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NOTA: A Progress or Regress

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NOTA or None of the above options in the ballot is one of the most controversial topics in relation to the Electoral Reforms in India. Since the NOTA gives a considerable right to the voters, the voters feel privileged and the opinion of each and every individual is being taken and thus it alienates the discontent among the voters to large extent. Originally thought of by the Election Commission of India (ECI) in the year 2001, it took more than a decade to implement this option and that too was only done after the Hon'ble Supreme Court gave direction in the Writ Petition Case of People's Union for Civil Liberties and Anr. v. Union of India (UOI) and Anr. Further, the political parties are uncertain about the probable outcome of this change and hence they did not welcome this move on a good note, except for a few parties who are fighting for cleaning the system, to make it free from corruption. In this paper, we have humbly tried to highlight the probable outcome of this move with reference to those countries which have already been practicing this option for a long and we have tried to analyze and solve the problems that may crop up in due course of time with appropriate suggestions.

Keywords: NOTA, ECI, corruption, electoral reforms.

INTRODUCTION

“A vote is like a rifle: its usefulness depends upon the character of the user.”

- Theodore Roosevelt

The above quote by the 26th President of the United States of America is quite relevant even today, especially in today's world where politics is being plagued by rampant hooliganism, corruption, and last but not the least mediocrity which is one of the main factors for failure of governance of the country to a great extent. If we analyze the quote of Roosevelt in the light of Indian politics things will become clear. India experienced its first voting in the year 1950 when it has a mere 18% literacy rate.¹ So it was indeed a big challenge for the Election Commission to conduct the first voting with a high chance of failure and risks of the election of someone not capable to lead the nation. It is well known that mistakes have taken place resulting in the slower development of society which has led to widespread discontent among people. Especially, those who without failure turn up for voting amid several adversities, be it political pressure or terror due to antisocial groups like terrorist organizations. Long back in 2004, the Election Commission of India mooted the concept of "neutral voting" to give an option to the voters in a constituency to reject all the candidates if they consider the candidates unfit for election.²² Post '26/11' the discontent with the elected candidates have escalated and the demand for having None Of The Above (NOTA) option in Electronic Voting Machines (EVM) has become more intense.

After much deliberation, while disposing of the case of the *People's Union for Civil Liberties and Anr. v Union of India*,³ the Supreme Court allowed the claim by the petitioners in having the NOTA option available for the voters in EVMs. Subsequently, the Election Commission issued a notice on 28th October 2013 numbered ECI/PN/48/2013 as a clarification clearing all doubts about the None of The Above option. In the instant case, the Supreme Court held that the provision of Rule 49-O⁴ was ultra-vires. As the voter may not wish to vote for any of the standing candidates was supposed to inform the presiding officer, which violates section 19⁵ of the Indian Constitution and Section 128⁶ of Representation of People's Act 1951. Prior

¹ R. Govinda & K. Biswal, 'Mapping literacy in India: who are the illiterates and where do we find them?' (UNESDOC, 2005) <<https://unesdoc.unesco.org/ark:/48223/pf0000146016>> accessed 10 February 2022

² Ministry of Law and Justice, *Electoral Reforms* (2010) <<https://lawmin.gov.in/documents/electoralreforms>> accessed 10 February 2022

³ *People's Union for Civil Liberties and Anr. v Union Of India* JT 1997 (1) SC 288

⁴ Conducts of Election Rules, 1961, s 49(o)

⁵ Constitution of India, 1950, art. 19

⁶ Representation of People's Act, 1951, s 128

to the introduction of Electronic Voting Machine (EVM), when voting through ballot paper was the only means, there was a provision for giving blank vote by not marking the name of any candidates which is equivalent to modern day *None of the Above Option* whereby a voter does not need to reveal his/her identity thereby protecting him/her from pressure, which is quite rampant during polling days. But with the introduction of EVM, that option of casting a blank vote was lost.

