

A. Constitutional Importance of NOTA & Right to secrecy while voting

1) What are the 2 key components of this sc judgment?

The two main key components that came out of the Supreme Court judgment are:

- Right to vote also includes a right not to vote i.e right to reject.
- Right to secrecy is an integral part of a free and fair election.

2) What is 'Right to reject'? How is it part of fundamental right of freedom of speech?

Voting is a formal expression of will or opinion in an electoral process. Right to reject implies that a voter while voting has every right not to opt for any of the candidates during an election. Such a right implies a choice to remain neutral. This may happen when a voter feels that none of the candidate in a candidacy deserves to be elected. It happens by the way of his choice, belief, thinking and expression. Right to reject has its genus in freedom of speech and expression.

3) Is 'Right to secrecy' while voting a fundamental right?

It is a central right of an elector to cast his vote without fear of reprisal, duress or coercion as per Article 21 of the Indian Constitution. 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, Article 19(1)(a) and Article 21 of the Indian Constitution.

4) Is 'Right to secrecy' recognized under international laws?

Right to secrecy has been internationally recognized. Article 21(3) of the Universal Declaration of Human Rights and Article 25(b) of the International Covenant on Civil and Political Rights deals with the "Right to secrecy".

5) In a Parliamentary democracy, why is secrecy of a voter so crucial?

The manner in which general elections are held, secrecy of the voters is necessary in order to maintain the purity of the electoral system. Every voter has a right to vote in a free and fair manner and not disclose to any person how he has voted in direct elections to Lok Sabha or State Legislatures, maintenance of secrecy is a must and is insisted upon all over the world in democracies where direct elections are involved to ensure that a voter casts his vote without any fear of being victimized if his vote is disclosed.

6) How 'NOTA' (Right to reject) button on the EVMs is important in a democracy?

- Voter's participation is an essence of democracy. Introducing a NOTA button can increase the public participation in an electoral process. The voters' participation in the election is indeed the participation in the democracy itself. Non-participation causes frustration and disinterest, which is not a healthy sign of a growing democracy like India.

- NOTA option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity
- For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. Thus in a vibrant democracy, the voter must be given an opportunity to choose 'None of the Above' (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells us the dire need of negative voting.
- 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.

B. ECI's stand on NOTA button & Right to reject

1. What was the initiative of ECI on implementation of "NOTA"?

In order to rectify this serious defect pertaining to the secrecy of the voters with regard to right to reject, the Election Commission on 10.12.2001, addressed a letter to the Secretary, Ministry of Law and Justice. The letter stated following view-points:

- The "electoral right" under Section 79(d) also includes a right not to cast vote
- To provide a panel in the EVMs so that an elector may indicate that he does not wish to vote for any of the aforementioned candidates.
- Such number of votes expressing dissatisfaction with all the candidates may be recorded in a result sheet.

However, no such action was taken by the Ministry in this regard.

2. What has been the ECI's stand on "right to reject"?

The Election Commission itself is in favour of the provision for NOTA in EVMs. The Election Commission has always maintained that –

- In the larger interest of promoting democracy, a provision for "None of the Above" or "NOTA" button should be made in the EVMs/ ballot papers.
- It is also highlighted that ECI has time and again said that such an action, apart from promoting free and fair elections in a democracy, will provide an opportunity to the elector to express his dissent/disapproval against the contesting candidates and will have the benefit of reducing bogus voting.

3. Is there is any additional cost involved in implementing NOTA on the EVMs?

ECI has already cleared that the facility for a negative or neutral vote can be provided in the existing electronic voting machines without any additional cost or administrative effort or change in design or technology of the existing machines. The implementation of the NOTA

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button will not require much effort except for allotting the last panel in the EVM for the same.

4. What are the final directions given by the Supreme Court in the implementation of NOTA in the EVMs?

- The Supreme Court has directed the Election Commission to implement the same either in a phased manner or at a time with the assistance of the Government of India.
- They have also directed the Government of India to provide necessary help for implementation of the above direction.
- Besides, the Election Commission is also directed to undertake awareness programmes to educate the masses.

