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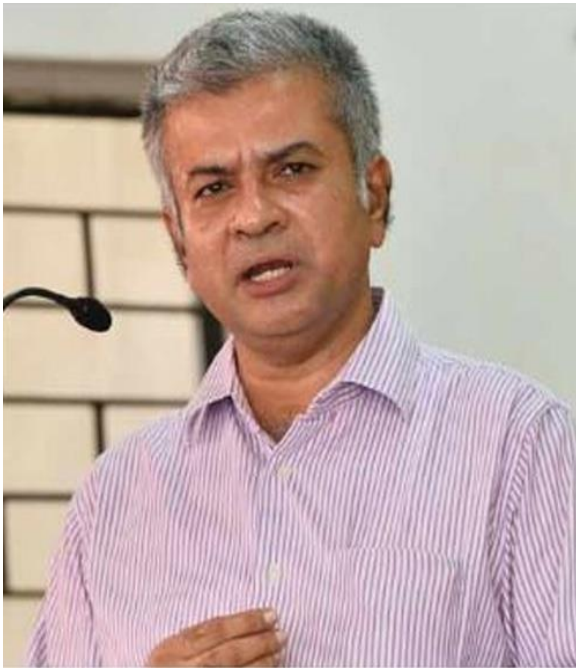
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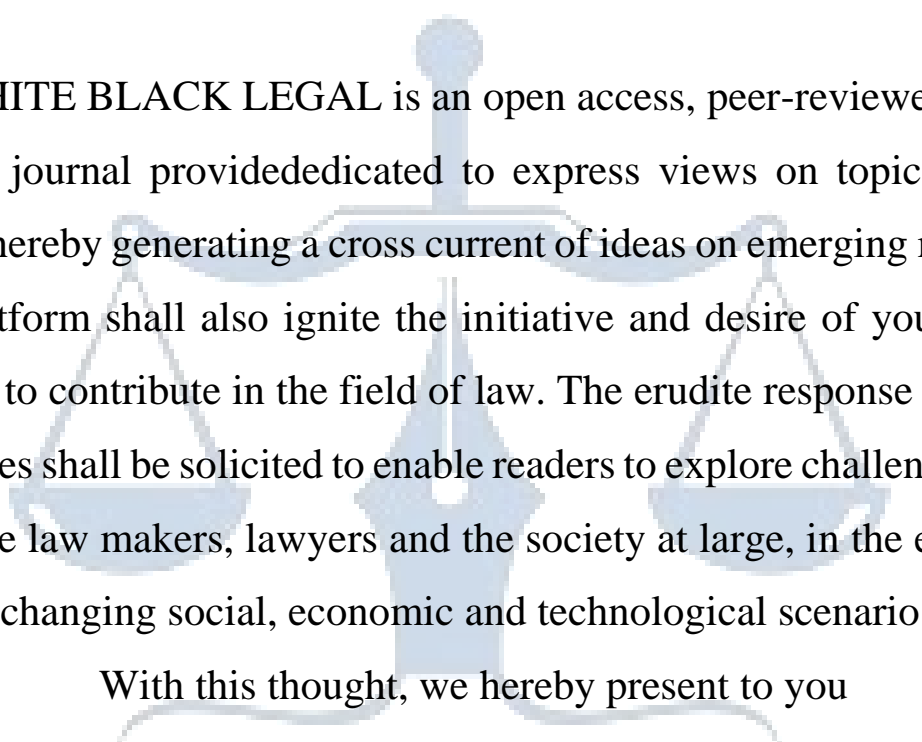


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

W H I T E B L A C K
L E G A L

THE ROLE OF 'NOTA' IN RIGHT TO ADULT SUFFRAGE

AUTHORED BY - UDAYASIMHA N G¹ &
SIDDHI SUMAN²

ABSTRACT

India being the largest working democratic country of the entire world, the right to adult suffrage plays a pivotal role in order to uphold and safeguard the fabric of democracy. The ethos of a real democracy is to have an active participation of the citizens of the nation. The concept of free and fair election in a democratic set up, builds a confidence amongst the citizens and in turn makes them to have utmost trust over the State and its machinery. 'NOTA' being introduced by the Election Commission of India on the due orders given by the Supreme Court of India, has created an opportunity to the voters of India to showcase their displeasure with respect to the contenders of the election. Though 'NOTA' (None of the above) is an option which is made available in all the EVM machines and it does reflect in the VVPAT (Voter-verified paper audit trail) it does not necessarily act as a fictional candidate in the said list of the contender.

