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Email –

[editor@ijlra.com](mailto:editor@ijlra.com)

Website – [www.ijlra.com](http://www.ijlra.com)



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# **KEEPING IT FOR A LATER DAY: THE USE OF “BY LAW” CLAUSES IN SOUTH ASIAN CONSTITUTIONS**

**By: Vineet Kumar (Doctoral Candidate at IIL, New Delhi) & Preetam Bharti (LLM, NLSIU Bangalore)**

## **Abstract**

Constitutions are the founding documents for a polity. They lay down ground rules and basic terms of debate for the populace. However, Constitutions are not made in one go at one point in time in history. For myriad reasons, the framers of the Constitution choose to defer decision making on certain provisions. One of the ways in which it is done is by the use of a “by law” clause in the Constitution. Such “by law” clauses are extensively used in Constitutions across the world. The present paper aims to describe and catalogue the use of “by law” clauses in the South Asian Constitutions. The aim is primarily two fold; firstly to exhaustively enumerate these clauses in a systematic way. Secondly, to try to decipher the underlying reasons as to why the founders of Constitution choose to enumerate those clauses in the first place. The choice of countries is aimed to highlight the diversity in use this constitutional device (“by law” clause) in nations across a similar geo-political region i.e. South Asia. Some explanations as to the choice of this constitutional tool are also offered.

## **I. INTRODUCTION**

Constitutions are contested documents. They emerge out of bitter intellectual tussles and prolonged churning of ideas. Their final form is one of the many possible alternative realities that eventually came to fruition at particular historical junctures. Therefore, Constitution making can aptly be characterized as an art as well as science which juggle between these alternative realities.

If Constitution making is seen as the site of clash of different ideas and groups, the choices that emerge out of the exercise of Constitutional drafting can be seen as negotiated bargains. The drafters use several ‘tools’ and ‘devices’ to arrive at the bargain<sup>1</sup>. With more than two centuries of Constitution making across the globe, there has emerged a comprehensive ‘tool kit’ that facilitated this bargain.

This paper is an attempt to study the use of one such tool across a particular geographical space. The tool being a “by law” clause and the geographical space being South Asia including India, Pakistan, Sri Lanka, Bangladesh, and Nepal.

In several ways, a Constitution even upon its promulgation is an ‘incomplete document’. It is incomplete in the sense that the drafters leave out a lot by way of “deferral”. The drafters, in their wisdom, think it better to defer certain decision to posterity. Such a deferral may have diverse reasons and varied implications. Rather than deep diving into these reasons and consequences, this

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<sup>1</sup> The nature of federalism, division of rights into justiciable or non-justiciable, provisions as to language etc. are such devices at the service of Constitution makers.

paper is merely a cursory attempt to collate, systematically arrange and draw conclusions from the “by law” clauses in South Asian Constitution.

The paper is structured as follows: Following this introductory Section, **Section II** discusses the “by law” clause as a tool in detail. It points out the utility of such clauses, their types as well as certain inherent dangers in their use. **Section III** looks at the use of “by law” clause in South Asian constitutions. The section presents a thematic survey of these provisions which criss-crosses across nations. This description is followed by **Section IV** which tries to analyse these clauses by looking at the similarities as well the dissimilarities in their use. Finally, **Section V** makes some concluding observations.

## II. KEEPING IT FOR ANOTHER DAY: DEFERRAL BY “BY LAW”

Constitution writing has to withstand pressures from numerous ideological positions and diverse ethnic or social groups. Consensus doesn't come easy under such situations. Therefore, the craft of a Constitution maker lies in pinning down certain substantial and core issues in the text while deferring some equally important ones to future.<sup>2</sup>

Instead of a complete silence on such issues, the Constitution drafters may choose to defer by using the “by law” clauses in the text. The “by law” clauses are an important tool in a Constitution maker's tool kit. These clauses are used profusely in the constitutional texts around the globe.<sup>3</sup> There are many reasons for their widespread use.

