



Unpacking Delimitation of Constituencies in Pakistan under Election Laws

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ABSTRACT

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This article critically inspects the Election Laws in Pakistan in the context of the Delimitation of Constituencies. To this end, this article unpacks the Pakistani perspective on Delimitation and scrutinizes the principles of delimitations and how it is polluted due to gerrymandering. This article also examines the role of the election commission and highlights the requirement of the census before delimitation.

Keywords:

Delimitation of Constituencies, Gerrymandering, Election Commission of Pakistan, Jurisdictional Bar



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INTRODUCTION

The Delimitation of Constituencies Act 1974 is an old enactment of election law that specifically discusses delimitation. Recently, the Election Act 2017 (hereinafter 2017 Act) and the Election Rules 2017 (hereinafter 2017 Rules) provide brief laws and principles regarding elections in Pakistan. The significance of these laws in case of delimitation increases because they set the boundaries for the electoral districts. The change in such boundaries can be the cause of variation in the election results. This article unearths the canons of Election laws but deep perusal and

meticulous analysis of Pakistani courts' jurisprudence. After the investigation of all the judgments of Pakistani courts on the 2017 Act and 2017 Rules, this article at first instance provides a brief account of the various dimensions and principles of Election laws described, defined, and evolved by the courts. To this end, this research article has been divided into various segments. The second segment describes the concept of delimitation and how it is conducted in Pakistan. This segment also develops the significance of representation made to the Election Commission of Pakistan (hereinafter Commission) and provides whether the constitutional jurisdiction of the High Court can be invoked regarding issues related to delimitation. The third segment scrutinizes the role of the commission during delimitation. The fourth segment describes the principles of delimitation more specifically discusses the ten percent variation principle and relates it with the jurisprudence developed by the United Kingdom's courts and the democratic "one man, one vote" principle. The fifth segment is very important as it provides a detailed account of the debasement of voters and "gerrymandering" to pinpoint how delimitation can be utilised to benefit any individual by discriminating others. In the sixth segment, the article inspects the concept of the census to highlight how the delimitation of 2022 does not rest well with the 2017 Act. In the end, this whole discussion culminates in a reasonable and justified conclusion.

Delimitation of Constituencies

Delimitation or *Halqa Bandi* is the process in which the total area of the country is divided into various smaller parts or units. Delimitation is done to divide the constituencies for the elections of the provincial as well as the national assemblies. The purpose of delimitation is to conduct the elections in the country in a smooth and very efficient manner. It seems unmanageable to conduct the polls on the entire electoral territory as a single unit. It is highly subjective and led to impracticability as the whole country is a big entity and its electoral territory cannot be treated as a single unit. Hence, delimitation is a privilege not only for the public but also for the dispensation of democracy and the promotion of democratic values (Chandra, 2000). None of any election laws or Pakistani courts has defined the term delimitation.

The enlightenment of the 2017 Rules practically describes the way of initialising the delimitation. Rule 10 (5) of the 2017 Rules elucidates that the delimitation must be initialised from the northern side of a district. Furthermore, the line proceeds in a zigzag clockwise direction. Delimitation must be as close as is realistic, feasible, achievable more specifically practicable to the quota (Rustom, 2018).

In *Muhammad Ibrahim Jatoi v Election Commission of Pakistan*, the petitioner alleged in the finalised delimitation subjected district was allocated three provincial assembly seats. The petitioner further asserted that the delimitation has not been initialised from the district's northern point. The petition was dismissed on the subjective ground that the commission is not very much bound to perform delimitation according to the laws. The court stated the legislature and the laws have given leeway to the commission. This decision of the double bench does not rest well with Rule (5) of the 2017 Rules as such rule has not provided any flexibility in its application (Muhammad, 2019).

None of the authorities has described what zigzag clockwise manners mean. Even none of the statutes including the 2017 Act and the 2017 Rules have described or defined this phrase. Zigzag is defined as a series of turns, directions, angles, variations, and alterations in any path (Merriam

Webster). Possibly this zigzag might be helpful in preserving the rights of the communities, regional ethnicities, and the group of identical castes that without cutting, dividing, or classifying such groups with straight lines the boundaries are allowed to be tilted in zigzag manners. As well as various physical features that are owned by different people to preserve such materials the boundary is allowed to be drawn in a zigzag manner to decrease the conflicts on such materials.

