

Current Status of Right to Reject (NOTA)

Shwet Kamal

Student at Central University of South Bihar, Gaya (Bihar)

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ABSTRACT

The country we love has a constitution which looks upon the freedom of speech and expression as one of the most important hallmark of a free democratic society. Article 19(1) (a) confirms the freedom of Speech and expression of every citizens and right to reject is one of the facet of it. The will of the people is the basis of the authority of government; this will is expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.⁴³⁰ In the case of *PUCL v. Union of India*⁴³¹, the Apex Court of India held that rules 41(2) & (3) and 49-O of the Conduct of Election Rule, 1961 are ultra vires to the section 128 of the Representation of Peoples Act, 1951 and Article 19(1) (a) of the Constitution of India to the extent they violate secrecy of voting. The Court further directed the Election Commission to provide necessary provision in the ballot papers or EVMs and another button called “None of the Above” (NOTA) may be provided in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the contesting candidates, are able to exercise their right not to vote while maintaining their right of secrecy. However, if NOTA gets the maximum votes election is not nullified. To implement the right to reject fully, it has been argued that good governance is one of the motivating factor behind the right to reject and it cannot be successfully achieved without nullifying the election if NOTA gets maximum votes.

I. Introduction⁴³⁰ Universal Declaration of Human Rights, 1948, art. 21 § 3.⁴³¹ (2013) 10 SCC 1.

Voting is the formal expression of will or opinion in an election process.⁴³² It implies delegation of real will of the people to nominated candidates. In choosing competent candidate for delegation electors must have liberty to give consent or not to give. If in eyes of people there are no competent nomination in the fray, he has right not to opt for any of them. This can be termed as the Right to reject. Right to reject has its genus in Right to freedom of speech and expression under Art.19 (1) (a) of the Constitution of India⁴³³. It became concrete concept after the landmark judgment of the Supreme Court in *PUCL v. Union of India*⁴³⁴. Where it has been held that the Right to vote include Right not to vote or remain silent. The apex court stated that the idea behind NOTA is to allow the voter to register a protest vote with maintaining secrecy. According to Honourable Justice P. Saithsivam, former chief justice of India, the negative voting occurs when voters respond more strongly to political actions or outcomes that they oppose than to comparable actions or outcomes they favour. It provide voter more choice and to record his disapproval of all candidates of the fray. The disapproval may be a reflection of public disconnect with both, the choice of contesting candidates as well as ideologies of political parties. It can also be result of dissatisfaction with manifesto of political parties or their past performance.

The democracy is all about the choice and process of election for representation constitutes its very essence but not participation in election may affect democracy in both ways such as: one hand less participation obstruct the development of democracy on the other hand it may cause frustration and apathy. Therefore, voters must have right to reject contesting candidates and elect new one. Provision of NOTA ballot in EVM has removed the frustration from voters which they feel earlier while voting due to lack of option.

NOTA, in the beginning of its journey, allowed for both direct as well as indirect election. But later on it was scrapped form indirect polls such as Rajya Sabha election

⁴³² *Lily Thomas vs. Speaker, Lok Sabha*, (1993) 4 SCC 234.⁴³³ The Constitution of India, 1950.⁴³⁴ (2013) 10 SCC 1.

by judicial decision. Then chief justice of India has observed that, NOTA is meant only for universal suffrage and direct election and not for polls held by the system of single transferable vote as done in Rajya Sabha poll. This view was supported by centre by saying that, NOTA in indirect election would lead to horse-trading, corruption and use of extra constitutional method to defeat the party candidate.

II. Origin and Development of 'NOTA'

Right to cast a negative vote being one of the facet of the Right to Freedom of Speech and Expression under article 19(1) (a) of the Indian Constitution, remained in dormant condition till 6 decades of democracy. History of right to cast negative vote with maintaining secrecy and Right to reject traced back to 170th report of Law Commission of India. Where, for the first time Right to reject was proposed along with recommendation were made by commission to provide none of the above (NOTA) button in the EVM. It also suggested that the contesting candidates should be declared elected only if they have obtained 50%+1 of the valid votes cast. Election Commission of India took also the same initiative twice such as: in 2001 under Mr. James Lyngdoh (the then Chief Election Commissioner) and in 2004 under Mr. TS Krishnamurthy (the then Chief Election Commissioner). Letter of ECI dated 10th DEC. 2001 to secretary, Law Commission of India, demanded the introduction of 'NOTA' button. The demand was apparently to ensure the secrecy while casting negative vote and to prevent a bogus vote in their place. In the original demand of ECI Right to reject was not discussed at all. Again in 2010, in Election Reform made by Law Commission of India demanded the same provision along with it was also proposed that if certain percentage of the vote is negative, then election result should be nullified and new election should be held.

