

**'MY VOTE - MY CHOICE'; VIABILITY OF INTRODUCING THE 'NONE OF THE ABOVE' OPTION IN SRI LANKA**

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## **Introduction**

Sri Lanka is a constitutional democracy which often employs the representational democratic process as its decision making method. Classical democratic theory has been used by many scholars as a normative standard that can be applicable to contemporary governing process. Three outstanding features of classical democracy are the centrality of the “common good” or “general will”, maximum participation in government by the populace, and rational discussion and debate about politics. <sup>1</sup> 1978 Second Republican Constitution (*hereinafter* Constitution) declares that sovereignty is in the

People and is inalienable. Sovereignty includes the powers of the government, fundamental rights and the franchise.<sup>2</sup> Thus, it is essential to have free and fair elections to maintain and uplift the quality of democracy in which people exercise their participation in a healthy manner and to protect the sovereignty of people which has been guaranteed by the Constitution. Sri Lankan citizens enjoy the universal franchise since 1931 which enables them to participate in the governance of the country. Arguably, it is essential that the best candidates who have high moral and ethical values should be chosen as people’s representatives in order to make this participation meaningful.

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<sup>1</sup> Susan Herbst, 'Classical Democracy, Polls, And Public Opinion: Theoretical Frameworks for Studying the Development Of Public Sentiment' (1991) 1 Communication Theory

<<https://booksc.xyz/book/9653545/6df027>> accessed 5 October 2019.

<sup>2</sup> Article 3 of 1978 Second Republican Constitution of Democratic Socialist Republic of Sri Lanka.

However, the reality is that the candidates who are nominated by the parties to the elections are not always up to the expectation of the citizenry.

Thus, this article attempts to explore the possibility of introducing **None Of The Above** (*hereinafter* **NOTA**) **option** to the ballot sheet of elections while placing its arguments on the right based approach. Thus, this paper argues that Right to reject or Right not to vote is a part and parcel of the freedom of expression enshrined in the Constitution and the presence of **NOTA** option in the ballot sheet in a representational democracy would expand the opportunity of exercising it in a meaningful manner while leaving an impact on the party politics of the country.

In order to support the said argument this paper attempts to draw examples from the comparative jurisdictions including India and discusses the

existing specific legal provisions of Sri Lanka pertaining to the options of ballot sheet. Finally, it suggests adoption of legislative or judicial methods to introduce **NOTA** option into Sri Lankan elections.

### **Why **NOTA** is Important?**

**NOTA** is a choice of negative voting in certain electoral systems to help voters express their dissent for all the candidates competing in an election. It is based on the principle that the spirit of democracy is upheld by giving citizens a platform to voice their dissent while simultaneously participating in the electoral process.<sup>3</sup>

The prime motivation behind introducing **NOTA** option in the ballot sheet at any election is to offer the voter with an option to manifest his dissatisfaction to the candidates who are nominated by the political parties.

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<sup>3</sup> V R Vachana, Maya Roy, **NOTA** and the Indian Voter,

On the other hand this option provides a forum for the voter to engage in the political discourse in a silent and diplomatic but a stronger manner. It is expected in an ideal context, that the significant amount of protest votes could force political parties or the other independent candidates to rethink their political and governing strategy and push them towards adopting higher standards based on acceptable criteria in terms of selecting nominees.

In a system where the NOTA option is not available to its voters, the said protest vote does not attract any significance in the process of interpretation of the overall election results, as oppose to a system in which the NOTA is available. For an example, in Sri Lanka, the protest voter has to resort to an option such as abstention, nullification of the ballot or ironically

vote for a non- establishment candidate even when the voter does not appreciate his proposed manifesto. Though these methods could be considered as grey signals of a protest, arguably they will not receive the due respect, which they would receive for a well thought of protest vote in a system where the NOTA option is available.

Many countries around the world opted to include NOTA option in their ballot papers at different levels of elections. The State of Nevada of USA is the pioneer state which introduced this option in the ballot sheet for the first time in 1976.<sup>4</sup> The option was brought to the ballot in the aftermath of the Watergate scandal to allow citizens to express their discontent.<sup>5</sup> In addition, an explicit 'blank vote' option is available on the ballot in Colombia, India, Ukraine<sup>6</sup> and Bangladesh<sup>7</sup> in order to facilitate the

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<sup>4</sup> Jyoti Hiremath, 'Analysis of the Introduction of NOTA in The Legislative Elections in India' (2017) 4 International Journal of Arts and Science research.

<sup>5</sup> Chiara Superti, 'The Blank And Null Vote: An Alternative Form Of Democratic Protest?' [2014] Midwest Political Science Association.

<sup>6</sup> Attila Ambrus, Ben Greiner and Anita Zednik, 'The Effects Of A 'None Of The Above' Ballot Paper Option On Voting Behavior And Election Outcomes' [2018] SSRN Electronic Journal.

<sup>7</sup> VR Vachana and Maya Roy, 'NOTA And The Indian Voter' (2018) LIII Economics and political Weekly.

expression of dissent or rejection of the voter.

