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# Right to reject the candidates in Election Process of India: Significance of NOTA

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### ABSTRACT

Hon'ble Supreme Court order for inclusion of NOTA has been welcomed by a larger section of the society who were questioning the relevancy and significance of democracy in India. This paper is an attempt to assess the impact of recently incorporated change in the EVM. The researcher on the basis of trends and existing no effect on outcome feel that recent changes and direction of supreme court will be futile exercise in terms of outcome in election process unless we will not affect the fate of candidates contesting and election outcome. Result of Madhya Pradesh Assembly is indicative of on the basis of those NOTA votes which are more than difference of winning candidate. If we include NOTA against the winning candidate what is the outcome. A serious thought are needed to redesign the consequence.

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### Introduction

This paper is an effort to assess the recently incorporated change in the EVM as per the direction of Hon'ble Supreme Court. Here an attempt is being made to suggest that the change will have least impact unless we will not focus on the roots of problem<sup>1</sup> and defects in Indian election process<sup>2</sup>. Despite the impact voting has on decisions made by our government and on people's everyday lives, a vast number of eligible voters do not participate in the process on a regular basis. Those who do not vote have various reasons for not participating. The feeling that no one in government listens to them, so their votes won't make a difference, is a big part of why many people don't vote. Moreover, increasing domination of number of criminal behavior people in all levels in political institutions has also created disinterest in majority of the voters and dislike for the political process in India.

The journey of criminalization of politics in election process of India did not befall all of a sudden but gradually in a time span of several decades.<sup>3</sup> Initially the candidates fetched support, aid and finances from criminals and muscle men.<sup>4</sup> After

a while the criminals involved in offences themselves started participating in politics since they could easily win the elections by threats and coercion. The battle of ballot became battle of bullets. This trend has reached to alarming level when an effort was made through ordinance to nullify the effect of Supreme Court judgement<sup>5</sup> to protect the interest of elected representatives with criminal charges pending against them. Despite the fact if survey of criminal background data is examined out of the 796 candidates analysed, 129 candidates (or 16%) have declared criminal cases against them in 2013 Delhi Assembly election more than 2008 assembly election.<sup>6</sup> There are 3 re-elected MLAs in Chhattisgarh Assembly who have declared criminal cases in 2013.<sup>7</sup> In state of Madhya Pradesh out of the 1045 candidates analysed 243 candidates (23%) have declared criminal cases against them. Out of the 243 candidates who have declared criminal cases, 143 have declared serious criminal cases. These include murder, attempt to murder, kidnapping, criminal intimidation and crime against women.<sup>8</sup> Total of 25 MLAs, including the maximum of 17 legislators from BJP, elected to the 70-member Delhi assembly, have criminal cases against them. The 2013 Delhi polls saw 22 MLAs being re-elected to the the assembly. Out of the 22 re-elected members, 15 have criminal cases against their name.<sup>9</sup> Similar trends have been reported in all states with marginal difference.

<sup>1</sup> See, Norio Kundu, Election Studies in India, Discussion Paper No. 98, March 2007, Institute of Developing Economics (IDE) JETRO, Japan

<http://www.ide.go.jp/English/Publish/Download/Dp/pdf/098.pdf>

<sup>2</sup> One of the major causes for the unruly and unproductive functioning of the legislatures is the quality of people who find their way into the legislatures. The birth of scourges like communalism, corruption, under-development, poverty, etc. can be attributed to the unethical practices, our leaders indulge in. See; <http://www.mightylaws.in/905/election-reforms-india-challenges-election-commission>.

<sup>3</sup> Dr. Mallikarjun I Minch, "Criminalisation of Politics and Indian Administration", SAJMR, Vol. 2 Issue 1, 2013 p.34.

<sup>4</sup> Sanjeev Chaswal, A Paradox of Right Recall or Reject: A Boon or Bane, ICPS, New Delhi, 2013.

[http://www.academia.edu/3257901/A\\_Paradox\\_of\\_Right\\_to\\_Recall\\_and\\_Reject\\_-\\_A\\_boon\\_or\\_bane](http://www.academia.edu/3257901/A_Paradox_of_Right_to_Recall_and_Reject_-_A_boon_or_bane)

<sup>5</sup> 10 July 2013 order was delivered by Apex Court of India to that a convicted lawmaker must be immediately disqualified and jailed persons must be barred from contesting elections if the conviction is for more than two years.

<sup>6</sup> ADR, Delhi Election Watch, 26<sup>th</sup> Nov. 2013. <http://adrindia.org/download/file/fid/3229>.

<sup>7</sup> ADR, Chhattisgarh Election Watch, 14dec. 2013.

<sup>8</sup> ADR, Madhya Pradesh Election Watch, November 18<sup>th</sup>, 2013.

