

DESIGNING A CONSTITUTIONAL REFERENDUM: CHALLENGES FOR SRI LANKA¹

EXECUTIVE SUMMARY

Sri Lanka is in the middle of a constitutional reform process that aims to bring durable peace to the island as well as bolster democratic institutions. Success is not guaranteed: Will parliament garner the necessary two-thirds majority to pass amendments to the constitution? And if the amendments require approval by referendum, will the people vote in favour? Winning an absolute majority of votes for a proposal with the backing of a two-thirds majority in parliament may seem assured, but it is by no means a foregone conclusion.

Constitutional referendums occur frequently around the world – in 2016, there were more than ten such referendums. It is therefore worth looking to the experiences of other countries to inform the debate in Sri Lanka. Even where countries hold constitutional referendums with good reason for optimism, experience has shown that referendums can fail. In some cases, people may see a constitutional referendum as a vote on the performance of the government rather than about changing the constitution; in other circumstances, those who are in favour of changing the constitution may be too certain of victory and fail to turn out to vote; and other instances still, people may feel so uninformed or uninterested that they do not wish to vote.

In Sri Lanka, turn-out will matter: according to the referendum law, a turn-out of two-thirds of the electorate is needed for validity, or alternatively, approval by an absolute majority

which should at least represent one-third of the electorate. The prospect of a possible referendum should already influence the way the reform process is designed.

Referendums are often regarded as the high-water mark of participatory constitution building, but they are only the back-end of the process. Participation should be wired into a constitutional change process from the beginning. The constitutional reform process in Sri Lanka began optimistically with the formation of the Public Representations Committee on Constitutional Reform, which conducted consultations across the island and received oral and written input from professional organisations, trade unions, civil society and the public. Similarly, some of the sub-committees of the Constitutional Assembly drafted their reports with the input of stakeholders such as the Human Rights Commission of Sri Lanka, the Bar Association of Sri Lanka and civil society. However, in January 2017 the constitutional process ground to a halt with no information on its outlook. Reports have now emerged that the Steering Committee may issue a draft interim report soon. Once the process regains momentum, transparency and public deliberation will be essential to build the public case for reforms.

Once the constitutional bill is adopted by parliament, a well-designed public information campaign will be needed to prepare the ground for a referendum. The referendum law indicates that there should be 30 days from the announcement of the referendum until it is held, a compressed timeframe for

¹ This Briefing Paper was written by DRI Sri Lanka's Country Representative, Sakuntala Kadigamar, with contributions by Raymond Serrato and Alexander Simm. It was edited by Michael Meyer-Resende.

a debate of complex reforms. While it is likely that the question will be simply about whether voters approve the package of constitutional amendments or not, voters should be informed in a neutral, non-partisan manner about the content of these reforms. In many countries, the government or the election management body communicate such information before a referendum.

There is currently no regulatory framework for a referendum campaign in Sri Lanka. This should be rectified by parliament to include rules on campaign finance and media conduct. Furthermore, it should be clarified if the government must remain neutral. Some countries have such provisions, although it may be curious for the current government to remain neutral when it was elected on a platform of constitutional change.

There are well-established norms that guide constitutional referendums and national referendums. The political and civic actors guiding this process in Sri Lanka should be aware of these norms and the international experiences of referendums, some of which are referred to below, when designing their own process.

Constitutional referendums are more complex than single-issue referendums and require a special strategy to design and implement. Constitutional referendums in societies with sharp ethno-nationalist cleavages and which are emerging from ethnic conflict face additional challenges that must be addressed in the design and implementation of such referendums. The design of the referendum is likely to impact the process and outcome, including the quality of public deliberations. Well-designed constitution building processes and referendums may increase the possibility that some people may soften long and hard-held positions because of these inclusive deliberations. Thus, constitutional referendums should be planned well in advance.

Key points to consider

- **Designing the referendum question.** This involves checking its clarity and neutrality, developing neutral material to inform the public on the referendum issues and process, and disseminating materials with adequate time assigned for debate and deliberation.
- **Securing an effective regulatory framework for the referendum that addresses issues relating to the campaign.** These issues include: who may campaign, campaign financing, including who may fund such campaigns and how much funds should be allocated to present all views on the matter – including those for and those against the referendum.