When we go through the judgment of PUCL v. Union of India⁴³⁵. It can be seen that there was no discussion on right to reject and candidacy of NOTA was made because it was

not prayed by PUCL in its petition. This petition was only limited to maintaining secrecy while casting negative vote. The court were of optimistic view on NOTA in the judgment. It seems that the Supreme Court had left the matter to the parliament to work out the broad policy in the light of the judgment. View of the Supreme Court on NOTA as Right to reject can also be seen in that petition. On 25th November 2013 the Supreme Court refused to entertain a writ petition by way of PIL in which petitioner sought a direction of the court to the Election Commission that it should order re-election if NOTA garners the highest vote.

Soon after Election Commission of India, issued a similar clarification that no re-election will be called even if 'NOTA' garner the highest vote. This view was based on the cumulative reading of Rule 64(a) of Conduct of Election Rule, 1961 and Section 53(2) of Representation of People Act, 1951. The rationale behind proposal of Election Commission on not proposing Right to reject was that the ultimate goal of any political system is the good governance with morality and democratic means and these can be achieved by NOTA, even if without implementing Right to Reject.

III. Features of 'NOTA'

Addition of None of The above (NOTA) button in the EVM ensured two fold purposes of such as: candidates with a clean background as well as inducing citizens to cast their votes. These purposes are serving with the following features.

A. Maintains Secrecy While Voting Negative Opinion

The epiphany of the Election Commission was turned into reality only through 2013 judgment of the Supreme Court. Earlier electoral system were conducted with ballot papers. Negative votes were mentioned in Section 49(o), Conduct of Election Rule, 1961 which did not protect the privacy of voters who casts negative opinion. With the advent of EVM several demands were raised by different social organizations to provide the option to cast negative with

⁴³⁵(2013) 10 SCC 1.

maintaining secrecy of voters. On 27th September 2013⁴³⁶ the Apex court held the same by invalidating Section 49(o)⁴³⁷ as violative of Section 128 of Representation of Peoples Act, 1951⁴³⁸ and Article 19(1)(a) of the Constitution of India.

B. No Electoral Value

Concerning NOTA, scenario in India is grossly different from the other countries. In India NOTA has no candidacy at all. It has no electoral value. It only provides professional morality to the functions and conduct of political parties. The logic behind having no electoral value is to ensure representation along with systematic change in political system.

C. Fundamental of Vibrant Democracy

India has very vibrant democracy from very grass root level. It is essential for such country to provide full freedoms and liberty to its citizen in the matter of statutory rights. Through NOTA, electors do not feel compulsion while voting because they cast negative vote in the exercise of their fundamental right. In this way it had become a very essence for vibrant democracy like India.

D. Voting Turnout

While delivering judgment in 2013 the Apex court was having optimistic view regarding NOTA that, it would increase voting turnout in upcoming elections. And it rings true in the latest elections. After conferring right to cast negative vote with secrecy, people opt for vota without any fear and express their negative opinion and in this way willingness to participate in voting process increases.

E. Accommodates Diversity of Opinions

Tolerance toward each and every section of society is the essence of democracy. Addition of NOTA rings true. Now electors are having more choice in the process of election and hence more opinions comes in consideration. It accommodate negative voter's opinion with same value.

F. Constitutionally Consistent

Through expanding the scope of fundamental right, it helps to realize the ideal of democratic system of government on basis of justice, liberty, equality, and fraternity. And it approaches towards constitutionally consistency. Broader interpretation of right to freedom of speech and expression expands to the right to reject and freedom of speech and expression is one of the most important hallmarks of a free democratic society.

G. NOTA is Similar to ABSTAIN Button in Parliament

While delivering judgment in 2013⁴³⁹, the court further went on to describe that the NOTA button sought for by the petitioners was similar to the 'ABSTAIN' button in parliament. ABSTAIN button provided for in the voting machines in Parliament, the other two being AYES and NOES.

IV. Successes and Benefits of 'NOTA'

A. Ensure Free and Fair Election

Election is the process of measuring consent of the electors and gaining legitimacy. It can't be free and fair unless and until electors have full liberty, freedom and equality in voting. NOTA left voters free from fear of reprisal, coercion in exercising their right to vote. Through NOTA citizens are not compelled to choose the best from worst candidates.

