulty was arguably that it was not clear from the outset the extent to which these deadlines governed the two-thirds principle in Art 27(8). By the time the Supreme Court made this clear in 2013, there was also limited time for Parliament to address the issue, prior to national democratic elections.[81] Moreover, the August 2015 deadline for legislation clearly had had some impact on the degree of legislative attention to the issue: while it did not produce actual legislation, it significantly increased debate and focus on the issue.[82]

Similarly, while courts in both Kenya and India have avoided any coercive order requiring implementation of the terms of Arts 27(8) and 44, they attempted at various times to promote the implementation of these provisions via more declaratory or persuasive means: the Kenyan Supreme Court, in its 2013 Reference clearly suggested that Parliament was in under an obligation to give effect to the terms of Art 27(8), and by not later than August 27 2015.[83] In decisions such as *Shah Bano*, *Mudgal v Union of India* and *Vallamattom v Union of India*,[84] the SCI has likewise made repeated suggestions that the Lok Sabha is under a duty to take measures to implement the terms of Art 44.[85]

A court could also potentially be explicitly empowered by a constitution to give even more direct effect to the terms of a by-law clause. The SCI in particular has suggested

Shahnaz, *Uniform Civil Code: Whether a Directive to Promote Unity? Rhetoric and Reality*, 4 J. CIVIL LEGAL SCI. (2015).

[79] Dixon & Issacharoff, *supra* note 43; Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016); Kent Roach, *Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity*, 35 U. BRIT. COLUM. L. REV. 35 (2001).

[80] For a recent example of an express time limit, *see, e.g.,* Constitution of Nepal Art. 47 (providing that for rights in part X, the State shall "make legal provisions, as required, within three years of the commencement of the Constitution").

[81] Get cite from Upadhayay case, as cited in 'How Modi Government Set Wheels of Uniform Code in Motion'

[82] The Attorney-General established a working group on the issue in 2014, and in April 2015, a bill ('the Chepkonga Bill') was introduced with a view to achieving compliance. *See, e.g.,* discussion in Maureen Bwisa, *Actualization and Implementation of the "Two-Thirds Gender Principle in Kenya*" (Society for International Development, 2015).

[83] Advisory Opinion No 2 of 2012, at [16]-[17], [49].

[84] Mohd. Ahmed Kahn v. Shah Bano Begum, 1985 S.C.R. (3) 844; Mudgal v. Union of India, A.I.R. 1995 S.C. 1531; Vallamattom v. Union of India, A.I.R 2003 S.C. 2902, 2906.

[85] *See supra* note 53.

that it would be contrary to traditional understandings of the separation of judicial and legislative power for a court to *compel* the legislature to take action in implementing such a clause.[86] Courts, however, can often give practical effect to the terms of a mandatory by-law clause, even without directly *ordering* parliament to adopt legislation of a particular kind.

Many courts around the world routinely 'remand' questions to the legislature for consideration, or attention, as part of 'suspended declarations of invalidity'.[87] To be maximally effective, delayed or suspended declarations of invalidity are also often combined with a form of 'constitutional penalty default structure': courts stipulate that if parliament fails to act in response to a given remand, a particular judicially-defined regime then takes effect.

One could also imagine a similar remedial structure for by-law clauses: courts, such as the German Federal Constitutional Court, have issued a range of declaratory orders in the context of express by-law clauses.[88] In issuing such orders, courts could also stipulate that if the legislature failed to enact implementing legislation within a given timeframe, a judicially defined approach to implementation of a by-law clause would then take effect. This kind of 'default rule' approach respects the formal role of the legislature in enacting legislation, but provides strong incentives for legislatures to overcome inertia, and enact relevant legislation.[89] Where incentives of this kind are insufficient, it also means that courts rather than legislatures effectively implement the requirements of a mandatory by-law clause.

An alternative would be for courts to adopt an incremental approach to filling the gaps left by legislative inaction in a particular context: over time, courts may give effect to the substance of a by-law clause by adopting various judicial doctrines designed to implement its requirements. This, for example, is arguably what the SCI did in cases such as the *Shah Bono Case*, by issuing specific decisions *indirectly* updating aspects of the system of personal laws in the direction of greater uniformity.[90] The GFCC, in the *Parental Duty of Contact Case*, took a similar approach, interpreting fines for parental non-contact

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[86] *Id*. *See also supra* note 76.