<sup>9</sup> [http://article.wn.com/view/2013/12/09/25\\_Delhi\\_MLAs\\_have\\_criminal\\_cases\\_against\\_them\\_p/](http://article.wn.com/view/2013/12/09/25_Delhi_MLAs_have_criminal_cases_against_them_p/).

To re-affirm the faith in the process right to reject or none of them is suitable to be elected come as suggestion. In Case of *PUCL v. Union of India*, on 27<sup>th</sup> September the Hon'ble Supreme Court has observation that when a large number of voters will press NOTA button, it will force political parties to choose better candidates. Negative voting would lead to systemic change in polls. The court said right to reject candidates in elections is part of fundamental right to freedom of speech and expression given by the Constitution to Indian citizens. Campaigns to "cleanse" the political system have gained considerable ground in the last few years in urban India.

The negative vote is intended to put moral pressure on political parties not to put forward candidates with undesirable record i.e., criminals, corrupt elements and persons with unsavoury background.<sup>10</sup> However, as we know that the suggested change do not have any impact on election result it perhaps may not attract the disinterested and anti-government policies people. Hence, government should also specify what would be the consequences if 'none of the above' secured more votes than any of contesting candidates or it is more than votes by which a candidate is declared winner.

### Background

To understand the intensity of the problem we need to understand the deteriorating conditions of parliament and legislative assemblies of provinces of India. Apathy has developed among the voters.<sup>11</sup> Voters dissatisfied with political actions and leadership felt cheated and reacted that there is no need of politicians and current political system.<sup>12</sup> Report said that a large number of members in the house have criminal backgrounds. Moreover, they have behaved in a manner which shamed the nation and raised the question mark about the procedure due to which they are reaching to the house unobstructed.

To check this effort has many made at various levels; by election commissioner with the assistance of civil society members; by NGO's through court and honest politicians. In July this year the Supreme Court ruled that parliamentarians and state legislators who were convicted of serious crimes, meaning carrying a jail term of two years or more, would be barred from contesting elections.<sup>13</sup> The Court struck down Section 8 of the Representation of the People Act. The government, backed by support from almost all political parties, had introduced a bill in Parliament to override this Supreme Court judgment and then passed the ill-fated ordinance<sup>14</sup> which now stands withdrawn. An ordinary citizen of India wondered why this scripted drama

was performed. Was it to protect Mr. Lalu Yadav<sup>15</sup> or to Mr. Rashid Mashood<sup>16</sup>? Countrymen looked with suspicion and questioned the credibility of every politician in India<sup>17</sup>. Politics and politician prima facie are considered as collegiums of criminals.<sup>18</sup>

### What is NOTA?

NOTA stands for 'None Of The Above'. NOTA is also known as "against all" or a "scratch" vote, is a ballot option in some jurisdictions or organizations, designed to allow the voter to indicate disapproval of all of the candidates in a voting system.<sup>19</sup> It is based on the principle that consent requires the ability to withhold consent in an election, just as they can by voting NO on ballot questions. Elections send ambiguous signals to the political system, particularly when interpreting the meaning of various "non-votes" e.g., abstention, ballot spoiling, and roll-off etc. While a NOTA option may allow voters to better signal discontent.

### History of NOTA Demand in India

It was first recommended by the Law Commission of India in 1999.<sup>20</sup> Further the proposal for a negative vote had come from the EC in 2001 when James Lyngdoh was the chief election commissioner (CEC). It was reiterated in 2004 by CEC T S Krishna Murthy. Though the Conduct of Election Rules, 1961 provide that one can refuse to vote after identifying oneself and thereafter, appropriate entries would be made by the polling officer in the electoral register, etc, this procedure did not protect the secrecy of the negative ballot.<sup>21</sup>

Further, in 2009, Election Commission of India asked Supreme Court to offer the voter a "None of the above" option at the EVM and ballot papers. It was something that the government had generally opposed whether it is BJP or INC. It was argued as one of the important steps, in order to eradicate corruption from the system. From now onwards, every political party will look out for the good character candidates in their respective parties.

Before the judgement of PUCL voters were enjoying right of withdrawing from vote, by filling Form 49-O which refers to dissatisfaction of voter with the candidate of that area. However, the secrecy of voting is not protected here inasmuch as the polling officials and the polling agents in the polling station get to know about the decision of such a voter.

<sup>10</sup> See; Negative/Neutral Voting, India Prospect, <http://indiapropect.org/Blog/?p=146>.

<sup>11</sup> Mumbai best example of voter apathy: CEC Express News Service : Wed Mar 28 2012 <http://archive.indianexpress.com/news/mumbai-best-example-of-voter-apaty-cec/929170/>.

<sup>12</sup> Bill George, Why Leaders Lose Their Way, Research & Ideas, 06 Jun 2011.

<http://hbswk.hbs.edu/item/6741.html>

<sup>13</sup> Supra note 5.

