CONSTITUTIONALITY AND DESIRABILITY OF RIGHT TO REJECT CANDIDATES IN ELECTIONS*

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Introduction

India has a distinct identity in the world order as a vibrant and functional democracy. Nevertheless, the Indian democracy faces certain grave challenges, especially, in the area of electoral system. Even though our Constitution creates an independent and apolitical body in the form of Election Commission to conduct free and fair elections, it does not exhaustively lay down the provisions to ensure the participatory and representative character of the electoral process. The power to legislate with regard to political parties, the manner of conducting the elections and maintenance of purity and probity of elections is vested in the Union Parliament. Unfortunately, the political class as a whole is reluctant to bring the necessary electoral reforms due to its own vested interests. The Indian judiciary, despite of its inherent limitations, has endeavored to bring in at least a few electoral reforms by way of judicial creativity, although, with partial success. However, the courts have, at times, transgressed their constitutional limits and encroached on the fields assigned to the other organs of government. In its zeal to reform the electoral system, the courts have inadvertently violated the principle of 'separation of powers' which is one of the basic features of the Indian Constitution.

Right to Reject/Right to Negative Vote: Is it Statutory or Fundamental Right?

In 2004, People's Union for Civil Liberties filed a petition in the Supreme Court with a plea that a voter ought to have right to negative vote if he does not approve any of the listed candidates on the Electronic Voting Machine (EVM). During the pendency of the petition, in the same year, the Election Commission of India recommended certain electoral reforms to the Government of India including a proposal for amendment in the Conduct of Election Rules, 1961 to provide a column 'None of the above' in the ballot paper/electronic voting machine to enable a voter to reject all the

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candidates, if he chooses to do so. The rationale behind the suggested electoral reform was to protect the secrecy of the voting by elector who refuses to vote. As per the existing Rule 49(O) of the Conduct of Election Rules, 1961, if any elector refuses to vote for all the contesting candidates, an entry to that effect is required to be made in the register of electors and marked copy of electoral rolls, after identifying such elector, thereby disclosing his identity to the polling officials and polling agents. The proposal made by the Election Commission only recognized the right of the voter to negative/neutral voting and not 'right to reject system', whereby, if 'none of the above' get majority of the votes than any of the contesting candidates, then the election results are nullified and re-election has to be conducted.

'Right not to vote' has been recognized by Rule 41 (2) and Rule 49 (O) of the Conduct of Election Rules, 1961. Rule 41 (2) provides that '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 counter foil of such ballot paper shall be marked as 'returned: cancelled' by the presiding officer'. It is quite evident that this provision is applicable only to the traditional voting system using the ballot papers. Rule 49 (O) provides that: '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, decides 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 signature or thumb impression of the elector shall be obtained against such remark' (emphasis supplied).

The constitutional validity of the above-stated provisions had been challenged before the Supreme Court in the petition filed by the PUCL on the ground that they were inconsistent with Section 128 of the Representation of People Act, 1951[1], Rules 39[2] and 49(M) (1)[3] of the

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[1] **128.Maintenance of secrecy of voting-**
(1) Every officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy:
Provided that the provisions of this sub-section shall not apply to such officer, clerk or other person who performs any such duty at an election to fill a seat or seats in the Council of States.
(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to three months or with fine or with both.

[2] **39.Maintenance of secrecy of voting by electors within polling station and voting procedure-**(1)Every elector to whom a ballot paper has been issued under Rule 38 or under any other provision of these rules, shall maintain secrecy of voting

Conduct of Election Rules, 1961 which protect the secrecy of voting. It was also contended that the Rules 41 (2) and 40(O) were violative of Articles 19(1) (a) and 21 of the Constitution. In *People's Union for Civil Liberties v. Union of India*[4] (hereinafter called as *the PUCL Judgment*), while maintaining that right to vote was a statutory right, the Supreme Court held that, an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. It was also held that not allowing a person to cast vote negatively defeats the very freedom of expression and the right ensured in Article 21 i.e., the right to liberty. The court directed the Election Commission to provide the 'NOTA' button in the Electronic Voting Machines. The court observed that that such an option would foster the purity of the electoral process and ensure wide participation of people.

The PUCL Judgment: Flawed Reasoning and Judicial Overreach

It is worthwhile to consider the following points reflecting the fair criticism of the Supreme Court's judgment:

(1) The court has refused to hold that 'right to vote' is a fundamental or even constitutional right and it has simply reiterated its earlier view taken by the constitutional bench in *Kuldip Nayar v. Union of India*[5] that right to vote is purely a statutory right under Section 79(d) of the Representation of the People Act, 1951. The court in the instant case has made an artificial distinction between 'right to vote' and 'freedom of voting as species of freedom of expression' and it has failed to explain the exact distinction between the two. It is on the basis of this false premise that the court applied Article 19(1) (a), thereby, reading 'right to negative vote' as a species of freedom of speech and expression.

(2) The application of Article 14 to the Rule 49(O), which does not protect the secrecy of voting in case a voter refuses to exercise right to vote, is also erroneous. Article 14, which guarantees right to equality, permits the 'reasonable classification', provided that two conditions are satisfied-(i) The classification must be based on intelligible differentia and; (ii) There must be a reasonable nexus between the basis of the classification and the object sought to be achieved by law. It is submitted that classification of voters into

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within the polling station and for purpose observe the voting procedure hereinafter laid down.

