

NOTA AND ELECTORAL DEMOCRACY IN INDIA

CASE COMMENTARY - PUCL V. UNION OF INDIA, (2013) 10 SCC 1

Anisha Mathur¹

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ABSTRACT

Election lies in the heart of democracy. Secrecy lies in the heart of elections. Voting is one of the most crucial decisions a citizen takes in a democracy. While deciding to vote for a candidate, if the voter is not satisfied with the quality of candidates being put up for elections, the voter can also choose to not vote at all. This would otherwise lead towards absenteeism which is negative for the entire election process, however, with the NOTA button the dissatisfaction is conveyed and it prevents absenteeism as well. But, what about secrecy? The voters voting for NOTA also deserve the same level of secrecy as any other voter voting for real candidates. The present case dealt with this major secrecy issue for NOTA voters. The court observed, among other things, when two voters are treated differently based on their decision regarding voting, it is violation of article 14 of the Constitution, equality principle. Moreover, if NOTA gets the highest number of votes, the candidate receiving the next highest number of votes is declared the winner of the elections. However, this does not serve the purpose of NOTA, that is, conveying the dissatisfaction. At best, the improvement in the quality of candidates may be seen in the next elections. This case comment seeks to trace the trajectory of the PUCL judgment and address the gaps that persist therein.

¹ Anisha Mathur, *Symbiosis Law School, Noida*

FACTS

The constitutionality of Rules 41(2) and (3) and 49-O of Conduct of Elections Rules² was challenged under article 32³ of the Constitution of India. These rules were challenged for violating secrecy of voters during voting which comes under the fundamental aspect of free and fair elections in a democracy. Representation of People Act⁴ requires secrecy to be maintained of the voters during elections under section 128⁵, along with Rules 39⁶ and 49-M⁷ of the 1961 Rules. Rule 41(2) and (3) and 49-O of the 1961 Rules acknowledge the right of the voters to not vote, however, the secrecy of not voting is not maintained, violating section 79(d)⁸ and 128⁹ of the Representation of People Act, 1951 and article 19(1)(a)¹⁰ and 21¹¹ of the Constitution of India. The petitioners prayed to declare the above-mentioned rules unconstitutional and to issue an order for the Election Commission of India to facilitate adequate amendments in the ballot papers, along with the EVMs in order to maintain the secrecy of the voters while exercising their right not to vote.

HISTORICAL BACKGROUND

- The concept of negative voting was explored in the 170th report by the Law Commission of India in 1999¹². However, the final recommendations were yet to come because of the problems faced in the practical application. Later, in its implementation in the elections, the records of the voters who chose not to vote were maintained by the Presiding Officer from the Election Commission which violated the ‘right to secrecy’ of the voters.
- The Representation of People Act, 1951¹³ mainly governs the Indian elections by controlling voter qualifications, delimitation of constituencies, corrupt practices, and electoral rolls. This act was amended in 2003. The amendments included introduction of Open Ballot for Rajya Sabha (Council of States), which was a shift from the traditional secret ballots. The Open Ballot system impacted transparency in upper house polls.

² Conduct of Elections Rules, 1961.

³ India Const. art. 32.

⁴ Representation of People Act, 1951.

⁵ Representation of People Act, 1951, § 128.

⁶ Conduct of Elections Rules, 1961, rule 39.

⁷ Conduct of Elections Rules, 1961, rule 49-M.

⁸ Representation of People Act, 1951, § 79(d).

⁹ Representation of People Act, 1951, § 128.

¹⁰ India Const. art. 19(1)(a).

¹¹ India Const. art. 21.

¹² 170th report of Law Commission of India, 1999.

¹³ Representation of People Act, 1951.

- Kuldip Nayar v. Union of India¹⁴ challenged this amendment as it goes against the core democratic principle of secrecy in voting and is in violation with article 19(1)(a). However, the court ruled that the amendment in question was not in violation of Article 19(1)(a) and secrecy principle. It highlighted the importance of open ballots in preventing corruption in indirect elections. It would also prevent practices like cross-voting.
- In People's Union for Civil Liberties v. Union of India¹⁵, petitioners challenged the Conduct of Elections, 1961 in the Supreme Court, to seek measures to protect the 'right to secrecy' of the voters. The Supreme Court in 2013 directed the EC to introduce NOTA as an option in the EVMs and ballot papers in order to maintain the secrecy of the voters who chose not to vote.
- People's Union for Civil Liberties v. Union of India¹⁶ set forth the argument that right of negative voting was included in the right to vote in secrecy. They sought quashing of rule 41(2) and 49-O of the Conduct of Elections Rules, 1961 for violating the secrecy principle. The petitioners prayed for releasing guidelines to the election commission for making appropriate changes to the EVMs and ballot papers to allow the voters to exercise negative voting and maintain the secrecy of the exercise of this right as well.