Since EVM did not have the NOTA option earlier, if a voter wanted to leave the polling station due to his / her discontent with the candidates the voter had to fill out Form Number 17A by which the voter was supposed to fill a form and had to put his / her signature as mentioned under Sub-rule (1) of Rule 49L⁷ and a remark was supposed to be made on the register mentioning his/her decision for not voting. Further as per Rule 41(2)⁸ of “Conduct of Election Rules of 1961” the cancelled forms were supposed to be written “Returned: cancelled” by the concerned Presiding Officer and as per Rule 41(3)⁹ of the same act. The entire procedure was supervised by the presiding officer who in turn gets to know who is leaving the polling station without voting which in turn violates the secrecy of the voting system and privacy of the voter which is failing to comply with Article 21 (3)¹⁰ of Universal Declaration of Human Rights and Article 25 (b)¹¹ of International Covenant on Civil and Political Rights.

SHORT HISTORY OF EMERGENCE OF NOTA IN INDIA AND OTHER COUNTRIES

The concept of NOTA in India was first conceptualized by the Election Commission of India in the year 2001 by the Election Commission of India (ECI) when it sent a letter of proposal to the then Union Law Minister, Mr. Arun Jaitley. The ECE's move was prompted by several organizations and individuals who sent a proposal to the ECI on proposed Electoral Reforms. The ECI iterated the proposal with a detailed note to Prime Minister in late 2004. The

⁷ Conducts of Election Rules, 1961, s 49(l) (1)

⁸ Conducts of Election Rules, 1961, s 41 (2)

⁹ Conducts of Election Rules, 1961, s 41 (3)

¹⁰ Universal Declaration of Human Rights, 1948, art. 21 (3)

¹¹ International Covenant on Civil and Political Rights, 1966, art. 25 (b)

Commission argued in favor of NOTA by mentioning that two of the provisions of the law should be amended to make space for NOTA in the elections – Rule 22 and Rule 49 B of Conduct of Election Rules¹². ECI spoke about Amending Rule 22¹³ adding a provision of a new sub-rule 4 which would give an option for rejection of all candidates by voters in a constituency in the ballot paper and amending Rule 49 B by which the option of neutral voting was supposed to be there in the ballot paper in the local language as same as the candidates' name. However, the proposal did not get approval due to opposition from political parties.

The option of NOTA is often compared to the Safety Valve Theory of the formation of the Indian National Congress (I.N.C.) party by Alexander Octavian Hume in 1885 where NOTA was being considered by many as the frustration of the voters with the democracy. But is showing the frustration on the democracy a sin or is it against the constitution? The democracy can fully deliver its promises only when the entire population participates equally in the deliberations and important decisions. The civilian voters are on one way or the other deceived by the legislators regarding their “Right to Neutral Voting” in an election while they themselves quite rampantly use the option of Neutral Voting in an election within the Parliament. The voting machines used in the parliaments have all three options¹⁴ AYES, NOES, and ABSTAIN representing the yes, no and neutral voting buttons respectively. The people’s representative can vote any of the options therein casting votes against, for, or keeping oneself neutral to the motion.¹⁵

So, when the political parties can do so in the parliament, what is the reason for their refusal to the public demand of incorporating the option of neutral voting in the elections of the representatives? As a result of low voter turnout in the 2001 British Parliamentary elections, the Election Commission of that country started discussing the introduction of the NOTA

¹² Conducts of Election Rules, 1961, s 22, 49 (b)

¹³ Conducts of Election Rules, 1961, s 22 (4)

¹⁴ People’s Union for Civil Liberties and Anr. (n 3)

¹⁵ Constitutional Importance of NOTA & Right to secrecy while voting’ (*Association of Democratic Reforms*) <[http://adrindia.org/sites/default/files/FAQ-%20None%20of%20the%20Above%20option%20in%20EVM%20\(Right%20to%20Reject\).pdf](http://adrindia.org/sites/default/files/FAQ-%20None%20of%20the%20Above%20option%20in%20EVM%20(Right%20to%20Reject).pdf)> accessed 10 February 2022

option in their ballot paper. Countries like France, Belgium, Greece, Bangladesh, Ukraine, Brazil, Chile, and the State of Nevada of the United States of America (U.S.A.) have the NOTA option in their EVMs or Ballot Paper. Whereas Columbia and Spain have the option of a blank vote system by which the voters can use blank ballot paper to indicate their apathy or disinterest in electing the candidates. Few countries like the U.S.A., Sweden, and Finland also have an option of “write in” by which the voters write the name of any person except the name of the candidates already there in the ballot paper, and thus this system is a kind of voting a random person.¹⁶ In Australia voting is compulsory. Failure to turn up for voting without having proper reasons like health problems or religious matters are dealt with heavily often charging hefty fines as punishment.