C. Why the Supreme Court has struck down 41(2) 41(3) & 49(O):

1) Meaning of Rules 41(2) 41(3) & 49 (O) of Conduct of Election Rules 1961

Rule 41. Spoilt and returned ballot papers:

Rule 41 (2): If an elector after obtaining a ballot paper decides not to use it, he shall return it to the presiding officer, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked as "Returned: cancelled" by the presiding officer.

Rule 41(3): All ballot papers cancelled under sub-rule (1) or sub-rule(2) shall be kept in a separate packet

49-O. Elector deciding not to vote: If an elector, after his electoral roll number has been duly entered in the register of voters in Form 17A and has put his signature or thumb impression thereon as required under sub-rule (1) of rule 49L, decide not to record his vote, a remark to this effect shall be made against the said entry in Form 17A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark.”

2) What is form 17-A?

Rule 49-O provides that if an elector, after his electoral roll number has been entered in the register of electors in Form 17-A, decides not to record his vote on the EVM, a remark to this effect shall be made against the said entry in Form 17-A by the Presiding Officer and signature/thumb impression of the elector shall be obtained against such remark.

3) Is form 17-A applicable in all the cases of voting?

Form 17-A is applicable only in cases of voting by EVMs. Chapter II of the Rules deals with voting by Electronic Voting Machines(EVMs) only. Rules 49A to 49X come under Chapter II of

Part IV of the Conduct of Election Rules. The said Chapter was introduced in the Rules by way of an amendment dated 24.03.1992

4) How is Rule 49-O is arbitrary and unreasonable?

Right to vote as well as right not to vote has been statutorily recognized under Section 79(d) of the Representation of People's Act and Rules 41(2) & (3) and 49-O of the Rules respectively. Therefore, a part of Rule 49-O read with Form 17-A, which treats a voter who decides not to cast his vote differently and allows his secrecy to be violated, is arbitrary, unreasonable and violative of Article 14,19(1)(a) and 21 of the Indian Constitution and is also *ultra vires* Sections 79(d) and 128 of the Representation of People's Act

5) How are rules 41(2) 41(3) unreasonable?

Rule 41 deals with the ballot papers. As per Rules 41(2) and (3), if an elector decides not to vote, he has to return the same to the presiding officer who in turns keeps it separately. Therefore, the secrecy of an elector who has decided not to cast his vote against any of the candidates is severely comprised which in turn is in direct contravention of Article 14,19(1)(a) and 21 of the Indian Constitution Sections 79(d) and 128 of the Representation of People's Act

6) How are Rules 41(2) and (3) and 49-O constitutionally ultra-vires?

Secrecy of a voter under 49-O is not maintained in its implementation and thus the impugned rule violates the fundamental right to secrecy and is violative of Articles 19(1) (a) and 21 of the Constitution of India

7) What is now the present status of Rules 41 and 49 of the Conduct of Election Rules with respect of the Supreme Court judgment?

Presently, Rules 41(2) & (3) and 49-O of the Rules stand *ultra vires* Section 128 of the Representation of People's Act and Article 19(1)(a) of the Constitution to the extent they violate secrecy of voting.

D. Parliament & State Assemblies have a NOTA Privilege Already

1) Constitutional interpretation of the "NOTA" judgment is based on Lily Thomas vs. Speaker, Lok Sabha, (1993)4 SCC 234:

- **What is meant by the expression voting:**

"Voting is a formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question" and that "right to vote means right to

exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well”.

- **What is the practice of voting in Parliament?**

The Practice and Procedure of the Parliament for voting provides for three buttons: viz.,

- a) **AYES**
- b) **NOES**
- c) **ABSTAIN**

A member can abstain or refuse from expressing his opinion by casting vote in favour or against the motion by using one of these buttons. Therefore, it can be seen that an option has been given to the members to press the ABSTAIN button.

- **The constitutional interpretation of the Lily Thomas Judgment was based on the inherent philosophy of Parliament’s sovereignty:**

Likewise, introduction of “NOTA” buttons on the EVMs is based on the central elements of sovereignty and democracy of our country.

E. Procedural dots on NOTA/Ballot paper/Right to reject:

1) How ‘Right to reject’ has been denied so far in the present practice of EVMs?