The introduction of NOTA in conducting elections, has created an element of doubt if the said option is a step towards right to recall? It needs to be noted that an option of none of the above which is given to the voters is not a right to recall the public representatives, as it does not follow the norms of recalling the candidates who have lost to 'NOTA' and they being debarred from contesting a re-election as NOTA being an alternate option is not legally considered to be a fictional candidate. The recent developments of the Hon'ble Supreme Court issuing a notice to the Election Commission of India regarding a petition of NOTA being strengthened and creating a way to bring in 'Right to Recall' is indeed an interesting one.

The Representation of People Act, 1951 play a crucial role in the overall conducting of elections in India and the Election Commission being a Constitutional body oversees the entire procedures of conducting elections to uphold the right of people to participate in the festival of democracy, by using their adult franchise.

Key Words: NOTA, Vote, Election Commission, Right to Recall, Democracy

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INTRODUCTION

The elections play an important role in any democratic country. Conduct of elections in a free and fair manner is the pro-active steps taken in order to celebrate the biggest festival called 'Elections'. India being the largest working democratic country, it represents the concept of unity and brotherhood to the entire world.

Sir Winston Churchill, Former Prime Minister of the United Kingdom has analysed the importance of votes and voters in a democratic setup in an impeccable way in the following words "At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper -no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of that point."³

In furtherance of this analysis Sir Churchill goes ahead to state in one of his speeches 'Penny in the Slot Politics 1934' about his father's teaching – "My father, the late Lord Rudolph Churchill, taught me to regard these matters from a very different angle. His view was that gradually a man came to represent something in the country, a certain association of political ideas, and that he could not surrender his personal freedom of speech and actions unless he exerted in return, as a member of a government, a proportional influence on public policy."⁴

According to Hon'ble Dr. Justice Arjit Pasayat, Former Judge, Supreme Court of India 'democracy' and 'free and fair election' are inseparable twins. There is almost an inseparable umbilical cord joining them. The little man's ballot and not the bullet of those who want to capture power is the heart beat of democracy. Path of the little man to the polling booth should be free and unhindered, and his freedom to elect a candidate of his choice is the foundation of a free and fair election.⁵

Analysing the opinions of the above intellectuals and their thought processes, one can come to a probable conclusion is that the pen is mightier than a sword in order to establish democracy and the voice of a common man plays an important role in upkeeping safeguarding the fabric of democracy.

THE ELECTORAL SYSTEM IN INDIA

³ www.thedailystar.net/opinion/perspective/news/the-power-the-little-man-democracy-1649548

⁴ www.nationalchurchill/museum.org/penny-in-the-slot-policies.html

⁵ www.student.manupatra.com/Academic/Abk/Law-Relating-To-Elections/Chapters.html

One of the pivotal laws of the land with reference to conducting of elections in India is the Representation of the People Act, 1951⁶ which deals with every aspect of elections in India. Further the establishment of the election commission a permanent constitutional body in accordance with the constitution on 25th January 1950.

The overall activities of conducting elections at the State level is supervised by the election commission who is represented by the Chief Electoral Officer of the State. Further the field administration at the District and Sub-Divisional levels in India are run by the District Magistrates (Deputy Commissioners/Collector), Sub-Divisional Magistrates, Revenue Divisional Officers, Tahsildars etc.⁷

According to Section 2(d) of the Representation of People Act, 1951 defines the term 'election' as "an election to fill a seat or seats in either house or either house of legislature of a State other than the State of Jammu and Kashmir.