Section 21 of the 2017 Act authorises the commission that delimits the constituencies, the representations/proposal can be made to the commission. If the representation is considered by the commission then it can make the modifications, alterations, and amendments to the preliminary constituencies' lists that had been already published. After modification, the new document will be published in the official Gazette. However, the representation should be made thirty days after the already published preliminary constituencies list.

At the preliminary stages of the delimitation, any voter can provide suggestions and can forward a proposal to the commission in the form of representations. The voter of the constituency is competent in making such suggestions. The commission is obliged to consider and decide the same in the light of the law. However, the person is not competent of claiming the vested right over what he has suggested should necessarily be accepted by the commission. Undoubtedly, it is a fundamental right of a person to take part in elections and the right to franchise however, to contest the same on the ground of delimitation at one's aspiration is highly subjective and is not permitted (Sardar, 2019).

As the commission is authorised to receive, consider and accept the representations. The question arises whether or not the commission has the power to dispose of various received representations on the delimitation of a constituency without making a separate order in each proposal. *Bahadur Ali and others v Election Commission of Pakistan* answers the aforementioned question that the commission in such cases when there is a very short time and many proposals have been forwarded for each district, the commission can give a consolidated order. The reason behind this judgment is that deciding on each proposal distinctly will consume more time and in a hurry, the commission might give conflicting orders for the same unit (Bahadur, 2018).

Section 236 of the 2017 Act bars the jurisdiction of courts expressly. Section 236 (3) says that the delimitation of the constituency done by the commission should not be questioned in any court of law. Undoubtedly, section 236 of the 2017 Act has barred the jurisdiction of courts but the question is whether this bar will be applied to the constitutional jurisdiction of the High Court. *Mir Shabbir Ali Khan Bijarini and others v Federation of Pakistan and others* evinces that the bar prescribed by section 236 of the 2017 Act cannot bar the constitutional jurisdiction of the High Court enshrined in Article 199 of the Constitution of Pakistan 1973. The court gave the reason that the 2017 Act is a sub-constitutional enactment and the provisions inscribed in it are also sub-constitutional and they have no power to bar either expressly or impliedly the jurisdictions of the higher courts as their jurisdictions have been awarded by the constitution to the superior courts. Furthermore, the court stated that it is the function of the High Courts to interpret the law, and the higher courts according to the circumstances of each case can decide and examine the nature of an ouster clause with acknowledgment of the "principles of consistency" (Mir, 2018).

In *Muhammad Saleem Khan and others v Election Commission of Pakistan*, the claimant argued that the commission has created ambiguity in the arrangements of union councils. The commission falsely and illegally subtracted a union council from one tehsil and added it to another tehsil. The court had checked the merit and in the views of the court, the commission had not violated basic and significant provisions of law during the process of delimitation and upheld that the constitutional jurisdiction of the High Court cannot be invoked for mere factual controversies (Muhammad, 2018). The court did not suggest the proper forum for the resolution of such mere factual controversies.

There is very limited shopping of the forum in cases of delimitation. *Rustom Ali v Election Commission of Pakistan* described that the aggrieved party at first instance has to get a remedy from the doorstep of the commission for any factual or substantial controversy and the aggrieved party can invoke the constitutional jurisdiction of the High Court against the order of the commission as well (Rustom, 2018). The court remained unsuccessful in describing in which circumstances the aggrieved party can directly invoke the constitutional jurisdiction of the higher courts.

Principles of Delimitation

The principles of delimitation have been enshrined in section 20 of the 2017 Act. Section 20 says:

“All constituencies for general seats shall, as far as practicable, be delimited having regard to the distribution of population in geographically compact areas, physical features, existing boundaries of administrative units, facilities of communication and public convenience and other cognate factors to ensure homogeneity in the creation of constituencies.”

Where there is no homogeneity there is a chance of discrimination. It is obligatory that homogeneity should be maintained during the process of delimitation. Delimitation is classification but this classification should be justified and reasonable and all the people of a constituency should be treated equally and should not be discriminated against on the basis of their color, creed, and caste (M.Q.M, 2014).