The impact of NOTA on democracy can be best understood if we analyze the 1991 Soviet Election which led to the disintegration of the Soviet Union to a number of countries. There was a Russian Version of NOTA there as a voting option (the system was later dropped on Kremlin’s insistence in the year 2006 as the option was getting popular in Russia). In 1991, amidst all the rigging the people felt really powerful and their enthusiasm was equally reflected in the vote box when as many as 200 incumbent lawmakers were not selected and in the fresh election, 200 new candidates were elected to the Congress. As many as 100 Russian Communist Party candidates lost their seats. The new choice of exercising the NOTA option was of immense importance in the post-Communist-led Soviet Union.¹⁷ Now the Russian lawmakers are mulling a proposal in Russian Parliament so as to re-introduce the NOTA option in their country election again after 2006.

The 1989 National Election of Poland also acted as a game-changer due to the NOTA option where the Communists allowed a partially semi-free election making sure in most of the constituents they don’t have any opposition. What they forgot was that the people have the right to reject all the candidates. In the election the sitting Prime Minister along with a good number of sitting lawmakers was defeated and that marked an end to the Communist rule

¹⁶ People’s Union for Civil Liberties and Anr. (n 3)

¹⁷ John Fund, ‘None of the Above should be on the ballot’ (*National Law Review*, 10 September 2012) <<https://www.nationalreview.com/2012/09/none-above-should-be-ballot-john-fund/>> accessed 10 February 2022

there. Lech Walesa, a prominent leader of the labour union called the device of NOTA as the bearer of change. Even the ineffective NOTA had a terrible impact on the 1975 Nevada Election as the pre-poll survey the candidates to go through a reality check of them as noted by Don Mello, a former state legislator of Nevada who wrote the 1976 law.¹⁸

The South Wales anarchists cluster has run a campaign urging citizens to "Vote Nobody" since 2008 and plenty of different Anarchist teams worldwide have promoted similar slogans. In Canada, it's possible to vote for "None Of the Above" by attending the Poll and formally "Declining to vote". These Declined votes are counted and become a part of the electoral record. In Pakistan, Abid Hassan Manto, who is a constitutional expert and a senior attorney of the Supreme Court of Pakistan had sent the proposal to EC of Pakistan to permit the "None Of The Above" (NOTA) mechanism in polling.¹⁹ In Serbia, None of The Above is a party, formed in 2010, that was largely popularized on Facebook and on different social networking websites. In the Serbian parliamentary election, 2012 they received 22,905 votes and so won one seat in the National Assembly of Serbia. Serbian NOTA aspires to kick start an international political movement not much on ideology but rather on a simple goal – fight against all corrupt politicians.

NOTA - A CHOICE FOR PROGRESS OF SOCIETY

- **Curbing the Electoral violence:**

Violence before, during, and after the time of voting is quite common in India. Even after posting armed Para-military and Police Forces, the violence cannot be averted and in most cases, they lead to unnecessary deaths. Amidst this tense situation, if the identity of the voter gets revealed due to any human error, the safety of the voter will be jeopardized only because he had some discontent with the candidates which goes against the basic utility to maintain the secrecy of voting. And the risk is more in a village than in a city since owing to the less

¹⁸ *Ibid*

¹⁹ Effective legislation proposed to ensure transparency in general elections' (*The Express Tribune*, 23 January 2013) <<https://tribune.com.pk/story/498106/effective-legislation-proposed-to-ensure-transparency-in-general-elections>> accessed 09 February 2022

population and less presence of security personnel in a village, people can easily be identified and targeted. The option of NOTA will curb the chance of identification to a large extent.