<sup>14</sup> Cabinet overrules Supreme Court, clears ordinance to protect convicted MPs, PTI , Express News Service : New Delhi, Wed Sep 25 2013. <http://archive.indianexpress.com/news/cabinet-overrules-supreme-court-clears-ordinance-to-protect-convicted-mps/1173585/>.

<sup>15</sup> Ahead of a Jharkhand special court verdict in a fodder scam case involving RJD chief Lalu Prasad next week, the Union Cabinet on Tuesday cleared an Ordinance that would protect convicted MPs and MLAs from facing immediate disqualification. The ordinance negates a recent SC order that said the elected public representatives would stand disqualified immediately if convicted by a court for crimes with punishment of two years or more.

<http://www.outlookindia.com/article.aspx?288026>.

<sup>16</sup> [www.dailypioneer.com/getmainfile.php?](http://www.dailypioneer.com/getmainfile.php?)

<sup>17</sup> See, Milan Vaishnav, Caste Politics, Credibility and Criminality: Political Selection in India, Chapter 3 of the author's dissertation, "The Merits of Money and 'Muscle': How Serious Criminality Affects Democracy in India".

<sup>18</sup> Ibid.

<sup>19</sup> "What is NOTA ? Does it means Right To Reject ?", <http://www.gyanvatika.com/nota-vvpat/>.

<sup>20</sup> Law Commission Report 170.; Background Paper on Electoral Reforms - Ministry of Law and Justice, 2008.

[lawmin.nic.in/legislative/ereforms/bgp.doc](http://lawmin.nic.in/legislative/ereforms/bgp.doc).

<sup>21</sup> Ibid.

**PUCL v. Union of India**<sup>22</sup>

**Facts:** In this case the petitioner argued Rules 41(2) & (3) and 49-O, recognize the right of a voter not to vote but still the secrecy of his having not voted is not maintained in its implementation and thus the impugned rules, to the extent of such violation of the right to secrecy, are not only *ultra vires* to the said Rules but also violative of Articles 19(1) (a) and 21 of the Constitution of India besides International Covenants. The petitioners herein prayed for declaring Rules 41(2) & (3) and 49-O of the Rules *ultra virus* and unconstitutional and also prayed for a direction to the Election Commission of India to provide necessary provision in the ballot papers as well as in the electronic voting machines for the protection of the right of not to vote in order to keep the exercise of such right a secret under the existing RP Act/the Rules or under Article 324 of the Constitution.<sup>23</sup>

**Case Referred:** To decide the claim the Hon'ble Supreme Court referred *R. v. Jones* to determine claim of secrecy. Where it was quoted that in constituency based representation, "secrecy" is the basis whereas in the case of proportional representation in a representative democracy the basis can be "open ballot" and it would not violate the concept of "free and fair elections", which concept is one of the pillars of democracy."

Further the court referred the observation of *S. Raghbir Singh Gill vs. S. Gurcharan Singh Tohra and Others*<sup>24</sup> held as under: "14...Secrecy of ballot can be appropriately styled as a postulate of constitutional democracy. It enshrines a vital principle of parliamentary institutions set up under the Constitution. It sub serves a very vital public interest in that an elector or a voter should be absolutely free in exercise of his franchise untrammelled by any constraint, which includes constraint as to the disclosure. A remote or distinct possibility that at some point a voter may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise. Therefore, it can be said with confidence that this postulate of constitutional democracy rests on public policy."

Court also referred Article 21(3) of the Universal Declaration of Human Rights and Article 25(b) of the International Covenant on Civil and Political Rights, which also recognize the right of secrecy.

**Issue:** The question issue was whether a voter decides to cast his vote or decides not to cast his vote, in both cases, secrecy has to be maintained or not.<sup>25</sup>

**Held:** Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Thus, secrecy is required to be maintained for both categories of persons. The court felt that giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy.<sup>26</sup>

Court further observed that in existing system a dissatisfied voter ordinarily does not turn up for voting which in turn provides a chance to unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one. Furthermore, a provision of negative voting would be in the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate thinks about them. The mechanism of negative voting, thus, serves a very fundamental and essential part of a vibrant democracy.<sup>27</sup>

**Examining Trends after Introduction of NOTA and Feasibility**

Before we go in details what happened in the assembly election of the five states where NOTA has been used in November and December 2013 election through EVM. We have to remember that the current system will have no effect on result. Moreover, the candidates are selected by their respective political parties on the basis of so-called "win ability" formula for representing respective legislative houses and then, the voters are asked to elect one of them. Therefore, sometimes the voters may not have a choice but to vote to candidate having selected by the party to represent that constituency despite of the candidate having criminal antecedents.