The Supreme Court of Pakistan in *Watan Party v Federation of Pakistan* (2011) stated that the commission has to show mastery while performing the process of delimitation. The court stated that delimitation should be done in such a manner that political polarization should be discouraged. Along with it, such delimitation should break the cycle of turf and ethnic conflicts. The Supreme Court even stated that the alteration should be made in the administrative units including the revenue estates and the police stations to destroy their hegemony. In this way, with such delimitation, harmony among the people can be promoted. People of the same class, creed, and mentality can share a peaceful environment with one another. As the Watan party case was discussing the matters and issues of Karachi, the court affirmed that the delimitation in Karachi should be done in that matter to convert Karachi into a peaceful city as this city is the economic hub and face of Pakistan. The court directed that all such measures should be taken by the commission on its behalf to flourish Pakistan and the Pakistani nation.

Section 20 of The Act 2017 describes the principles of delimitation. Clause (3) of section 20 while setting out a principle of 10% variation states: “As far as possible, variation in a population

of constituencies of an Assembly or a local government shall not ordinarily exceed ten percent.” This segment inspects the dimensions and the basis on which this principle has been based and draws a relationship and comparison between Pakistani and United States Principles.

Delimitation is the name of dividing constituencies into equal populations. However, there is always a margin and variation of 10 percent. The variation in the population must not exceed 10 percent (Mir, 2018). However, if such variation occurs or exceeds the fixed ratio then the delimitation committees have to describe the logical reasons and reasonable justifications for happening of such extraordinarily exceptional circumstances due to which exceeding the fixed limit happened and the commission has to reduce reasons such in writing (Sardar, 2019).

Sue Evenwel a landmark case, describes a very famous democratic doctrine that is “one person, one vote.” *Evenwel’s case* while authenticating the existence of this doctrine in Pakistan considers it a ground of fundamental democracy. *Evenwel’s case* relied on a very famous amendment in the Constitution of the United States that is known as the “Equal Protection Clause of the Fourteenth Amendment.” The amendment stated that the representational equality principle should not be violated while drawing the legislative districts. *Evenwel’s case* elucidated that this representational equality principle is the base of section 20 clause (3) in which there is a flexibility of 10% (*Sue Evenwel*, 2015). However, the 10% variation in the representational equality principle is added by the Pakistani court although such variation is not part of the Equal Protection Clause of the Fourteenth Amendment.

The variations in congressional districts should be bonafide and should show good faith and the purpose behind it should be the accomplishment of the exact mathematical equality. Hence, if the variation has been made in reapportioning the congressional districts, to give this variation a constitutional look, there must be a logical and justified justification with reasoning. *Kirkpatrick v. Preisler* can be cited in this regard. However, *Wesberry v Sanders* states that it is impossible to achieve exact mathematical equality. The court further describes that it is impossible to draw the district satisfying the mathematical computation otherwise, there is no reason to subjectively disturb the constitutional clause ‘equal representation for the equal people.’

In *Reynolds v. Sims*, the court stated that it is the very essential condition of the Equal Protection Clause that a truthful effort be made while the construction of legislative districts into an equal population. Practical and objective approaches should be utilised and it is the responsibility of the state to ensure good faith and truthfulness while the performance of such hectic tasks. The court realised that it is very difficult to construct a district that contains an equal number of citizenry and voters as it is impossible to make the mathematical accuracy and exactness as to the constitutional requirement.

Although 10% is a high percentage for variation. However, this variation should not be utilised for the debasement of the voter. As well as the “one man, one vote” doctrine should also not be practically and realistically violated. In this way, it is submitted to eradicate any ambiguities and to fulfill the exigency the legislature of Pakistan has added a 10% variation principle among the principles of delimitation. These can be called permissible limits in the Election Laws of Pakistan. However, the Election Commission of Pakistan should have to be a keen observer when the variation has been exceeded as much increase in variation may preserve gerrymandering in it.