[87] Roach, *supra* note 79; Robert Leckey. *The Harms of Remedial Discretion*, 14 INT'L J. CONST. L. 584 (2016); Rosalind Dixon, *De Facto Weak-Form Review* (Unpublished manuscript, 2017) (On file with author).

[88] *See, e.g.,* Prohibition on Nocturnal Employment, BVerfGE 85, 191 (1992) (finding working hours that banned women from working at night inconsistent with art 3.2and ordering the Bundestag to redraft the law so as to be gender non- discriminatory and protect worker's physical integrity as required by Art 2.2); Rubble Women, BVerfGE 87, 1 (1992) (holding that under art 3.2 the Bundestag was obliged to compensate to a greater extent child care hours when calculating pensions within the existing statutory scheme).

[89] Rosalind Dixon, *Responsive Judicial Remedies* (Working paper, 2017) (On file with author).

[90] *See, e.g.,* Mohd. Ahmed Kahn v. Shah Bano Begum, 1985 S.C.R. (3) 844 (interpreting Muslim personal law as providing more generous rights of maintenance to divorced women than previously understood). The decision, however, was also subject to widespread criticism, as unnecessarily inflaming sectarian tension by virtue of its reasoning: *see, e.g.,* Chibber, *supra* note 67; Mullaly, *supra* note 72.

with children as discretionary rather than mandatory, as a means of giving effect to the terms of the by-law clause in art 6.2.[91]

Whether more immediate, or incremental, judicial implementation of a by-law clause is preferable as a second best response to legislative non-implementation is clearly a complex question, which depends largely on the specifics of each case – i.e. both the nature of the issue at stake, and the relevant judicial and legislative politics.[92] What is clear, however, is that there are a range of doctrinal tools available for a court in seeking to put pressure on the legislature to implement its constitutional obligation under a by-law clause.

Constitution-makers could also give greater consideration to these options in deciding on the optimal level of constitutional deferral: a number of constitutions, including the Indian Constitution, expressly provide that by-law clauses are *not* directly judicially enforceable. Yet they could just as easily provide that they are justiciable, by including them in sections of the constitution generally deemed justiciable, or expressly providing that a court could hear complaints arising from a failure to comply with the terms of a particular by-law clause.

4. CONCLUSION

Constitutional deferral has long been part of the toolkit of constitutional designers worldwide. Recent decades have also seen the use of at least three different modes of constitutional deferral: age-old techniques of using abstract constitutional language, as a means of deferring a decision on certain concrete constitutional questions to later judges or legislators; the adoption of express 'by-law' clauses nudging, or requiring, legislators to take action on a particular question in the future; and the use of relatively specific but conflicting provisions, which implicitly require later judges or legislators to resolve concrete constitutional conflict.

The chapter explores each of these different modes of constitutional deferral, and their respective logics, as well as potential dangers or downsides to the use of deferral as a constitutional design technique. At the same time, it does not answer a range of important questions about constitutional deferral as a general tool of constitutional design. It does not, for example, attempt to provide statistical analysis of trends in constitutional deferral, over time. My prior work with Ginsburg provides a snapshot of the use of by-law clauses across different constitutions worldwide, but does not look at trends in the use of constitutional deferral across time. Its only longitudinal analysis is of the relationship between the frequency of by-law clauses and 'hazard rate' of constitutions: it finds that constitutions with a larger number of by-law clauses tend to have a statistically significant *lower* hazard rate, or increased chance of endurance, controlling for a range of factors. The examples given in the chapter are also simply illustrative of a recent trend in constitution-

[91] Duty of Parental Contact, BVerfGE 121, 69 (2008)

[92] For arguments for and against this in the Indian context, *see, e.g.,* Nanda, *supra* note 75 (arguing for incremental judicial updating); Herklotz, *supra* note 65 (making similar arguments); Chibber, *supra* note 67, at 708 (on the inadequacy of piecemeal judicial reform).

making processes, not a definitive attempt to show the actual rate of change in the relative use of different deferral tools across different countries over time.

