

## NOTA OPTION- POLITICAL GAMECHANGER OR MERE TRUMPERY

*Ayushi Kalyan*

Institute of Law, Nirma University

*When it comes to democratic societies, where voting is an affirmation of one's freedom and equality, the freedom to abstain from making a choice is often missing. Citizens are given the freedom to vote for any candidate standing for elections, but few democracies give voters the explicit right to reject all the candidates, if they find no one suitable. In effect, citizens are given the freedom to choose but not to declare discontent with the candidature by way of voting. The Supreme Court of India, on 27th September 2013 in the landmark case of People's Union for Civil Liberties v. Union of India, ruled that the right to register a "none of the above" option during elections should apply. The author aims to analyse the legal issues arising out of the judgement in light of the right to vote and violation of secrecy as being integral to fundamental rights guaranteed by the Constitution. The author further highlights the practical limitations of the option. Concluding with suggestions on how to use the option of NOTA as an effective tool of political discourse in India and not just mere trumpetry, the author aims to highlight the role of NOTA as a positive call against malicious and manipulative democracy.*

### Introduction

#### PEOPLE'S UNION FOR CIVIL LIBERTIES v. UNION OF INDIA

(2013) 10 SCC 1

The Supreme Court of India, on 27th September 2013 in the landmark case of People's Union for Civil Liberties v. Union of India<sup>1</sup>, ruled that the right to register a "none of the above" option during elections should apply and ordered Election Commission to provide such buttons in the Electronic Voting Machines. Whether this case will have major repercussions on the democratic set up of the country with regard to elections is a question that remains yet to be answered.

### Brief Facts of the Case

People's Union for Civil Liberties, filed a writ petition under article 32 of the Constitution of India challenging the constitutional validity of Rules 41(2) and (3) and 49-0 of the Conduct of Election Rules, 1961 to the extent that these provisions violated the secrecy of voting. The aspect of secrecy of voting is fundamental for "free and fair elections" and has to be essentially maintained as per section 128 of the Representation of the People Act, 1951 (hereinafter as RP Act) and Rules 39 and 49-M of the Rules. The petitioners stated that though the rules 41(2) and (3) and 49-0 recognize the right of a voter not to vote but

<sup>1</sup> (2013) 10 SCC 1

exercise of such a right is not kept secret and thus these rules are not only violative of the right to secrecy but also violative of articles 19(1) (a) and article 21 of the Constitution. In case an elector decides not to record his vote, a remark to this effect is made against the said entry in form 17-A thereby violating his right to secrecy. On the other hand, the respondents were of the view that the right to vote is neither a fundamental right nor a constitutional right but is a simple statutory right, thereby asserting that the writ petition is not maintainable. Secondly, the respondents contended that the right to secrecy applies to only those voters who have actually exercised their right to vote and it can under no circumstances extend to those who have not voted at all.

---

### Important Issues

---

The Court in this case had to deliberate on two major issues on the question of right to vote and significance of free and fair elections:

1. Whether the question of law with regard to the rights of a voter as decided in *Kuldip Nayar & Ors Vs Union of India*<sup>2</sup> was flawed.
2. Whether earlier judgements of *Association for Democratic Reforms Vs Union of India*<sup>3</sup> and *People's Union for Civil Liberties Vs Union of India* referred to by the Constitution bench in *Kuldip Nayar* stood impliedly over-ruled or not.

---

### Judgement

---

With regard to the question of voting rights, the Court analysed its decision given in the case of *Kuldip Nayar and Ors v. Union of India*<sup>4</sup> and held that right to vote is neither a fundamental right nor a Constitutional right but purely a statutory right. The question on the maintainability of the petition was answered in the affirmative since a prima facie case existed for the exercise of jurisdiction of the Court under Article 32.

The Court declared part of Rule 49-O read with form 17A arbitrary and violative of Article 19 and ultra vires sections 79(d) and 128 of the RP Act. The court consequently directed the Election Commission to include the None of the Above ("NOTA") option on EVMs and ballot papers and also directed the Government of India to provide for any necessary help in the implementation of the above option.

---

### Free & Fair Elections and Democracy as Basic Structure

---

The case of *Kuldip Nayar* forms a quintessential part of the decision of this case and reference to the same, on numerous instances, has been made by the Court in resolving pertinent questions of law. In *Kuldip Nayar Vs UOI*<sup>5</sup> the petitioners sought to challenge amendments made in the RP Act, 1951. The amendment removed the requirement of

