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FREEZE ON DELIMITATION: A STEP TOWARDS EQUALITY OR INEQUALITY?

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ABSTRACT

The whole structure of the democracy revolves around the doctrine of separation of power which upholds the goals of justice in its full magnitude. This gives independence to the legislature which has the power to amend the Constitution. It can be well very concluded that the Constitution framers were cognizant of the changing needs of the time and intended to create a balance between flexibility and rigidity by granting the power to amend under express provisions like Art.368. This power was even enlarged when 'The Representation of the People Act, 1951' (hereinafter RPA) empowered the government to promulgate laws for the purpose of the act i.e., representation of people and in pursuance to it bars the jurisdiction of courts in electoral matters. The question whether this power of legislature can abridge the power of judiciary remains a debatable issue. In this regard this article tends to critically analyse the principle of equality of representation in the legislative assembly by focusing upon the freeze on delimitation exercise by an amendment, the blanket ban on the jurisdiction of courts, the concept of judicial review under the basic structure doctrine, the process of computation of seats and the effects of the freeze on the fundamental rights of the people.

Keywords: Delimitation freeze, basic structure, separation of power, judicial review, blanket ban, doctrine of one-vote, one value, equality of representation.

INTRODUCTION

The object and form of state action alone determines the extent of protection claimed by an individual. If the object and purpose sought are legitimate the state's action becomes justified. Article 82[1573] and Article 170[1574] talks about the readjustment of the territorial constituencies the manner in which Parliament may decide by law, provided that such readjustment doesn't affect the representation of people. This authorization stands out to be an enabling provision under art. 332(3) of the Constitution of India which provides that "*the number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved bears to the total population of the State.*" For the purpose of this following the 84th amendment to the Constitution, "The delimitation act, 2002" was enacted by the legislation exercising its power to amend the Constitution under art. 368 to put a freeze on delimitation exercise in India until first census after 2026 with the aim to ensure that the low populations of the southern states should not cost them their representation in the assembly since they have started the family planning norm. However, the said amendment remained untouched and unscrutinised by the virtue of art. 329 that refrains the court from interfering in the matters pertaining to the delimitation of the boundaries. But whether the wording "delimitation" also attracts the freeze under its ambit is the point of discussion.

[1573] INDIA CONST. art. 82.
[1574] *Id* at art. 170.

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THE STATUS OF AMENDMENT THAT INCORPORATED FREEZE

In the Parliament of India, the 42nd amendment to the Constitution was enacted in 1976, which incorporated the freeze on delimitation till 2001. This measure, through the enactment of the 84th amendment, has been extended for another 25 years till 2026. This clearly means that the freeze on delimitation was not present in the original text of the Constitution and the Parliament incorporated the provisions of freeze later through an amendment, barring the jurisdiction of the courts. However, what the legislature had forgotten to consider was the prevailing situations[1575] at the time of enactment of such amendment i.e., the emergency, and the situation when half of the opposition were in detention[1576] which leads us to a point that, the 42nd amendment had not undergone scrutiny and did not receive the assent of the majority at that time which violates the condition of attaining majority under art. 368. Thus, the very enactment of the amendment was contrary of the Constitution itself. And it is well settled that any provisions incorporated through amendments could not put a blanket ban over the courts and that the bar of jurisdiction is only against the ordinary courts and not the extraordinary jurisdiction of the Constitutional Courts.[1577]

JUDICIAL REVIEW: THE DOCTRINE OF THE INVIOLABILITY OF THE BASIC FEATURE

The question whether provisions of the Constitution have a non-obstante clause to the effect of "Notwithstanding anything in the Constitution" can come in the way of testing the provision against the touchstone of violation of the basic features of the Constitution? The SC has answered such a question in the negative saying that "no constitutional amendment can be made so as to damage any basic feature of the Const."[1578] The doctrine places an embargo on the erosion of basic features. As the power to annul the acts which violate the Constitution is vested by the Constitution itself in the Judiciary and not the Legislature which is a creature of the Constitution.[1579] It is a settled principle that every law has to pass through the test of constitutionality, which is nothing but a formal test of rationality.[1580]

"Judicial review is such the ability of a court to examine the activities of other levels of government, particularly the ability of the court to invalidate legislative and executive measures for violating the constitution."[1581] The origin of the judicial review in the judiciary is based upon the doctrine of separation of power[1582] which upholds the goals of justice in its full magnitude[1583] because if the powers of the all the organs are combined in the same organ, the liberty of the people gets jeopardized as it leads to the tyrannical exercise of these powers.[1584] It is thus regarded as a part of the 'basic structure of the doctrine'[1585] and is beyond the pale of amenability.[1586] Thus, judicial review of administrative action is an essential part in the independence of the judiciary as it's a *sine qua non* for democracy.