### Why use a “by law” clause in the Constitution

Firstly, according to Dixon and Ginsberg<sup>4</sup>, the “by law” clauses end up minimizing the ‘decision cost’ and ‘error cost’ in both absolute terms as well as relative terms.

‘Decision cost’ are essentially the costs associated with negotiating and finalizing the constitutional text. They arise because of “too much passion” on either side, asymmetric information, or even because of ‘holding out’ by the parties and refusing to change their stance. ‘Error costs’, on the other hand, essentially mean the gap or wedge between the expected outcome of a prospective provision and its actual outcome. This would actually play out in the distant or near future and can only be approximated by ‘discounting’ the future to the present.

In absolute terms, the “by law” clauses substantially reduce these costs by increasing the potential sphere of agreement between the different stakeholders, letting parties avoid making unalterable concessions and deferring the decision making to future when more information is available to take the decision.<sup>5</sup> In relative terms, the “by law” clauses fare much better than other drafting tools such as the ‘sunset clauses’, deliberate vagueness in provisions or mandatory periodic reviews etc.<sup>6</sup> Alternatively, the presence or absence of these costs also affects the breadth as well as strength of the delegation and deferral in the Constitutional text.

Secondly, according to Tushnet<sup>7</sup>, the “by law” provision of the Constitution also help to apportion power between the legislature and the executive. Under the common law, it is legislature that is supposed to exercise its power by law whereas the executive functions are carried on by delegated

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<sup>2</sup> Tushnet, Mark. 2014. *Advanced Introduction to Comparative Constitutional Law*. Chapter-2.

<sup>3</sup> There was an average of 2.29 deferral by law clauses found in the Constitutions with deferrals being comparatively more common in Africa and South Asia than anywhere else (infra footnote 4)

<sup>4</sup> Dixon, Rosalind & Ginsburg, Tom. (2011). *Deciding Not to Decide: Deferral in Constitutional Design*. *International Journal of Constitutional Law*. 9. 10.1093/icon/mor041.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid. footnote 2

rule making. Therefore, the “by law” clause also limits the executive power.

### **Types of “By law” clauses and where they are used predominantly**

In Constitutions around the globe, these “by law” clauses come in myriad forms and types. A legislature may be required by a “by law” clause (weaker form of deferral) to act in a certain way or a Constitution may simply empower a legislature (strong form of deferral) to act “by law”. In the former case, the legislature is bound to comply with the clause whereas in the later there is a discretion with the legislature to act in furtherance of the “by law” clause.

Secondly, the “by law” clauses can also be categorised on the basis of how broadly or narrowly they defer decision making to the future. As is evident from the nomenclature, the broad clauses give extreme leeway to legislatures in terms of how to go about the particular issue. These clauses do not even bother providing for some constitutional arrangements for the interregnum till the legislature uses the “by law” clause.

On the other hand, the narrow “by law” clauses spell out limitations on decision makers of the future. These limitations can be procedural or substantive or both. Also, the narrow clauses tend to make arrangements for interim periods further narrowing down the scope of exercise of the power by legislature.

According to Dixon and Ginsberg<sup>8</sup>, the “by law” clauses, as a deferral technique, are most likely to be employed in situations where there are either very high stakes or very low stakes. In the former i.e. high stakes situations the framers might not end up at any concrete formulation after protracted dialogue. On the other hand, in the latter case i.e. low stakes situations there might be time constraints that prevent deliberations on them and therefore they are deferred.

Empirically, Constitutional provisions related to citizenship, modalities related to working of legislature, qualifications of electors and legislators, selection/removal of judges are some of the sites where the “by law” clauses are most frequently used across nations.<sup>9</sup>

### **Pitfalls with the use of “By law” clauses**

At the outset, some basic procedural issues like basic mechanism to sort out conflicts cannot be deferred. This is because such a deferral will add any another layer of conflict to the existing conflict. Also elementary steps to kick-start the democratic journey of a nation like initial date of seating or quorum etc. are not usually delegated.<sup>10</sup>

One of the main dangers associated with deferral is that the legislature might not pass the implementing legislature at all. This leaves certain Constitutional issues permanently undecided. This may be because a consensus does not come about the issue or there is lack of will at the part of the legislature. As an illustration, it has been stipulated that the Brazilian Constitution would require 56 complementary legislation and 314 new laws to fulfil the Constitutional mandate of delegation.<sup>11</sup>

If overused, the tool of “deferral” may also lead to substantial overburdening of the legislature on the one hand and the reduced sanctity or belief in the Constitution. Both these developments can then have substantial implication on the endurance of the Constitution.

