

II. PLACING WITH VOTING RIGHTS

Our Constitution begins with words that India is 'democratic republic'. Democracy which is a Greek word signifies a State in which leaders are chosen from general public. Contextualizing preamble of the Constitution, it refers that India has a responsible and parliamentary form of government which is accountable to an elected legislature⁶. The Supreme Court has recognized democracy as the basic feature of Indian Constitution⁷. In context with term republic, it denotes that the head of the State is not a hereditary but an elected functionary. Further, going by specification of democracy, it is the political democracy which envisages: (i) representation of people, (ii) responsible government, (iii) accountability of the Council of Ministers to legislature. The essence of political democracy is to draw a direct authority from the people through the legislature to the executive⁸. This can only be fulfilled through the free and fair elections, meaning thereby, allowing citizens to participate in electoral process.

To give effect to the declaration 'democratic republic', Article 325 of the Constitution mandates for one general electoral roll for every territorial constituency for *election to either house of parliament or to the house of State legislature....* The provision ensures the political equality to all citizens of India. The Supreme Court in *R. C. Pounyal v. Union of India*⁹ made it clear that the provision contained in this article, if contravened, will have adverse impact upon the secular character of the Republic which is the basic feature of Indian constitution. Article 326¹⁰ of the Constitution lays down *adult suffrage* as basis for election. This gives the most important provision for ensuring political democracy. Here, the right to vote originates.

Our Constitution came into effect on 26th January 1950. The first elections were held after the passage of Representation of People Act in 1951. The statute like this one was needed to provide mechanism, conduct of elections, criteria for voters and candidates etc. If we go by its section 62, we find the following six clauses in relation to right to vote. "(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950.(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police: Provided that nothing in this sub-section shall apply to a person subjected to

⁶See M. P. Jain, *Indian Constitutional Law* 11-12 (Lexis Nexis, Wadhwa, Nagpur, 2007)

⁷*S. R. Bommai v. Union of India* (1994) 3 SCC 1.

⁸*S. R. Chaudhari v. State of Punjab* (2001) 7 SCC 126, 138-39 (Para 21)

⁹AIR 1993 SC 1804.

¹⁰ The election to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say every person who is citizen of India and who is not less than eighteen (see 61st Constitution Amendment, 1988) years of age on such date as may be fixed in that behalf by or under any law made by appropriate Legislature and is not otherwise disqualified under the Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as voter at any such election.

preventive detention under any law for the time being in force. (6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorized to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.”

The treatment given in both the places in Constitutional law and the statute passed by the Parliament shows that one place originates the right to vote whereas the other actualizes the same, though both the laws direct towards the same destination but with different identity. In number of cases¹¹, the Court has made it clear by giving reference as to who can cast vote and limitations provided in statutory provisions that right to vote is *not civil right but is a creature of statute or special law*. However, Prof. M. P. Jain differs on the point by giving due regard to Articles 325 and 326 of Indian Constitution. He says that “the right to vote is neither common law right nor fundamental right. But it is also not purely a statutory right but much more substantive than that. The right to vote is not a gift of the Legislature but flows from the Constitution. In first place, free and fair election has been declared to be a basic feature of the Constitution which means that no statute can completely negate the right to vote”¹². Adding to the above view it can be also submitted that any contravention by legislature of Article 326 (as mentioned above) will disturb the secular feature of the Constitution. And consequently, the impugned statute may be struck down on the ground of violation of basic feature of Indian constitution. Furthermore, if right to vote is denied on the ground of equal treatment, the remedy provided under Articles 32 and 226 may be invoked. Thus, as per the above discussion, right to vote, though not fundamental and common law right but at the same time is not a purely statutory right.

Existence of voting right and exercise of voting right is different from each other though they belong to the same family and directing towards same object. As said above, the former originates from Constitution but placed in statute on the basis of actualization. But since the exercise of the former is an expression of one’s choice, it is protected under Article 19 (1) (a) of Indian Constitution. The exercise of voting right is fundamental right.