B. Check and Balance of Democracy

Strength of democracy lies in more and more participation of people in choosing representative. NOTA ensure the same. People choose their best representative free from corruption, criminalisation, casteism, communalism, linguism and regionalism. In this way challenges of democracy is eradicated.

C. Democratization of Political Parties

⁴³⁶(2013) 10 SCC 1.

⁴³⁷Conduct of Election Rules, 1961.

⁴³⁸Representation of People Act, 1951, § 128.

⁴³⁹PUCL v. Union of India, (2013) 10 SCC 1.

Democracy represent itself through political parties. Sometimes political parties function in undemocratic manner while nominating candidates. Through NOTA political parties are compelled to nominate candidate with a so to speak „clean background“ in the various constituencies. NOTA also protects voters from oppression of political parties known for its bully character.

D. Ensure Negative Right

Although NOTA have no electoral value but it gives full liberty to electors in choosing their representatives. It ensures that right to vote includes right note to vote. And it is also one of the facet of right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India.

V. Understanding ‘NOTA’ AND ‘Right to Reject’

The two expressions such as: NOTA and Right to reject do not mean the same thing even there are many common feature between them. Both are somehow similar in some theoretical aspects but in practically both are very much different. ‘NOTA’ is the dynamic concept it have many facets. One facet is that there would be right to reject if nota will get the maximum votes and re-election will be held. In present scenario both the terms can be understood in the following ways-

A. NOTA is Preventive in Nature but Right to reject is Remedial in Nature.

Ongoing along the judgment of the Supreme Court of India in PUCL v. Union of India⁴⁴⁰. It can be seen that judges were of optimistic regarding the concept of nota. They were of the view that nota will prevent the political system from corruption, criminalization and nepotism as menaces of democracy. It would prevent political parties in nominating corrupt candidates and through the concept of nota they will be forced to nominate the candidates with clean background. Nota gives moral to political parties in their behaviour and function. By these way nota is preventive in nature.

⁴⁴⁰(2013) 10 SCC 1.

When the morality of nota get fail in protecting the political system from menaces of democracy then the concept of right to reject comes out. The philosophy behind nota are good governance, free and fair election. If they are not achieved through nota then the right to reject come forward and provides remedies to the political system, such as rejection of candidates, re-election. So by these way right to reject is remedial in nature.

B. Candidacy of ‘NOTA’

Modern representative democracy has feature like one person, one vote and one value but this concept is not proving the same regarding the concept of nota. In India nota has been given no electoral value, by this way nota have no candidacy. If nota garners the maximum votes there would be no effect on the election and the candidate with second highest vote will be declared winner.

For nota as the right to reject, it must be possible that nota should be present as an independent candidate and must have candidacy.

C. ‘NOTA’ Reject Political Parties not the Political System

Representation is the essence of modern democracy. Representation of a constituency is very important to respond the problems of that constituency. In the country with nota as right to reject if the nota garners the maximum votes then there would have no representation and this would lead to demarcation of that constituency.

But nota ensured that there must be a representation. This concept is only rejection to the political parties and their candidates not the political system. According to Justice P. Sathasivam, the former chief justice for India, negative vote will lead to a systematic change in polls and political parties and they will be enforced to project the candidates with clean background⁴⁴¹.

VI. ‘NOTA’ Taking the Form of ‘Right to Reject’

⁴⁴¹PUCL v. Union of India, (2013) 10 SCC 1.

Political parties are the essential element of every modern representative democracy. Their behaviour and functions makes the democracy perfect. But sometimes, political parties indulged into corrupt practice like money laundering, casteism, communalism and other such practices. To eradicate these challenges use of NOTA comes forward. The use of 'NOTA' compelled political parties to nominate clean candidates, behave like delegate of the people and so on. But in the country like India, where nota have no electoral value, the purpose of NOTA is not proving to be full supportive in strengthening democracy. Because of that in present scenario the social trends are moving towards right to reject where NOTA will have the electoral value and candidacy. If NOTA will get the maximum votes then election will get void and new fresh election will be held.