NOTA

None of the above or in short 'NOTA' has created a furor within the political parties and others who are not in favour of it in the country. It is indeed an important option which enables the voter to officially cast his vote not in favour of any candidate of the said constituency but in favour of none. The voter is hereby utilizing his democratic rights to vote but not to any candidate but to none by expressing his displeasure about the competency of all the candidates in the race to win the election. A notable development which took place in India with respect to NOTA being introduced in the Indian electoral system dates back to the year 2013, where the Hon'ble Supreme Court of India in the case of People's Union for Civil Liberties & Anr v. Union of India and Anr.⁸ judgment dated 27/09/2013 has sought for the introduction of NOTA as it would improve the electoral process through⁹-

- Increased voter participation
- Compulsion on the political parties to field good candidates
- Reflection of negative votes in election result

Few notable observations of the judgment delivered by the Supreme Court in the said case gives us an insight about the necessity of 'NOTA' in elections:

Survival of democracy- Survival of democracy is the need of the hour for any democratic

⁶ Act no. 43 of 1951

⁷ The Electoral System in India, Dr. M.S Gill, Former Chief Election Commissioner of India. See. eci.gov.in

⁸ W.P (Civil) No. 161/2004

⁹ State Election Commission, NCT of Delhi & U.T. Chandigarh. No. F4(350) OSD-1/SEC/2022/3286 order dated 24/01/2022

nation in this world. Though on the papers the democracy exists, but the real picture will be a bit different one. The Court in the said paragraph 51 of its judgment concentrates on the survival of democracy and that can be achieved through elections, by choosing best available men for proper governance of the country. Further the Court lays emphasis on the moral as well as ethical values which should be occupying the highest seat to achieve a vibrant democracy. The Court believes that the said objective can be achievable through introduction of NOTA where the voter has been vested with this notable right of him/her to reject the candidates by casting his vote in favour of NOTA.¹⁰

Right to vote: A statutory right – The essence of democracy is to uphold the right to vote which is a statutory right which is vested in the hands of a common man. The Supreme Court in paragraph 52 states that the right to vote as a statutory right is the essence of democracy and in the absence of the same the democracy will fail to thrive and once it fails it is indeed an alarm of threat to the democracy.¹¹

Effective political participation – Another pivotal aspect of a vibrant democracy and elections are the effective participation by the political parties both the regional as well as the national political parties. The Supreme Court in paragraph 53 has made a notable observation regarding the accelerate growth of participation of political parties in elections, by introducing the NOTA button in the EVM machines. Further the Court believes that by introducing NOTA it will encourage the voter who wishes to cast his negative vote at a time when electioneering is in full swing and it helps to foster the purity of the electoral process and also fulfills its one of the objectives namely, the wide participation of people.¹²

Fair and free election – Fair and free elections are always a dream come true for any democratic nation of this world. Fair and free elections guarantee the rights of a common man by creating a platform to express his solitude, support, anger, displeasure against the incumbent government during the elections. The Supreme Court in paragraph 54 of the said judgment believes that the free and fair elections 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 and duress of coercion. Further the Court also opines that that the identity of the voter and the vote which he has cast and the maintenance of secrecy is an integral part of free and fair election.¹³

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

Freedom of expression through vote – One of the pivotal freedoms of mankind is to express dissent. Expression of dissent through vote is one of the best forms of democratic rights. The Supreme Court in paragraph 55 states that NOTA being one of the options in the elections, gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political candidates. Further the Court opines that when there is a large number of votes in favour of NOTA, it leads to a systematic change and the political parties will be compelled to accept the will of the people and field the candidates who are known for their public service and integrity.¹⁴

RECENT DEVELOPMENTS

The Supreme Court on 26th of April 2024 has issued a notice to the Election Commission of India regarding a plea seeking to frame rules in case 'NOTA' option gets majority in elections.¹⁵

The petitioner Mr. Shiv Khera contends that the 'NOTA' to be treated as a 'fictional candidate' by the Election Commission of India and to establish guidelines for conducting re-elections in constituencies where NOTA garners a majority.¹⁶