## **III. THE SOUTH ASIAN EXPERIENCE WITH “BY LAW” CLAUSE**

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<sup>8</sup> Ibid. footnote 4

<sup>9</sup> Ibid footnote 4

<sup>10</sup> Ibid footnote 4

<sup>11</sup> Javier Martinez-Lara, Building Democracy in Brazil (1996) cited in Dixon, Rosalind & Ginsburg, Tom. (2011).

Deciding Not to Decide: Deferral in Constitutional Design. International Journal of Constitutional Law. 9.

10.1093/icon/mor041.

South Asia is a microcosm of the diversity of polities in the world. It holds within itself both a 'secular state' in India as well 'a religious state' in Nepal & Pakistan, a Presidential systems in Sri Lanka as well as a Westminster style parliamentary system in India & Pakistan, a unitary system in Bangladesh as well as federal polity in India & Pakistan.

These nations converged under the British Empire at some point in their history and then diverged to their respective paths during the course of the last century. Their Constitution making (and remaking in several cases) reflects both this convergence as well as divergence. It also reflects the unique challenges and insurmountable problems facing them. Therefore, the drafters were drawn to the use of several Constitutional tools one being the "by law" clauses. This sections attempts to collate the "by law" clauses under these constitutions by focusing on their current constitutions.

The "by law" clauses can be effectively studied by grouping them into two broad categories. The first category involves their use under completely distinct themes or purposes. The "by law" clauses under this category are used to tackle the peculiar problems germane to the given nation. On the other hand, the second category the "by law" clauses are used under common themes such as Judiciary, Fundamental Rights, legislative procedures etc. Their use under common themes must not understood to be identical. In spite of being under the same theme, the "by law" clause are still tinkered with to suit the particular circumstances.

#### **"By law" clauses for distinct themes**

Different South Asian nations have deployed the "by law" clauses for distinct and unique purposes in their Constitutions. The Pakistani Constitution, while defining the crime of 'high treason', has left it with the legislature (Majilis-e-shoora) to determine the punishment for 'high treason' "by law".<sup>12</sup> This provisions attempts to check the frequent instances of the overthrow of democratically elected governments by the armed forces.

The Bangladeshi Constitution ends up delegating to the legislature the power of determining the boundaries of the capital Dhaka "by law".<sup>13</sup> The Nepalese Constitution gives consumers the right to quality food stuffs and services and urges the Parliament to provide for compensation in cases of sub-standard goods and services "by law".<sup>14</sup>

The Indian Constitution was born out of the pangs of partition and puts a strong premium on preserving the unity of the nation. Therefore, the Constitution even allows altering or abolishing of the boundaries of its constituent units i.e. the States as well as the abolishing the second chamber in these States "by law".<sup>15</sup>

Sri Lanka, being a Buddhist majority state, provides for the creation and establishment of institutions, tribunals and courts for matters related to the discipline and performance of services of the 'bikkhus' "by law" under its Constitution.<sup>16</sup> The Sri Lankan parliament is also tasked with providing for the procedure related to the conduct of Referendum<sup>17</sup> "by law" in situations where the conduct of such a Referendum is mandated under the Constitution in Article 85.