Some new attempt have been made recently, albeit at the local level to expand the concept of NOTA, particularly after 2015 when it got symbol as a ballot paper with a black cross running across it. In NOV. 2018 the Maharashtra State Election Commission announced that if the NOTA garners the maximum votes in the local bodies election such as: Panchayat and Municipal Corporation Election then none of the candidates of the fray would declared elected and instead, a fresh election would take place. In the same way, in NOV. 2018 the Haryana State Election Commission took somehow the same initiative like Maharashtra Election Commission. And along with these, an another provision were also added that if in re-election NOTA again garners the highest vote then the candidate with second highest vote will be declared elected. But these two initiatives were related to State Election Commission and not to Election Commission of India. And these initiatives limited to the local bodies election only. In the same month an another initiative were moved by the Election Commission of India. It was seeking opinions of political parties on the possibility of re-election or re-poll, if nota would garners the highest vote in general election. To give the value of NOTA as negative vote in general assembly election conducted by Election Commission of India, there is a need of an

amendment in the Rule 64 of the Conduct of Election Rules 1961.

In this regard a public interest litigation were filed recently in the Supreme Court by an advocate named Ashwini Kumar Upadhyay demanding the status of candidateship to the NOTA and to direct the ECI to use its plenary power under Article 324 to nullify the election result and hold fresh elections, if maximum votes have been polled in favour of NOTA in a particular constituency, and restrict the candidates who have participated in the invalidated election from contesting the fresh election. This petition was filed under Art. 32 and it was held maintainable despite that right to vote is a statutory right, as decided in the case of *Kuldeep Nayar v. Union of India*⁴⁴². Because the process of giving consent or voting someone is implicit under the fundamental right of freedom of speech and expression under Article 19(1) (a) of the Constitution of India and it is one of the facet of it.

It was contended that political parties choose contesting candidates without consulting electors and in undemocratic way, due to this people are totally discontented many candidates presented by the political parties. It was also argued that the right to reject provides power to the people to express their discontent. Dissatisfied voters will opt for NOTA to reject such candidate and will elect a new candidate. On 15th March 2021, the Supreme Court issued notices to the Ministry of Law and Justice of India and the Election Commission of India while seeking their replies on the plea.

On empirical study of 'NOTA' votes across the country it can be seen that the provision of NOTA is not functioning on the same optimistic way as it was discussed by the Apex Court in 2013. So, on the basis of above recommendations, views and arguments of the petition it can be seen that, the NOTA is moving toward the right to reject.

VII. Debate on the 'Right to Reject'

Although, the concept of nota is not the same as right to reject in present scenario but it would be the same in future.

⁴⁴²2006 SC 3127.

Then political system and its element may be affected by it. It can be seen through following terminologies:

A. Democracy and Right to reject

It may possible the right to reject exists in democratic country but on philosophical value both are not only different but opposite in nature. As democracy is based on the idea of inclusion. It includes the voice of every section of society and through it arrive at the collective idea. On the other hand the concept of right to reject is based on the philosophy of exclusion. Here if NOTA gets the highest votes then all others votes are having no value and no representation at all.

B. Representation and Right to reject

Modern democracies are mostly representative in nature. And representation is the core element and essential of democracy. Here one person become leader of a particular constituency after got elected. But if NOTA have candidacy and it gains the maximum votes then there would no representation at all. Then who will be responds on the problem of that constituency? By this way it would lead to demarcation of the voices of people of that constituency. This would also decelerate the development of the area.

C. Economy and Right to reject

Election is the process to measure the consent of the people. Through this process a government gains legitimacy in the eyes of people. Here the consent of people turned into legitimacy. But this process bear very huge expenses. If nota will get the highest vote then it is obvious that re-election will be held. It caused the double expenditure on the same election. By these way national economy may get affected.

VIII. Effect of 'NOTA' on Political Parties

Modern representative democracies are based on party system. Nature and goodwill of democracy depends upon the behaviour and functions of political parties. Political parties affected by NOTA in many ways with ultimate aim to keep political parties in balance and responsible to society. In following ways political parties are affected.

- A. **Democratization** – sometimes political parties follow non-democratic process in choosing candidates for nomination. As candidates remained totally disconnected with constituency and its people. In this case NOTA lead to rejection of these candidates and by this way political parties would follow democratic means nominating candidates.
- B. **Systematic Change**- although NOTA have no electoral value but it has still managed the role of political parties. Sometimes political parties nominate candidates with criminal and corrupt nature. Here, people are not compelled to vote for anyone of given fray. If they opt for NOTA, it would lead to systematic change in behaviour of political parties.
- C. **Delegate Nature of Political Parties**- in India there might have common situation where only two parties are winning till the date and behaving like trust (when representative work on his own behalf) after election in the absence of alternative. Here NOTA ensures an alternative option in election. And compelled political parties to work as delegate (when representative work on the people behalf).
- D. In Tamil Nadu, R. K. Nagar bypoll 2017, it was not TTV Dhinakaran's victory that grabbed headlines but the Bharatiya Janta Party's (BJP's) abysmal performance. The BJP's candidate K. Nagarajan came sixth with 1,417 votes, much lesser than the number of votes NOTA got-2,373.
- E. In 2018 state assembly election held in five states such as: Chhattisgarh, Madhya Pradesh, Rajasthan, Telangana and Mizoram. Mainstream parties like Aam Aadmi Party, Samajwadi Party all fell behind NOTA in terms of overall vote share.