While planning the referendum (such as determining the referendum question, publishing the draft text) is dependent on the finalisation of the constitutional text, other measures can be undertaken in the interim. Sri Lanka's regulatory

framework does not adequately cover many important issues for referendums in general and constitutional referendums in particular. Even as the constitution is drafted, parliament should develop a comprehensive regulatory framework and a strategy to strengthen deliberations around the constitution should be put in place. Sri Lanka's political and civic actors should also highlight the need to connect the public "buy-in" at the front end of the process, even as it plans for the "back-end" through the referendum.

1. INTRODUCTION

In 2016 alone, more than twenty countries held national referendums; of these referendums, 11 were intended to change the constitution. Voters decided on constitutional changes regarding fundamental rights, terms limits for the executive, and electoral systems, among others.

Sri Lanka is at such a seminal moment. In the aftermath of President Maithripala Sirisena's victory, a government of national unity was formed in 2015 and a new constitution is being debated in parliament. There is broad consensus on the flaws of the constitution drafted in 1978, including the sense of exclusion that was experienced by minorities in the country. Some immediate and decisive measures were taken in 2015 to roll back the executive powers of the presidency, but the electoral commitment to draft a new constitution and adopt it through a referendum remains. Public expectations are high.

2. REFERENDUMS: THE "BACK ENDS" OF THE CONSTITUTION-MAKING PROCESS

"Constitutional reformers should focus more on generating public "buy in" at the front end of the constitution making process, rather than concentrating on ratification and referendums at the "back end" that were unlikely to correct for an "original sin" of limited citizen deliberation during drafting."²

This political wisdom provides a reality check for the Sri Lanka process, especially in the light of the delays and opacity of the current process. Public awareness of and engagement with the constitution-building process cannot be achieved through a referendum only, but should be present from the start.

Currently, there is public anxiety that the positive measures taken at the early stages of the constitutional reform process (the work of the Public Representations Committee, the

² Todd A. Eisenstad, A. Carl LeVan and Tofigh Maboudi, "When Talk Trumps Text: The Democratizing Effects of Deliberation during Constitution-Making 1974–2011", *American Political Science Review*, Vol.109, No 3 August 2015.

subcommittees of the Constitutional Assembly, and the Steering Committee) have been in vain and that the constitutional reform process is not progressing. For the constitutional reform process to advance towards a referendum, there must be a draft at hand that is robustly debated both in parliament and among the public prior to approval by two-thirds of the members of parliament and the people in a referendum.

Good practices in constitutional referendums indicate that extensive public awareness of and engagement with the issues at stake is required to ensure effective and meaningful participation. This awareness and engagement is necessary both during the drafting stages, through parliamentary debates, and in the run up to the referendum itself. To make the referendum a truly deliberative and meaningful exercise, the constitution must be disseminated to the public, explained in a clear and understandable manner and include robust discussions – both for and against the new constitution.

Time, space and resources are required for neutral bodies to provide this information on the constitution, and for those supporting and opposing the referendum to express their views. Therefore, well-structured laws on the period of campaign, campaign finance and oversight are required in referendums as well, just as they are in general and presidential elections.

3. REFERENDUMS IN SRI LANKA

3.1. THE REGULATORY FRAMEWORK FOR REFERENDUMS IN SRI LANKA

The Constitution of Sri Lanka (1978) provides for consultative referendums³ and mandatory referendums to be held in specific circumstances.⁴ The president may call for a consultative referendum on any matter of importance. This is discretionary and the results, while not binding, may be politically salient. However, the president must submit to a referendum a bill that has been passed by two-thirds of members of parliament to amend selected provisions of the constitution.⁵ The Supreme Court is also empowered to determine if a referendum should be held in relation to any bill that is not presented as a constitutional amendment, but is considered to impact specific constitutional provisions.