The chapter likewise does not provide an in-depth account of the social and political dynamics driving rates of constitutional deferral in various contexts, or the choice of one deferral technique over another. Ginsburg and I, in our prior work, noted a range of factors contributing to deferral as a design choice, including the specificity of a constitution, the common law versus civil law origins of a constitutional system, the formal difficulty of constitutional amendment under a constitution, and the degree of public-involvement in constitutional drafting.[93] Many of these factors also directly shape the likely magnitude of potential decision and error costs in a given setting: constitutions that in general are more specific, or difficult to amend, will involve a higher potential for error costs. Public participation can also increase the number of potential veto players and/or increase publicity in a constitution making process, thereby increasing decision costs. We also explored the most common topics or subject matters of constitutional deferral in current constitutions, and suggested that the choice of different deferral techniques will often depend on prevailing attitudes toward courts and legislators: abstraction is a technique that can empower future judges or legislators, but inevitably tends to give a central role in constitutional decision-making to constitutional courts.[94] The more trust drafters have in courts, the more likely they therefore are to prefer abstraction as a technique, over rival forms of legislative-based deferral.[95]

We did not, however, provide a comprehensive empirical account of the social and political conditions driving overall deferral rates. Nor did we consider the degree to which different types of deferral are a product of factors such as (a) the history of judicial review in a particular country; (b) the levels of public trust expressed in different institutions at the time of constitution making; (c) the involvement in the drafting process of individuals with prior legislative, executive or judicial experience; and (d) the different mechanisms for judicial appointment stipulated in a constitutional instrument.

There is also clearly the need for more work by both comparative constitutional lawyers and political scientists, which seeks to address these gaps in the literature, and provide a fuller and more reliable picture of general trends in patterns of constitutional deferral, and the causal factors driving the choice between different tools of deferral.

The focus of this chapter is on a second set of questions arising from Ginsburg and my prior work on deferral as design tool – i.e. on the way in which particular dangers or downsides to deferral, and specifically the danger of ongoing or repeated deferral, could more effectively be addressed by constitutional designers in adopting a preference for specific modes of deferral, namely the use of mandatory by-law clauses. Repeated deferral of this kind, it suggests, effectively negates the whole idea of deferral: it represents a form of constitutional abdication, rather than postponement, as a design response, and thus

[93] Dixon & Ginsburg, *Deciding Not to Decide*, *supra* note 2, at 653-55
[94] *Id.* at 659-61, 653.
[95] This is one reason we suggest deferral may be more common in some systems compared to others.

frequently undermines core constitutional aims and commitments on the part of drafters. At the same time, there is a range of ways in which constitutional decision-makers may be able to address this danger: they can adopt express time-limits for legislative action under a by-law clause, which can then serve as a focal point for legislative action on particular questions. In addition, or in the alternative, they can attempt to empower courts to enforce the terms of a mandatory by-law clause via a range judicial tools and techniques. The chapter does not suggest that either of these techniques will be a fail-safe solution to problems of ongoing legislative inertia. Nor does it provide clear guidance to drafters as to which strategy should be preferred in a particular context. Rather, it simply highlights the relative advantages and disadvantages of more political versus judicial modes of enforcement, and the precedent for each as a potential design strategy.

As many other contributions to this volume highlight, questions of constitutional design are almost always questions that, in the final analysis, require close attention to the particular national social economic and political context, and to the specific legal and institutional trajectories of a country that inform how constitution-makers approach the task of constitutional drafting, or change. The aim of the chapter, therefore, is not to suggest how and when constitutional drafters should deploy various modes of deferral. It is simply to expand existing understandings about the global toolkit available to constitution makers in in their own particular national contexts.

A further benefit to a focus on 'deferral' as a tool of constitution-making, in a volume of this kind, is that it reminds us that constitution-making does not simply take place in a single moment, or defined period labelled 'constitution-making', but rather, across many years or stages, and through processes that involve multiple actors – including judges and legislators, as well as individually formally labelled 'constitution-makers'. If we understand this, I have argued elsewhere, we begin to see the process of constitutional design in a quite different light: it is no longer simply a question of how to enact a set of institutions and texts that can fulfil drafters' aspirations.[96] It is also a question of how to create a constitutional judiciary, and legislative and executive branch, that share the substantive aims and aspirations of the drafters; and can thus carry on the work of implementing its substantive goals over subsequent decades.[97] There are a range of lenses through which to see the process of constitution-making in this way.[98] But a focus on deferral provides a particularly illuminating, and important, vantage-point.

[96] Rosalind Dixon, *Drafting and Distrust*, 13 INT'L J. CONST. L. 819 (2015); Rosalind Dixon, *Constitutional Drafters as Judges* (Unpublished manuscript, 2017) (On file with author).
[97] *Id*.
[98] Dixon, *Constitutional Drafters as Judges*, *supra* note 96.