IX. Empirical Study of 'NOTA'

The right to vote being one of the facet of right to freedom of speech and expression under Article 19(1) (a) of the Constitution of India remained in dormant condition for

around 60 years till 2013. In this year the Apex Court held that giving negative opinion about the candidates of the fray while maintaining secrecy is the fundamental principle of free and fair election. Rule 41(2) and 49(o) of the Conduct of Election Rule, 1961 were held ultra-virus for violating section 128 of the Representation of People Act, 1951 and Art. 19(1) (a) of the Indian constitution.⁴⁴³

On the basis of empirical study of NOTA voters and society these following results came out:

The option NOTA has weathered several assembly elections and two Lok Sabha elections. But it has not been able to garner the significant percentages of vote. 3.6% is the highest vote in the latest Chhattisgarh Assembly election. On empirical study it has been also found that at some constituency, NOTA got more votes than the winning margins of the elected candidates. On analysing political scenario after 2014 it has been found that there are around 260 constituencies where the negative vote were having higher value than the winning margins. In Lok Sabha election 2014, there were around 22 constituencies where it got the same position. Now, suppose that NOTA vote were absent then, there might have possibility that of the changed result. According to figure provided by Association of Democratic Reform (ADR) (2013-17) the negative has been secured about 1.5 crore throughout all elections.

According to the research of Garima Goel, a scholar at the King's India Institute, King's College London, "NOTA voting decreasing as constituencies get more urbanized" in other words it can be said that, the rural voters are more likely to cast negative votes than the urban voters. It shows the inverse relationship between NOTA and urbanization.

It has also been found that reserved constituencies are having more NOTA turnout than general seats. This can be understood as the continual social prejudice against political reservation for S.C's and S.T's.

As so far as left wing affected constituencies are concerned, the pattern is the same as the former. There are having also higher NOTA turnout than others. It can be understood as

the outcome of sentiment of disaffection prevailing against the Indian state itself.

X. Conclusion

The purpose of this research article was to explore and analyse the right to reject in the context of none of the above (NOTA), linkage between right to reject and NOTA and its causes and effects. As beginning to NOTA is from judicial decision in landmark judgment in PUCL vs. Union of India, 2013. So, it was a result of judicial activism. Because the matter of electoral reform is a policy matter and it falls under the exclusive jurisdiction of legislature under Article 324 of the Constitution of India, 1950. So, one can say that here separation of power was breached. But the sanctity of separation of power can be seen in another PIL, which sought for providing NOTA as right to reject and of its candidacy in election. This PIL has held invalid by the Supreme Court by stating that these are policy matter and left these matter to the legislature to make law in this regard in the light of this judgment. Moreover, whether NOTA would be more effective by achieving right to reject or in its position in current scenario, this is the matter of great concern over the features, empirical study of NOTA and its effectiveness in future time. Its effectiveness lies in its achieving its aims such as: balancing the political system, systematic changes to political parties and end of democracy, which had sought to achieve at time of its formation.

XI. Opinion and Suggestions

With addition of NOTA electors got right to cast negative vote with maintaining secrecy but, it got nothing extra to it. It can't be termed as electoral renaissance because NOTA have no electoral value. Due to absence of candidacy of NOTA negative opinion does not affect so much the electoral process. Unless and until negative opinion get the status of negative vote, the addition of NOTA can't be termed as electoral renaissance. The end of democracy can only be achieved if NOTA get the status of right to reject. Because, in any constituency if all electors are voted for

⁴⁴³ PUCL v. Union of India, (2013) 10 SCC 1.

NOTA and on the other hand candidate who is having corrupt nature voted for himself. Here, despite the majority of NOTA votes the candidate will be declared elected. So if NOTA get the highest votes then re-election should be held and the existing candidates should not be allowed to contest the re-election. When percentage of NOTA votes turns higher, political parties must re-think about their policies, nominated candidates and their ideologies. These eventually will bring more accountability and responsibility in the overall electoral process.

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