The outcome of the NOTA vote is different from country to country and election to election. In many countries the NOTA votes are treated separately for the purpose of reporting. They do not form a part of invalid votes because they are produced as a result of an unintentional mistake made by the voter while the NOTA votes are considered as a result of a deliberate action to express their dissent by the part of the voter. However, the NOTA votes do not affect the final outcome of the election. This category of NOTA option does not confer the voter to the right to reject but merely provides for demonstration of his dissatisfaction or disapproval of the candidates. However, some states such as Colombia, if the blank vote attracts the most votes, the election has to be repeated, sometimes excluding the

previous candidates from the new ballot paper.<sup>8</sup>

### **Indian Experience**

In India NOTA option was introduced in 2013 through a judicial pronouncement. India changed its election methods from ballot sheet to Electronic Voting Machines (*hereinafter EVM*) which has denied the voter the right to not to vote. Traditionally, when voting, the voter had the choice of not to vote any candidate and put the blank sheet to the ballot box instead. However, with the introduction of new EVM, voters were compelled to cast their vote to one of the candidates due to the absence of the NOTA option in the EVM. New evolution has violated right not to vote and the quality of the secret ballot.<sup>9</sup> In this context, People's Union for Civil Liberties filed a Writ

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<sup>8</sup> Chiara Superti, 'The Blank And Null Vote: An Alternative Form Of Democratic Protest?' [2014] Midwest Political Science Association.

<sup>9</sup> See further: Jyoti Hiremath, 'Analysis of the Introduction of NOTA in The Legislative Elections in India' (2017) 4 International Journal of Arts and Science research

application in the Supreme Court of India.

**People's Union for Civil Liberties v.**

**Union of India.**<sup>10</sup> in this case, Election Rules 41(2 and 3) and 49-O were challenged by the Petitioners on the ground of constitutional inconsistency. Both parties agreed on the fact that the combined effect of these rules was that persons who did not vote in elections were recorded (by the presiding officer) as having not voted. The Petitioners argued that this was a violation of the right to secret balloting, protected by Articles 19(1)(a) and 21 of the Constitution. State argued that Right to vote is merely a statutory right which brought into existence by the Representation of Peoples Act<sup>11</sup> and it does not have any recognition as a fundamental right under article 32 of the Indian Constitution. However, Court held that that the freedom to

vote is not only a statutory right but a facet of the fundamental right to free speech and expression under Article 19(1)(a) of the Constitution. The Court took a step further from its own earlier rulings in two cases<sup>12</sup>. In *Kuldip Nayar v. Union of India*,<sup>13</sup> while interpreting an amendment to the Representation of the People Act, 1951, the court emphasized that the freedom to vote is a facet of Article 19(1)(a).

Provisions of the Representation of the People Act, 1951 were up for challenge once again, this time, Rules 41(2), (3) and 49(O) which failed to ensure to a voter who chose not to vote for any of the candidates standing for election, the right to secrecy of his choice. While secrecy was assured to all those who voted in favour of the candidate of their choice, it wasn't extended to those who rejected all candidates. Where a voter decided not

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<sup>10</sup> (2013): Writ Petition(Civil)No.161 of 2004, Supreme Court judgment Dated 27<sup>th</sup> September 2013

<sup>11</sup>See: *Kuldip Nayar v. Union of India* (2006) 7 SCC 1

<sup>12</sup> PUCL v. Union of India, (2003) 4 SCC 399: The Supreme Court held that the voter exercises a

statutory right by casting a vote but is entitled to information about the antecedents of an electoral candidate under her/his right to information under Article (19)(1)(a).

<sup>13</sup> *Kuldip Nayar v. Union of India* (2006) 7 SCC 1

to record his vote, a remark to that effect was made under Form 17A by the Presiding Officer and his signature or thumb impression was obtained against it, violating the privacy of his choice.

The court held that the freedom of a citizen to vote or not to vote are both choices entrenched in the freedom of expression under Article 19(1)(a). The freedom of expression captures not just a positive right but also the freedom not to express oneself or to express oneself through a negative vote or a non-vote. Just as the freedom of speech takes within its sweep the right not to speak or the right to silence, so is the freedom of expression broad enough to incorporate the right to express oneself by not voting for any candidate.

In addition, the Supreme Court noted that;

*'Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. We are of the considered view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfil one of its objectives, namely, wide participation of people.'*<sup>14</sup> [emphasis added].

According to above statement, it can be argued that the presence of NOTA option in a ballot sheet not only make a real impact on the modern democracies through fostering the purity of the electoral process but also upgrade the democratic values by providing a voice to silent protesters to the rulers in a country.