The parliament passed a law to regulate referendums in 1981.⁶ The Referendum Act focuses largely on the role of the election commissioner in conducting the referendum, the minimum period for holding a referendum after a proclamation by the president and the requirement for the proclamation to receive a “Yes” or “No” vote. The Referendum Act does not provide

details on how the referendum question should be framed or who should frame it, nor does it provide for any measures for assessing the clarity and neutrality of the referendum question. Moreover, the Act omits information on the fair and impartial conduct of the referendum in terms of access to neutral information, independent observers of the polls, public participation in the campaign, and on the regulation of campaign finance. The referendum law also leaves other campaign issues unaddressed, such as access to the media to provide information for or against the referendum and protections against politically-inspired disinformation. These are critical issues to consider if serious public deliberation is to be promoted. Hence laws specifically guaranteeing access to neutral information, access of all parties to the media and public participation in the campaign, and laws regulating campaign finance and providing for observation of the polls will go a long way to enhancing confidence in the process.

The possibility of a referendum, along with other elements such as the executive presidency and proportional representation, was newly introduced to Sri Lanka through the 1978 Constitution. It was designed to strengthen popular participation and the franchise. It was also regarded as a mechanism to freeze some features of the constitution and firewall them from repeal except through exceptional majorities in Parliament and by referendum.

Thus, if fundamental constitutional changes are to take place in Sri Lanka, they are best done when there is a government of national unity in place and cross-party alliances can be forged.

3.2. SRI LANKA'S EXPERIENCE WITH REFERENDUMS

Sri Lanka has limited experience with referendums. Sri Lanka has only held one referendum, which took place in 1982 and dealt with the question whether the term of parliament could be extended. This measure required a constitutional amendment (Fourth Amendment to the Constitution), which was passed by a two-third parliamentary majority and was required, by judgement of the Supreme Court, to be approved by a referendum.

The referendum question posed was:

“Do you approve the Bill entitled “the Fourth Amendment to the Constitution published in Gazette Extraordinary No. 218/23 of November 13, 1982, which provides inter alia that ‘unless sooner dissolved the First Parliament shall continue until August 4, 1989, and no longer and shall thereupon stand dissolved.’”

The referendum passed.⁷

³ Article 86.

⁴ Articles 83 & 85.

⁵ Articles 1,2,3,6,7,8,9,10,11, 30(1), 62 (2).

⁶ Referendum Act, No. 7 of 1981, Parliament of the Democratic Socialist Republic of Sri Lanka

⁷ The referendum was held on December 22, 1982. Turnout at the referendum was 70.82 percent, out of a total of 8,145,015 Sri Lankans

3.3. PROBLEMS WITH THE REFERENDUM LAW

In order to pass, a referendum needs to garner an absolute majority of votes where the turn-out of voters exceeds two-thirds of the electorate (as per the electoral roll), or at least one-third of voters must vote in favour where the turn-out is lower than two-thirds. The law is not clear on the status of invalid votes. In some jurisdictions, such as New Zealand, invalid votes are counted to calculate the overall turn out. In other jurisdictions, for example Scotland, the voter turn out is calculated on the basis of valid votes only.

The referendum law provides that the question put forward requires a “Yes” or “No” answer.⁸ This appears to preclude soliciting voters’ views on multiple issues and options. The law does not indicate who will draft the referendum question or whether it will be reviewed for clarity, impartiality and neutrality.

Key Considerations for the Referendum Question
Constitutional referendums pose distinct challenges compared to single issue referendums (e.g. a referendum to allow or reject abortion). Unlike single issue referendums, constitutional referendums often require citizens to vote on a package of different constitutional reforms or a new constitution entirely. In light of this, the wording of the question on the ballot paper requires careful consideration.
When crafting the wording of the text that is put to the people in a constitutional referendum, there are several options to consider. They include:
<ul style="list-style-type: none">• Will a question of principle, or several such questions, be put to a “Yes” or “No” vote? (For example: “Are you in favour of amending the constitution to introduce a parliamentary system of government?”)• Will a specifically worded draft of a constitutional amendment, legislative enactment or other measure be put to the vote? And if so, will the whole draft be subjected to a “Yes” or “No” vote at the referendum?• Will a concrete proposal, not presented in the form of a specific provision and known as a “generally-worded proposal,” succeed? (For example: “Are you in favour of amending the Constitution in order to include a new Bill of Rights and to repeal Articles X, Y and Z?”)• Is the question (or questions), clear, unambiguous and non-leading? Who or what body can determine if the question is unclear? Are referendum questions open to judicial challenge? And if so are the organisers of the referendum prepared for such challenges?