It was Chhattisgarh that polled the largest number of 'none of the above' (NOTA) votes — an option available for the first time to voters to reject all the candidates. Delhi recorded the least number of NOTA votes until results last came in.

As many as 10,848 voters exercised the option in Chitrakot, a small constituency in the naxal-affected Bastar region of Chhattisgarh — declared a "liberated zone" by left-wing extremists. This was the highest number in all four States where Assembly election results were declared on Sunday. The least number of NOTA votes was polled in Mehgaon in Madhya Pradesh, with 136 voters exercising the choice.<sup>28</sup>

An interesting scenario emerged in Pansemal (reserved for the Scheduled Tribes) in Madhya Pradesh, where there were only two contestants — one from the Bharatiya Janata Party and the other from the Congress. While the winning BJP candidate polled 77,919 votes, his rival got 70,537, whereas 9,288 votes were recorded under NOTA — much more than the difference between the votes polled by the candidates<sup>29</sup>. If we include NOTA as vote casted against winning candidate also the margin of win was less than NOTA votes. In Kawardha, Khairagarh, Khallari, and Dongargaon, the number of rejections under the NOTA was higher than the difference between the votes polled by the winning and losing candidates.<sup>30</sup>

Interestingly, there was no constituency where voters did not reject their candidates.

However, according to the Election Commission of India, NOTA votes will not be treated as valid. Under Section 158 of the Representation of the People Act, 1951, it is the total number of valid votes polled by all candidates that is to be taken into account for calculating the one-sixth of votes polled by an individual for returning the security deposit. Hence, votes polled

<sup>27</sup> Ibid.

<sup>28</sup> NOTA vote maximum in Chhattisgarh, The Hindu, NEW DELHI, December 9, 2013, <http://www.thehindu.com/news/national/nota-vote-maximum-in-chhattisgarh/article5437327.ece>

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>22</sup> [www.pucl.org/Topics/Law/2013/vote\\_none.pdf](http://www.pucl.org/Topics/Law/2013/vote_none.pdf).

<sup>23</sup> Ibid.

<sup>24</sup> 1980 (Supp) SCC 53.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

under the NOTA option will not be taken into account for calculating the total valid votes polled by the candidates for returning the deposit.

And if presumed that those whose names are figured in voters list but did not reached to booth also stand against the contesting candidates the result in majority places perhaps would be different. Question here arose; are we seriously willing to cleanse the process? If yes the present NOTA pattern needs modification and certainly requires to be counted as vote and concept debarring and re-election needs to be introduced.

Although it was contended by the academic class that the government has to bring adequate reform in the electoral process by simply implementing right to reject by providing a “none of the above” option in the EVMs. It was felt that higher the number of NOTA it would be reflected of distrust against politicians.

The recent assembly election pattern is emphasizing on that the effort still is incomplete and only serves the reasons of secrecy but cleansing remains to be done.

#### **Policy Strategy**

No electoral system can function properly unless the underlying political system in which it operates is appropriate. Information given by candidates in their affidavits will be ceased to have any useful effect if its correctness and accuracy are not ensured. We have to seriously count this fact that current pattern of representation is not a representation of majority. Moreover, in number of constituencies more votes are casted against the winning candidates than for them. To convert the theoretical premises of NOTA in translation following reforms along with NOTA is needed:

1. In case the “None-of-the-above” option gets more votes than the difference of winning candidate and second number candidates, none of the candidates should be declared elected and a fresh election should held in that constituency, in which all the candidates in this election are not allowed to contest.

2. In the following elections, with fresh candidates and with a “None-of-the-above” option, only that candidate should be declared elected who gets at least 50%+1 of the votes cast.

3. To remove the cast factor and religion winnability of the candidate, we need to incorporate the prohibitive eligibility by disabling that if the numbers of voters in any constituency is more than 20 % for any cast or religion they cannot contest election from there.

4. In majority of the constituency voters list is defective. On examination of current list we find that the names of the voters are mentioned who is not residing on that address and some names are given at two places. To ensure authenticity of the list BLO must visit the local area for a week after notification of the election. With the involvement of local postman, two constable from police chowki and house tax collection clerk list will be updated.

5. To get effective and better outcome of NOTA; compulsory voting should be introduced in phase starting from municipal bodies in first level to parliament in a span of 5-10 years. All eligible voters must cast their ballot in Municipal, Nagarpallika and Panchayat elections or be subjected to punishment. This will force political parties to change their criminal and corrupt candidates.

6. To ensure corrupt and criminal candidates should not reach in the house all possible details of the their financial sources, criminal records of pending cases and charges should be published in daily newspaper and must be displayed at digital advertising board an various places of that constituencies after nomination paper is scrutinized.

7. No elected candidate can contest for more than two consecutive terms in any house.

8. Inner-party democracy should be mandatory to be eligible to contest election an affidavit and details of party inner election should be submitted along with nomination form.