The advocate on record appearing for the petitioner seeks directions to ensure proper reporting and publicity of NOTA as a viable electoral option. This petition is in the backdrop of Surat in State of Gujarat wherein the candidate of the incumbent party was elected unopposed as the other contenders of the election withdrew their nominations due to reasons best known to them. In furtherance of the said petition, the petitioners contended that there is a need for uniform implementation of NOTA across the country, citing Maharashtra, Puducherry and Haryana, where there is a practice of conducting a mandatory re-poll if NOTA emerges as winner surpassing all other contenders for the Lok Sabha seat.¹⁷

Another interesting contention by the petitioner in the said petition is that the same candidates, who lost to NOTA, should be barred from contesting the bye-election which is held after the cancellation of the first election where NOTA got majority votes.¹⁸ The Hon'ble bench comprising of Justice D Y Chandrachud, Justice J B Pardiwala and Justice Manoj Mishra has agreed to entertain the issue raised before the bench by the petitioner. The Chief Justice of India

¹⁴ Ibid.

¹⁵ https://www.business-standard.com/elections/lok-sabha-election/sc-issues-notice-to-ec-on-plea-seeking-re-election-if-nota-gets-majority-124042600894_1.html

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ <https://www.livewlaw.in/top-stories/supreme-court-seeks-eci-response-on-plea-to-cancel-election-if-nota-gets-majority-votes-256194>

observed that the petitioner was seeking to develop the law further from the judgment laid down by the Supreme Court.¹⁹

The following are the reliefs sought by written submission:

- Directing the respondents to frame necessary rules to effect that if NOTA gets majority, the election held in the particular constituency shall be declared null and void and a fresh election shall be conducted to the constituency.
- A candidate who loses against 'NOTA' shall stand debarred from contesting all elections for a period of five years.
- Directing the respondent to ensure proper and efficient publicity of NOTA as a 'fictional candidate'.

The above petition is indeed an interesting one which is filed before the Supreme Court of India and the same has been accepted on the face of it and an order in this regard is passed asking the response of the Election Commission of India. The petitioner's contention about declaring the result of those constituencies as null and void where, the NOTA emerges as a winner is bit impracticable, as conducting elections is a humongous task for the Election Commission and re conducting election incurs lot of monetary expenditures and man power.

The petitioner further contends that the candidate shall be barred for the next five years in contesting in any kind of elections goes against the basic ethos of democracy and this cannot be appreciated in any democratic set up as debarring a candidate can only be done on the basis of any irregularities and not because of NOTA being declared as a winner in the said constituency.

Is NOTA a right to recall?

Recall means removal of an elected person during his term of office by the electorate²⁰. The idea of right to recall is one of the most crucial ideas in an electoral system. In a democratic set up right to recall can be used for removal on the basis of his/her non-performance. The concept of right to recall in India is not a new thing as this is operational in India for a long period at the lower levels like that of municipal or panchayat. The said right to recall is never applied in the elections conducted in the State or at the central level.

It was Sachindra Nath Sanyal who first demanded 'right to replace public servant' way back in 1924. Mr. Sanyal was clear that 'In this republic, the electors shall have the right to recall their

¹⁹ Ibid.

²⁰ Ipsita Mishra, Right to Recall- Can this clean up the Indian political system? The Hindu

representatives if so, desired otherwise the democracy shall be a mockery²¹.

The rationale behind the right to recall is a means by which the voters can ask the elected representatives to come back from their office by resigning much before their term due to non-performance. The recall is one of the pivotal elements of 'direct democracy' often described collectively as the 'initiative, referendum and recall'. In those jurisdictions that have adopted direct democracy, it is the citizens-initiated referendum that has dominated the exercise of direct democracy, with the recall being much less commonly exercised as it is a less direct and less efficient method of achieving changed policy outcomes.²²

There are two distinct rationales for the recall. The first based upon the theory that elected politicians are agents for the electors and must exercise their vote in the legislature in a manner consistent with the will of their constituents.²³ According to this theory, an elected official should not exercise initiative or leadership or vote in the legislature on the basis of what he or she believes is best for the polity overall.²⁴