eligible to vote. Over 54 percent voted in favor of extending the life of parliament. See: <https://www.parliament.lk/referendums>
A large majority of voters in Tamil majority areas of the country voting against the referendum. In total, majorities in the 120 of the 168 electorates voted in favor of the referendum.

⁸ Section 2 (2) (a) (2). A Proclamation issued under subsection (1) shall
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(a). specify the proposal to be put to the People at the Referendum in

4. WAYS FORWARD: LEARNING FROM COMPARATIVE EXPERIENCE

Given the one tangible experience of a referendum in Sri Lanka, there is much that political and civic actors can learn from the experiences of other countries, including the challenges they faced when holding constitutional referendums - be they referendums for the complete repeal and replacement of constitutions or referendums to introduce partial, but nevertheless significant constitutional amendments.

There are also normative standards and good practices that are useful for identifying and addressing the critical issues relating to constitutional referendums, which are inevitably more complex and far-reaching than single-issue referendums. In 2001, the Venice Commission published “Guidelines for Constitutional Referendums at the National Level” and in 2006 a “Code of Good Practice on Referendums.” In 2005, the Venice Commission also published an analysis of the legal rules in European States, which highlights some key issues encountered by various countries in the framing and conduct of referendums.⁹ Collectively, these resources form a useful body of guidance and experiences to draw upon.

4.1. PUBLIC INFORMATION AND DISSEMINATION OF THE CONSTITUTIONAL TEXT

For there to be meaningful deliberation leading up to the vote on the constitution, the proposed text should be available to the public, with sufficient time prior to the referendum to understand and discuss the contents of the proposal. In the case of Sri Lanka, the text should be available in all the official and national languages. Time and financial resources should be allocated for professional translations and the dissemination of the texts well in advance of the vote.

Dissemination strategies of the text range from minimum to broad-based distribution. At a minimum, a government should publish the text in the official gazette, on the internet and in other places. This type of publicity is limited in reach, however, because most people do not – or cannot - read legal texts. In Sri Lanka, there should be a prior mapping of the locations where the text should be made be available – such as the *Hansard*, the major newspapers, publishing in all three languages, TV channels, websites, social media, and radio.

Some countries have rules stipulating that the authorities must not only put the text at the disposal of citizens, but also provide additional objective or balanced information. In Ireland, for example, the Referendum Commission prepares general

the form of a question which shall be answered by a “Yes” or a “No”; ...
⁹ Venice Commission (2005), “Referendums in Europe – An Analysis of The Legal Rules in European States”, Report adopted by the Council for Democratic Elections at its 14th meeting, (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

explanations on the proposal and the referendum text and distributes this information via print, television, radio, and other, including electronic, media.¹⁰

In Australia, the regulations allow for a balance of arguments for and against constitutional referendums through “yes” and “no” committees formed in the parliament. Once these committees prepare cases, they are filed with the Australian Election Commission (AEC), which prints “a pamphlet containing the arguments together with a statement showing the textual alterations and additions proposed to be made to the Constitution” and sends them by post to voters and any other addressees it deems appropriate.¹¹ In France, the authorities must supply objective information by providing voters with the text and an explanatory note and the Constitutional Council checks the draft note.

In Sri Lanka, appropriate authorities and resources should be identified in advance to provide these summaries and explanatory notes. It may be prudent to create a vetting or oversight mechanism to ensure that the summaries and explanations are factual and neutral and to make complex text understandable to lay persons. Again, these summaries must also be available in advance and in all three languages and consistently relay the same information. Traditional and electronic media should be used for dissemination. University scholars, civil society and journalists have traditionally been engaged in providing such information, but if it is to be an authorised publication it may be appropriate to present it with the certification of the Election Commission.