Moreover, in the Indian context, the functions of the different parts or branches of the government have been sufficiently differentiated. Subha Rao, C.J also opined that "*the constitution demarcates minutely in three instruments of power, namely the Legislature, the Executive, and the Judiciary, and expects*

[1575] ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.
[1576] Indira Gandhi vs Raj Narain, 1975 AIR 1590.
[1577] Eppala China Venkateswarlu v. Secretary to Government, Social, 2006 (5) ALD 409.
[1578] Nachane Ashwini Shivram v State of Maharashtra, AIR 1998 Bom 1; see also, R.C. Poudyal and Anr. Etc. vs Union of India and Ors, 1993 AIR 1804.
[1579] S.C. Advocates on Record Association v. U.O.I. (1993) 4 SCC 441.
[1580] State of U.P. v. Deepak Fertilizers & Petrochemical Corporation Ltd. (2007) 10 SCC 342.
[1581] REPLEVIN, BLACK'S LAW DICTIONARY (10th ed. 2014).
[1582] State of Bihar v. Bal Mukund Shah, AIR 2000 SC 1296; see also, Bhim Singh v, UOI, (2010) 5 SCC 538; State of UP v. Sanjay Kumar, 2012 6 All LJ 746 (SC).
[1583] University of Kerala v. Council Principals, Col Kerala, AIR 2010 SC 2532.
[1584] MONTESQUIEU, THE SPIRIT OF THE LAWS, quoted in C.K. TAKWANI, ADMINISTRATIVE LAW, 151-152 (7th ed. 2021).
[1585] Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625; see also Waman Rao and Ors vs Union of India and Ors, (1981) 2 SCC 362; Re: Berubari Union, AIR 1960 SC 845; Behram Khursh Pesikaka v State of Bombay, AIR 1955 SC 123; Basheshar Nath v Comm, AIR 1959 SC 149.
[1586] Kihota v. Zachilhu, AIR 1993 SC 412.

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them to exercise their respective powers without overstepping their limits."[1587] Thus, Any policy that destroys the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution."[1588] Therefore the judicial review is justified if the Government policy is arbitrary, unfair, or violates part III and the Court must loathe venturing into an evaluation of State policy. Therefore, the blanket ban imposed on the judiciary is not valid and not applicable on the freeze of delimitation since it attracts the vice of doctrine of separation of power and the doctrine of basic feature. The reliance could be placed upon Smt. Sk. Khasim Bee vs The State Election Commissioner where in a similar instance art.243(O) was incorporated by 73rd Amendment to the Constitution in which the apex court held that *"where the constitutional validity of any statute, rule, or notification, is challenged, which is brought before through the amendment the Supreme Court can scrutinize the same by exercising its power of judicial review"* [1589].

Therefore, the freeze violates the basic structure of the Constitution by interfering with the power of judicial review and the phrase "...shall not be called in question in any court" can't be applied in the matters of provisions brought by the Parliament later as amendments.[1590]

THE PRINCIPLE OF EQUALITY OF REPRESENTATION

"Art.14 is a basic feature of the Constitution."[1591] It commands equal protection of the laws in order to establish equality amongst all.[1592] The essence of art. 14 is the most pertinent bulwark against discriminatory procedural law[1593] and provides equality in all aspects. "This equal protection embraces the entire realm of 'State action', it would extend not only when an individual is discriminated against"[1594] , but also in the matter of granting privileges, e.g., issuing quotas[1595]. A basis for invalidating legislation under art. 14 is the vice, of discrimination and unreasonableness thereby vitiating the law that prescribes that procedure."[1596] Bhagwati J. also affirmed that "wherever there is unreasonableness, there is the denial of rule of law."[1597] Similarly, in order to be in conformity with the law of equality the objective sought for the enactment of the legislation should be met.

THE PROCESS OF COMPUTATION OF SEATS DEFIES THE OBJECTIVE OF RPA

The question of what would be an arbitrary exercise of legislative power would depend upon the provisions of the statute vis-à-vis the relation to its purpose and object thereof. The process of computation of seats destroys the objective and purpose of the reservation by disturbing the federal balance (political equality and political justice) guaranteed by Article 330(2). The usage of two different census data i.e., 1971 census for calculating total seats and 2011 census for computing reserved seats creates irregularity in the population-territory ratio.