ISSUES

- i. Whether a writ petition can be issued for a statutory right to vote?
- ii. Whether the Association for Democratic Reforms and PUCL judgments stand overruled?
- iii. Whether Rules 41(2), 41(3), and 49-O of the Conduct of Election Rules, 1961, are unconstitutional and violative of a voter's fundamental rights?

HOLDING/DECISION

The court answered the questions raised as follows:

- i. The Constitution provides for remedies when there is a breach of the fundamental rights under Article 226¹⁷ and 32¹⁸. These articles give the right to the citizens to move the High

¹⁴ Kuldip Nayar v. Union of India, (2006) 7 SCC 1.

¹⁵ People's Union for Civil Liberties v. Union of India, (2004) 2 SCC 482.

¹⁶ People's Union for Civil Liberties v. Union of India, (2009) 3 SCC 200.

¹⁷ India Const. art. 226.

¹⁸ India Const. art. 32.

Court and the Supreme Court, respectively, for challenging such violation of a fundamental right. On the contention regarding the maintainability of the petition filed by the PUCL, since right to vote is not a fundamental right, rather a statutory right, and to file a writ petition there should be a breach or violation of a fundamental right, the court clarified that the right to vote in a democracy is more than just a mere statutory right. The right carries with it more importance because it is concerned with the voter's fundamental right of speech and expression as envisaged under article 19 to choose their representatives for the governance of the nation. Moreover, the maintainability of the secrecy of voters is concerned with the fundamental Right of Privacy under Article 21¹⁹. Therefore, the petition was maintainable as the statutory right of voting, in reality, is related with the core fundamental rights of the citizens, and the breach of these core fundamental rights fulfilled the essentials required for filing a writ petition.

- ii. In *Association for Democratic Republic (ADR) v. Union of India*²⁰, it was established that Indian voters have a fundamental right to have information regarding the background of the electoral candidates. *People's Union for Civil Liberties (PUCL) v Union of India*²¹ was initial case for None of the Above (NOTA) button in the Indian elections. In this case the court established that the right to not vote is also available to the voters. This was termed as negative voting. As an outcome of this ruling, the Election Commission was mandated to provide for a NOTA button on Electronic Voting Machines (EVMs) and ballot papers. The court clarified on the question regarding these judgments that it is the voter's right to know the candidate's complete background in order to make a sound decision. In 2004, the court held in the case of PUCL that voters have the right to know the candidate's criminal, financial, and educational background as part of article 19(1)(a). Further, in 2006, in the *Kuldip Nayar*²² case the court reaffirmed this principle however noted some doubts regarding the extent of mandatory disclosure of a candidate's information. In further rulings, the court reaffirmed the right to know of the voters and also highlighted the transparency principle.

¹⁹ India Const. art. 21.

²⁰ *Association for Democratic Republic (ADR) v. Union of India* (2002).

²¹ *People's Union for Civil Liberties v. Union of India*, (2004) 2 SCC 482.

²² *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1.

iii. The Court highlighted the importance of free and fair elections as a core principle of democracy. It emphasized on the voter's right of voting for the best candidate and also their right to reject all the candidates if the voter wishes to do so by exercising the NOTA (None of the Above) button. Regardless of the decision of the voter, of whether to choose a candidate or to reject all the candidates and select the NOTA button, the secrecy of the decision taken by a voter needs to be maintained by the Election Commission. The core of free and fair elections in a democracy is secrecy which, the court clarified, can only be removed in a situation when there exists a tussle among secrecy principle and a 'higher principle' of free elections.²³ The positive right not to vote is included in the right to vote and thus, needs to be given importance equal to the right to vote. A candidate may abstain from voting due to multiple factors including the reason that he or she may think that none of the elected candidates are worthy of his vote. The ways to refrain from voting include absenteeism from the voting exercise altogether, which is not the right alternative for a citizen who is responsible for showing his dissatisfaction with the quality of candidates nominated for elections. Therefore, it becomes vital to enable the NOTA button for voters to appear for voting and reject all candidates and choose NOTA even if they don't want to vote for any candidate.²⁴ Furthermore, it is important to maintain the secrecy of the candidates who decide to exercise the NOTA button just like the secrecy of other voters is maintained. The Court held that Rules 41(2) and 41 (3) and 49-O clearly goes against section 79(d) and 128 of the Representation of People Act.