The present system of EVM comprises of two units, i.e. control and balloting units, which are interconnected by a cable. While the balloting unit is placed in a screened enclosure where an elector may cast his vote in secrecy, the control unit remains under the charge of the Presiding Officer and so placed that all polling agents and others present have an unhindered view of all the operations. The balloting unit, placed inside the screened compartment at the polling station gets activated for recording votes only when the button marked “Ballot” on the control unit is pressed by the presiding officer/polling officer in charge. Once the ballot button is pressed, the Control unit emanates red light while the ballot unit which has been activated to receive the vote emanates green light. Once an elector casts his vote by pressing balloting button against the candidate of his choice, he can see a red light glow against the name and symbol of that candidate and a high-pitched beep sound emanates from the machine. Upon such casting of vote, the balloting unit is blocked, green light emanates on the control unit, which is in public gaze, and the high pitched beep sound is heard by one and all. Thereafter, the EVM has to re-activate for the next elector by pressing “ballot button”. However, should an elector choose not to cast his vote in favour of any of the candidates labeled on the EVM, and consequently, not press any of the labeled button neither will the light on the control unit change from red to green nor will the beep sound emanate. Hence, all present in the poll booth at the relevant time will come to know that a vote has not been cast by the elector. With the introduction of EVMs, the said option of not voting for anybody without compromising the right of secrecy is not available to the voter since the voting machines did not have ‘None of the Above’ (NOTA) button.

2) How is voting by ballot takes care of the “Right to secrecy”?

Voting by ballot papers is governed by Chapter I of Part IV of the Rules. Rule 39 talks about secrecy while voting by ballot and Rule 41 talks about ballot papers. In the case of voting by ballot paper, the candidate always had the option of not putting the cross mark against the names of any of the candidates and thereby record his disapproval for all the candidates in the fray. Even though such a ballot paper would be considered as an invalid vote, the voter still has a right not to vote for anybody without compromising on his/her right of secrecy.

3) When and at what condition can the secrecy principle be invoked?

Secrecy principle is integral to free and fair elections which can be removed only when it can be shown that there is any conflict between secrecy and the “higher principle” of free elections.

F. Evaluation of “NOTA” around the Globe:

Many countries in the world have recognised neutral, protest or negative voting in their electoral process. The table given below list these countries .

| S.NO. | Name of the Country | Method of Voting | Form of negative vote |
|-------|------------------------|------------------|----------------------------------|
| 1. | France | Electronic | NOTA |
| 2. | Belgium | Electronic | NOTA |
| 3. | Brazil | Ballot Paper | NOTA |
| 4. | Greece | Ballot Paper | NOTA |
| 5. | Ukraine | Ballot Paper | NOTA |
| 6. | Chile | Ballot Paper | NOTA |
| 7. | Bangladesh | Ballot Paper | NOTA |
| 8. | State of Nevada, U.S.A | Ballot Paper | NOTA |
| 9. | Finland | Ballot Paper | Blank Vote and/or ‘write in*’ |
| 10. | Sweden | Ballot Paper | Blank Vote and/or ‘write in*’ |

| S.NO. | Name of the Country | Method of Voting | Form of negative vote |
|-------|---------------------|---|----------------------------------|
| 11. | U.S.A | Electronic/Ballot (Depending upon the State) | Blank Vote and/or 'write in*' |
| 12. | Columbia | Ballot Paper | Blank Vote |
| 13. | Spain | Ballot Paper | Blank Vote |

G. Association for Democratic Refroms (ADR) and National Election Watch (NEW) recommend:

Now that ***None Of The Above (NOTA)*** button will be provided in the **Electronic Voting Machines (EVMs)**, we recommend the following with respect to the counting of votes as registered against the NOTA in a particular constituency:-

- a) Votes cast for the 'none-of-the-above' option **should also be counted.**
- b) In case the '**none-of-the-above**' option gets more votes than any of the candidates, **none of the candidates should be declared elected** and a fresh election held in which none of the candidates in this election are allowed to contest.
- c) In the following elections, **with fresh candidates and with a 'none-of-theabove' option, only that candidate should be declared elected who gets at least 50 percent + one of the votes cast.**
- d) If even in this round, the 'none-of-theabove' option gets the highest number of votes cast or none of the candidate gets at least 50 percent + one of the votes cast, **then the process should be repeated.**

This may appear to be a cumbersome and tedious process but it will nudge the entire system in the direction of (a) better representative-ness among the elected representatives by reducing the sectarian effects of vote banks, and (b) encouraging political parties to put up better candidates.