Gerrymandering

Delimitation has great significance and has a very important effect on elections hence, this process should be performed with great effort and care although it is a hectic activity. *M.Q.M and others v Province of Sindh* have become a landmark to discuss the concept of “Gerrymandering.” The Karachi High Court stated that:

“Gerrymandering was a practice in the process of setting electoral districts that attempted to establish a political advantage for a particular party or group by manipulating district boundaries to create partisan advantaged districts. Resulting district was known as a "gerrymander", however, said word could also refer to such a process. When used to allege that a given party was gaining disproportionate power, the term "gerrymandering" had negative connotations.”

Karachi High Court had shed light on the concept of redistribution of an unbalanced population at the district level. The court held that gerrymandering promotes an unbalanced, unstable, and discriminatory delimitation (M.Q.M, 2014). However, the word gerrymandering has not been defined in any statute and the same has been always subjected to the subjective approach utilised by Pakistani courts. Therefore, it will remain difficult to describe delimitation within the scope of gerrymandering on specific grounds.

Gerrymandering is discrimination and is a violation of fundamental rights. Particularly gerrymandering does not rest well Article 25 of the 1973 Constitution says:

- “(1) All citizens are equal before law and are entitled to equal protection of law.
- (2) There shall be no discrimination on the basis of sex.
- (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.”

Gerrymandering is an adverse distinction and unfavorable bias against a specific group, caste, or individual. It benefits one and violates the rights of the other by discriminating against him.

In *Rustam Ali and others v Election Commission of Pakistan and others*, the court stated that the debasement is undoubtedly a violation of the rights of an individual. The “Principle of one man, one vote” is violated due to debasement. The court defined debasement as the process of decreasing the quality and transparency of something by degradation (Rustam, 2018). Hence when section 20 (3) of the 2017 Act is read with Article 51 (5) of the Constitution, the principle of one man, one vote is preserved. Hence, by gerrymandering and debasement, the population uniformity is disturbed as well as it establishes the unjustified disparity. Consequently, it disturbs the whole election. Honest and fair elections are not conducted.

Function of Election Commission of Pakistan

Article 218 of the Constitution of Pakistan 1973 (hereinafter 1973 Constitution) constitutes the Election Commission of Pakistan with an aim to create a watchdog on the elections and their ancillary purposes.

The Supreme Court of Pakistan in *Workers' Party Pakistan v. Federation of Pakistan* has elaborated function and role of the Commission during the elections. The Supreme Court has

stated that the commission is obliged by the 1973 constitution to perform all the tasks of the election on the basis of good faith and by maintaining the highest standard. The Commission has to work according to law and norms. The commission is responsible for conducting the elections fairly as well as the commission has to make all the arrangements for conducting the elections before the day of the elections. The requirements that needed to be fulfilled on the day of elections would also be supervised and fulfilled by the commission. The court affirmed that the commission should work by maintaining fairness, free from corruption and illegal practices (Workers, 2012).

One of the tasks of the Commission is to finalise the delimitation of national and provincial constituencies (Raza, 2018). In light of the 2017 Act, the Commission is bound by law to start the delimitation process and procedure. There are some basic requirements that are needed to be fulfilled before the start of delimitation; firstly, delimitation can be started after every census. Secondly, all the processes and the procedure of the delimitation must be done four months before the scheduled day of the polling.

The commission has to conduct elections on time and the delay is unbearable. Any inference in the processing of the election at the delayed stage can be the prominent cause for the delay in the election and it would be considered as the interruption in the procedure and processing of the election (Abdul, 1989). That is why in *Ghulam Mustafa v. Commissioner/Delimitation Authority, D.G. Khan*, the court dismissed the interference of the petitioner in the union council's process of delimitation on the ground that the schedule of the elections had already been announced as well as the delimitation process had been completed and finalized. The decision of the court sits well with section 10-A of the Punjab Local Government Act 2013 which says that the court of law or any other authority is not capable of reviewing or making corrections to the Union Council or ward's delimitation after the schedule of the election has been notified. For a particular purpose, if there is a need to challenge the Union Council or ward's delimitation the aggrieved party has to come timely to the proper forum before the announcement of the elections (Ghulam, 2014).

Census

This segment describes the concept of the census and relates it to Election Laws and highlights the requirement of a fresh census for fresh delimitation. First of all, there is a need to define the term census as none of the election laws define it.