---

<sup>2</sup> AIR (2006) 7 SCC 1

<sup>3</sup> 2002) 5 SCC 294

<sup>4</sup> Ibid

<sup>5</sup> Ibid

“domicile” for getting elected to the Council of States which, in turn, violated the principle of Federalism, a basic feature of the constitution. Secondly, the introduction of Open ballot system through the amendments was also condemned by the petitioner on the grounds that it violated the principle of 'secrecy' and the voter's freedom of expression which is the essence of free and fair elections and subject matter of fundamental right as under Article 19(1)(a) of the Constitution, respectively. The Supreme Court accepted the view of petitioners as far as the significance of free and fair elections was concerned in a democracy. The Court has authoritatively held, time and again, that democracy is a basic feature of the Constitution, one that is not amenable even to the power of amendment. The edifice of democracy in a country like India rests on a system of free and fair elections. These principles are inseparable not only from the preamble, which has always been considered as part of the Constitution, but also from its provisions. Justice Jaganmohan Reddy, in his separate judgment, stated that the "*edifice of our Constitution is built upon and stands on several props*" which, if removed would result in the fall of the Constitution and which includes the principles of 'Sovereign Democratic Republic' and 'Parliamentary democracy'. Further the Court stated that Democracy essentially contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of defence to mass opinion<sup>6</sup>.

The Court in the instant case also reiterated that Democracy being the basic structure of the Constitution has, as its very foundational necessity the need for free and fair elections. In order for elections to be free and fair the next aspect that needs to be ensured is the maintenance of secrecy of voters at all times.

---

### Right to Vote and Violation of Secrecy

---

Another question that came up in front of the Court was to decide whether the right to vote was a fundamental right or a plain statutory right. In para 97 of the case of **PUCL v. Union of India**<sup>7</sup>, Justice Reddi observed that the right to vote, if not a fundamental right, was certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326; the right has been shaped by the statute, namely, R.P. Act<sup>8</sup>. The ratio of this case was that the right to vote is a statutory right but the decision taken by a voter either to vote or not is his right of expression as under article 19(1)(a). The Court in the case of Kuldip Nayar rejected the contention of the petitioners that the majority view in **PUCL v. UOI** was that a right to vote is a constitutional right. The Court stated that there is no basis to contend that the right to vote and elect representatives of the State is a Constitutional right and that no provision declares the right to vote as an absolute right under the Constitution.

---

<sup>6</sup> Kuldip Nayar & Ors v. Union of India, AIR (2006) 7 SCC 1

<sup>7</sup> AIR (2003) 4 SCC 399

<sup>8</sup> People's Union for Civil Liberties v. Union of India, AIR (2003) 4 SCC 399

As far as the question of violation of secrecy is concerned, The Court in Kuldeep Nayar clearly stated that the principle of secrecy is of paramount importance to free and fair elections.

The impugned rules in dispute in the present case are Rules 39(1), 41, 49-M and 49-O. The most prominent one being Rule 49-O which makes it very clear that in case an elector decided not to record his vote, a remark to this effect shall be made in Form 17-A by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark. This clearly compromises on the secrecy of the vote as no privacy is provided to the elector when the fact of the negative voting goes into record. It can also be said that right to vote as well as right not to vote has been statutorily acknowledged by the aforementioned rule and under Rules 41(2), (3) and section 79(d) of the RP Act. The Supreme Court thus rightly declared a part of the Rule 49-O read with Form 17-A that treated a voter who decided to cast his vote differently and allowed secrecy to be infringed, as violative of Article 19 read along with section 79(d) of the RP Act.

---

### **Negative Voting and Impact on Society**

---

Honourable Supreme Court through the instant case thus propounded the provision of a “NOTA” in Electronic Voting Machines for a situation wherein the voter does not want to cast a positive vote for any of the candidates standing for elections. Democracy is truly all about choice which can be better exercised by giving the voters a chance to freely form opinions and impose least restrictions on their ability to make such choices. Protection of elector’s identity and providing secrecy is therefore essential for free and fair elections.

This provision and right to not vote can have a profound impact on the society. NOTA option gives voters the right to express their disapproval with the candidates put forth by the political parties. Thus once when the political parties realize that a large number of people are not impressed with the quality of candidates put forward by them they will be coerced to accept the choice of the people and appoint candidates who are dignified and cater to the needs of the people. Though this change will be gradual but once initiated it can be a turning point in the political democracy of the Country. Besides in the current system of voting a voter who is not satisfied with the kind of candidates does not usually turn up for voting which subsequently gives a chance to malicious people to use this opportunity to impersonate the voter and cast a vote in his place. This provision of negative voting would send clear messages to political parties and is a positive step toward purifying the electoral process.

---

### **Practical Limitations**

---

This concept of negative voting though promulgated with a bona fide noble intent is not free from practical difficulties and loopholes. India possesses low literacy rate and most people vote on party lines and caste lines instead of judging merits of individual candidates.

The common public does not possess detail information about the profiles of candidates and the use of the NOTA option. Further, neither the Government nor the Election

Commission has taken any major steps to educate the masses regarding the use of this option. Even voters in urban areas are not adequately aware about the use of this option and its possible consequences. Thus in such situations negative voting will not be able to serve its purpose if enough steps are not taken to root out voting on party and caste lines.