THE IMBALANCE BETWEEN THE POPULATION-TERRITORY RATIO

The object of maintaining the ratio between population and territory, cannot be successfully accomplished unless delimitation exercise for the formation of local bodies at all levels is properly undertaken.[1598] It is crucial, to the greatest extent feasible, that the constituency-

[1587] Golak Nath v State of Punjab, AIR 1955 SC 549.
[1588] Brij Mohan Lal v. UOI, (2012) 6 SCC 502.
[1589] Smt. Sk. Khasim Bee vs The State Election Commissioner, AIR 1996 AP 324; see also, Sri Ram Ram Narain Medhi v. State of Bombay, AIR 1959 SC 459 (496).
[1590] I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu & Ors., (2007) 2 SCC 1.
[1591] Kesavananda Bharati v State of Kerala, (1973) 4 SCC 225.
[1592] Charanjit Lal Chowdhary v UOI, AIR 19511 SC 41; see also, Srinivasa Theatre v State of TN, (1992) 2 SCC 643; Binoy Viswam v UOI (2017) 7 SCC 59.
[1593] Kathi Raning v. State of Saurashtra, AIR 1952 SC 123,126.
[1594] State of WB. v. Anwar Ali Sarkar, 1952 SCR 284 (320).
[1595] Ramana Dayaram Shetty v. L.A.A.I, AIR 1979 SC 1628.
[1596] Olga Tellis v. Bombay Corpn., AIR 1986 SC 180.
[1597] Bachan Singh v State of Punjab, AIR 1982 SC 1336; see also, EP Royappa v State of Tamil Nadu, AIR 1974 SC 555; Maneka Gandhi v. UOI, (1978) I SCC 248.
[1598] Dravida Munnetra Kazhagam v. State of T.N. (2020) 6 SCC 548.

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population ratio remains the same across the country.[1599] The disproportionate reservation leads to disparity in the size of Parliamentary constituencies across states due to the differential rate of population. Ample evidence is found in similar situations in India, where "states like Bihar, Haryana, Madhya Pradesh, Maharashtra, Rajasthan, and Uttar Pradesh represent larger numbers of people in comparison to MPs elected from Himachal Pradesh, Kerala, and Uttarakhand."[1600] Due to the freeze, there is differential population growth in regions. As a result, MPs belonging to two different states represent the different populations and do not represent the equal size of the population this violates Art.81(2), disturbs the population-territory ratio, and harms the principle of equality of representation. Even in Charles Baker's[1601] case, American SC explicitly held- "*any act is unconstitutional if it sought to bring about a gross disproportion of representation to the members of the public*." Similarly, the process also breeds disparity among states and violates the letter and spirit of RPA which talks about equal territorial representation to all.

DISPROPORTIONATE COMPUTATION OF RESERVED SEATS

Section 9(c) of the Delimitation act, 2022, art. 330(2) as well as art. 332(3) of the constitution of India talks about the reservation of seats shall bear, "...as nearly as may be, the same proportion to the total number of seats allotted to that State, ...as the population of the Scheduled Castes in the State". Moreover, SC held that "the government rules for reservation cannot be implemented without quantifiable data on backwardness and underrepresentation."[1602] However, referring two different data clearly poses a threat on the fairness and reasonability which attracts the vice of not only Art. 14 but also the golden triplet.

The State and its actions are bound to be evaluated in the litmus test set forth in Art.14[1603] as it condemns discrimination in both substantive law and the law of procedure.[1604] Bhagwati J. affirmed that art.14, art.19, and art.21 are mutually inclusive rights wherein a violation of one lead to the violation of another.[1605] Herein the erroneous computation of seats not only results in the violation of the equality but along with it falls foul to the principle of *one-vote, one-value.*

ONE-VOTE, ONE-VALUE

The principle of one-vote, one value is fundamental to the republican principle found in Art.170(2) of the Constitution that had been recognized statutorily for a long. As derived from the principle of adult suffrage, both the right to choose a candidate and the right to stand as a candidate in an election are inherent to it, that is, one-man-one-vote-one-value.[1606] Due to the freeze on delimitation, the reservation upon the population couldn't be calculated adequately in the state and thereupon the seats are not increased however the reservation for the scheduled caste and schedule tribe is. This restricts the people from choosing their desired representative by limiting the choice to a selected (reserved) group only. This unreasonable restriction infringes on the free choice of the candidate[1607] and it stops the citizens from exercising their Right to Expression. Therefore, this process disproportionality violates the very core of the principle of *one-vote-one-value*, by striking at the candidate's Right to Equal Representation and thereby expression as well.