Census is the counting of the population that includes gathering, assembling, analysing, calculating, estimating, publishing, and disseminating the statistical records related to the population and their geographical location. The census can be done either by De facto or by De jure methods. De facto describes the listing of the people who were found in the census. The limitation of the De facto way is that it does not regard the normal residence of the person and only adds the people who were present at the time of the census. While the De jure method lists the person according to their residence. The limitation of this method is that on the day of the census and at the time of the census the existence of the listed person is not necessary.

In Pakistan, the first census took place after its independence in 1951 while the second was held after 10 years in 1961. Likewise in 1972, the third census took place and the delay of one year happened due to an unstable political environment. The fourth and fifth census was held in 1981 and 1998 respectively. After the passage of nineteen years, in 2017, another census was held in

Pakistan. That is a horrible fact as such delay cannot be expected in the postmodern 21st century. The census has shown overpopulation in Pakistan. The total population of Pakistan was 213,222,917. There was a huge increase in population between 1998 and 2017. The population crossed all the estimated limits.

Section 17 of the 2017 Act says that it is the responsibility of the commission to initialise the process of the delimitation of the constituency after the official publication of the census in the Gazette. Section 17 (2) reads: *“The Commission shall delimit constituencies after every census officially published.”*

There is a need for interpretation of the term “every census.” Does this phrase elucidate the commencement of fresh census, modified or altered census, upgraded census, or any other census? Once a census has been done, it is called a final census. When the census will be held, it will be called a fresh or new census. It will not be called the modified or altered census. Hence, the meaning of the phrase every census shows that delimitation has to be done after the commencement of every fresh census.

Consequently, section 17 requires that there should be the commencement of a fresh census and it should be officially published. The requirement of section 17 is not fulfilled just on mere publication of census in the official gazette but it also requires the occurrence of a fresh census, then the process of delimitation is allowed to be started.

The sixth census was held in 2017 by the Pakistan Bureau of Statistics and has been published in the official gazette. On the basis of the sixth census, the delimitation was done by the commission in 2018 for the general elections of 2018 and fulfilled the requirement of section 17(2) of the 2017 Act. The delimitation of 2018 can only be utilised by the 2018 elections and its subsequent by-elections. In April 2022 the commission initialised the process of new delimitation of constituencies as well as the commission published the preliminary report of 2022 delimitation on May 31 in the light of section 21 of the 2017 Act (Anfrel, 2022).

The question is whether or not the publication of the preliminary report 2022 fulfills the requirement of section 17(2) of the 2017 Act. The delimitation of 2022 has been done by the commission without conducting a fresh census and without publication of it in the official Gazette as well. Meanwhile, the commission had relied on the census of 2017 to delimit the constituencies in 2022 which does not rest well with the criteria set by section 17(2) of the 2017 Act.

It is submitted that rather than delimiting the constituencies again in 2022 which requires the commencement of a new census and its publication in the Gazette, the election of 2023 should be conducted on the basis of 2018 delimited constituencies. There are two grounds for that; firstly, in the past, the census had been consecutively done after a ten years gap. There will be a minute change in population in the period of four or five years and if a new census occurs in 2022 there will not be any massive change in population in comparison with the figures of the 2017 census. Secondly, Pakistan is facing a financial debacle so at that stage, it will be useless to utilise a huge amount of finance on the census.

CONCLUSION

There is no cavil to the proposition that the delimitation process is termed to be the sacred most for the process. However, it loses its efficacy if politically polluted. Thus, it is the prime responsibility of the commission to perform its process of delimitation in such a manner that it not only adheres to the provisions of the 2017 Act but also protects the rights of the voters being affected by such delimitation. Failure in doing so, would not only infringe on the rights of the voters but also discomfort the democratic system protected under the supreme law that is the 1973 Constitution. From another angle, if the power of the commission is concluded with this then a great mandate is placed upon the shoulders of the commission which cannot be overlooked on the basis of whims and caprices of “persons in power” in an arbitrary manner. The 2017 Act is an appreciable work and is a complete code if interpreted to protect the rights of the voter and to encourage democracy in Pakistan. Inflexible interpretation of such a piece is neither the intention of the legislature nor the spirit of the law of Election.

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