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<sup>14</sup> (2013): Writ Petition(Civil)No.161 of 2004, Supreme Court judgment Dated 27<sup>th</sup> September 2013

## Sri Lankan Legal Framework

Sri Lankan citizens enjoy universal franchise since 1931 and it has enabled millions of individuals to go to the poll and thus participate in the governance of the country. 1978 Constitution provides for legal framework pertaining to the franchise and elections under Chapter XIV. Accordingly, every person shall, if his name is entered in the appropriate register of the electors, be qualified to be an elector at the presidential election and the general election or to vote in the referendum.<sup>15</sup> In addition, franchise is recognised as an element of popular sovereignty under the Article 4(e) of the Constitution. Though fundamental rights chapter of the constitution does not expressly recognise the Right to Vote as a Fundamental Right in Sri Lanka, Sri Lankan judiciary has utilized its creative role in constructing

fundamental rights to include Right to Vote as a part and parcel of Freedom of Expression guaranteed under Article 14(a). In Karunathilaka v. Dayananda Dissanayake<sup>16</sup> the Petitioners claimed that Article 14(a) also protects the right to vote as one form of ‘speech and expression’. State argued that there was a clear distinction between the franchise and fundamental rights as contained in Chapter III. However, Court held that Article 14(1) (a) entrenches the freedom of speech and expression, it guarantees all forms of speech and expression. Thus, Court noted that:

*‘the silent and secret expression of a citizen’s preference [or dissent] as between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression, than the most eloquent speech from a political platform. To hold otherwise is*

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<sup>15</sup> Article 88 of the 1978 Constitution.

<sup>16</sup> [1999]Sri LR 157

*to undermine the very foundations of the Constitution.*'.

Accordingly, it can be argued that the Right to vote is recognized under the fundamental right jurisprudence in Sri Lanka. In addition, it should be noted that Sri Lanka is a state party to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which recognize the right to vote at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.<sup>17</sup> In light of the above international standards Sri Lanka has a positive and ethical responsibility to enhance the fair and free elections procedure to reflect genuine 'people's will' of the voters. Furthermore, Sri Lanka should

undertake each and every measure that could enhance the legal infrastructure needed for the assurance of equal respect and recognition to the protest voters who wants to convey a message through their sovereign powers. This could be a positive step towards ensuring participation of the people who have different opinions in the governance.

### **Format of ballot sheet**

The format of the ballot sheet is determined based on the different election statutes in Sri Lanka. Specification pertaining to ballot sheet of each election is set out in different legislations. Section 29 (2) and Form B of the Presidential Election Act<sup>18</sup>, Section 32(1) and 32(2) and Form C of the Parliamentary Act<sup>19</sup>, Section

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<sup>17</sup> Article 25(b) of the ICCPR and Article 21(3) of the UDHR

<sup>18</sup> Section 29(1) and 29 (2) of the Presidential Election Act No.15 of 1981 refers to the Form B of the Schedule of the Act and requires to adhere to the format stipulated in the said form B.

<sup>19</sup> Section 32(1) and 32 (2) of the Parliamentary Elections Act No.01 of 1981 refers to the Form C of the Schedule of the Act and requires to adhere to the format stipulated in the said form C.



30(1) and 30(2) of the Provincial Councils Elections Act<sup>20</sup> and Section 47 of the Local Authority Ordinance<sup>21</sup> are the main enactments which set out the provisions for format of the ballot sheets to be used in different elections held in Sri Lanka to select public representatives to political organs of the governing mechanism of the country.

None of the above-mentioned provisions provides for an option for a voter to exercise his *Right to Reject* all the candidates which he deems not suitable to hold a responsible public position.

There are two possible legally legitimate ways to introduce NOTA option in Sri Lanka. First path is to amend the above-mentioned provisions and forms, included in each legislation, by way of an

amendment brought by the Parliament for the purpose of introducing NOTA option to the ballot papers. Further, there should be a slight amendment to the Article 94<sup>22</sup> of the Constitution to clarify the availability of NOTA option for presidential election as well. Given the prevailing political circumstances of the country this option seems to be unfeasible unless there is a huge public pressure.

The second path is to get inspired by the Indian tradition of introducing NOTA in to the election procedure by way of judicial pronouncement. According to Article 4(c) of the Constitution, Judiciary also holds the sovereignty of people of Sri Lanka. Hence, arguably, it is empowered by the people to interpret existing legal provisions in light of judicial precedents in order to ensure the

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<sup>20</sup> Section 30(1) and 30 (2) of the Provincial Councils Elections Act No.02 of 1987 refers to the Form C of the Schedule of the Act and requires to adhere to the format stipulated in the said form C.

<sup>21</sup> Section 47 of the Local Authorities Elections Ordinance (Ch262) refers to III Schedule of the Act and requires to adhere to the format stipulated in the same.

<sup>22</sup> Election of the President

people's democratic right to reject any unsuitable candidate at the election. At present, there is a pending Writ application before the Court of Appeal praying for introduction of NOTA option to the ballot sheet. However, it is still premature to discuss the said case. When introducing NOTA option, it should be introduced as a powerful tool for the voters to hold it against unsuitable candidates rather than introducing it as a mere expression of dissent.

### **Conclusion**

Sri Lanka has long tradition of constitutional governance based of democratic values. It has become a need of the hour that Sri Lanka introduces the NOTA option into its ballot sheets. It could protect the freedom of expression in a meaningful way and also sensitise the political parties to the need for putting up quality candidates who

are capable of holding a responsible public office. However, it should be noted that this process would take substantial period of time to get rooted in to the political landscape of the country. Thus, it would be essential to educate people of the utility of the option and the overall impact that it could create on the representational politics of the country.

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