Secondly, another very essential aspect of the NOTA option is that it does not mean the right to reject all candidates. Right to Reject (RTR) was a campaign by Aam Aadami Party (AAP) which stated that if most of plurality is in favor of a RTR, a re-election must be held. NOTA on the other hand, is merely abstaining from voting for someone's favor. Former Chief Election Commissioner, S Y Quraishi in an interview recently stated that the Supreme Court through its verdict has just given the right to register a negative opinion. "*Even if there are 99 NOTA votes out of a total of 100, and candidate X gets just one vote, X is the winner, having obtained the only valid vote. The rest will be treated as invalid or 'no votes'.*" Mr. Quraishi said in an opinion piece<sup>9</sup>. Thus in pragmatic senses, the provision of NOTA buttons is not going to make any effective impact on the election results since the candidate getting the maximum number of positive votes would still be able to succeed despite there being votes for none of the above too. There is not enough weightage being given to the None of the Above option as of now. Thus the only major effectual use of NOTA is to ensure privacy to the voter who does not wish to vote for any candidate.

Besides this, one very essential challenge attached to the effective implementation of the NOTA option is fighting the declining rate of voter participation. From one aspect the premise, that giving voters the right to express their disapproval of candidates without their secrecy being violated would eventually motivate them to vote in larger numbers can be accepted. But at the same time if voters are told that the NOTA votes polled by them eventually shall not affect election results, it might also lead to decline in voter participation.

This concept of NOTA option is not new and is prevalent in 13 countries up to now. Colombia, Ukraine, Brazil, Bangladesh, Spain, Sweden, France, Belgium, Greece are few countries who allow their voters to cast NOTA votes. USA also allows NOTA in some of its states.

---

## Conclusion & Suggestions

---

Today, when electioneering takes place in full vigour, it is the duty of the Supreme Court and Election Commission to be more vigilant and ensure that elections take place in a positive spirit and are not won on the basis of money or muscle power. The Election Commission in a move to incorporate this option had earlier on 10/12/2001 addressed a letter to the Secretary, Ministry of Law and Justice emphasizing on the need to allow voters their right, to not cast a vote but no action was taken on the said letter. The Indian

---

<sup>9</sup> *NOTA option does not mean right to reject and won't affect election results, says former election commissioner*, India Today Online, October 3, 2013 Available at <http://indiatoday.intoday.in/story/nota-does-not-mean-right-to-reject-voter-election-evm/1/312960.html>

Parliament also provides to its members the three buttons for voting, namely: AYES, NOES and ABSTAIN whereby through the last option a member can refuse from expressing his opinion.

After an analysis of all the positive and negative aspects involving the use of NOTA option, I think that this landmark verdict should be appreciated for its noble intent and as a measure towards making democracy more representative. Though its consequences are yet to be seen but it surely has had an impact on the political parties and pushed them to field sound and dignified candidates as their representatives. Secondly, a perusal of section 79(d) of the RP Act, Rules 41(2) and (3) and Rule 49-O clearly state that the right not to vote has been recognized and is part of expression of a voter in a parliamentary democracy. It is essential that it is given effect in the same way as right to vote is given. This will foster the purity of electoral process. The Supreme Court in this case further directed the Election Commission to provide for the inclusion of NOTA buttons in Electronic Voting Machines and also directed the Government to assist in the implementation for the same.

One major drawback of the option of NOTA is its inability to invalidate the elections conducted. However, in this regard, a petition was filed by Tharangambadi Duraisamy in the Madras High Court, in April, 2016. The petitioner requested the High Court to consider a re-election in the constituencies that record a NOTA count higher than the votes received by any other candidate and the need to de-bar candidates from subsequent elections for a given period of time. In response to his petition, a High Court bench headed by Judges M.Kirupakaran and MV Muralidharan said that the lawyer representing EC had reportedly objected to re-election being declared; and reinstated that the highest-pollled candidate would come to power<sup>10</sup>. A second hearing regarding this petition had however been ordered by the High Court in July, 2016.

If at all, there is sufficient weightage given to the number of NOTA votes polled it shall further lead to the political parties being greatly vigilant. NOTA shall also serve as the most viable tool for making voter discontent measurable. Re election at an instance when the number of NOTA votes exceeds the votes polled for any candidate shall set up an example both for the citizens of an active democracy and impact quality of candidates and their credibility. NOTA is therefore not just an essential but easily implementable reform since it is a step towards correcting a systemic flaw in the electoral system, and is a logical, moral, and a legal prerequisite for an effective democracy.

---

<sup>10</sup> *What happens if you choose to press the NOTA option: an Explainer*, The News Minute, May 14, 2016 Available at <http://www.thenewsminute.com/article/what-happens-if-you-choose-press-nota-option-explainer-43239>