3 **49M.Maintenance of secrecy of voting by electors within polling station and voting procedure—**(1) Every elector who has been permitted to vote under Rule 49L shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

4 *Supra* note 2.

5 (2006) 7 S.C.C. 1.

two categories-those who cast their vote and those who do not cast their vote-is based on *intelligible differentia*. It also has a reasonable nexus with the object of the law-to protect the identity of the voter who has voted for a particular candidate or a particular political party. A voter who decides not to vote is not likely to be threatened or discriminated by any candidate or political party because of his neutral approach. In any case, a voter who does not want to vote has choice of not going to the polling booth at all.

(3) The application of Article 21, which guarantees right to life and 'personal' liberty, also seems to be erroneous. No right to privacy is violated under Article 21 simply because identity of the voter, who goes to the polling booth and decides not want to vote, is disclosed. It is worthwhile to note that the identity of the voter, who does not go polling booth at all, can also be easily ascertained. Moreover, Article 21 provides for right to 'personal liberty' which only protects the person from denial of his physical liberty. Therefore, 'right not to vote' cannot be read into Article 21 particularly because the Supreme Court in the instant case has refused to hold 'right to vote' as a fundamental right.

(4 One of the major implications of the judgment is that if 'right not to vote' is regarded as a fundamental right, as the judges in this case suggest, then 'compulsory voting' as an electoral reform can never be implemented in India. One of the challenges before the electoral system in India is the 'voter apathy', particularly among the urban voters. As a result of 'first-past-the-post' electoral system and multi-cornered contests in Indian elections, a winning candidate is generally required to secure not more than 20 to 25 percent votes. It also encourages communalization of politics as the candidate who belongs to a majority caste or community or linguistic group can ensure his electoral victory by appeasing a limited section of the population or by spreading hatred against the minorities. Making voting compulsory can cure these menaces. Unfortunately, *the PUCL Judgment* on negative voting will prove to be a major hurdle in future to implement compulsory voting. If voting is made compulsory, a right to cast a negative vote, as a matter of policy may be provided.

(5) Even if the Supreme Court in near future declares 'right to vote' as a fundamental right, it is difficult to assume that such right will include within its ambit 'right not to vote'. The Supreme Court has conclusively held in *Basheshar Nath v. I.T. Commissioner*[6]

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6 A.I.R. 1959 S.C. 149.

that it is not open to a citizen to waive his fundamental right and no person can, by any act or conduct, relieve the state of the solemn obligation imposed on it by the Constitution. Moreover, 'right to vote' not only serves the private interest but also the public interest. Ironically, the Supreme Court has refused to read a positive 'right to vote' as a fundamental right but it has read negative 'right not to vote' into Article 19(1) (a).

(6) Whether there should be 'NOTA' option given to the voters or not and if 'NOTA' option gets majority of the votes, whether there should be re-election in the concerned constituency or not, are purely political questions. There are no judicially manageable standards by which such questions can be answered by the court. Moreover, a developing country like India cannot have the luxury of conducting re-election in all such constituencies where majority of the voters have preferred 'NOTA' option over all the listed candidates. In this regard, *Mr. Bhaira v. Acharya* in his article on *Neutral Voting in India* rightly observes that:

> "…. If such situation forces a fresh election-which is an expensive and complex logistical exercise, what is the guarantee that the electorate will return a positive result? If there is an electoral winner by single largest number of votes polled, are the number of neutral votes received to be subtracted from the margin of difference between the single largest winner and the runner-up contestants? These are all questions that need to be resolved in a manner consistent with due process, natural justice and established traditions of Indian democracy."[7]

Conclusion

With due respect to the Honorable Supreme Court, it is submitted that *the PUCL Judgment* is based on a flawed reasoning and it encroaches upon the legislative and executive domain of policy making. It appears that the court wrongly and artificially applied the fundamental rights under Articles 14, 19(1) (a) and 21 of the Constitution to the impugned provisions. Moreover, whether there should be a right to negative vote or right to reject the candidates in the elections, particularly when it is not provided under the electoral law or the Constitution, could only be decided by the competent

[7] Acharya Bhairav, *Neutral Voting in India*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995476 (last visited Dec. 17, 2013).

legislature or alternatively by the Election Commission in exercise of its powers under Article 324 of the Constitution.[8]

A seven judge bench of the Supreme Court in *P. Ramchandra Rao v. State of Karnataka*[9], has conclusively held that giving directions of a legislative nature is not a legitimate judicial function and also referred, with approval, the following observations made in the book *Judicial Activism in India-Transgressing Borders Enforcing Limits* by Prof. S.P. Sathe:

> "In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law...through directions...is not a legitimate judicial function."[10]

The decision of the three judge bench in *the PUCL Judgment,* directing the Election Commission to provide the 'NOTA' option on the Electronic Voting Machines, has clearly undermined/ignored the principle laid down by a seven judge bench in *P. Ramchandra Rao.* It is, therefore, submitted that the issue of the 'electoral reforms' is a policy matter and it falls under the exclusive jurisdiction of the legislature.

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8 In A.C. Jose v. Sivan Pillai, (1984) 2 S.C.C. 656, the Supreme Court has held that if there is no law or rule made under the law, the Commission may pass any order in respect of the conduct of election.

9 (2002) 4 S.C.C. 578.

10 *Id.* ¶ 26.