- **Probable increase of voter turnout:**

The Supreme Court of India while laying down the judgment also emphasized that providing the option of NOTA is more likely to curb the chances of impersonation. In point no. 56 of the judgment²⁰ the Hon'ble Court clearly said that the provision of NOTA is more likely to increase the voter turnout which will indirectly deter the attempts of unscrupulous elements in their attempt to vote on behalf of the disgruntled voters.

- **Message to the political parties regarding discontent of people:**

The option of NOTA was mandated by the Supreme Court of India on the 27th of September 2013 in the case of the *People's Union for Civil Liberties and Anr. v. Union of India (UOI) and Anr.*, with the hope that the provision for this negative voting is more likely to put more moral pressure on both the mainstream and regional political parties to choose wisely and field candidates having no alleged or proven misdeeds in the past. And the rejection of the candidates will send a strong message to the parties regarding the discontent of people with their selection.

Nowadays in a democracy, the voters have very little role in the formation of the Government and choosing the representatives and the major role is being played by the political parties who say the final word on the selection of the candidates. When NOTA was not in existence, the voters who were discontented with the candidates had three options, one was not to turn up for voting, the second option was to vote for some random candidate and the third one was to fill the form 17 A and to leave the voting booth. The last option itself is ridiculous since it is not understandable why a voter will stand in a queue to turn up for voting. The voter can easily show his/her discontent by not turning up for voting at all since there remains a long duration the gap between declaration of candidates name and voting date. By that time the voter can make a reasonable decision. But if a voter does not turn up

²⁰ People's Union for Civil Liberties and Anr. (n 3)

for voting, then can it be called the proper practice of democracy when the opinion of many of them is not being taken while electing the people's representatives?

In the 2009 general elections, only 58.17% of the registered voters cast their ballots, as against a high percentage of 63.56% twenty five years ago, in the 1984 General Election. So there is a constant decline in the number of registered voter turnout over the years. When it involves democratic societies, where voting is a major affirmation of one's freedom and equality, and that is the cornerstone of democracy, the liberty to abstain from creating an alternative is usually missing. Voters are given the liberty to vote for any candidate standing for elections; however few democracies offer voters the specific right to reject all the candidates if they notice nobody appropriate. In effect, voters are given the liberty to settle on not withholding by creating an alternative. The second option can be best described as choosing the lesser evil options where in spite of knowing the past record and inability of the candidates, a voter has to choose from the list of candidates.

- **The impact upon parties:**

The Judgment of granting an additional button could appear to be a development, however, it's not. The very fact that it took over twelve years for NOTA to implement means that there should be something potent concerning it, that all political parties feared and resisted, whereas those outsiders of the political circles absolutely supported. If a large range of individuals during a given election vote for "None Of The Above" then it sends a clear message to all or any political parties that the voters don't value the candidates fielded by them appropriately, and reject the policy of dirty politics practiced by them.

- **Satisfaction of voters:**

NOTA may encourage a lot of voters to participate in elections as they'll vote and have their votes counted, albeit they don't choose any candidate. It permits them to satisfy their duty with a clean conscience.

IMPLICATIONS OF NOTA IN INDIA

Now the question lies what are the implications of NOTA, whether the NOTA option is enforceable judicially or not. In an article written by S.Y. Quraishi, former Chief Election Commissioner (CEC) of India, he has pointed out what will happen if the number of NOTA votes is more than any of the candidates in a constituency, Mr. Quraishi remarked that out of 100 votes, if 99 votes are cast against the voters in the form of NOTA vote and the single vote goes to any of the candidates then the candidate getting that one vote will be declared a winner.²¹ Another former CEC pointed out that currently there is no rule of re-polling if the number of NOTA voters is more than any candidates and thus many are questioning the necessity of NOTA. But this a minor glitch in the system which can be solved easily if the recommendations of National Election Watch (NEW) and Association for Democratic Reforms (ADR)'s are implemented like votes cast for none of the above options to be considered while counting the votes, in case the number of NOTA votes cast is more than the votes of individual candidates, none of the candidates will be selected, unlike the current situation where the candidates getting the highest number of votes next to Nota are selected. A fresh election should be convened with new candidates where the winner should get a minimum of 50% votes + 1 vote extra. If the process does not give any result, the process should be repeated again. Additionally when Rule 64(a) of Conduct of Election Rules, 1961²² is read with section 65²³ of Representation of People's Act 1951 states that candidate with the highest number of valid votes will be declared as winner irrespective of whether the None of the Above is getting more votes than the winning candidate or not. This provision will neutralize the effort by the 170th Law Commission Report²⁴ in reforming the electoral system and making them worthy of administration as voting the NOTA will be of identical nature as that of not turning up for voting.