According to William Munro the officeholders share the similar position in the public as agents with respect to the principal. They are the instruments for carrying on business of the public, and if they fail in performing their duties the law of the land shall provide adequate measures for getting rid of them in the public arena.²⁵

In furtherance of the first rationale, the second rationale is the more practical one. One of the pivotal aspects of this rationale is that there shall be a mechanism to eradicate corruption, red tapism and favoritism and this can be achieved only when the representatives are called back because of their irregularities and incompetency.²⁶

Advantages of Right to Recall

- It showcases the true power of democracy.
- A clean imaged candidate will fight in elections.
- It makes way towards the direct democracy.
- Public accountability.
- Restriction on false promises made by the candidates during elections.
- Upholding free and fair elections

²¹ Articles.manupatra.com/article-details/Right-to-recall-a-true-reflection-of-popular-demand

²² Anne Twomey, The Recall of Members of Parliament and Citizens' Initiated Elections, UNSW Law Journal, 2011

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid. Also refer: William Munro, The Initiative, Referendum and Recall (Appleton, 1916) 314

²⁶ Ibid.

- Encourages active participation of electors.

Disadvantages of Right to Recall

- Uncertainty of a public a public representative holding on to the position.
- An element of doubt regarding the welfare activities due to right to recall.
- Popular schemes would be rolled in order to appease the voters.
- Political uncertainty.
- Leads to a roller coaster ride of Democracy
- Unnecessary expenditure by the State to conduct re-election.
- Mis use of right to recall due to interference of the other possible contenders.
- Mis use of right to recall on the caste-based politics with reference to India.
- Goes against the basic ethos of principles of natural justice where an opportunity is not provided properly to the existing public representatives.
- Leads to unstable formation of government.
- Apprehension of the government being toppled, especially if the party has no majority, but still has formed a government with the help of allies.

CONCLUSION:

NOTA plays an important role in order to uphold democracy subject to the condition that it is implemented in its true sense. India being one of those few nations where NOTA was introduced in the state elections of 2013, wherein more than 15 lakh voters voted in favour of NOTA by showcasing their displeasure against, the candidates fielded by various political parties and as well as the other independent candidates, who were in race to win the elections. Countries like Greece, Spain and Colombia 'NOTA' is referred to as white vote and Argentina considers it to be as a blank vote and Ukraine considers it as against all. The said concept is being followed by 14 countries in different names and in different ways, were in India is also a party to the same, being the largest working democratic country of the entire world.

There are indeed many examples in the world similar to 'NOTA' being used in its true sense. One of the most relevant and interesting ones come out of Poland and Russia. In the year 1989, Poland was under the Communist regime, where in the government allegedly tried to manipulate the elections in such a way that many seats had no opposing candidates and this lead to dislike from people against the communist regime. Further the voters instead of voting

the candidate, they crossed their names off in the ballot and this led to conducting re-election. The Soviet Union also experienced something similar in the year 1991 where more than 3200 seats had to have re-election with new candidates because of the existing candidates lost to 'NOTA'. In the successive year 1992, after the fall of the Soviet Union and when a new Russia was formed the first President Boris Yeltzin said 'NOTA helped convince the people they had real power even in a rigged election and played a role in building true democracy'. One of the unfortunate actions taken by Russia is the removal of 'NOTA' in the year 2006.

It is indeed an undisputed fact that in any country the significance of 'NOTA' is similar where as it is utilized to showcase the displeasure with the existing candidates. Taking India into context, it is clear that the Election Commission's action to introduce 'NOTA' in the EVM is not necessarily a 'Right to Recall' step which is being followed, where in there is no guarantee of re-election to be conducted when 'NOTA' emerges as a winner against all other candidates of the political parties including that of the independent contestants. NOTA is just a way of giving negative feedback and sending the message across to political parties about their dislikes.

The time will eventually give us an answer, as the Supreme Court has recently issued a notice to the Election Commission of India asking their response, on the basis of a petition filed by the petitioner demanding NOTA to be considered as a 'Fictional' candidate and NOTA should be vested powers of 'Right to Recall'. As on today the position of NOTA remains as an empty threat to the political parties and has remained as a tooth less snake.

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