DENIAL OF RIGHT TO OPPORTUNITY

[1599] Vol. 14(1) MAHINDER D. CHAUDHRY, Population growth trends in india: 1991 census, POPULATION AND ENVIRONMENT 31-48 (Springer 1992).
[1600] Vol. 41(11) A K VERMA, Fourth delimitation of constituencies: An appraisal, 12-16 (Economics and political weekly 2006).
[1601] Charles W. Baker v. Joe C. Carr, 7 L Ed 2d 663.
[1602] Suraj Bhan Meena v. State of Rajasthan, (2011) 1 SCC 467.
[1603] Tata Cellelur v. Union of India, (1994) 6 SCC 651.
[1604] Charan Lal Sahu v UOI, AIR 1990 SC 1480.
[1605] Maneka Gandhi v. the Union of India, 1978 SCR (2) 621.
[1606] Harji Chaku v. Mamlatdar, Lalpur, (15 GLR 64).
[1607] State Of Sikkim vs Surendra Prasad Sharma, 1994 AIR 2342; relying upon, State of Sikkim vs Surendra Prasad Sharma, 1994 AIR 2342.

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The Constitution's Art. 14 embodies the idea of "non-discrimination" which is not a freestanding provision. Thus, "it must be interpreted in conjunction with rights conferred by other articles like Art. 21" which includes the Right of Opportunity. Even the Preamble of India *inter alia* speaks of equality of opportunity. The reservation thus limits the seats for general category by limiting the seats and thereby frequently reserving them for the scheduled category on the basis of their increasing population but the total number of the seats in the assembly remains constant thereby hampering the equal opportunity of the people of India. However, in order to give the seats to Schedules castes and scheduled tribes to contest, they also need to be equally served with the ratio of no. of seats to their population but due to the freeze on delimitation the adequate number of seats could also not be reserved for the Scheduled category. Therefore, the unreasonable and unfair process of reserving seats denies the people of their Right of Fair Opportunity as well which yet again pose a question upon the objective and success ratio of the impugned freeze on delimitation.

CONCLUSION

Democracy and Federalism are very essential features of our Constitution and form a part of its basic structure. To protect and sustain the democratic structure free and fair elections are provided to it that can only be achieved when states have the power to be fairly represented in the parliament and in the rulemaking process. Though in a country like that of India where the diversity flourishes and the population is increasing in an alarming rate, be it noted that proportionality though mainly dependent upon the basis of population but it cannot always be done with arithmetical precision and mathematical nicety.[1608] But the flawed approach by the legislature while enacting the 42nd amendment could be rectified through the judicial pronouncement and enactment of yet another law uplifting the ban on the delimitation exercise. Moreover, the ban on the jurisdiction of Constitutional Courts has only been placed by the virtue of delimitation of boundaries, extending its scope to the freeze of delimitation that was not present in the original text of the constitution and incorporated through an amendment, results in the arbitrariness and abuse of power. Therefore, it's the high time for the guardians of the Constitution to take cognizance of this ambiguity and by the doctrine of interpretation rectify the repugnancy arising there upon.

REFERENCES

- 1 D.D. BASU, SHORTER CONSTITUTION OF INDIA (14TH ED. LEXIS NEXIS 2014).
- 2 DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (8TH ED. LEXIS NEXIS 2011).
- M.P. JAIN, INDIAN CONSTITUTIONAL LAW (8TH ED LEXIS NEXIS, 2018).
- The Delimitation Act, 2002, No.33, Acts of Parliament, 2002.
- The Representation of People Act, 1951, No. 43, Acts of Parliament, 1951 (India).
- REPLEVIN, BLACK'S LAW DICTIONARY (10th ed. 2014).
- MONTESQUIEU, THE SPIRIT OF THE LAWS, quoted in C.K. TAKWANI, ADMINISTRATIVE LAW, 151-152 (7th ed. 2021).
- Vol. 14(1) MAHINDER D. CHAUDHRY, Population growth trends in India: 1991 census, POPULATION AND ENVIRONMENT 31-48 (Springer 1992).
- Vol. 41(11) A K VERMA, Fourth delimitation of constituencies: An appraisal, 12-16 (Economics and political weekly 2006).
- 2 S.S. NIGAM, Equality and the representation of the scheduled classes in Parliament, JOURNAL OF THE INDIA LAW INSTITUTE 297-320 (Indian Law Institute 1960).

[1608] Subrata Acharjee v. Union of India, (2002) 2 SCC 725.