The importance of timing: Zambia’s 2016 constitutional referendum

On 11 August 2016, Zambia held a constitutional referendum that failed to muster the necessary turnout to approve an enhanced Bill of Rights. Some commentators noted that the timing of the process, the need for the referendum and the lack of awareness about the proposed amendments might have played a role in the referendum’s failure. The referendum question and the proposed amendments to the constitution were only gazetted on 23 May 2016, with the referendum planned for early August. This left a little over two months for civil society, the government, and the election commission to conduct awareness-raising on several technical issues, such as the implications of the referendum. In addition, the election commission, which was tasked with managing the referendum, only printed a comic book on the referendum question and constitutional amendments in July, one month before the referendum. This comic book was also only available in English, even though only around 1.3% of the population speak English.

4.2. CAMPAIGN RULES

Countries have different rules on who may campaign actively for a position relating to the referendum. One difficult question is whether public authorities are permitted to campaign. In some countries, there is a total ban and in others there are restrictions imposed on the authorities. Minimum restrictions on campaigning include registering with the election commission or the competent authority that is managing the referendum.

During Italy’s 2016 constitutional referendum, the public administration was not permitted to campaign, but individuals, such as public servants and office holders, could engage in campaign activity if they did not use public resources.¹² The legal framework for Armenia’s 2015 referendum also allowed public officials to campaign, but the OSCE reported that this led to the use of “extensive” public resources.¹³ In addition, campaigning was not permitted by judges, the military, religious organisations, and law enforcement officials.

Some countries place no restrictions on who may campaign during referendums. During Bolivia’s 2016 constitutional referendum, the law allowed political organisations, civil society, and indigenous groups to campaign without prior registration with the election commission.¹⁴ Any decision to restrict campaigning to certain groups or individuals should be based on clear criteria, proportional to the aim of the restriction, and in the public interest. In Sri Lanka, public officials and persons deprived of their civic rights may not campaign.

The importance of a level playing field: A look at Turkey’s 2017 constitutional referendum

In April 2017, Turkey held a referendum on a package of constitutional reforms designed to transform the country from a parliamentary democracy into a presidential system of government with weakened separation of powers. Turkey’s referendum was held under a state of emergency that was ushered in and twice extended after a failed coup in 2016 - a state of affairs that the OSCE considered did “not provide for the due democratic setting for a constitutional referendum.”¹⁵

The state of emergency placed restrictions on fundamental rights, creating an environment in which the freedoms of expression, assembly and association were curtailed. Moreover, late changes in counting procedures removed an important safeguard and undermined confidence in the referendum. At the same time, Turkey’s legal framework for referendums lacks the necessary guarantees and protections to ensure proponents and opponents of the referendum proposal compete on a level playing field and have an equal say. In practice, this meant that the government-backed ‘Yes’ campaign benefited from

¹⁰ Republic of Ireland. Referendum Act, 2001.

¹¹ Australian Government. Federal Register of Legislation. *Referendum (Machinery Provisions) Act 1984*, Act No. 44 of 1984 as amended, taking into account amendments up to Statute Update Act 2016.

¹² Circolare No. 42/2016, 7 October 2016, p. 2

¹³ OSCE/ODIHR Referendum Expert Team. Republic of Armenia: Constitutional Referendum, 6 December 2015. Warsaw: 5 February 2016.

¹⁴ Law No. 757, 5 November 2015.

¹⁵ Organisation for Security and Cooperation in Europe, Statement of Preliminary Findings and Conclusions, International Referendum Mission, Republic of Turkey Constitutional Referendum, 16 April 2017.

significantly more campaign visibility and media coverage (the legal framework does not provide for equal access to media) than the 'No' camp, whose campaigners faced undue restrictions. In several instances, 'No' campaigners faced considerable interference and obstruction to their campaign activities and, in some cases, were arrested on charges of holding unlawful public events.

4.3. ACCESS TO THE MEDIA: PUBLIC, PRIVATE AND SOCIAL MEDIA

Prior to the holding of the referendum, clear principles should guide all decisions regarding access to the media. The Venice Commission's Code of Good Practice on Referendums holds that the state should ensure supporters and opponents of the referendum proposal in question have equal access to media, especially publicly-owned media.