REASONING

Court elucidated the meaning of the term 'voting' in *Lily Thomas v. Union of India and Others* as "the formal action of will or option by the person entitled to exercise his right on the subject and issue in question. Right to vote means right to exercise the right in favour or against the motion. Such a right implies the right to stay neutral as well."²⁵ It implies that the right to vote also extends to right not to vote, known as negative voting. Therefore, when a person is not given the right to not vote, it is essentially depriving the person from his or her right to vote. Even though the right in question is a statutory right, from a wider perspective, it is related with the freedom

²³ *People's Union for Civil Liberties v. Union of India*, (2013) 10 SCC 1.

²⁴ *People's Union for Civil Liberties v. Union of India*, (2013) 10 SCC 1.

²⁵ *Lily Thomas v. Union of India and Others*, (2013) 7 SCC 653.

of speech and expression of the voter, covered under article 19. Thus, it is essential for the EC to implement NOTA option for the voters who don't want to vote for any candidate.

The court analyzed the challenged rules. As per the rules, when a voter decides not to vote, the Presiding Officer writes the remark in Form 17-A and gets the voter's thumb impressions or signatures for the same. Moreover, the ballot papers of these voters are kept separately in a different packet which makes it evident that the concerned voter chose not to vote, defeating the principle of privacy. Therefore, it is also essential to maintain the secrecy of the voters who rejects all the candidates in the same manner as the other voter's secrecy is maintained. When two voters are treated differently based on their decision regarding voting, it is violation of article 14 of the Constitution, equality principle.

Taking these aspects in concentration, the court held that as a citizen of a vibrant democracy, one must have the option to choose the NOTA button to show his or her disapproval regarding the standards of candidates elected by parties. This would not just compel the political parties to enhance the quality of candidates that are being put up but also enhance the overall quality of elections. Furthermore, it would reduce absenteeism in the elections as even if the voter wants to reject all the candidates that decision will be registered and corrective measures for the same can be taken. The court held that the challenged rules are ultra vires and violates section 79(d) and 128 of the Representation of People Act²⁶.

CRITICAL COMMENTARY

In either case of choosing to vote or not to vote altogether, the principle of secrecy is of utmost importance in a vibrant democracy. The voters who vote and the ones who don't, need to be treated equally, adhering to the right of equality. In free and fair elections, an essential element is secrecy. If the secrecy is not maintained for the voters voting for NOTA, then the absenteeism rate would increase. The elections will no more be able to serve the purpose. Therefore, the decision of the court in declaring the rules challenged was a significant and needed change in the election procedure. Additionally, the guideline for the situation where NOTA gets the highest votes is also clear, which is- the second highest voted candidate wins the election. However, this, in a way defeats the purpose of the whole idea of enabling NOTA as an option. Even though, NOTA receiving the highest vote would set the statement for the political parties regarding the dissatisfaction of the voters, however, any steps taken for improving that would be applied in the

²⁶ Representation of People Act, 1951.

next elections and one of the candidates nominated for the current year would ultimately win the elections, despite the fact that the majority of voters did not approve the quality of the candidate. This is a gap in the system yet. This can be cured by the political parties by putting up their best candidates only in the first place who are worthy of the votes.

CONCLUSION

Election lies in the heart of democracy. We have witnessed over the span of several years how the entire procedure of election is being carried out in our country, through rallies, propagandas, schemes, promises, promotional stunts and more. Elections are treated with great importance by the political parties. When in reality, the citizens or voters should be more serious and diligent about the elections because the decision we make at the voting booth impacts the working of the nation for the next five years. When a right carries such a great importance, it becomes crucial for the voters to exercise this right with diligence and ensure that they vote for the right candidate because every vote is important and it can make a great difference. The court has cleared that even though voting is a statutory right, yet it is deeply connected with citizens fundamental right of speech and expression under article 19(1)(a) and therefore, deserves to be treated equally.

In order to choose an ideal representative for the masses, the first step is for the political parties to put up candidates who meet the expectations of the voters and are worthy of their votes. When the political parties fail to meet these expectations, the voters have the right to abstain from voting as well. This means the voters have the right to reject all the candidates. It is important to understand that this right of not voting can be exercised in either a negative way or a positive way. The negative way would be by not showing up for voting at all, resulting in absenteeism. The positive way is to show up for voting and choose the NOTA button which conveys the dissatisfaction and disapproval of the voter.

Secrecy lies in the heart of elections. In any given scenario, the choices of the voters need to be treated equally. Ensuring that elections are free and fair and the secrecy of voters is maintained, is the duty of the Election Commission. The court has time and again decided cases to improve and evolve the procedures and working of EC in order to make the entire process of elections better. The declaration of Rules 41(2) and (3) and 49-O being unconstitutional was one of the crucial decisions, protecting the fundamental rights of the voters and enhancing the quality for future elections as well.