On journey of right to vote, it originates from Articles 325 and 326 of Constitution and places in the Statute and during exercise it becomes fundamental right. An act of voting or voting rights comprises right to know about the antecedent of the candidate. “...right to know the background of a candidate is a fundamental right of a voter so that he can take a rational decision of expressing himself while exercising the statutory right to vote”¹³. Thus, expressing his voting wishes in favour of one and other is an expression under fundamental right concept. However, in case the voter does not go to the polling booth or he goes to polling booth but does not cast his vote he waives off his statutory right.

It is argued that the right to vote is not a fundamental right but a statutory right, so Article 32 of Constitution could not be invoked by the petitioner. Sections 171A(b)¹⁴ and 79D¹⁵ of Indian Penal code and Representation of people Act 1951 respectively give the meaning of the expression –‘electoral right’ of the voter as a right to choice to vote or refrain

¹¹See *N P. Pannuswami v. Returning officer, Namakkal Constituency*, AIR 1952 SC 64; *Jamuna Prasad Mukharia v. Lachhi Ram*, AIR 1954 SC 686; *P. Nalla Thampy v. B. L. Shanker*, AIR 1984 SC 135, etc.

¹²*Supra* n. 6 at 805.

¹³*Supra* n. 2 at 78D.

¹⁴‘Electoral right’ means the right of a person to stand, or not to stand as, or to withdraw from being a candidate or to vote or refrain from voting at an election.

¹⁵‘Electoral right’ means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election.

from voting. By adding new dimension to the right based approach, the NOTA judgment made it a fundamental right protected under freedom of expression¹⁶ of Indian constitution. This dimension strengthens a major element (people's participation in election and decision-making process) of democracy which distinguishes it from authoritarianism.

III. INTERFACE WITH NOTA

Going through the Rule 49 (O)¹⁷ of R. P. Act which was giving an option to reject the candidate with a requirement of conveying his choice to the polling officer and NOTA option raised secrecy issues and unrepresented citizen/s in representative form of the government system. On the secrecy concern, the Supreme Court took a view in *Kuldip Nayar v. Union of India*¹⁸, and said that the voters for council of States membership are required to show their vote to the party representative. Hence, the secrecy in choice of vote has already been compromised. 'Democracy about the choice'¹⁹ was one of the foundations to raise the reasoning towards NOTA journey. Further, NOTA application in Rajya Sabha election in Gujarat and implication on Tenth schedule, the Court made it clear that even in case of presence of whip for Rajya Sabha candidate, the anti-defection law of tenth schedule will not disqualify a defiant MLA²⁰. Thus, the NOTA option is strengthening 'Democracy about the choice' premise but it requires more addition to it. Question should be raised and determined politically on the floor of the house if a large percentage of voters go in favour of NOTA. The Legislature should give space for right to reject²¹ to the voter. The election commission should fix a limit beyond which the percentage of NOTA will invite re-election. As already stated, with an irony tone to link NOTA with FPTP (first-past-the-post) system, the Law Commission itself has recognized this system's failure to realize fundamental test of fairness. In these circumstances, the recommendations of 170th Report of Law commission of India²² should be implemented.

¹⁶Art. 19(1)(a) of Constitution of India states that all citizens shall have the right to freedom of speech and expression.

¹⁷Secrecy of the ballot is violated as the voter has to inform the presiding officer and an entry is made against his name in the voters list. (... a remark to this effect shall be made against the said entry in Form 17A by the presiding officer).

¹⁸*Kuldip Nayar v. Union of India*, AIR 2006 SC 3127

¹⁹*Supra* n. 2.

²⁰Editorial, "The NOTA Principle: On Rajya Sabha Polls" *The Hindu*, August 04, 2017.

²¹Subhash Kashyap, "NOTA will not serve the democracy" *Frontline*, November 01, 2013.

²²Available at: <http://www.lawcommissionofindia.nic.in/lc170.htm> ((last visited on Jan. 6, 2018).