Being large federations, India and Pakistan provide for regulation of inter-state or inter-province trade and commerce "by law".<sup>18</sup>

<sup>12</sup> Article 6 (3) of The Constitution of the Islamic Republic of Pakistan 1973

<sup>13</sup> Article 6 (2) of The Constitution of the People's Republic of Bangladesh 1972

<sup>14</sup> Article 44 of The Constitution of Nepal 2015

<sup>15</sup> Article 3 and Article 169 of The Constitution of India 1949

<sup>16</sup> Article 105 (4) of Constitution of The Democratic Socialist Republic of Sri Lanka 1978

<sup>17</sup> Article 87 (2) of Constitution of The Democratic Socialist Republic of Sri Lanka 1978

<sup>18</sup> Article 302 of the Constitution of India & Article 151 (2) of The Constitution of the Islamic Republic of Pakistan 1973

**“By law” clauses under common themes****“By law” clauses and Fundamental Rights**

All South Asian countries deploy the “by law” clauses alongside the Constitutional provisions relating to basic or fundamental rights.<sup>19</sup> These “by law” clauses are used to empower the legislatures to restrict these rights by passing legislations subsequently. This delegation, however, is not unchecked and is circumscribed by broad heads or categories (such as public order, sovereignty etc.) within which these subsequent legislations must fall.

The restrictions upon Basic Rights vary across countries and therefore the “by law” clause can be used only if satisfies the restriction contemplated under the particular Constitution. For example, the Freedom of speech and expression can be restricted “by law” for ‘the glory of Islam’ in Pakistan but not in India and for ‘defamation’ in India but not in Pakistan.<sup>20</sup>

**“By law” clauses and the Legislature & Executive**

All these Constitutions allow their respective legislatures to decide on the disqualification of their members, their privileges, salaries and their secretarial staff “by law”. This is symbolic of their encounter with the Westminster model during Colonization.

All these countries allow their legislatures to regulate the conduct of elections to the Parliament and other levels by expressly empowering their Parliaments to frame electoral laws in their Constitutions. Article 327 in Indian Constitution, Article 222 & 225 in Pakistan, Article 125 in Bangladesh and Article 101 in Sri Lanka.

All these Constitutions refer the financial matters of legislation such as the decision on the custody of the Consolidated Fund of the Government or whether a particular expenditure is charged on the Consolidated Fund to be determined “by law”.

**“By law” clauses and the Judiciary**

South Asian Constitutions are not self-contained in their provisions as to the judicial branch. Although some aspects may be common, different Constitutions end up deferring different aspects related to Judiciary. The Bangladeshi Constitution allows the legislature to prescribe qualifications for appointment as an SC judge and regulate the procedure of their impeachment “by law”.<sup>21</sup>

The Sri Lankan Constitution, like its Bangladeshi and Indian counterparts, allows the parliament to regulate the procedure impeachment proceedings under Article 107 (3). It also allows the parliament to legislate on matters relating to retirement of HC judges in Article 111. The jurisdiction of the Supreme Court and the High Court can be extended “by law” under Article 118 (g) and 154P.

The legislature is empowered to decide on the number of judges (Article 176, 193), to regulate the exercise of contempt of court power (Article 204, 240) and extend the jurisdiction of the High Court “by law” under the Pakistani Constitution. As discussed earlier, the Indian Constitution also allows the Parliament to decide on the number of judges (Article 124) and on extending the jurisdiction of the SC as well as the High Courts (Articles 138, 139, 140, 230) “by law”.

**“By law” clauses and the Institutions created by Constitutions**

These Constitutions deal with institutions in two distinct ways. In some cases, they allow or mandate the legislature to create an institution “by law”. For example, the Pakistani Constitution

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<sup>19</sup> Articles 15 to 23 of the Constitution of The Islamic Republic of Pakistan 1973, Articles 14 to 35 of the Constitution of India 1949, Articles 17 to 25 of the Constitution of Nepal 2015, Articles 36 to 45 of The Constitution of the People’s Republic of Bangladesh 1972, Article 15 of the Constitution of The Democratic Socialist Republic of Sri Lanka 1978

<sup>20</sup> Article 19 of the Constitution of the Islamic Republic of Pakistan 1973 & Article 19 (2) of the Constitution of India 1949.

<sup>21</sup> Article 95 & 96 of the Constitution of the People’s Republic of Bangladesh 1972

provides for the creation of Administrative Tribunals (Article 212) and Public Service Commission (Article 242) “by law”.