In Bolivia's 2016 constitutional referendum, campaigners had equal access to media in accordance with the election laws, which specify equal limits on broadcasting time and print and require media to provide access to all campaigners regardless of political affiliation.¹⁶

Similarly, Italy's electoral and referenda regulations guarantee fair and equal access to media for all political parties campaigning for or against the referendum question.¹⁷ The regulations on equal access to media, with oversight by a parliamentary committee and the communications authority, provide that public and private broadcasters must ensure an equal playing field of political opinions and positions in their coverage of all relevant fora, interviews and other transmissions.

By contrast, Thailand's 2016 Referendum Act placed broad restrictions on campaigning against the constitutional referendum proposal, including through use of traditional and social media.¹⁸ Among other things, the law prohibits the dissemination of 'false' information that seeks to influence voters. Ahead of the 2016 constitutional referendum, the National Council for Peace Order (NCPO) also issued an order mandating the national broadcasting commission to shutdown television and/or radio broadcasters deemed to violate NCPO orders, further skewing the playing field in terms of access to media.

In Sri Lanka, the Referendum Act only covers equitable radio and television access for recognised political parties on state media (with the possibility of debates between two or more parties as well). During Sri Lanka's 2015 parliamentary elections, the Election Commission issued media guidelines that also applied to referendums. These guidelines covered impartial and balanced reporting, fair and diverse panel discussions, the use of state resources, and ethical

considerations. However, the guidelines on resources did not apply to private media, and several election observers noted that the media guidelines were often vague or impractical.¹⁹

Social media continues to play an increasingly important and uncertain role in elections, especially with younger voters but they are relatively unregulated and uncontrollable.

Sri Lanka should use the opportunity of a referendum to review the existing media guidelines and legal framework pertaining to the referendum as well as the enforcement capabilities of the Election Commission to support fair practices in relation to the campaign. There should also be a policy and strategy regarding social media and whether and how it should be monitored throughout the campaign.

4.4. FUNDING

While public funds may be used to organise a referendum, many countries have restrictions on the use of public funds to canvas for or against a particular position. In most countries, the rules related to campaign funding in constitutional referendums are set out in the country's electoral laws and/or specific legislation on referendums.

In the United Kingdom, the electoral commission plays a key role in designating lead campaigners for and against the referendum proposal and dispenses grants of up to GBP 600,000 to each organisation. The Political Parties, Elections and Referendums Act (2000) enumerates eligible campaigning activities, with few restrictions. These rules applied, for instance, to Scotland's 2014 independence referendum and the UK's 2016 vote on its membership of the European Union.

In Slovenia, where referendums are mandatory for constitutional changes, public funding for referendum campaigns is capped at 25% of the maximum amount permitted for campaign spending (set at EUR 0.25 per capita).²⁰ Political parties and campaigners are guaranteed equal access to public funds for their campaign activities, which are defined by the Elections and Referendums Campaign Act (2007) to include media-related activities, electronic and traditional materials, and public meetings. The same legislation mandates the Court of Auditors to conduct an audit within six months of the referendum.

By contrast, Australia's Referendum Act (Section 11(4)) effectively restricts federal spending to the preparation, printing, and provision of an official pamphlet that contains the textual changes and the arguments in favour of and against the proposed constitutional amendment. The arguments in the pamphlet are prepared by parliamentary committees

¹⁶ Law No. 757, Article 3, 15 November 2015 and Law No. 26, Law of the Electoral Regime, 30 June 2010, Articles 117-118.

¹⁷ Regulations for equal access to media during electoral and referendum campaigns and for political communication, Law 22, February 2000 (No. 28)

¹⁸ Article 61, Referendum Act 2016, Kingdom of Thailand

¹⁹ Commonwealth Observer Group Presidential Elections of Sri Lanka, 8 January 2015. European Union Election Observation Mission. *Final Report: Democratic Socialist Republic of Sri Lanka, Parliamentary*

Elections. 17 August 2015: p. 9ff, Centre for Monitoring Election Violence (CMEV), Final Report on Election Related Violence Presidential Elections 2015, January 2015 https://cmev.files.wordpress.com/2015/06/final-report-presidential-election-2015_cmev.pdf

²⁰ Elections and Referendums Campaign Act (2007), Slovenia

composed of members who voted for or against the amendment.