²¹ S.Y. Quraishi, 'Pressure of a Button' (*The Indian Express*, 3 October 2013)

<<https://indianexpress.com/article/opinion/columns/pressure-of-a-button/>> accessed 09 February 2022

²² Conducts of Election Rules, 1961, s 64 (a)

²³ Representation of People's Act, 1951, s 65

²⁴ Law Commission of India, *Report on Reform of Electoral Laws* (Law Com. No. 170 1999)

<<https://lawcommissionofindia.nic.in/reports/report255.pdf>> accessed 09 February 2022

This practice should be changed and if the number of NOTA voters is higher than the candidate/party winning consecutive two elections in that particular constituency that should be considered as a defeat for him/her since the result can be interpreted as a message that the parliamentarian has underperformed and have to deliver its promises.

CONCLUSION

India has a multi-party democratic system. However, one factor that voters have found in common with all or any parties is the overarching role of crime, connections, and wealth. Increasing criminalization of politics, corruption and rampant abuse of wealth has become the new trend. Nearly a third of Member of Parliaments (MPs) faces criminal charges. As of 2012, in U.P., 47% of the Members of Legislative Assembly (MLAs) have criminal charges against them²⁵, whereas, as of 2010 in the State of Bihar the corresponding figure is 58%. All political parties notionally agree that individuals with criminal records mustn't contest elections. In application, they together resist any attempts to enforce this, be it by NOTA, the Lokpal Bill, or the Supreme Court ruling that disqualifies any politician condemned for crimes punishable with over 2 years in jail. There's a vicious circle wherever political parties claim that it's the voters who elect these candidates, whereas the voters claim that in the absence of NOTA, they do not have any real choice and have to vote for candidates or political parties they believe to be less tainted than the others.

NOTA is simply one in a series of efforts being created to return power to the citizens. It's an outcome of the gradual awakening of the Indian voters that led to new ideas, movements, and laws. In 2003, the Supreme Court asked the candidates to disclose any criminal act on their part. In 2004 the non-governmental organization, People's Union for Civil Liberties (PUCL) filed public interest litigation asking for voters to be granted the right to a negative vote. Our democratic establishments ought to perpetually modify to mirror the aspirations and demands of the individuals and desires of society. Candidates and political parties contesting elections ought to develop bigger responsibility and respect for the individuals

²⁵ Mohammad Ali, 'Over 30% of MPs, MLAs face criminal charges' (*The Hindu*, 4 December 2021) <<https://www.thehindu.com/news/national/article60515258.ece>> accessed 09 February 2022

they represent and therefore the concern that the voters won't hesitate to reject and recall all of them if they become tainted or deviate from the trail of public service. The politics needs a total rethink and reform of our electoral structures, and then thus be it, and it's time to begin the method. This may encourage honest and sincere candidates to enter politics knowing that voters wish clean and nation-building politics, which they need the tools to reject tainted candidates.

There is no doubt that the process becomes lengthy, complex, and unwieldy. And it is also true that if the election procedure is repeated several times just to determine the winners, then it will make the people impatient and unresponsive. Otherwise, the newfound power given to the People of India will have no use, only the counts of NOTA votes might increase without any impact on Indian Society and politics. Then NOTA will become a register of noting down the neutral votes and this neutral voting will have the least impact on the Indian political parties the main motive of this judgment of reducing the effects of sectarian voting and attempting to encourage political parties to have a better choice of candidates will be nullified. So we, the People of India have to decide as to what we want? People represented by unworthy, exploitive, corrupt leaders or leaders who are diligent, conscientious, and highly moralized? The answer lies within us. The Constitution of India gave us complete freedom and power to decide which path to take and how to take it. As indeed written by William Ernest Henley in his poem "Invictus", "*I am the master of my fate; I am the captain of my soul.*"