Similarly, the Bangladeshi Constitution empowers the Parliament to establish an Office of Ombudsman (Article 77), Administrative Tribunal (Article 117) and Public Service Commission (Article 137) “by law”. The Sri Lankan legislature may create a Parliamentary Commissioner for Administration (Article 156) and Administrative Appeals Tribunal (Article 59) “by law”. The Indian Parliament may also provide for Administrative and Other Tribunals under Article 323A and Article 323B of the Constitution.

The second motif is that the Constitution itself establishes an institution and leaves it to the legislature to determine its powers, duties and functions “by law”. The Indian Constitution, while establishing the offices of the Attorney General, Comptroller and Auditor General and the Finance Commission, allow the parliament to determine their functions, duties and powers “by law” under Article 76, 148 and 280 respectively. Similarly, the Nepalese Constitution allows the Parliament to regulate the conditions of services of the Attorney General (Article 157), Chief Election Commissioner (Article 245) and Commission for the Investigation of Abuse of Authority (Article 239) among others “by law”.

#### IV. ANALYSING THE USE OF “BY LAW” CLAUSES

The diversity of uses for which the “by law” clause has been put to in South Asian countries has important lessons for Constitutionalism in the global south. It reaffirms the belief that despite the similar macro dynamics of imperialism, colonialism and the quest for economic development, the micro dynamics of countries tied so closely by geography and history are starkly varied. Any attempted generalization masks a lot of specificities and details.

Also, as a corollary, it can be averred that Constitution drafting is a highly personalised and tailored craft. Every drafter looks at Constitutional tools and devices as a piece of clay which he/she/it can mould according to the existing problems and circumstances.

The use of “by law” clause for similar purposes across these nations hints towards a normative consensus upon certain constitutional issues. Nations across the board have found it useful to expressly delegate these issues. There could also be an element of ‘path dependence’ in some delegations as nation follow each other in simply deferring certain things. Also, Westminster conventions as a legacy of shared British colonial encounters have also nudged certain deferrals across these countries.

The use of “by law” clause in citizenship provisions also points to an interesting phenomenon. Both Bangladesh and India empower their legislatures to address the issue of citizenship “by law” under Article 6 and Article 11 of their Constitution respectively. Consequently, the legislatures have passed laws<sup>22</sup> as mandated by these Articles. However, there is no express mandate by the Pakistani Constitution and still the Citizenship under the Pakistani law is governed almost similarly by an almost similar instrument i.e. The Pakistan Citizenship Act 1951.

This example highlights a muddled line of division between the use of a “by law” clause in the Constitution or mere silence in the document as to a particular issue. Both might end up achieving the same end and therefore hint towards the futility of the use of a “by law” clause in the first place. However, the use of a “by law” clause or a mere silence depends upon the contestations and circumstances at the time of the drafting of the particular Constitution. It may become essential to

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<sup>22</sup> The Citizenship Act 1955 in India and The Bangladesh (Adaptation of Existing Laws) Order, 1972 Bangladesh Citizenship (Temporary Provisions) Order, 1972 in Bangladesh

explicitly incorporate a “by law” clause to assuage the feelings of a particular group or to underscore the importance of an issue by explicitly mentioning it in the text of the Constitution.

## V. CONCLUSION

The present article is merely a textual study of South Asian Constitutions and their tryst with the “by law” clauses. It is broadly in the nature of survey of these Constitutions. Therefore, this article is bound to be laden with all the shortcomings of a textual or superficial analysis. It is a focused attempt to study the use of one of the tools of Constitution at a regional level.

This work can be supplemented in multiple directions. The next step could be to analyse the history and reasons for incorporating these “by law” clauses in the respective Constitutions. The specificities of each Constitutional experience can add vivid details to this bland sketch and make comparison a fruitful exercise. This could be supplemented by looking at the actual working or non-working of these clauses. How effective or non-effective they have been in achieving the purpose of their incorporation will be the ultimate test for their usefulness as a tool in the Constitution making exercise.