An example of excessive referendum financing was that of Hungary's 2016 migrant quota referendum. A recent study indicated that the government used significant public funds to campaign for its position in the referendum – totalling EUR 31.4 million.²¹ This was possible because of weak provisions on campaign financing in Hungary's referendum law²², as well as a decision by the Supreme Court which gave the government considerable latitude on campaign spending.

Sri Lanka should review the regulatory framework for elections, noting that there are currently no rules for campaign finance or party financing – and no contribution limits or disclosure requirements (in the election laws or Referendum Act). This is an appropriate juncture to consider campaign finance laws and consider their applicability in the context of a constitutional referendum.

Referendums are expensive to hold and demand financial and human resources and logistical support. While donors and non-governmental organisations are often at the forefront in funding and organising civic education campaigns, it sends a clear message of commitment when the government takes ownership of the process. This requires not only managing the vote but also allocating sufficient resources to develop and disseminate the required factual and neutral information, such as texts and summaries.

Based on realistic timelines, Sri Lanka should consider expanding the Referendum Act to address the issue of complex constitutional referendums. However, any amendment to the Referendum Act should be done well in advance of the referendum.

4.5. PLANNING AN EFFECTIVE CAMPAIGN

Effective participation is linked to effective deliberations. They reflect the expressed commitment of the voters to trust the process, engage with the issues, inform themselves and to deliberate on matters of substance. However, effective deliberation should not be confused with the outcome in terms of the “Yes” or “No” vote.

The British Columbia Citizens Assembly (BCCA) (2004) and the Australian Constitutional Convention (ACC) (1999) are often cited as two models of energetic public participation around constitutional issues. In the case of the BCCA, the referendum was on the choice of a new electoral system in British Columbia. In the case of the ACC, the choice was about a republican constitution for Australia and a new constitutional preamble.

With the BCCA, the process was trusted and the referendum question received a substantial number of votes in favour, but failed to meet the required high threshold to pass. Analysis of the campaign found that despite the quality deliberations, the Assembly did not make a sufficient enough investment to educate the general public before the referendum.

Compounding this, political parties and politicians did not sufficiently engage on this quasi-constitutional question. Therefore, the BCCA experience highlights a key lesson learned: educate the general public in advance.

In the ACC, where the defeat of the republican agenda came as a surprise, the failure of the republic referendum was ascribed to several factors: a lack of bi-partisanship; undue haste; a perception that the republic was supported by big-city elites; a “denigration” of the other faction (monarchists) as “unpatriotic” by republicans; the adoption of an inflexible republican model by the Convention; concerns about the specific model proposed (chiefly the ease with which a Prime Minister could dismiss a president); a republican strategy of using big “names” to promote their cause; strong opposition to the proposal in the smaller states; a counter-productive pro-republican bias in the media; and an instinctive caution among the Australian electorate regarding Constitutional change. While specific to the context, some of these “failure factors” are generalisable and can be discerned in other unexpected referendum and electoral reversals.

5. LESSONS FOR SRI LANKA

Even as the draft constitution is being prepared, the Government, Parliament and the Election Commission should plan for the conduct of the constitutional referendum. This may include:

- Further consultations with the public on key constitutional principles
- Drafters should communicate on the process
- Garnering technical support on framing the referendum question
- Developing media strategies on messaging and providing neutral information
- Putting in place clear regulations regarding access to the media, campaign funding and the engagement of public authorities in the referendum

²⁴ Democracy Reporting International, Judging by results: 5 facts on Hungary's ‘illiberal state’, http://democracy-reporting.org/wp-content/uploads/2017/03/DRI_Report_Hungary_2017_en.pdf

²² Act CCXXXVIII of 2013 on Initiating Referendums, The European Citizens' Initiative and Referendum Procedure

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